

Ft. Lauderdale



Tallahassee



Miami



West Palm Beach



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Palm Beach



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Stuart



Tampa



Orlando



Jacksonville

YOUR I-9 PROGRAM UNDER THE ICE MAGNIFYING GLASS

**Prepared for
South Florida
Hospitality Human Resources
Association**

February 2016

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Raiders of the Worksite Have Been ...



... Replaced by Forensic Document Examiners



Overview

“BEGIN THE I-9 PROCESS WITH THE END IN MIND”

- The EEV Framework
- Preparing for the ‘ICE Age’
 - Why employers are sanctioned
 - Government audits – Silent Worksite Raids
 - Penalties
 - Passing forensic ICE auditor scrutiny
- ICE Mindset – What is your IMAGE
- E-Verify
- Electronic I-9s – “Buyer Beware”
- Comprehensive Compliance Program



EEV Framework

Employers are forbidden from knowingly hiring individuals who do not have work authorization in the U.S.

- Essentially self-policing
- Employees are required to certify
 - Who they are
 - Where they live
 - What their immigration status is
- Employees must present documentation that establishes:
 - Identity – they are who they say they are
 - Employment Authorization



EEV Framework (continued)

- Employers must:
 - Verify that the presented documentation appears to be genuine and relates to the employee
 - Ensure proper completion of the I-9 to document the identity and work authorization of the employee
- Employers must ensure that employees remain authorized to work



Preparing for the “ICE Age”



Why Employers are Sanctioned

- **Knowingly employing or continuing to employ unauthorized aliens**
- **Paperwork violations in I-9 process**
- **Discrimination based upon national origin or citizenship status**
- **Document abuse**
- **Other criminal violations**



I-9 Inspection Fallout

Unauthorized Workers

- Chipotle fired or lost half of its 900 employees in Minnesota as well as workers in Washington D.C. and Virginia and spent over \$1 million in legal fees related to the I-9 audit
- American Apparel lost 1,800 workers (a quarter of its workforce) and faces a class action lawsuit alleging it made false statements about its hiring practices resulting in negative financial performance
- 7-Eleven franchisees and operators on Long Island and in Virginia lost their fourteen franchises, forfeited five houses worth \$1.3 million, paid back wages of \$2.6 million, and face sentencing for up to 20 years in prison



I-9 Inspection Fallout (continued)

Unlawful Discrimination

- **Imagine Schools, Inc. agreed to pay over \$20,000 in back pay plus interest and civil penalties for unlawful discrimination by improperly terminating an employee in connection with reverification.**
- **Security Technology Inc. agreed to pay back pay to a lawful permanent resident for unlawful discrimination after improperly requiring the employee to present a Green Card despite the fact he had already presented a driver's license and social security card.**
- **BAE Systems Ship Repair Inc. paid over \$50,000 in back pay and the settlement required training, adoption of written policies and procedures, and mandatory I-9 inspections for 3 years – all based on the improper suspension of one Lawful Permanent Resident**

