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What Every Employer Should Know About E-Verify and I-9 Compliance

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INTRODUCTION

- New I-9 Form
- I-9 Form Basics
- ICE Notice of Inspection
- E-Verify Requirements
- Pros and Cons of End of Session Formal Separations or Continued Employment—Practical and Legal Considerations



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Enforcement Efforts

- April 2009, Department of Homeland Security (DHS) issued new worksite enforcement guidelines for Immigration Customs & Enforcement (ICE).
- Shift of focus from illegal foreign worker to employer that hired worker.
- Goal is to create a culture of compliance.



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FY2012 Record-Breaking Immigration Enforcement Continues

- 520 criminal arrests tied to worksite enforcement investigations.
- 3,020 Notices of Inspection & 495 Final Orders
- \$12,475,575.00 in administrative fines.
- All industries and businesses, regardless of size, being targeted.



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I-9 Basic Requirements



- Immigration Reform and Control Act (IRCA) - Employers must verify identity and work eligibility of all employees hired after November 6, 1986.
- All current employees hired after November 6, 1986 must have a current I-9 form on file.
- Section 1 - completed by employee prior to starting work.
- Section 2 - completed by employer by end of third business day after employee starts work.

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I-9 Form – Issued March 8, 2013



- Revised I-9 Form issued, expiration date (3/31/16)
- Older versions no longer effective.
- Instructions are 6 pages (formerly 3). New handbook.
- Obtain new 2-page form at:
<http://www.uscis.gov/files/form/i-9.pdf>
- Obtain new 70 page Handbook at:
<http://www.uscis.gov/files/form/m-274.pdf>

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Section 1 Changes: Employee

- E-mail address and phone number (optional)
- For an employee who selects “Alien Authorized to work until...” & who was issued an I-94 card, need to list foreign passport # & country of issuance

Employment Eligibility Verification
Department of Homeland Security
U.S. Citizenship and Immigration Services

USCIS
Form I-9
OMB No. 1615-0047
Expires 03/31/2016

▶ **START HERE.** Read instructions carefully before completing this form. The instructions must be available during completion of this form.
ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate against work-authorized individuals. Employers **CANNOT** specify which document(s) they will accept from an employee. The refusal to hire an individual because the documentation presented has a future expiration date may also constitute illegal discrimination.

Section 1. Employee Information and Attestation (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.)

Last Name (Family Name)		First Name (Given Name)		Middle Initial	Other 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	E-mail Address		Telephone Number		

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.

I attest, under penalty of perjury, that I am (check one of the following):

A citizen of the United States

A noncitizen national of the United States (See instructions)

A lawful permanent resident (Alien Registration Number/USCIS Number) _____

An alien authorized to work until (expiration date, if applicable, mm/dd/yyyy) _____. Some aliens may write "N/A" in this field. (See instructions)

For aliens authorized to work, provide your Alien Registration Number/USCIS Number OR Form I-94 Admission Number:

1. Alien Registration Number/USCIS Number: _____

OR

2. Form I-94 Admission Number: _____

If you obtained your admission number from CBP in connection with your arrival in the United States, include the following:

Foreign Passport Number: _____

Country of Issuance: _____

Some aliens may write "N/A" on the Foreign Passport Number and Country of Issuance fields. (See instructions)

Signature of Employee: _____ Date (mm/dd/yyyy): _____

3-D Barcode
Do Not Write in This Space

Changes to Form I-9 – Section 2

- Employee's name on top of Section 2
- List A now has room to list three documents;
- Documents, List C, #1 provides additional information/clarification about what is an acceptable SS card; and
- The List of Acceptable Documents includes information about acceptable receipts.

Section 2: Employer

Section 2. Employer or Authorized Representative Review and Verification
(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 examine a combination of one document from List B and one document from List C as listed on the "Lists of Acceptable Documents" on the next page of this form. For each document you review, record the following information: document title, issuing authority, document number, and expiration date, if any.)

Employee Last Name, First Name and Middle Initial from Section 1:

List A Identity and Employment Authorization	OR	List B Identity	A/D	List C 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:				
Issuing Authority:				
Document Number:				
Expiration Date (if any)(mm/dd/yyyy):				
Document Title:				
Issuing Authority:				
Document Number:				
Expiration Date (if any)(mm/dd/yyyy):				

3-D Barcode
Do Not Write in This Space

Section 2: Certification

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.

