The I-9 and E-Verify Handbook

A Guide to Employment Verification & Compliance

SECOND EDITION

Bruce E. Buchanan and Greg Siskind

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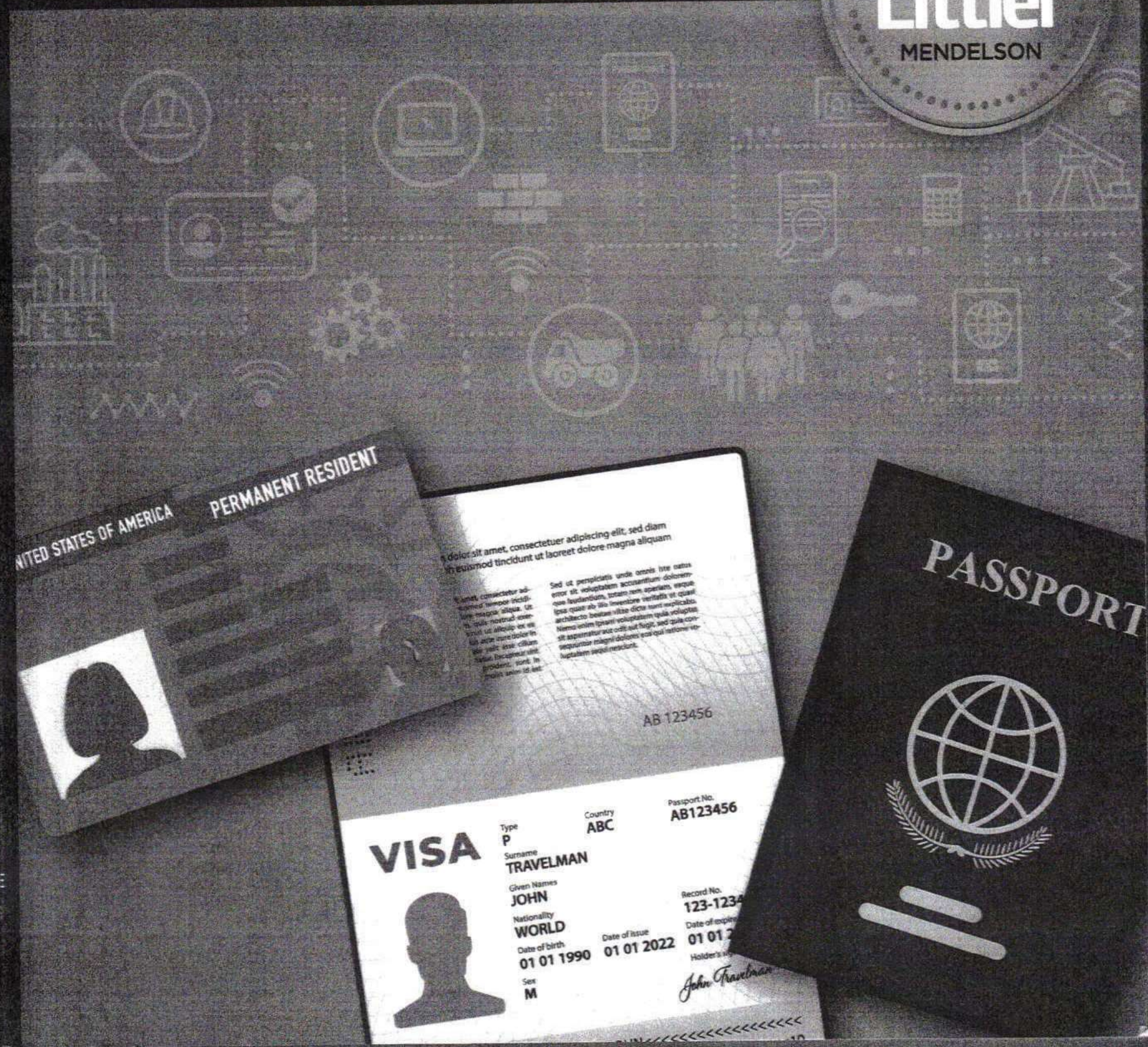

WV.4 Can a business license be revoked under SB 70?

Yes. If an employer is convicted a third time under SB 70 of knowingly employing an undocumented employee, the state's labor commissioner may issue an order imposing the following:

- Permanent revocation of any license held by the employer, or
- Suspension of a license held by the employer for a specified period.

