

I-9 Employment Eligibility Verification & Employer Compliance in an Era of Heightened Worksite Enforcement

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CLARK HILL

CLARK HILL PRESENTATION TEAM

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INTRODUCTION AND PRESENTATION OUTLINE

I-9 COMPLIANCE

- What is I-9 compliance? And why does this matter anyway?
- How do you comply?
 - Who completes the form?
 - How is the form completed?
- E-Verify – friend or foe?
- Nondiscrimination law in the immigration context

ENFORCEMENT – IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE)

- Employer-Focused Enforcement: I-9 Notice of Inspection, civil and criminal penalties, administrative litigation
- Employee-Focused Enforcement: workplace raids, employers' responsibilities, employees' rights

CALIFORNIA EMPLOYERS – SPECIAL CONSIDERATIONS

- Employer responsibilities under Assembly Bill 450: “Immigrant Worker Protection Act”

BASIC I-9 COMPLIANCE: WHEN TO COMPLETE FORM I-9

- Form I-9 is required for every employee hired since November 7, 1986.
- Only use the current version of Form I-9 (Edition Date 7/17/2017).
- Only use the English language version of Form I-9 (unless the employment is in Puerto Rico).
- Required timeframe for completion:
 - Employee completes **Section 1 on or before 1st day of employment.**
 - **Employer has 3 business days**, after the first day of employment, to complete Section 2 and examine original documents (4 day rule).
- Form I-9, Form I-9 instructions (in English and Spanish), and Form I-9 Preparer and/or Translator Certification are available at www.uscis.gov/i-9.

FORM I-9: CURRENT VERSION

	Employment Eligibility Verification Department of Homeland Security U.S. Citizenship and Immigration Services	USCIS Form I-9 OMB No. 1615-0047 Expires 08/31/2019			
<p>▶ START HERE: Read instructions carefully before completing this form. The instructions must be available, either in paper or electronically, during completion of this form. Employers are liable for errors in the completion of this form.</p> <p>ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate against work-authorized individuals. Employers CANNOT specify which document(s) an employee may present to establish employment authorization and identity. The refusal to hire or continue to employ an individual because the documentation presented has a future expiration date may also constitute illegal discrimination.</p>					
<p>Section 1. Employee Information and Attestation <i>(Employees must complete and sign Section 1 of Form I-9 no later than the first day of employment, but not before accepting a job offer.)</i></p>					
Last Name (Family Name)		First Name (Given Name)	Middle Initial	Other Last Names Used (if any)	
Address (Street Number and Name)			Apt. Number	City or Town	State ZIP Code
Date of Birth (mm/dd/yyyy)	U.S. Social Security Number	Employee's E-mail Address		Employee's Telephone Number	
<p>I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.</p> <p>I attest, under penalty of perjury, that I am (check one of the following boxes):</p> <p><input type="checkbox"/> 1. A citizen of the United States</p> <p><input type="checkbox"/> 2. A noncitizen national of the United States (See instructions)</p> <p><input type="checkbox"/> 3. A lawful permanent resident (Alien Registration Number/USCIS Number): _____</p> <p><input type="checkbox"/> 4. An alien authorized to work until (expiration date, if applicable, mm/dd/yyyy): _____ Some aliens may write "N/A" in the expiration date field. (See instructions)</p> <p>Aliens authorized to work must provide only one of the following document numbers to complete Form I-9: An Alien Registration Number/USCIS Number OR Form I-94 Admission Number OR Foreign Passport Number.</p> <p>1. Alien Registration Number/USCIS Number: _____</p> <p style="text-align: center;">OR</p> <p>2. Form I-94 Admission Number: _____</p> <p style="text-align: center;">OR</p> <p>3. Foreign Passport Number: _____</p> <p>Country of Issuance: _____</p>					
QR Code - Section 1 Do Not Write in This Space					
Signature of Employee			Today's Date (mm/dd/yyyy)		
<p>Preparer and/or Translator Certification (check one):</p> <p><input type="checkbox"/> I did not use a preparer or translator. <input type="checkbox"/> A preparer(s) and/or translator(s) assisted the employee in completing Section 1. <i>(Fields below must be completed and signed when preparers and/or translators assist an employee in completing Section 1.)</i></p> <p>I attest, under penalty of perjury, that I have assisted in the completion of Section 1 of this form and that to the best of my knowledge the information is true and correct.</p>					
Signature of Preparer or Translator			Today's Date (mm/dd/yyyy)		
Last Name (Family Name)		First Name (Given Name)			
Address (Street Number and Name)			City or Town	State	ZIP Code