The employee's first day of employment (mm/dd/yyyy): See instructions for exemptions.)

Signature of Employer or Authorized Representative		Date (mm/dd/yyyy)	Title of Employer or Authorized Representative	
Last Name (Family Name)		First Name (Given Name)	Employer's Business or Organization Name	
Employer's Business or Organization Address (Street Number and Name)			City or Town	State Zip Code

- Adds numbers to the things the HR representative must attest to when reviewing the documents
- Separates out the place where the employer is required to insert the employee's first date of work for pay

Changes to Form I-9 Section 3: Re-verification & Rehires

Section 3. Reverification and Rehires <i>(To be completed and signed by employer or authorized representative.)</i>		
A. New Name <i>(if applicable)</i> Last Name <i>(Family Name)</i> First Name <i>(Given Name)</i> Middle Initial		B. Date of Rehire <i>(if applicable)</i> (mm/dd/yyyy):
C. If employee's previous grant of employment authorization has expired, provide the information for the document from List A or List C the employee presented that establishes current employment authorization in the space provided below.		
Document Title:	Document Number:	Expiration Date <i>(if any)</i> (mm/dd/yyyy):
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.		
Signature of Employer or Authorized Representative:	Date (mm/dd/yyyy):	Print Name of Employer or Authorized Representative:

- Provides clarification that List B identity documents do not require re-verification; and
- Adds a field for the Employer representative to print his/her name

Section 1 - Employee

- Employee must complete section one before work commences.
- Section 1 asks for name, address, date of birth (Social Security number, optional unless use E-Verify).
- Employee must check box regarding authorization to work in the U.S.
- Must sign and date form.
- May have assistance completing form.



Section 2 - Employer

- Complete by end of 3rd business day after employee starts work.
- Examine & record documents presented by employee (identity & employment authorization) List A **OR** List B **AND** List C.
- Insert start date, name & title of employer representative, business name & address & sign and date.



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Section 2 - Documents

- Certify that the documents:
 - reasonably appear to be genuine;
 - relate to the individual; and
 - authorize the individual to work
- Documents examined must be **ORIGINALS** – not photocopies.



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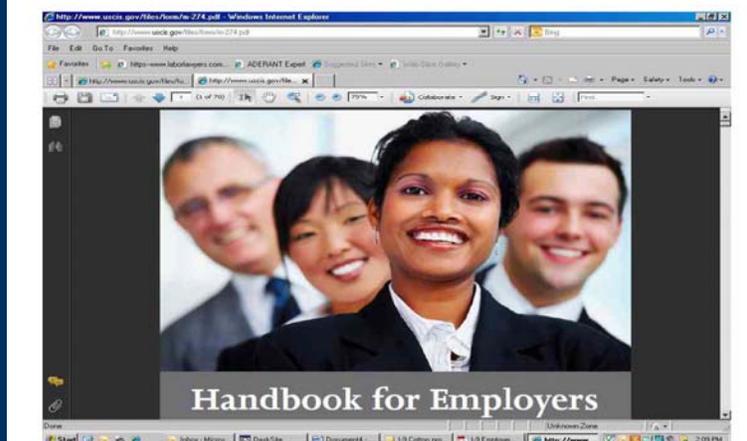
Section 3 - Reverification



- If employee's authorization to work in U.S. will expire – reverify.
- If rehire employee within 3 years of original hire date – may reverify – use current version of Form I-9.
- If employment authorization document originally presented is still valid, no need to review document.

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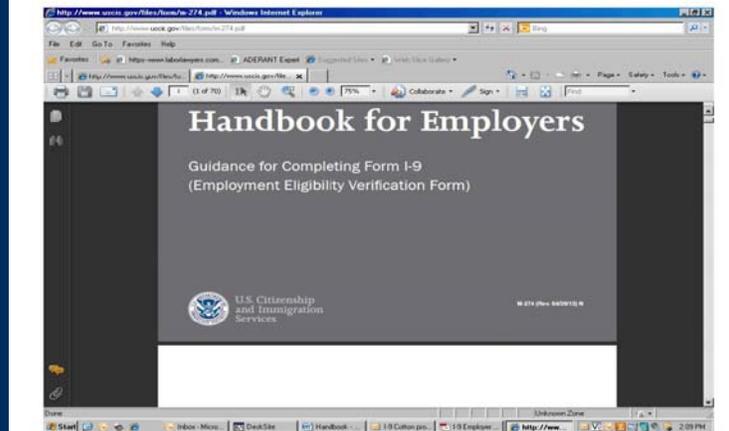
USCIS Handbook—updated April 30, 2013 –Form M-274
<http://www.uscis.gov/files/form/m-274.pdf>