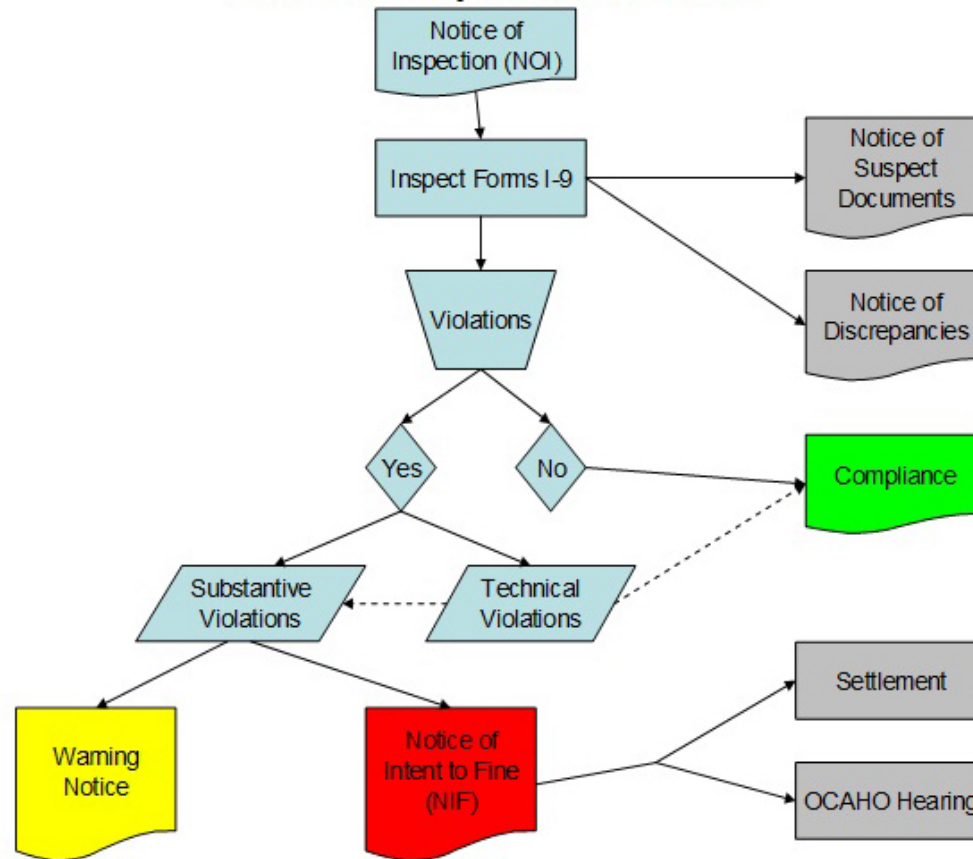


Government Audits



Silent Worksite Raids

Form I-9 Inspection Process



What to Expect in the Event of a Government Audit

- **Government Agencies include ICE or DOL**
- **Are you likely to be selected for audit?**
 - **Target of a specific lead**
 - **Random selection – within targeted industry**
- **Notification**
 - **Three-day advance notice**
 - **Subpoena**
 - **Civil or criminal search warrant**



What to Expect in the Event of a Government Audit (cont.)

- **Key actions to take**
 - **Follow company policy on cooperation**
 - **Notify employer and counsel immediately**
 - **Know who can consent to agent requests**
 - **Provide photocopies, not originals if possible (retain photocopies of all original documents provided)**
 - **Get agent's name, phone #, business card**



Notice of Inspection

Notice Provisions

- Addressed to a specific employer – is this your company?
- Original I-9s and attachments for all current employees and employees terminated during the past 12 months
- Employee listing in electronic format (excel spreadsheet on a CD-rom) name, DOB, date hired, date terminated, SSN
- Payroll register for last payroll period processed
- Copy of Articles of Incorporation
- Social Security Administration Correspondence (No-Match Letter Procedures)
- Evidence of participation in E-Verify and/or the Social Security Number Verification Service
- Business Entity Questionnaire
- Employer Interview Questions



I-9 Inspection Outcomes

- Educational visit (don't count on it)
- Notice of Inspection Results – “Compliance Letter”
- Warning Notice
- Notice of Technical or Procedural Failures
- 10-day opportunity to cure “technical” or “procedural” but not “substantive”
- Notice of Suspect Documents – specific action required and employer and employee given opportunity to present additional documentation
- Notice of Discrepancies – ICE unable to determine employment eligibility. Employer and employee given opportunity to produce other documentation
- Notice of Intent to Fine
- Settlement
- Appeal to OCAHO
- Referred to U.S. Attorney





Substantive vs. Procedural Errors



Penalties:
Red = Substantive
Yellow = Technical



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: _____ *

3-D Barcode
Do Not Write in This Space

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): _____
------------------------------	--------------------------

Preparer and/or Translator Certification (To be completed and signed if Section 1 is prepared by a person other than the employee.)

I attest, under penalty of perjury, that I have assisted in the completion of this form and that to the best of my knowledge the information is true and correct.

Signature of Preparer or Translator: _____		Date (mm/dd/yyyy): _____	
Last Name (Family Name)		First Name (Given Name)	
Address (Street Number and Name)		City or Town	State Zip Code



Employer Completes Next Page



* Substantive unless stated in Section 2 or 3 or a legible copy is attached
** Substantive unless a legible copy is attached

Penalties:
 Red = Substantive
 Yellow = Technical

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	AND	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

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 _____

Section 3. Reverification and Rehires *(To be completed and signed by employer or authorized representative.)*

A. New Name (if applicable) Last Name (Family Name) First Name (Given Name) Middle Initial B. Date of Rehire (if applicable) (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 (if any)(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: _____
--	-----------------------------	---

* Substantive unless stated in Section 2 or 3 or a legible copy is attached
 ** Substantive unless a legible copy is attached



Most Common I-9 Related Penalties



Employment Verification and Unlawful Employment of Aliens Penalties

VIOLATION

CURRENT PENALTY

SENATE BILL 744

I-9 Preparation:

(per individual)

Paperwork violations

\$ 110 - \$ 1,100

First order

\$ 500 - \$ 2,000

Second order

\$1,000 - \$ 4,000

Third order

\$2,000 - \$ 8,000

Unlawful employment of unauthorized aliens:

(per unauthorized alien)

