

## WORKSITE ENFORCEMENT AND THE NEW I-9

### **Form I-9: Effective Date, Changes, What to Look Out For**

- Beginning January 22, 2017, employers must use the 11/14/2016 version of Form I-9.
- Employers who fail to use Form I-9 (11/14/2016 N) on or after Jan. 22, 2017 may be subject to all applicable penalties under section INA 274A as enforced by ICE. Employers should continue to follow existing storage and retention rules (see below).
- \*\* Note: If your client downloaded and electronically used Form I-9 between November 14 and November 17, 2016, they should review the social security number entered in Section 1 as a glitch caused the numbers to be transposed when employees completed Section 1 using a computer. Normal correction procedures should be followed if this error occurred.
- Review the updated Handbook for Employers or see the Table of Changes for the Revised M-274 for highlights of the differences between the previous and new versions:
  - Section 1 box now asks for Other **Last** Names Used only
  - Employee can now provide a P.O. Box as the address in Section 1
  - One checkbox must be checked under the Preparer/Translator Section
  - New Citizenship/Immigration Status Box at top of Section 2. This will automatically populate as a number if the form is completed electronically. Otherwise, client can either write in title of checkbox that employee marked in Section 1 or the number that corresponds to that section (i.e. U.S. Citizen or 1).
  - Additional Information box should be used to notate things such as employment authorization extensions for TPS, F-1 OPT STEM, CAP-GAP, H-1B change of employer, H-2A, etc.; employee termination dates and form retention dates; E-Verify case number; or, any other notes the employer would find helpful.
- The Spanish version of Form I-9 may only be used and retained in Puerto Rico. If used as a guide for U.S. employers, it should not be kept with the original Form I-9 and the translator section must be completed.
- Advise clients to be careful if they choose to use an I-9 software. Utilization of a software does not guarantee freedom from mistakes and fines. (Neither does using E-Verify!)
- \*\* Practice Pointer: Encourage employers to make the I-9 completion process a separate and distinct step from any other hiring matters. If proof of identity or other documents are being provided for payroll or other purposes and your employer client specifically requests a social security card, green card, etc. for a reason other than I-9 employment verification, it could lead to issues and an investigation by the DOJ Immigrant and Employee Rights Section. Advise the employer client to make each step clear and definite so that it is obvious to the employee that he or she decides what document(s) to provide for I-9 verification, and later ask for documents needed to process payroll per the employer's hiring practice (even if documents are provided twice). All I-9 documentation should be stored separately from other personal/hiring information.

### **“Smart” I-9**

- The new form contains pop-up informational icons and has error-checking capabilities
- “Smart” I-9 precludes completion of the form if a mandatory field is left blank

- Allows for multiple preparer/translator certifications
- \*\* Note: The changes stop short of creating a fully electronic Form I-9. The Form I-9 must still be printed, signed by both employer and employee, and properly stored.

**Retention Rules for Form I-9**

- Provide this calculation formula to clients to assist them with proper retention and storage of their Form I-9’s.

To calculate how long to keep an employee’s Form I-9, enter the following:

1. Date the employee began work for pay	1.	_____
A. Add 3 years to the date on line 1.	A.	_____
2. The date employment was terminated	2.	_____
B. Add 1 year to the date on line 2.	B.	_____
3. Which date is later; A or B?	3.	_____
C. Enter the later date.	C.	_____

\*\*The employer must retain Form I-9 until the date on Line C.

- Whether storing I-9’s electronically or in paper form, employer clients should develop a system to help track retention and re-verification dates. As with any confidential employee information, employer clients should keep I-9’s in a secure area or restricted access portion of a server.

Helpful Links:

- I-9 Central <https://www.uscis.gov/i-9-central>
- E-Verify Homepage <https://www.uscis.gov/e-verify>
- Free I-9 and E-Verify Webinars <https://www.uscis.gov/e-verify/e-verify-webinars/take-free-webinar> (great for you or your clients!)

**Impact of “Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers”**

- New 10-day grace periods before and after E-1, E-2, E-3, L-1, and TN visas to prepare to begin employment and to provide time after the end of expiration to depart, extend, or change status.
- New 60-day grace periods for E-1, E-2, E-3, H-1B, H-1B1, L-1, O-1, or TN visa holders to find additional positions if the employee resigns or is terminated. \*\*Note: the grace period only

protects lawful stay but not ability to work. The employee is not authorized to work for a new employer until a new visa is approved.