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USCIS Handbook: bottom half

<http://www.uscis.gov/files/form/m-274.pdf>



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For “seasonal” employees returning from year to year – two future options

1. Terminate and rehire with update or re-verification of I-9 on 2013 form, Section 3 – Handbook pp. 24-25 or
2. “Continue” employment – seasonal layoff and recall - Handbook pp. 25-26—updating as required if expired documents

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For seasonal layoff and recall – continuing employment status

- Both employer and employee must have “reasonable expectation” of “continuing” employment at the next season when lay off begins
- Both employer and employee must treat employment status as layoff for all purposes, not as termination
- Maintain employee on employee roster--status “seasonal” layoff

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For seasonal layoff and recall – continuing employment status

- Maintain I-9 for employee with current employee I-9 file –maybe maintain lay off list
- Remember to re-verify if any document expires

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How USCIS looks at “continuing” employment

If you elect to treat seasonal employees as being on layoff, not terminated

- USCIS says it will examine whether the employment relationship is “continuing” on a “case-by-case” basis
- If worker seeks unemployment compensation, reason should be seasonal layoff; employer should treat “layoff ” the same

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How USCIS looks at “continuing” employment

- MSPA Form 516 should be issued to “continuing workers” for recall or work resumption before they depart at the end of the season to state expected/ estimated date of recall and other terms of employment expected as of the date issued. Should follow up with revised WH-516 for changes and confirmations

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How USCIS looks at “continuing” employment

- For the first season of continuing employment from season-to-season, an employer will be unable to rely on past history of formal recall to establish intent of continuing relationship
- Possibly past history of returning employment can partially establish intent; not a sure thing, however

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How USCIS looks at “continuing” employment

- Financial/business condition of employer must indicate likelihood of continuing operations next season to support planned continued employment
- May create a contractual expectation on the part of workers that they will have a job as of the estimated return to work date

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Practical considerations

- May establish a workforce roster large enough to make an employer not otherwise subject to Title VII, the Age Discrimination and Employment Act, the Americans With Disabilities Act and others subject to these laws coverage for which are based on employment rosters for of 15/20 employees for 15/20, weeks of employment status, depending on statute

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Practical considerations

- There may be worker comp and other financial considerations to maintenance of status
- Employer may be subject to more garnishments and other recordkeeping responses requiring documentation
- Must still manage I-9 forms as to documents that have expired and for which updates must be examined and recorded

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Practical considerations

- Must officially terminate non-returning workers and retain forms for one (1) year after termination, assuming three (3) year initial period of maintenance from Date of Hire has been met
- Likely to be no tolerance for examination of documents on return to work if documents have expired during layoff period

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IRCA Prohibited Acts

Cannot:

- Knowingly hire an alien who is not authorized to work
- Hire any individual without verifying identity and work authorization
- Continue employing person if you know **or should know** the person is not authorized to work.



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Unfair Documentary Practices

- Do not require specific documents or combination of documents.
- Do not require more or different documents than minimally required.
- Do not refuse to accept documents that reasonably appear to be genuine.
- Employee's choice which of the acceptable Form I-9 documents to present.



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Photocopy Rule

- Copying of documents permitted but not required.
- Even if copy documents, penalty may result if form is not also properly completed.
- Photocopies can be used to correct problems identified during a periodic self-audit or in advance of a government audit.



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Retention Requirements



- Once employee terminated, you must retain I-9 form for:
 - At least three years from date of hire; and
 - At least one year from date of termination;
 - Whichever is later.
- Once retention requirements met, purge form.

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Monetary Penalties



- I-9 substantive/uncorrected technical violations range from \$110 to \$1,100 per violation
- Knowing hire/continuing to employ violations range from:
 - \$375-\$3,200 (1st violation)
 - \$3,200-\$6,500 (2nd violation)
 - \$4,300-\$16,000 (Subsequent)

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Things to Remember

- U.S. passports, U.S. passport cards, Permanent Resident Cards, or List B Identity documents should not be re-verified.
- As of April 3, 2009, expired documents may not be accepted (unless they have been automatically extended – such as Temporary Protected Status).
- Social Security card marked “Not Valid for Employment” is not acceptable List C document.