STOP Employer Completes Next Page STOP

	Employment Eligibility Verification Department of Homeland Security U.S. Citizenship and Immigration Services	USCIS Form I-9 OMB No. 1615-0047 Expires 08/31/2019			
<p>Section 2. Employer or Authorized Representative Review and Verification <i>(Employers or their authorized representative must complete and sign Section 2 within 3 business days of the employee's first day of employment. You must physically examine one document from List A OR a combination of one document from List B and one document from List C as listed on the "Lists of Acceptable Documents.")</i></p>					
Employee Info from Section 1		Last Name (Family Name)	First Name (Given Name)	M.I.	Citizenship/Immigration Status
List A		OR		List B	
Identify and Employment Authorization		Identify		AND	
List C		AND		List C	
Employment Authorization		Employment Authorization		Employment Authorization	
Document Title	Document Title	Document Title			
Issuing Authority	Issuing Authority	Issuing Authority			
Document Number	Document Number	Document Number			
Expiration Date (if any)(mm/dd/yyyy)	Expiration Date (if any)(mm/dd/yyyy)	Expiration Date (if any)(mm/dd/yyyy)			
Document Title	Additional Information				QR Code - Sections 2 & 3 Do Not Write in This Space
Issuing Authority					
Document Number					
Expiration Date (if any)(mm/dd/yyyy)					
Document Title					
Issuing Authority					
Document Number					
Expiration Date (if any)(mm/dd/yyyy)					
<p>Certification: I attest, under penalty of perjury, that (1) I have examined the document(s) presented by the above-named employee, (2) the above-listed document(s) appear to be genuine and to relate to the employee named, and (3) to the best of my knowledge the employee is authorized to work in the United States.</p> <p>The employee's first day of employment (mm/dd/yyyy): _____ (See instructions for exemptions)</p>					
Signature of Employer or Authorized Representative		Today's Date (mm/dd/yyyy)		Title of Employer or Authorized Representative	
Last Name of Employer or Authorized Representative		First Name of Employer or Authorized Representative		Employer's Business or Organization Name	
Employer's Business or Organization Address (Street Number and Name)			City or Town	State	ZIP Code
<p>Section 3. Reverification and Rehire <i>(To be completed and signed by employer or authorized representative.)</i></p>					
A. New Name (if applicable)			B. Date of Rehire (if applicable)		
Last Name (Family Name)		First Name (Given Name)		Middle Initial	Date (mm/dd/yyyy)
<p>C. If the employee's previous grant of employment authorization has expired, provide the information for the document or receipt that establishes continuing employment authorization in the space provided below.</p>					
Document Title		Document Number		Expiration Date (if any) (mm/dd/yyyy)	
<p>I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.</p>					
Signature of Employer or Authorized Representative		Today's Date (mm/dd/yyyy)		Name of Employer or Authorized Representative	

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BASIC I-9 COMPLIANCE: HOW TO COMPLETE FORM I-9

- **Section 1:** Employee only
 - Exception: If the employee has assistance (and/or has Section 1 translated to him/her), complete the Form I-9 Supplement, Section 1 Preparer and/or Translator Certification.
 - The I-9 instructions must be available during completion of the form.
- **Section 2:** Employer (or its agent) only
 - Employee must be permitted to provide any acceptable combination of documents evidencing identification and work authorization in the US.
 - Employer or its agent must review original documents provided.
 - Documents presented must be unexpired, appear reasonably genuine, and appear to reasonably relate to the employee.
- Always carefully review Form I-9 after completion to make sure that every required field was fully and accurately filled.