17

ICE I-9 AUDITS

17.1 What happens in an audit by U.S. Immigration and Customs Enforcement?

An audit of employment records starts when U.S. Immigration and Customs Enforcement (ICE) agents deliver a Notice of Inspection (NOI) and, often, a subpoena to an employer. (A few ICE offices, such as the one in Philadelphia, do not usually include a subpoena.) Recently, NOIs are delivered by FedEx or certified mail. Occasionally, a contractor mails the document, which is simply an NOI—contractors lack authority to issue subpoenas.

With or without a subpoena, the NOI demands that the employer produce both the Forms I-9 completed by all current employees and all supporting documentation. Supporting documentation can include copies of the documents presented (such as a passport, lawful permanent resident card, employment authorization document (EAD), driver's license, Social Security card, or birth certificate) and any E-Verify confirmations or other E-Verify paperwork. The NOI may also seek the Forms I-9 of employees whose employment was terminated in the previous one to three years. Whether to seek the Forms I-9 of terminated employees and, if so, for what length of time (though for no longer than three years) is within the discretion of ICE.

17.1A What type of information is sought in the Notice of Inspection or subpoena?

Here are some of the documents that the NOI or subpoena will seek:

- List of names of employees (either current employees or both current employees and those terminated recently), including dates of hire, dates of termination, Social Security numbers, and maybe their dates of birth, department, and shift.
- Most recent payroll report and maybe one immediately prior payroll report.
- Copies of Form 941, Employer's Quarterly Federal Tax Return, for the past two to four quarters.
- Copy of the company's articles of incorporation.
- Copy of any business license.
- Employer's federal employer identification number.
- List of the employer's officers and titles.
- Information concerning the company's owners, such as home addresses, e-mail addresses, Social Security numbers, telephone numbers, and so on.
- If the employer uses E-Verify, the Memorandum of Understanding from the agency.
- Whether the employer uses Social Security Number Verification Service.
- Any Social Security Administration no-match letters that the employer has received and any responses to those letters.
- Names and maybe the addresses and Forms 1099 of any independent contractors.
- Names and maybe the addresses of all staffing companies utilized, and sometimes copies of the employer's contracts with such companies.

There is no template for the NOI or subpoena; different ICE offices request different subpoenas. At one time, ICE was considering issuing a template of an NOI and accompanying subpoena, but it has never done so.

17.2 How does U.S. Immigration and Customs Enforcement decide which cases to investigate?

U.S. Immigration and Customs Enforcement may investigate cases on its own initiative and need not have received a verbal or written complaint. When ICE does receive a complaint, it has the discretion to decide whether the complaint has a reasonable probability of validity and whether to investigate (8 CFR Section 274a.9(b)).

Companies in certain industries, such as critical infrastructure, hospitality, construction, and manufacturing, are more likely to receive NOIs. In addition, often an investigation by one federal agency, such as the Occupational Safety and Health

Administration, the Wage and Hour Division of the U.S. Department of Labor, or the Drug Enforcement Administration of the U.S. Department of Justice, will lead to an NOI on the basis of information discovered in that initial investigation. And if a foreign national is arrested and found to be undocumented, ICE may begin an investigation, sometimes with the foreign national employee working as an undercover source in exchange for deferral of removal and an EAD.

17.3 After receipt of the Notice of Inspection, what should the employer do?

If an NOI arrives, the employer should immediately contact its legal counsel and its immigration counsel, if there is one. There is a good chance that even if the employer does have immigration counsel, he or she will want to refer the matter to immigration counsel with experience in worksite enforcement. Most immigration attorneys do not handle worksite enforcement matters.

In California and Oregon, by state statute, an employer must post a notice of the audit within 72 hours of receiving the NOI. This time limit is not extended even if the employer receives an extension of time to respond to the NOI from ICE.

Once an employer has put together its response to the NOI, it should make a copy of each and every document produced for ICE. Auditors have been known to lose the Forms I-9 they were given. The employer may also have reason to keep a copy of the Form I-9 during the pendency of the audit (to provide to legal counsel, to document a reverification, to add a termination date to the Additional Information field, to conduct an internal audit (in an effort to understand what ICE may find), or to correct technical violations).

17.4 How long does the employer have to produce the requested documents?

The NOI must give the employer at least three business days to produce the documents. An employer can waive the three days—but under no circumstances should an employer do so. Often, ICE will provide more than three days. If the NOI is served by FedEx, the time period to respond is usually longer, as much as two weeks.