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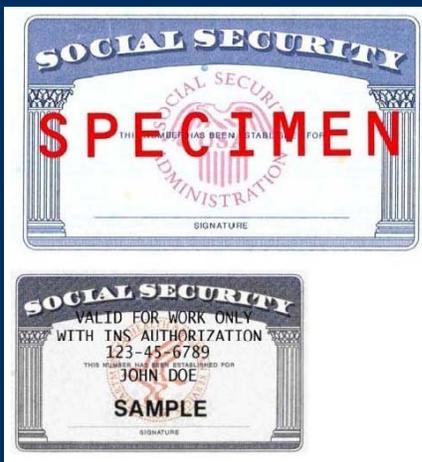
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There are at least 50 valid versions of the Social Security Number Card.

Example 1: UNRESTRICTED SS cards: “Valid for Work Authorization”.

Example 2: RESTRICTED SS cards: “Not valid for Employment”; “Valid for work only with INS Authorization” and “Valid for Work only with DHS Authorization”.



Most Common I-9 Mistakes

- Section 1 – Work status box not checked.
- Section 2 – Start date missing.
- Section 2 – Issuing authority missing for document.
- Section 2 – More documents requested/listed than required.



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Self-Audit – Getting Started

- Generate a list of all current employees.
 - Include name, date of hire, and distinguishing fact (SSN or DOB).
- Pull I-9 forms for all current employees.
- Make sure that you have an I-9 form for each employee on the list.
- Make a note on the list if an I-9 form is missing for a particular employee.



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Missing Form I-9



- If you determine that an I-9 form is missing for a current employee – complete a form immediately.
- Ask employee to complete Section 1, sign and date (with current date).
- Complete Section 2 (insert original start date) and sign and date (with current date).

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Making Corrections



- Correct errors, as allowed, on each form.
 - Section 1 – Employee makes corrections.
 - Section 2 – Employer makes corrections.
- Strike through errors – do not use White Out or Liquid Paper.
- All corrections should be initialed, dated, and include the words “Per Self Audit”.

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E-Verify

- System checks SSA and DHS databases using information in Section 1 of I-9 form.
- Initiate E-Verify query within 3 business days of start date of employment.
- Only for newly-hired employees (unless covered by Federal Contractor E-Verify Rule.)



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E-VERIFY - Rules

- New Hires/Rehires Only (unless Federal Contract requirement for existing employees)
- Must allow employees to contest a mismatch (Tentative Nonconfirmation)
- Cannot use to discriminate
- USCIS Compliance/Monitoring
- Posters



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E-Verify

- **Employee must:**
 - provide SSN on I-9 Form;
 - present photo ID in connection with completion of I-9 Form.
- **Employer must:**
 - take no adverse action against employee during Tentative Non-Confirmation process;
 - post notices at job site notifying applicants/employees of E-Verify use;
 - sign Memorandum of Understanding between company, DHS and SSA.



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Implementation – Notifying Prospective Employees

This Employer Participates in E-Verify



This employer will provide the Social Security Administration (SSA) and, if necessary, the Department of Homeland Security (DHS), with information from your own employee's Form I-9 to confirm work authorization.

NOTICE: Federal law requires all employers to verify the identity and employment eligibility of all persons hired to work in the United States.

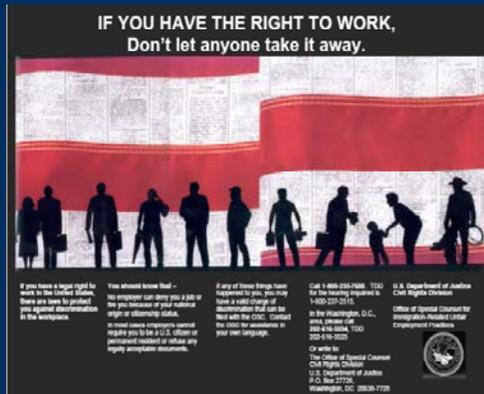
If you believe that your employer has violated the requirements under this program or has discriminated against you during the verification process based upon your national origin or citizenship status, please call the Office of Special Counsel at 1-800-205-7688 (TDD) 1-800-237-8155.