BASIC I-9 COMPLIANCE: CONTINUED

- May not accept expired documents or receipt notices (some exceptions apply).
- Must not hire individuals who lack valid work authorization – actual & constructive knowledge.
- Cannot use a subcontractor relationship (staffing company or independent contractor) to hire someone you have reason to believe is not work authorized

BASIC I-9 COMPLIANCE: RETAINING FORM I-9

- Must have Form I-9 on file throughout employment period.
- After employment ends, must retain I-9 for *either* 3 years after the first day of employment or 1 year after termination, whichever date is **later**.
 - See <https://www.uscis.gov/i-9-central/retain-store-form-i-9/retaining-form-i-9>
- Store Forms I-9 securely and separate from other employee files.
- Create **reminder system** for reverification of expiring employment authorization documents.
- For more information on remaining I-9 compliant, refer to M-274, Handbook for Employers: <http://www.uscis.gov/sites/default/files/files/form/m-274.pdf> and USCIS I-9 Central: www.uscis.gov/i-9-central

NONDISCRIMINATION IN I-9 COMPLIANCE CONTEXT

- Cannot “pre-I-9.”
- Cannot require particular documents in Section 2.
- Cannot over-document.
- Cannot reverify employment authorization of:
 - A US Citizen or Lawful Permanent Resident (LPR).
 - Exception: If LPR provides temporary I-551 stamp or I-751 receipt extending his/her status for one year.
 - An asylee or refugee – i.e. alien authorized to work who has an unrestricted Social Security card.

ELECTRONIC STORAGE OF FORMS I-9

- Requires controls for the integrity, accuracy, and reliability of the electronic storage system including:
 - Controls for preventing tampering or unauthorized access.
 - Accidental altering and/or deterioration of the stored I-9s.
 - Inspection and quality assurance procedures.
 - A retrieval system that includes indexing capabilities.
 - The ability to print paper copies.
 - Protection against information loss and providing for backup.
- When reviewing I-9s, a permanent record must be created to identify the person who accessed the record.
- Employees must be trained in the system.
- Must be able to document the entire system.

E-VERIFY – FRIEND OR FOE?

- E-Verify builds on the I-9 process, and is designed to ensure that the documentation presented is valid.
- Employee must have a social security number (normally voluntary).
- “Backs” into DHS/SSA/DOS/CBP databases. 2 responses issued.
- Does *not* confirm that the documents presented are for that person.

- Must complete E-Verify within 3 days of hire (DHS is watching this!); date of hire dictated by the certification box on the Form I-9.
- Not for current employees (government contractor exception), only new hires.
- Anti-discrimination rules apply: cannot use E-Verify to “screen” new hires and cannot fire for “tentative nonconfirmation.”
- Once enrolled must run all new hires through E-Verify for that worksite.

WHAT TO DO IN THE EVENT OF AN ICE I-9 AUDIT

Contact counsel immediately.



*"Do you promise to pay the bill,
the whole bill and nothing but the bill?"*

EMPLOYER-FOCUSED ENFORCEMENT: ICE I-9 AUDIT PROCESS

- ICE provides Notice of Inspection (NOI) compelling production of all Forms I-9 in at least 3 business days
 - Often also request payroll or other evidence of who is currently employed (quarterly tax reports, etc.)
- ICE reviews all Forms I-9 for technical and substantive violations
- ICE verifies that all employees are authorized to work in the US by cross-referencing SSNs, A-numbers, etc.
- At conclusion of audit, ICE provides one or more of the following:
 - Notice of Inspection Results (i.e. “Compliance Letter”)
 - Notice of Suspect Documents
 - Notice of Discrepancies
 - Notice of Technical or Procedural Failures
- Based on response, ICE then issues one of the following:
 - Warning Notice
 - Notice of Intent to Fine: Can negotiate fine with ICE or appeal to OCAHO (Office of Chief Administrative Hearing Officer)

