



Worksite Enforcement

Makes I-9 Compliance Essential



EQUIFAX WHITE PAPER

Why Worksite Enforcement Matters

On the surface, Form I-9 compliance seems simple — upon hiring individuals, employers need to make sure every employee completes a Form I-9 confirming their employment eligibility. The form must be kept on file for the entire term of employment. If an employee leaves, the form must be retained for one year from the date of departure or for three years after their hiring date, whichever time period is later. However, a Form I-9 inspection is often much more comprehensive than HR professionals anticipate, with investigators examining a variety of documents in addition to the I-9s. Due to the sheer scope of the documentation required, notice of an I-9 investigation can completely disrupt an HR department, resulting in lost time and productivity. I-9 investigations can also be costly for employers if violations are found. Penalties are at an all-time high, and continue to increase.^{1,2,3,4,5,6,7}

Unfortunately, there is no real way to predict which companies will be subjected to Form I-9 inspections. They may be triggered by a complaint or a lead from another investigation, or ICE may randomly select an employer to be inspected.

The Form I-9 Inspection Process

Although the prospect of a Form I-9 inspection is understandably intimidating, having a working familiarity of what actually occurs during an inspection is the best way to avoid unexpected issues. Understanding what happens during the three phases of a Form I-9 inspection — Notification and Preparation, Forms Inspection, and Contest Period — will help employers prepare for the possibility of an inspection and prevent surprises that could waste time and money.

Figure 1: Form I-9 inspection process⁸

Phase 1 - Notification and Preparation

The first step in a Form I-9 audit is the Notice of Inspection (NOI). Once an employer receives a Notice of Inspection there is generally a 72-hour response window to provide all requested materials.