First order

\$ 375 - \$ 3,200

\$ 3,500 - \$ 7,500

Second order

\$ 3,200 - \$ 6,500

\$ 5,000 - \$ 15,000

Third order

\$ 4,300 - \$16,000

\$10,000 - \$25,000



ICE I-9 Penalty Calculation

Base Fine for Substantive and Uncorrected Technical Violations

- Number of I-9s with Violations Divided by Number of I-9s Required to be Maintained
- The standard fine amount is **per I-9**
- Example

STANDARD FINE AMOUNT

SUBSTANTIVE VERIFICATION VIOLATIONS	1 st OFFENSE \$110-\$1100	2 ND OFFENSE \$110-1100	3 RD OFFENSE \$110-1100
50% or more	\$935	\$1,100	\$1,100



ICE Penalty Calculation for Knowingly Hiring Violations

Base Fine for Knowingly Hiring / Continuing to Employ Violations

- Number of Violations Divided by Number of I-9s Required to be Maintained
- Tiers relate to 1st, 2nd or 3rd time violators
- Example

STANDARD FINE AMOUNT

KNOWINGLY HIRE AND CONTINUING TO EMPLOY VIOLATIONS	FIRST TIER \$375-3,200	SECOND TIER \$3,200-\$6,500	THIRD TIER \$4,300-\$16,000
20%-29%	\$1,315	\$4,300	\$8,200



ICE I-9 Penalty Calculation (continued)

Base Fine Enhancement or Mitigation Matrix (cumulative)

- Plus or minus 5% or Neutral
- Factors

- Business Size	+5%	-5%	+/- 0%
- Good faith	+5%	-5%	+/- 0%
- Seriousness	+5%	-5%	+/- 0%
- Unauthorized Aliens	+5%	-5%	+/- 0%
- History	+5%	-5%	+/- 0%



Criminal Violations

FELONY (3-20 or more years of imprisonment, \$250,000-\$500,000 fines, forfeitures)

- Making false statements;
- Document fraud;
- Identity theft;
- Alien smuggling;
- Alien harboring;
- Worker exploitation;
- Money laundering.

MISDEMEANOR (fine and/or 6 months imprisonment)

- Pattern or Practice



Other Sanctions

- **Rehire complainant**
- **Cease & desist from unfair immigration-related practices**
- **Order to comply with I-9 procedures for 3 years**
- **Post notices, educate, train personnel**
- **Back pay**
- **Lift restrictions on employee**
- **Remove false warnings or reviews from employee's personnel file**
- **Debarment from government contracts**



Other Potential Ramifications

- **Significant Potential Work Disruption**
- **Adverse Impact on Business Reputation**
- **Inability to Meet Contractual Provisions Requiring Compliance**



**“An Ounce of Prevention is Worth
a Pound of ICE”**

**Proper Completion of the Form
I-9**

Passing a Forensic ICE Auditor's Scrutiny



"GOOD FAITH" Compliance

- **Provides a defense to a charge of knowingly hiring or continuing to employ an unauthorized person**
- **Allows for correction of technical errors on the Form I-9 without penalty**
- **Mitigates the amount of any civil penalty**



Preparation = Performance I-9 Training Program

Goal

- **Good Faith Compliance**

Elements

- **Whose employment eligibility must be verified**
- **Use of correct version of the I-9 Form**
- **Retention requirements**
- **Evaluation of documents presented**
- **Reverification requirements**
- **Proper completion of sections 1-3**
- **Common errors (based on internal audit)**
- **Correction, Copying, and Storage**
- **Use of explanatory memoranda**
- **Government guidance**



Comprehensive Approach to an I-9 Internal Review

- Is there an I-9 for each employee on the payroll?
- Does the date of hire on the payroll match the date in Section 2?
- Are I-9's for former employees maintained in a separate file and are they being retained for the required period of time?
- Is the I-9 form the correct version based on the date of initial hire and date of reverification?
- Is the documentation on the acceptable list of documents?
- Is the I-9 completed properly?
- Does the documentation still appear to be genuine and relate to the employee ?
- Documentation of Review Findings?
- Corrective Action?



Fraudulent Documents Abound



Recognizing Fraudulent Documents



Authenticity of Documents

- Establish Identity and Work Authorization
- Appear “Genuine On Their Face”
- Relate to the Individual
- Not Forged, Tampered or Fraudulent
- Further Inquiries?
- Employer Not Detective but because of published guides expectation for scrutiny is higher.
- Discrimination Issues



New Version of the Permanent Resident Card



- **USCIS #** is the person's A number and should match the numbers following USA in the 1st line on the back of the card.
- First set of numbers in the 2nd line on the back is the birthdate in YY/MM/DD format.
- The second set of numbers in the 2nd line on the back is the expiration date of the card in YY/MM/DD format.