- Codified permission for H-1B workers to change jobs or employers and allows H-1B holders to begin work with a new employer upon the filing of a non-frivolous petition.
- Allows beneficiaries of E-3, H-1B, H-1B1, L-1, or O-1 visas to apply for a compelling circumstances EAD.
- Provides for the automatic extension of the validity periods of certain EAD's for up to 180 days if the employee:
  - 1) Timely filed to renew the EAD; 2) Is applying to renew such EAD in the same category as the previous EAD; and 3) Is in a category that is eligible for the extension
  - \*\* Practice Pointer: Make employer clients aware of these automatic extensions ASAP. USCIS no longer has to adjudicate EAD applications or renewals in 90 days. Practitioners are starting to see the first few automatic EAD extensions take effect (can create issues when driver's licenses expire- a SAVE inquiry must be completed before Texas DPS will issue a new license for automatic extension applicants). Instructions regarding how to complete the I-9 when faced with an automatic extension can be found here: <https://www.uscis.gov/sites/default/files/USCIS/Verification/I-9%20Central/FactSheets/Fact-Sheet-AutoExtendEAD.pdf>
- Created Form I-485 Supplement J. Employee with approved I-140 awaiting AOS decision or priority date must file this to continue AOS eligibility. Employee must provide evidence of new job offer. This can be filed proactively or in response to an RFE. Employer client must provide information to employee for the completion of this form.

### **Worksite Enforcement**

- Settlement numbers for government enforcement litigation in 2016 decreased substantially as compared to 2015, as did the litigation dockets of the DOL and the EEOC.
- Settlement recoveries in 2016 were the second lowest in the past seven years.
- Both the DOL and the EEOC were focused on “big impact” lawsuits, but patterns under the Trump administration have not yet presented themselves.
- The Wage and Hour Division continued its aggressive enforcement actions in 2016, particularly in the hotel, restaurant, and retail industries. Much of the focus was on industries with high usage of franchising, subcontracting, and independent contractors.
- Opinion letters in response to specific requests could return—abandoned under Obama DHS
- \*\* Practice Pointer: The best protection from ICE is preparation. ICE cannot fine a company for immigration violations if they have a strong culture of immigration compliance and properly execute and retain the Form I-9 for each employee. Employers are responsible for identifying who should even complete the Form I-9 to begin with. Strong compliance systems and protocols will be essential for a company that might be quickly required to create I-9s for members of its workforce. Every employer in a high-risk industry should have a plan B in place. If a raid should take place, a protocol should be in place as to who to call and how to quickly replace employees.
- If entrepreneurial companies are looking to move into the shared economy workforce model, they must carefully document who is an independent contractor, a joint employee, or a true

employee. If the company fails to clearly document that those who perform its work are not employees, the failure to maintain I-9s could be extremely costly.

- There are two main statutes available to the Department of Justice under which to investigate and prosecute employers who employ unauthorized workers. The harboring statute, 8 USC §1324(a)(1)(A)(iii), is a felony that, in addition to criminalizing what would be viewed by a layperson as harboring (transporting, concealing, shielding from detection), also includes a provision that punishes "encouraging...an alien to reside in the United States." The other main statute available to the DOJ is the unlawful employment provision of IRCA that punishes employers who employ or continue to employ workers they know to be unauthorized aliens. 8 USC §1324(a). AG Sessions has discussed a renewed focus on targeting people who harbor aliens—this could lead to ICE/DOJ narrowly defining harboring and targeting employers who encourage an alien to reside here by providing employment.

### **Recent Cases/Settlement Agreements/Opinions:**

- *SCM Data Inc and MMC Systems, Inc.* (USAO D.N.J. Sept 26, 2016): investigation of an Indian-based IT company who fraudulently obtained H-1B visas and made workers' pay cash to the company to issue payroll checks.
- *U.S. v. Golden Employment Group, Inc.*, 12 OCAHO nos. 1274 and 1277 (2016): staffing company liable for 465 Form I-9 violations resulting in civil penalties in the total amount of \$209,600 (liable for 140 Form I-9 violations concerning the failure to timely present I-9 forms, 236 Form I-9 violations for failure to prepare and/or present I-9 forms, and 89 Form I-9 violations for failure to properly complete I-9 forms.) "E-Verify program does not purport to insulate an employer from the necessity of proper I-9 completion" and that participation in the E-Verify program "does not exempt an employer from the requirements to complete, retain, and produce I-9 forms for its employees."
- 1<sup>st</sup> Class Staffing Settlement Agreement (Dec. 13, 2016): 1st Class Staffing's California office routinely requested that non-U.S. citizens, but not U.S. citizens, provide specific immigration documents to establish their authority to work. 1st Class must pay for lost wages to the charging party and \$17,600 in civil penalties; participate in department-provided INA anti-discrimination training and be subject to departmental monitoring.
- *United States v. Cawoods Produce, Inc.*, DOJ OCAHO, No. 15A00039, 6/2/16: ICE charges of I-9 violations dismissed where agency failed to present sufficient evidence, penalty reduced because employer is a small business, violations varied in level of seriousness. Employers may prevail when challenging ICE's I-9 audits, but not by generally denying liability.
- Mary's Gone Crackers Settlement Agreement (July 2016): Agreed to pay \$1.5 million and institute a compliance program to avoid criminal prosecution for potential violations stemming from the gluten-free snack maker's employment of unauthorized workers.
- OSC TAL on Permissible Questions to Ask Job Applicants Regarding Sponsorship, AILA Doc. No. 16061702 (June 15, 2016): "Asking job applicants detailed questions about their immigration or citizenship status may deter individuals who *are* protected from citizenship status discrimination from applying due to a misunderstanding about their eligibility for the position."