17.5 Can an employer get an extension of time to respond to the Notice of Inspection?

Yes. An employer may request a reasonable extension of time to respond to an NOI. Extension requests, if feasible, should be made by e-mail to the special agent and the auditor working the case, and the employer's attorney should make a record of all interactions with ICE.

Some ICE offices, such as those in Atlanta and Chicago, usually do not grant extensions of time to produce Forms I-9. Other ICE offices, such as those in Nashville, Memphis, Boston, New Orleans, Little Rock, Jackson (MS), Honolulu, San Francisco, Philadelphia, and Miami, will normally grant a reasonable extension of time, such as three to seven days. The longer the requested extension, the more likely it will be denied.

The minimum three-day period does not statutorily apply to the production of records that are not Forms I-9, and ICE offices will liberally grant seven to 14-day extensions on the production of these records.

17.6 Can an employer remediate errors made on the Forms I-9?

Yes, in most cases. It is very advantageous for an employer to correct errors on the Forms I-9. Scott McCormack, former national program director of ICE's Worksite Enforcement Unit, spoke at a conference on worksite enforcement conference held by the American Immigration Lawyers Association in September 2019. McCormack stated that employers should be able to make corrections on Forms I-9 between receipt of the NOI and delivery of the Forms I-9 to ICE. Remediating the errors on the existing Forms I-9 may substantially decrease the number of substantive errors that the ICE forensic auditor finds, thus lowering any penalties assessed against an employer.

A few ICE offices prohibit employers from making any additions or corrections on existing Forms I-9. Even if that is the case, an employer may be able to complete a new Form I-9, attach it to an existing Form I-9, and submit both. However, if the NOI or subpoena was sent because of a criminal investigation (this is very rare), it is wise not to make any corrections or additions to the existing Forms I-9.

17.7 Are there any tips on remediating errors on Forms I-9?

Yes. An employer must be very careful in remediating the errors on Forms I-9. If enough care is not taken, remediation may do more harm than good. An example would be where an employer failed to complete Section 2 of the Form I-9 and then completes a new Form I-9 and shreds the old one. When remediating I-9 errors, always retain the existing Form I-9 as well as the new Form I-9. Ensure that any corrections are made in a different color of ink and initialed—and remember that only the employee may update or correct Section 1. Transparency is key; the auditor will want to see all the steps of any change.

17.8 If an employer has no Form I-9s when it receives a Notice of Inspection, what should the employer do?

An employer that has no Forms I-9 should immediately obtain a completed form from all current employees. True, ICE will consider the newly filled out Forms I-9 to have been not timely prepared; however, it is better to have Forms I-9 that were not timely completed than no Forms I-9. The employer should explain why the preparation is not timely, either in an attached memorandum or a notation on the Form I-9. The Additional Information field in Section 2 is a suitable place for the notation.

17.9 Will the employer face a penalty for each Form I-9 that is not timely completed?

Under a strict interpretation of the Immigration Reform and Control Act, the employer faces a penalty for each Form I-9 that is not timely completed. However, there have been businesses that received warning notices, rather than penalties, for these violations. The penalties could have been between $15,000 and $40,000 for the businesses, which were small restaurants. The reasoning for issuing warning notices rather than penalties is that the NOI is often educational for small employers that may not have realized the necessity of having Forms I-9, especially for employees who are family or friends.

17.10 In what format must Forms I-9 be provided to U.S. Immigration and Customs Enforcement auditors?

The original Forms I-9 must be provided for inspection, whether paper or electronic. (There is an exception: Recruiters or referrers for a fee who designate an employer to handle Form I-9 completion may present copies of the Forms I-9.) If an employer retains Forms I-9 in an electronic format, whether stored as such or in the original format, the employer must retrieve and reproduce the specific forms requested by the NOI or subpoena. The employer must also retrieve and reproduce the associated audit trails showing who accessed the computer system, when the access occurred, and what actions were performed on the system in a specified period of time. The inspecting officer must be provided with any necessary hardware and software. An inspecting officer is also permitted to request an electronic summary of all the immigration fields on an electronically stored Form I-9.

17.11 What if records are kept at a different location from the one U.S. Immigration and Customs Enforcement agents will visit?

If the Forms I-9 are stored at a location other than the worksite, the employer must inform the inspecting officer where they are kept. The employer must also cooperate with the inspector in making the forms available, either at the location where they are kept or at the office of the government agency conducting the inspection.