ICE Mindset – What is Your Company's "Image"



James Gibbons, of HSI Chicago and
Daniel Dreckman of Wright Construction Services



The IMAGE Program

Goal

- Minimize vulnerabilities resulting in unlawful employment

Requirements

- Complete the IMAGE Self-Assessment Questionnaire
- Enroll in E-Verify within 60 days
- Adopt a written hiring and I-9 policy
- Conduct an annual internal Form I-9 audit
- Submit to an ICE I-9 Inspection
- Sign an official IMAGE partnership agreement
- Commit to BEST EMPLOYMENT PRACTICES



The IMAGE Program (continued)

- **Benefits**
 - **Employer Training**
 - **Reduced unauthorized employment**
 - **Minimized use of fraudulent documents**
 - **Protected workforce integrity and stability**
 - **Protected company image and lawsuit avoidance**
 - **Waived fines (if <50% contain substantive violations)**
 - **Mitigated fines (if > 50% contained substantive violations)**
 - **Two-year break from I-9 inspections**



IMAGE Best Employment Practices

The Coming Industry Standard


- **Use E-Verify**
- **Use Social Security Number Verification Service (SSNVS) for wage reporting purposes**
- **Adopt a written hiring and I-9 policy**
- **Establish an internal compliance and training program**
- **Form I-9 and E-Verify processes completed only by trained individuals**
- **Conduct annual I-9 audits**



IMAGE Best Employment Practices (continued)

- **Report credible information of suspected criminal misconduct**
- **Ensure contractors establish I-9 procedures**
- **Establish procedures for responding to government notifications**
- **Establish a tip line mechanism to report suspected unauthorized workers**
- **Adopt policies, practices and safeguards**
- **Maintain copies of verified documents for new hires**





E-Verify and the Governor's Executive Order



E-Verify

The federal government's electronic online system for confirmation of an employer's Form I-9 employment eligibility verification.



E-Verify (continued)

- **Voluntary under federal law**
 - **But mandatory if a federal contractor**
 - **May opt to E-Verify all employees**
- **Numerous states have made it mandatory**
 - **Must comport with federal requirements for use**



Florida Governor's Executive Orders on E-Verify

- Executive Order 11-116 (May 27, 2011) (Superseding Executive Order 11-02)
 - All new agency employees
 - All new contractor employees hired during the contract term
 - Contracts in excess of a nominal value
 - Such contracts to include an express requirement for the use of E-Verify for all new employees hired by the subcontractor during the contract term



Electronic I-9 Systems



“Buyer Beware” – Electronic I-9 Creation and Storage

- The electronic creation and retention of Form I-9s is authorized
- ICE does not certify vendors of I-9 software.
- Recent Case
 - Rose Acre Farms allegedly used an electronic I-9 system that demanded LIST A documents for non U.S. citizens and that allowed the employer to complete Section 1 for all employees
- There are rigid standards for electronic record keeping, signed electronic signatures and audit trails (data integrity).
- Recent Case
 - Abercrombie & Fitch paid a \$1 million penalty when an ICE audit revealed that their proprietary I-9 platform did not contain an audit trail.



“Buyer Beware” – Electronic I-9 Creation and Storage (continued)

- **An electronic I-9 System must include:**
- **Reasonable controls to ensure the integrity, accuracy and reliability of the electronic generation or storage system**
- **Reasonable controls to prevent and detect the unauthorized or accidental creation of, addition to, alteration of, deletion of, or deterioration of an electronically completed or stored Form I-9**
- **An inspection and quality assurance program evidenced by regular evaluations of the electronic generation or storage system**
- **A retrieval system that includes an indexing system that permits the identification and retrieval for viewing or reproducing**
- **The ability to reproduce legible and readable hardcopies.**



A Due Diligence Team is Essential

Team should include HR, IT and Legal

Examples of Potential Inquiries

- Who owns the data? Where is it stored? There may be a DHS requirement that electronic I-9 data must be kept in the U.S.
- What happens if the vendor ceases operations? Can the Company get its data?
- What happens if the Company sues the vendor? Will the vendor prevent timely access to the data during arbitration/litigation? USCIS regulations establish that the failure of an employer to timely provide I-9s for governmental inspection is a violation of the retention requirements
- What happens if the vendor system is not accessible? There are strict time limits for completion of the I-9 by the employee and by the employer.
- Who performs the legal review of the software for compliance?
- Does the Vendor provide indemnification for an error caused by the software?



Comprehensive Proactive Approach to Compliance

- Review and update written policies and procedures on maintaining a legal workforce
 - I-9 Completion
 - Preventing immigration-related discrimination
 - ICE visit
 - SSA No-match
- Review Electronic I-9 Software Processes
- Annual training
- Annual internal I-9 audit
- Develop E-Verify strategy
- Other IMAGE best practices



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GUNSTER

FLORIDA'S LAW FIRM FOR BUSINESS