EMPLOYER-FOCUSED ENFORCEMENT: I-9 VIOLATION PENALTIES

- The Form I-9 is often the entry point for immigration investigations – I-9 investigations are conducted by ICE HSI (Homeland Security Investigations). **Potential civil and criminal penalties** can arise from I-9 audits:
- **Civil Penalties:**
 - *Paperwork Violations:* Civil fines for substantive or uncorrected technical errors on Forms I-9 range from **\$224-2236** per form for first offense.
 - *“Knowingly* Hiring or Continuing to Employ” Violations:* Civil fines range from **\$559-\$4,384** per unauthorized worker for first offense.
*“Knowingly” = actual or constructive knowledge
- **Criminal Penalties:**
 - Pattern or practice of hiring, recruiting, or referring for a fee aliens unauthorized to work.
 - Up to \$3,000 fine per unauthorized worker and/or a prison sentence of up to 6 months for entire pattern or practice

EMPLOYER-FOCUSED ENFORCEMENT: PENALTIES

- Mitigating Factors that ICE considers when assessing civil fines (can increase or decrease the fines by up to 25%):
 - Business Size
 - Good Faith Effort to Comply
 - Seriousness of Violations
 - Presence of Unauthorized Workers
 - Employer's History of Violations

EMPLOYER-FOCUSED ENFORCEMENT: FIGHTING FINES

Notice of Intent to Fine: Can negotiate fine with ICE through settlement process or appeal to OCAHO (Office of Chief Administrative Hearing Officer), a division of the Department of Justice's Executive Office for Immigration Review, whereby an Administrative Law Judge will make a determination on the merits of the employer's and ICE's arguments related to the proposed fines.

Timing: Important to remember that these ICE audits take many years, from the day ICE shows up at your workplace to the day the employer writes a check to pay the penalties (which may or may not have been reduced by an Administrative Law Judge).

EMPLOYEE-FOCUSED ENFORCEMENT: ICE WORKPLACE RAIDS

- **“ICE workplace raid”**: any action by immigration officers to arrest one or more noncitizens at a worksite.
- **Raids are designed to:**
 - apprehend removable noncitizens;
 - apprehend individuals – citizens and noncitizens alike – that ICE suspects of violating federal criminal laws relating to unauthorized immigration; and
 - gather evidence.
- **What does ICE do before a raid?**
 - Investigates. How does ICE decide to hone in on a particular employer?:
 - Employee arrested by local police. ICE interrogates.
 - ICE receives anonymous tips
 - ICE cultivates confidential informants
 - Review of Social Security Administration documents (like no match letters), etc.
 - Obtains criminal search & arrest warrants from a federal magistrate or judge.

EMPLOYEE-FOCUSED ENFORCEMENT: ICE WORKPLACE RAIDS

- What does ICE do during a raid?
 - Armed government agents surround the premises.
 - Supervising agent serves warrant; others follow.
 - ICE might demand machinery be shut down, no one leaves, that employees be corralled into contained areas. ICE might handcuff employees.
 - While agents question employees, others seize documents & property.
 - ICE will take into custody individuals for whom warrants of arrest were issued (citizens and noncitizens alike).
 - ICE may also detain noncitizens whom ICE has reason to believe are in the United States in violation of law and are likely to escape before a warrant can be obtained for their arrest.

EMPLOYEE-FOCUSED ENFORCEMENT: ICE WORKPLACE RAIDS

- What does ICE do after a raid?
 - ICE will likely detain and seek to remove (deport) noncitizens subject to removal.
 - With USAO, ICE will likely pursue criminal charges against prosecutable individuals, including the employer.
 - Possible criminal charges:
 - 8 U.S.C. §1324 (harboring certain noncitizens);
 - 8 U.S.C. §1324a(f) (pattern or practice of unlawful employment of noncitizens);
 - 8 U.S.C. §1324c (document fraud);
 - 18 U.S.C. §1546 (fraud and misuse of visas).
 - ICE may continue to surveil and investigate employer after a raid.

EMPLOYEE-FOCUSED ENFORCEMENT: ICE RAIDS – DO AND DON'T

WHAT TO DO

1. Contact worksite's responsible party (RP) as soon as Company employees become aware of upcoming raid.
2. Have RP express that the Company wants the process to be orderly and will not impede agents but that the Company does not consent to the search.
3. RP should:
 - Ask to read and copy any warrants ICE possesses.
 - Send a copy to counsel.
 - Ask counsel to go to the facility while the raid is occurring.
 - Ask whether employees are free to leave, and record agent's answer.
4. RP should request that agents operate out of a conference room and RP will bring to agents the individuals and items specified in warrant.
 - If ICE refuses, RP (and necessary support staff) should follow ICE agents and record (via notes and/or video) ICE behavior.