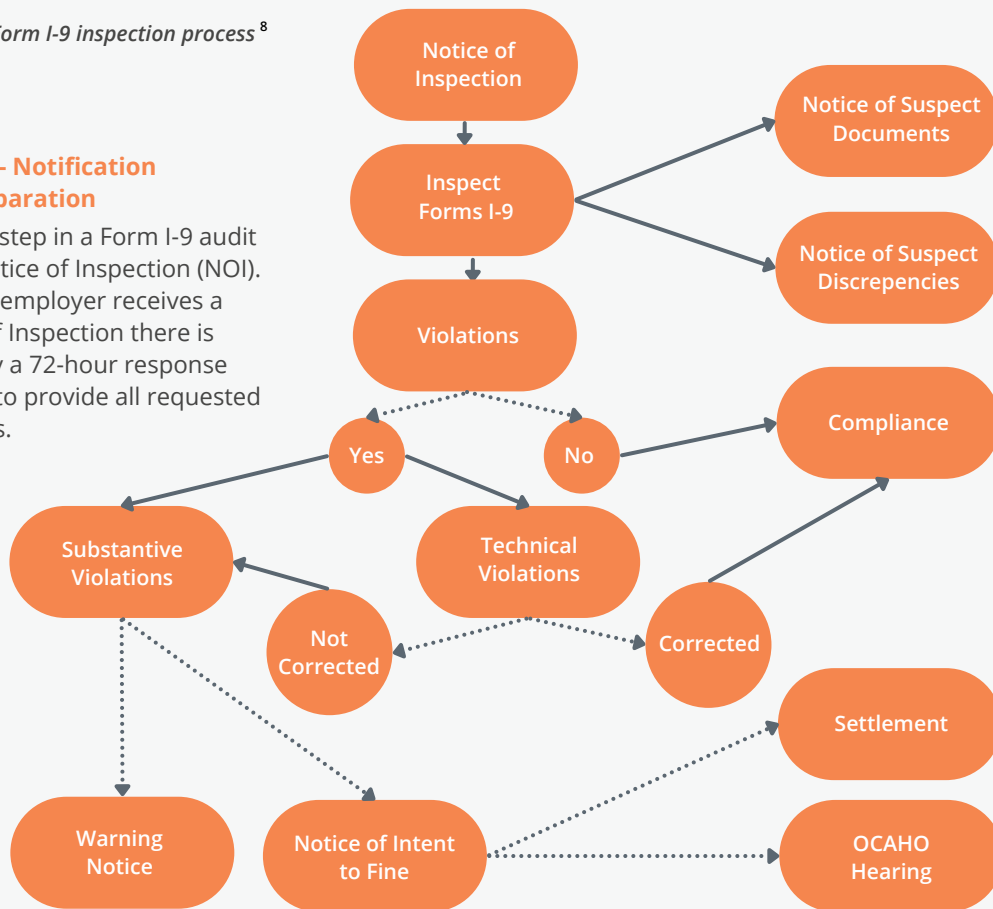


Figure 2: Potential Form I-9 Violations

Annual employees onboarded	3-Year retention (average)	Potential paper system error rate ⁹	Potential penalty (based on an average fine of \$1,230)
50	150	70%	\$129,150
100	300	70%	\$258,300
150	1,500	70%	\$1,291,500
1,000	3,000	70%	\$2,583,000
2,500	7,500	70%	\$6,457,500
5,000	15,000	70%	\$12,915,000
10,000	30,000	70%	\$25,830,000

"Employers need to understand that the integrity of their employment records is just as important to the federal government as the integrity of their tax files and banking records."

Derek Benner, Former Executive Associate Director for Homeland Security Investigations (HSI)



Figure 3: Forms Inspection

Phase 2 - Forms inspection

As the inspection progresses, ICE will classify any compliance failures it finds into two categories — 1) substantive violations, which are errors impeding the ability to verify employment eligibility, and 2) technical or procedural errors, which include missing select dates or titles. Once the inspection is complete, the results will be communicated in writing. While substantive violations cannot be corrected, technical or procedural violations may be amended within 10 days of the company being notified of the issues. Examples of inspection results may include:



Notice of inspection results

Indicates that an employer meets compliance requirements



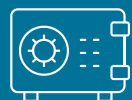
Notice of suspect documents

Conveys that an employee is ineligible to work in the U.S. and their employment should not continue



Notice of discrepancies

Communicates ICE's inability to verify an employee's employment eligibility and offers the option to submit additional documentation



Notice of technical or procedural failures

Discusses specific violations and provides 10 days to remedy them



Warning notice

Notifies employer of substantive violations that exist but that will not be accompanied by a monetary fine



Notice of intent to fine

Identifies violations that require a financial penalty

Monetary fines are levied for most substantive violations; any remaining technical or procedural violations; hiring an individual known to be ineligible for employment; and employing an individual after being notified of their ineligible status. Fines increased in 2022 and are based on a sliding scale that takes into account multiple factors, including company size, violation seriousness, and history. When evaluating each of these factors, ICE uses an Enhancement Matrix to either increase or decrease the recommended fine in accordance with each category.

Figure 4: Substantive/uncorrected technical violation fines: 1999-2022 ^{1,2,3,4,5,6,7}

	DOJ penalty assessed							
	Before 8/1/16*	After 8/1/16†	After 2/3/17†	After 1/29/18†	After 4/5/19†	After 6/17/20†	After 10/18/21†	After 1/11/22†
Minimum fine per individual	\$110	\$216	\$220	\$224	\$230	\$234	\$237	\$252
Maximum fine per individual	\$1,100	\$2,156	\$2,191	\$2,236	\$2,292	\$2,332	\$2,360	\$2,507

*For violations occurring from September 29, 1999, to November 2, 2015.

† If a penalty is assessed after August 1, 2016, for a violation that occurred on or before November 2, 2015, the pre-August 1, 2016, penalty level remains applicable.