17.12 After the Forms I-9 are submitted, who reviews them?

In most cases, it is an ICE forensic auditor who reviews the submitted Forms I-9. His or her job is to analyze the Forms I-9, locate errors if there are any, and determine whether the employee's documentation reflects authorization to work in the United States.

17.13 How long does an audit take from the submission of the Forms I-9 to an initial response from the U.S. Immigration and Customs Enforcement auditor?

It depends. In some cases, the auditor finishes the audit in one or two months, although most audits last six months to several years. Obviously, one factor is the size of the workforce and the number of Forms I-9 to analyze—the more Forms I-9, the longer the audit takes.

17.14 What kind of notices can be given to the employer during or at the end of the audit?

Employers can receive any or all of six possible notices. These are the Notice of Technical or Procedural Failures, Notice of Suspect Documents, Notice of Discrepancies, Notification of Inspection Results, Warning Notice, and Notice of Intent to Fine.

Under California state law, an employer must notify its employees individually of the results of the Forms I-9 audit within 72 hours of receiving the results.

17.15 What is a Notice of Technical or Procedural Failures?

This notice is issued if the employer's Forms I-9 have minor or technical errors. Many Forms I-9 have such errors. Examples of technical errors include:

- Home address or date of birth of employee is not given;
- Alien Registration Number (assigned by U.S. Citizenship and Immigration Services (USCIS) and so also called the USCIS number or the Alien number) is missing in Section 1 but given in Section 2 or on a legible copy of a document attached to the Form I-9;
- Some information is missing, such as expiration date, issuing authority, or the title of the document, but is given on a legible copy of the document attached to the Form I-9 form; and
- Business name or address is missing.

This notice is often good news in that the employer will not be assessed a penalty if the errors are corrected within 10 business days of the employer's being told of them. Some errors cannot be corrected, such as an untimely date of signature, the use of the wrong edition of the Form I-9, and the use of the Spanish edition of the Form I-9 (prohibited except in Puerto Rico). Even then, ICE will not issue a penalty if the employer attaches the correct form to the wrong one. If the technical error is in Section 1 and the individual is now a former employee, the employer can document that the individual is no longer employed. This should not become an error for which the employer will be penalized.

17.16 What is a Notice of Suspect Documents?

A Notice of Suspect Documents (NSD) is a notice advising the employer that after review of an employee's Form I-9 and documentation, and a check of government databases, ICE has determined that an employee is unauthorized to work. The notice also advises the employer of the possible criminal and civil penalties for continuing to employ that individual. Both employer and employee will have an opportunity to present additional documentation to demonstrate work authorization. Employers that do not employ undocumented workers will not receive an NSD.

17.17 What must an employer do after receipt of a Notice of Suspect Documents?

The employer must notify each designated employee that ICE has determined that the work authorization document submitted by the employee to the employer for Form I-9 purposes is not valid. The employer must then give the employee an opportunity to provide another document or documents to prove authorization to work in the United States (so-called newer and better documents). This notification should be given in writing to each designated employee.

The employer must give ICE any new documents within 10 business days of the NSD unless a longer period of time to respond is negotiated. If the new documents are found to be valid for work authorization, ICE will remove the individual from the NSD. If employees do not provide new documentation or the new documentation is invalid, employers must terminate those employees or face penalties for knowingly employing undocumented workers.

Some employers may be able to negotiate with ICE a period for gradually reducing the number of employees with invalid work authorization—for example, an employer might terminate a certain number of employees who cannot meet Form I-9 requirements each week, or every other week, to avoid catastrophic labor disruptions. Employers seeking such a "winding down" period should present the special agent and auditor with a written plan that details how they intend to implement the serial reduction in unauthorized workers.

17.18 What is a Notice of Discrepancies?

A Notice of Discrepancies advises the employer that ICE has been unable to determine an employee's work eligibility on the basis of a review of the Forms I-9 and documentation submitted by the employee. The employer should provide the employee with a copy of the notice and give him or her an opportunity to present ICE with additional documentation to establish employment eligibility. U.S. Immigration and Customs Enforcement may want to interview that individual.

17.19 Can an employer be penalized if it properly completed a Form I-9, but the employee turns out to be unauthorized?

No. If an employer has a properly completed I-9 for an employee who proves to be unauthorized to work, the employer will not be penalized unless it had actual or constructive knowledge that the employee is not authorized to work. Employers who do not have such knowledge will have a good-faith defense against any penalties that might be imposed for knowingly hiring an unauthorized employee.