Employment Verifications Done.
 For more information on E-Verify, please contact DHS at 1-888-464-4218



- Participating employers are required to post the English and Spanish notice provided by DHS

Implementation – Notifying Prospective Employees



- Participating employers are also required to post the Right to Work Poster

Submitting E-Verify Query

- Information submitted includes:
 - citizenship status checked
 - employee's name
 - Social Security number
 - date of birth
 - hire date
 - document expiration dates



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Photo Match

- Triggered when employee presents one of following for I-9 Form:
 - U.S. Passport or Passport Card
 - Permanent Resident Card (I-551)
 - Employment Authorization Document (I-766)
- Must make a copy of the Employee's I-9 form photo document and retain with I-9 form



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Initial Cases Results

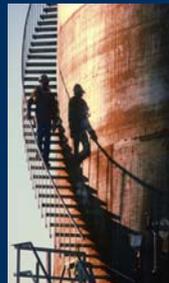
- **Employment Authorized** – Employment eligibility verified – information matches SSA and/or DHS records
- **SSA Tentative Nonconfirmation** (SSA TNC) – Social Security information could not be verified
- **DHS Tentative Nonconfirmation** (DHS TNC) – Information matches SSA records but not DHS records
- **DHS Verification In Process** – case referred to DHS



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Tentative Nonconfirmation (TNC)

- Promptly notify employee of TNC
- Print TNC Notice to Employee
- Employee may contest or not contest
- Contest : Initiate referral to SSA/DHS
- Not Contest – acknowledges employer may terminate employment
- Employee and HR sign original Notice – keep original & give employee copy



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Referral to SSA or DHS

- Employee Contests - initiate referral
- Print referral - review, sign, provide copy to employee
- Employee has 8 federal government workdays to visit SSA or contact DHS
- May not terminate, suspend, delay training or take any other adverse action against employee while case is pending with SSA or DHS



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Final Case Resolution

- Employment Authorized
- SSA or DHS Final Nonconfirmation
 - E-Verify cannot verify information
 - Close case
 - May terminate employee
- DHS No Show
 - Employee did not contact DHS
 - Considered Final Nonconfirmation
- Error: Close Case and Resubmit
 - Expiration date on document incorrect
 - Submit new query for employee



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E-Verify Employer DON'Ts

- Use E-Verify to verify current employees.
- Use E-Verify selectively.
- Use E-Verify to pre-screen applicants.
- Coerce employee not to contest TNC.
- Terminate or take adverse action against employee contesting TNC.
- Ask employee for written verification from SSA or DHS.
- Ask employee for additional documentation of employment eligibility after TNC.

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Immigration & Customs Enforcement

- Responsible for enforcement of Form I-9 compliance
 - I-9 Audits
 - Worksite raids
 - Issuance of fines
 - Arrests



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ICE AUDITS

- Notice of Inspection
 - Legal requirements
- Subpoena
- Triggers for Audit



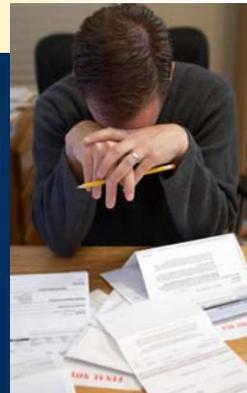
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What Can ICE Ask For?

- I-9s for current employees hired after Nov. 6, 1986
- Electronic employee listing
- Quarterly wage and hour reports
- Payroll data
- SSA, E-Verify, SSNVS correspondence
- Business owner information



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After ICE Inspection

- ICE issues Notice of Inspection Results if found in compliance.
- If not in compliance, may receive:
 - Notice of Technical or Procedural Failures.
 - Notice of Intent to Fine.
 - Notice of Suspect Documents.
 - Notice of Discrepancies.
- Notice of Intent to Fine – employer has opportunity to negotiate settlement or request hearing.



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Protect your Business



- I-9 audit may be foundation for raid, civil money penalties and criminal sanctions.
- Ensure I-9 and E-Verify compliance programs are in place, up-to-date, and followed.
- Conduct regular internal I-9 audits and remedy identified errors.
- Have outside counsel conduct periodic I-9 audits.

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