EMPLOYEE-FOCUSED ENFORCEMENT: ICE RAIDS – DO AND DON'T

WHAT TO DO - CONTINUED

5. RP finds out which government agencies are involved and copies ID of lead agent.
6. RP should obtain a detailed inventory of all seized items.
7. RP should note which employees were questioned or arrested.
8. RP should cooperate but contain – provide only what is specifically requested in the warrant, and offer to organize items and provide them at a later date if possible.

WHAT NOT TO DO

1. Don't instruct employees not to speak with ICE. Do inform employees of their rights.
2. Don't engage in "harboring" activities, such as hiding employees, aiding in their escape, providing false or misleading information, denying the presence of specific named employees, or shredding documents.
3. If ICE brings members of the media, you don't have to let them onto the premises.

EMPLOYEES SHOULD KNOW THEIR RIGHTS

- Employees have the right not to answer ICE agents' questions.
- Employees may wish to ask whether they are free to leave.
- Employees have the right to refuse to sign documents ICE agents urge them to sign.
- Employees have the right to be represented by an attorney in their dealings with the government. If they wish to speak with a lawyer, they should affirmatively—and repeatedly—say so to ICE agents who question them.

WHAT CAN YOU DO BEFORE ICE SHOWS UP (I.E., NOW)?

- Engage counsel to perform an audit of Forms I-9 and Company policies and procedures for completing the I-9 process.
- Create, or engage counsel to create, an I-9 compliance handbook and training materials to train future employees on the Company's policies and procedures.
- Discuss with counsel whether signing up for E-Verify is a workable option.

SHAMELESS PLUG:

<http://www.clarkhill.com/pages/form-i-9-compliance-internal-audits>

- Have a plan to manage and contain an ICE visit, and ensure that the plan is communicated to the first employees that agents are likely to meet (e.g., receptionists) and the responsible party at each worksite.
- Make sure employees know their rights in the event they are interviewed by ICE.

SPECIAL CONSIDERATIONS FOR CALIFORNIA EMPLOYERS

- California's Assembly Bill 450 ("Immigrant Worker Protection Act"), effective January 1, 2018, imposes new duties on California employers with respect to worksite enforcement actions. Potential civil fines up to \$10,000 per violation.
- The new duties and potential fines relate to:
 - Immigration enforcement agents entering workplaces
 - Immigration enforcement agents accessing employee records
 - Notifying employees about authorized inspections of employment records
 - Re-verifying employment eligibility for Form I-9 purposes
- Public and private employers are prohibited from providing *voluntary consent* to an immigration enforcement agent *to enter nonpublic areas of a workplace* unless the agent provides a *judicial warrant*. Employers prohibited from providing *voluntary consent* to an immigration enforcement agent to *access, review, or obtain the employer's employee records* without a *subpoena or court order*.
- **IMPORTANT: An ICE Notice of Inspection of I-9 records is a type of subpoena that is exempt from AB450 prohibitions. Employers must comply with a properly served Notice of Inspection.**

SPECIAL CONSIDERATIONS FOR CALIFORNIA EMPLOYERS

- Beginning July 1, 2018, if an employer is served a Notice of Inspection of Forms I-9 or other employment records, the employers must post a notice (developed by the California Labor Commissioner) to current employees:
 - Within 72 hours of receiving the Notice of Inspection
 - In the language the employer normally uses to communicate employment information
 - Notice Template available at:
http://www.dir.ca.gov/DLSE/Notice_to_Employee.html
- Employers must provide an affected employee with a copy of the Notice of Inspection of Forms I-9 upon reasonable request.
- After an inspection, employers must provide the employee a copy of the written immigration agency notice requiring inspection, the result of such inspection if an employee is impacted, and the employee's obligations.
- Employers are prohibited from re-verifying an employee's employment eligibility verification documents unless required by the current Form I-9 employment eligibility verification process.

THANK YOU – ANY QUESTIONS?



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