However, as noted, an employer that fails to terminate an employee who cannot present newer and better documents in response to a Notice of Discrepancies can face civil and criminal penalties for knowingly continuing to employ such a person.

17.20 What is a Notification of Inspection Results?

At the conclusion of the audit, if everything is perfect on the Forms I-9 and there are no undocumented workers, an employer will receive a Notification of Inspection Results. However, this notice is very rare.

17.21 What is a Warning Notice?

A Warning Notice states the basis for any substantive violations and lists the sections of the law that have been violated. Such a notice means that ICE has decided to use its discretion and issue a warning instead of a penalty. When ICE does so, it holds the expectation of future compliance by the employer. In addition, ICE will sometimes return, usually within a year or two years, to conduct a new audit. If violations are found, ICE may consider the employer to have committed a second offense, making it subject to heftier penalties.

17.22 What is a Notice of Intent to Fine?

A Notice of Intent to Fine (NIF) is a final notice from the ICE audit. If ICE determines that there has been a violation of the employer sanctions rules, either a substantive or uncorrected technical error, or that the employer has knowingly hired one or more unauthorized employees or is continuing to employ unauthorized employees, ICE will issue an NIF. (For an exception, see Question 17.22 on warning notices.)

If ICE issues an NIF, the notice must contain the charges (substantive or uncorrected technical errors, knowingly hiring unauthorized employees or continuing to employ unauthorized employees), the basis for the charge, the sections of the law that were violated, the penalty to be imposed for each violation, and the total amount of penalties. It also must advise the employer that any statement given by the employer may be used against the employer, that the employer is entitled to a hearing before an administrative law judge (ALJ), and of the employer's right to counsel.

17.23 What must an employer do to challenge a fine?

If an employer wants to challenge the fine, it must notify the issuing ICE office, within 30 days of being served with the NIF, that it reserves the right to a hearing before an ALJ in the Office of the Chief Administrative Hearing Officer (OCAHO). If no appeal is filed, ICE will issue a final order 45 days from the issuance of the NIF.

The original NIF will have contained contact information for challenging the NIF. The employer's attorneys should first contact the person named in the NIF (usually an attorney with the local Office of the Principal Legal Advisor), to inform ICE of the employer's intent to contest the NIF. The next step is to follow up that discussion with an e-mail and a mailed notice to ICE challenging the NIF. This notice to ICE does not have to contest or dispute the charges; it must merely ask for a hearing.

17.24 What is the difference between a substantive error and a technical error?

Substantive errors are errors that cause ICE to assess a penalty against an employer. Technical errors are minor issues that ICE will allow an employer to correct. To qualify as a technical error, there must be a good faith attempt to comply with the paperwork requirements of section 274A(b) of the Immigration and Nationality Act. When technical errors are found during an ICE I-9 audit, an employer is given 10 government days to make corrections. Technical errors that are corrected will not result in a fine. However, uncorrected technical errors become substantive errors.

17.25 What are examples of substantive errors?

The following are examples of substantive errors:

- Failing to prepare or produce a Form I-9;
- Failing to timely complete a Form I-9;
- No box was checked in Section 1 of Form I-9 or multiple boxes were checked attesting to the employee's status;
- No employee signature in Section 1;
- No employer signature in Section 2;
- No USCIS number or Alien number provided in Section 1 for lawful permanent residents or noncitizens who are authorized to work, and the number is also not recorded in Section 2, or there is not a legible copy of a document retained with the form (and presented at inspection) that provides the number;
- List A, B, or C data not fully recorded in Section 2, such as name or number of documentation, issuing authority, or expiration date, where applicable, and

legible copies of the documents, bearing this information, were not retained, and provided to ICE;

- Unacceptable documents recorded in Lists A, B, or C;
- Failing to date Section 2 of the Form I-9 within three business days after the employee's first date of employment;
- Failing to correctly describe the document in Supplement B (formerly Section 3), when a legible copy of the document was not retained and provided to ICE at the time of inspection;
- Failing to sign Supplement B (formerly Section 3) when required;
- Failing to date Supplement B (formerly Section 3), or date the section no later than the date of expiration of the individual's work authorization.