### **What Fines Apply?**

- The fine increases provided for in the Federal Register went into effect as of August 1, 2016:

Knowing Hire / Continuing to Employ Fine Schedule (on or after 03/27/2008)

Knowing Hire/Continuing to Employ Violations	Standard Fine Amount		
	First Tier	Second Tier	Third Tier
	\$375 – \$3,200	\$3,200 – \$6,500	\$4,300 – \$16,000
0% – 9%	\$375	\$3,200	\$4,300
10% – 19%	\$845	\$3,750	\$6,250
20% – 29%	\$1,315	\$4,300	\$8,200
30% – 39%	\$1,785	\$4,850	\$10,150
40% – 49%	\$2,255	\$5,400	\$12,100
50% or more	\$2,725	\$5,950	\$14,050

Knowing Hire / Continuing to Employ Fine Schedule (between 09/29/1999 and 03/27/2008)

Knowing Hire/Continuing to Employ Violations	Standard Fine Amount		
	First Tier	Second Tier	Third Tier
	\$275- \$2200	\$2,200 – \$5,500	\$3,300 – \$11,000
0% – 9%	\$275	\$2,200	\$3,300
10% – 19%	\$600	\$2,750	\$4,600
20% – 29%	\$925	\$3,300	\$5,900
30% – 39%	\$1,250	\$3,850	\$7,200
40% – 49%	\$1,575	\$4,400	\$8,500
50% or more	\$1,900	\$4,950	\$9,800

Substantive / Uncorrected Technical Violation Fine Schedule

Substantive Verification Violations	Standard Fine Amount		
	1st Offense	2nd Offense	3rd Offense +
	\$110 – \$1100	\$110 – \$1100	\$110 – \$1100
0% – 9%	\$110	\$550	\$1,100
10% – 19%	\$275	\$650	\$1,100
20% – 29%	\$440	\$750	\$1,100
30% – 39%	\$605	\$850	\$1,100
40% – 49%	\$770	\$950	\$1,100

Substantive / Uncorrected Technical Violation Fine Schedule

	Standard Fine Amount		
	1st Offense	2nd Offense	3rd Offense +
<b>Substantive Verification Violations</b>	<b>\$110 – \$1100</b>	<b>\$110 – \$1100</b>	<b>\$110 – \$1100</b>
<b>50% or more</b>	<b>\$935</b>	<b>\$1,100</b>	<b>\$1,100</b>

Enhancement Matrix

Factor	Aggravating	Mitigating	Neutral
Business size	+ 5%	- 5%	+/- 0%
Good faith	+ 5%	- 5%	+/- 0%
Seriousness	+ 5%	- 5%	+/- 0%
Unauthorized Aliens	+ 5%	- 5%	+/- 0%
History	+ 5%	- 5%	+/- 0%
Cumulative Adjustment	+ 25%	- 25%	+/- 0%

- USCIS released the following fine tables on their website. ICE and the DOJ are the agencies in charge of worksite enforcements and USCIS officers are not involved in the investigation or fine negotiation. It is unclear why USCIS released these figures. Practitioners should advise clients based on the ICE fine amounts found above until further guidance is provided by ICE.

Civil Violations	1st Offense		2nd Offense		3rd+ Offense	
	Min.	Max.	Min.	Max.	Min.	Max.
Knowing hire/continuing to employ	\$539 per unauthorized alien	\$4,313 per unauthorized alien	\$4,313 per unauthorized alien	\$10,781 per unauthorized alien	\$6,469 per unauthorized alien	\$21,563 per unauthorized alien
Failing to comply with Form I-9 employment verification requirements	\$216 per form	\$2,156 per form	\$216 per form	\$2,156 per form	\$216 per form	\$2,156 per form
Committing or participating in document fraud	\$445 per document	\$3,563 per document	\$3,563 per document	\$8,908 per document	\$3,563 per document	\$8,908 per document
Committing document abuse	\$178 per violation	\$1,782 per violation	\$178 per violation	\$1,782 per violation	\$178 per violation	\$1,782 per violation
Unlawful discrimination against an employment-authorized individual in hiring, firing, or recruitment or referral for a fee	\$445 per violation	\$3,563 per violation	\$3,563 per violation	\$8,908 per violation	\$5,345 per violation	\$17,816 per violation
Failing to notify DHS of a Final Nonconfirmation (FNC)	\$751 per violation	\$1,502 per violation	\$751 per violation	\$1,502 per violation	\$751 per violation	\$1,502 per violation

Requiring an individual to post a bond or security to provide financial guarantee against liability arising under I-9 requirements	\$2,156 for each bond the employee paid to the employer.
	Refund the employee the full amount of the bond. If the employee cannot be found, this refund will go to the U.S. Department of Treasury.