Figure 5: Knowing hire/continuing to employ fines: 2008-2022 ^{1,2,3,4,5,6,7}

	DOJ penalty assessed							
	Before 8/1/16*	After 8/1/16†	After 2/3/17†	After 1/29/18†	After 4/5/19†	After 6/17/20†	After 10/18/21†	After 1/11/22†
First Offense	\$375 - \$3,200	\$539 - \$4,313	\$548 - \$4,384	\$559 - \$4,473	\$573 - \$4,586	\$583 - \$4,667	\$590 - \$4,722	\$5627 - \$5,016
Second Offense	\$3,200 - \$6,500	\$4,313 - \$10,781	\$4,384 - \$10,957	\$4,473 - \$11,181	\$4,586 - \$11,463	\$4,667 - \$11,665	\$4,722 - \$11,803	\$5,016 - \$12,537
Third Offense	\$4,300 - \$16,000	\$6,469 - \$21,563	\$6,575 - \$21,916	\$6,709 - \$22,363	\$6,878 - \$22,927	\$6,999 - \$23,331	\$7,082 - \$23,607	\$7,523 - \$25,076

*For violations occurring from September 29, 1999, to November 2, 2015.

† If a penalty is assessed after August 1, 2016, for a violation that occurred on or before November 2, 2015, the pre-August 1, 2016, penalty level remains applicable.

Figure 6: Enhancement Matrix⁸

Factor	Aggravating	Mitgating	Neutral
Business Size	+5%	-5%	+/-0%
Good Faith	+5%	-5%	+/-0%
Seriousness	+5%	-5%	+/-0%
Unauthorized Worker(s)	+5%	-5%	+/-0%
History	+5%	-5%	+/-0%
Cumulative Adjustment	+25%	-25%	+/-0%



Phase 3 - Contest Period

After receiving a Notice of Intent to Fine, an employer may either negotiate with ICE regarding a settlement or it has 30 days to contest the findings and request a hearing with the Office of the Chief Administrative Hearing Officer (OCAHO), which will assign an Administrative Law Judge to rule on the case and potentially mitigate penalties. If an employer does not engage in negotiations or request a hearing, ICE will issue a Final Order for the company to pay the fines as determined.

Confirming Form I-9 Compliance

It is common for companies that believe they are I-9 compliant to have violations they don't realize, and even those without issues may find themselves scrambling to meet ICE's deadlines. However, proper preparation and the application of best practices allow a company to respond quickly and confidently to a Form I-9 inspection with little disruption in day-to-day activities. This can be accomplished via four simple steps — optimize, prioritize, standardize and digitize.

Step 1: Optimize — Find your risk

Performing self-audits is essential to confirming I-9 compliance. By examining documents regularly, employers may find mistakes, locate missing paperwork and make corrections well in advance of ICE sending a Notice of Inspection. Furthermore, self-audits demonstrate good faith toward compliance, which can have a positive influence in the event a Form I-9 inspection identifies any irregularities.

Efforts to self-audit may include an examination of all forms or a cross sample of forms; however, if the self-audit includes only a subset of forms, it is important to be careful when selecting a sample — this will prevent discrimination or retaliatory issues. Although self-audits are not mandated, ICE and the The Immigrant and Employee Rights Section (IER) of the U.S. Department of Justice offer Guidance for Employers Conducting Internal Employment Eligibility Verification Form I-9 Audits. This document can serve as a helpful resource for HR professionals.

Often, employers are surprised to find out that ICE will note violations on any Forms I-9 the company possesses — even those that are past the retention requirements. Consequently, before beginning a self-audit, employers should purge Forms I-9 for former employees that no longer need to be retained. Once all unnecessary forms are removed, the self-audit can begin.

During a basic self-audit, employers should complete the following:

- Gather all Forms I-9 (paper and electronic)
- Identify missing forms
- Identify issues with current forms
- Make corrections

Because executing an internal I-9 audit requires a high degree of I-9 knowledge, it is best to consult legal counsel and utilize electronic self-audit and remediation programs to simplify the internal audit and improve the process.

The path to I-9 compliance



**Step 1:
Optimize**
Find your risk



**Step 2:
Prioritize**
Fix your issues



**Step 3:
Standardize**
Enforce consistency



**Step 4:
Digitize**
Automate Compliance



Step 2: Prioritize — Fix your issues

Upon identifying errors, employers should sort and prioritize any issues so resources can be assigned accordingly. It is advisable to tackle the most critical issues and the errors most easily corrected first. Instructions on how to correct Forms I-9 are available on the U.S. Citizenship and Immigration Services website.

When remediating Form I-9 issues, remember:

- Employers should complete any missing forms as soon as possible.
- Employer corrections can be made only to Sections 2 & 3, and employees must make corrections to Section 1.
- A detailed internal audit trail is needed to document the correction process.
- If a Form I-9 includes multiple mistakes, it may be best to complete an entirely new form but keep the original form as part of the internal audit trail.

Although employers are still at risk for penalties associated with violations noted during a Form I-9 inspection, ICE has ruled favorably by reducing or even eliminating fines for employers who have taken steps to correct their issues in advance of an inspection.

Step 3: Standardize — Enforce consistency

Adopting a uniform approach to Form I-9 completion is the key to avoiding errors in the first place. Best practices call for annual training and the development of a Standard Operating Procedure manual that includes process details, parties involved, an escalation path and how to address complex situations, such as rehire processes or the handling of reverifications. Forms I-9 should be kept separate from other personnel records so they are easy to locate and audit.

Centralizing processes when possible will also go a long way toward preventing errors. At the very least, employers should create a system for compliant Section 2 completion that includes physical inspection of documents for all new hires. Because new hires must complete Section 1, detailed instructions for accurate and timely Section 1 completion should be included as part of their onboarding.

ICE has ruled favorably by reducing or even eliminating fines for employers who have taken steps to correct their issues in advance of an inspection.

Step 4: Digitize — Automate your compliance

While the effort needed to confirm Form I-9 compliance may seem substantial, it does not have to be. Form I-9 compliance can be simplified with the use of an electronic I-9 system. Leveraging an automated self-audit and remediation solution enables an employer to efficiently and thoroughly review a company's entire I-9 archive. Electronic systems expedite and elevate the internal audit process by:

- Recognizing issues easily overseen when reviewing physical documents
- Analyzing risk and prioritizing issues accordingly
- Providing a step-by-step guide to corrections
- Creating an extensive, on-demand internal audit trail
- Allowing employers

Electronic systems are useful for more than just self-audit and remediation — they can streamline I-9 completion and serve as a safeguard against common errors, preventing the creation of new risk with each new hire. Electronic I-9 technologies also facilitate central oversight and control by offering a look at what is going on in other locations, so employers can feel confident that all locations are executing their Forms I-9 consistently and correctly.

Conclusion

Given the administrative burden and potential risk of a Form I-9 inspection, it is imperative that employers work proactively to build confidence in their I-9 compliance processes and archives. Planning for the possibility of an inspection — by understanding the inspection process and by confirming compliance on an ongoing basis — will help avoid headaches and hefty fines down the line. Electronic I-9 systems offer an efficient, comprehensive avenue for achieving compliance and should be a consideration for forward-thinking companies looking for impactful HR solutions.

About Equifax Workforce Solutions

HR is tasked with meeting an array of ever-changing federal, state, and local regulations. Equifax Workforce Solutions helps your HR teams work smarter. From unique challenges of Form I-9 to complex unemployment processes we leverage data and technology with market-leading innovation to help make your job easier

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References

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- ⁷ Civil Monetary Penalties Inflation Adjustment, 87 Federal Register 7 (11 January 2022), pp. 1317-1330
- ⁸ Form I-9 Inspection Fact Sheet. 2022. Official Website of the Department of Homeland Security. Web. 10 June 2022.
- ⁹ According to an industry attorney at Jackson Lewis P.C.

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