17.26 What are examples of technical errors?

The following are examples of technical errors:

- Failure to ensure an individual provides other last names used, if applicable, address, and birth date in Section 1;
- Failure to ensure that an individual provides his USCIS number (Alien number) in Section 1, but it is listed in Section 2 or on a legible copy of a document retained with Form I-9 and presented at the ICE inspection;
- Failure to ensure that the employee dates Section 1 at the time of hire (for employees hired on or after 09/30/1996);
- Failure to complete the Preparer and/or Translator Certification of the Form I-9 when someone assists the employee in completing Section 1;
- Failure to provide the document number or title, issuing authority, identification, or expiration date, where applicable, of a proper List A, B, or C document in Section 2, but only if a legible copy of the documentation is retained with the Form I-9 and presented at the ICE inspection;
- Failure to provide the first day of employment in the certification (when the certification was completed on or after 09/30/1996);
- Failure to provide the representative's title, company name, or address in the certification;
- In Supplement B (formerly Section 3), failure to provide the date of the employee's rehiring.

17.27 How does U.S. Immigration and Customs Enforcement calculate penalties?

There is an ICE memorandum, "Revised Administrative Fine Policy Procedures," that contains specific procedures to follow for calculating fines for paperwork errors and for hiring or continuing to employ unauthorized workers (H/CTE). Fines are calculated as follows:

- Calculate a percentage, using the number of violations of each type (paperwork errors or H/CTE) as the numerator and the number of total employees as the denominator.
- Use the percentage thus calculated to determine the percentage box in the matrix of fines, to start with.
- Adjust fines up or down by 5 percent for each of the five statutory factors—business size (small or large); acted in good faith or bad faith; seriousness of error; employment of unauthorized workers; and prior history of violations in an ICE or legacy Immigration and Naturalization Service audit.

To increase penalties, ICE has begun to add the number of paperwork violations to the number of H/CTE violations as the numerator. This is indeed resulting in higher fines. Here are examples of the difference in penalties:

- For an employer with 100 employees with 10 substantive paperwork violations and 20 H/CTE violations, add 10/100 = 10 percent for paperwork violations and 20/100 = 20 percent for H/CTE violations for each matrix. This would lead to a fine of $40,560 without any aggravating or mitigating factors applied.
- For an employer with 100 employees with 10 substantive paperwork violations and 20 H/CTE violations, add 10 + 20 = 30 to calculate 30 percent violations for each matrix. This would lead to a fine of approximately $60,270 using recent matrices.

The agency has defended this calculation method by pointing to language in its 2008 procedures for fines: "The recommended base fine amount is determined by dividing the number of 'knowing hire,' 'continuing to employ,' and substantive verification violations by the total number of Forms I-9 presented for inspection to determine a violation percentage." However, the next two pages of the procedures instruct agents to "divide the number of 'knowing hire' and 'continuing to employ' violations by the number of employees for whom a Form I-9 should have been prepared to obtain a violation percentage" and to "divide the number of substantive violations by the number of employees for whom a Form I-9 should have been prepared to obtain a violation percentage." Each instruction is paired with its own matrix of fines. No other ICE documentation instructs agents or attorneys to add the violations together.

17.28 What are the amounts in the matrix that ICE uses in calculating the penalty?

Substantive errors (also referred to as paperwork violations) can result in significant fines. Each Form I-9 with a substantive error—a mistake or a missing item—can result in a penalty of $281 to $2,789 per form for the first offense (increased from $272 to $2,701 as of February 13, 2024).[1] The level of the penalty is based on the percentage of Form I-9 errors. ICE uses a matrix (the last matrix available was effective through February 12, 2024) but has refused to publish it for the past five years. The following is the matrix effective through February 12, 2024:

- 0–9 percent: $272
- 10–19 percent: $676
- 20–29 percent: $1,081
- 30–39 percent: $1,486
- 40–49 percent: $1,891
- 50 percent and higher: $2,296.

For second and third offenses, the maximum is statutorily capped at $2,701, now $2,789 as of February 13, 2024.

There are separate penalties for hiring or continuing to employ unauthorized workers (referred to in the Immigration Reform and Control Act as aliens). As of February 13, 2024, the fines are as follows:

- First offense: $698 to $5,579 for each unauthorized employee.
- Second offense: $5,579 to $13,946 for each unauthorized employee.
- Third and subsequent offenses: $8,369 to $27,894 for each unauthorized employee.

17.28A Are there factors that U.S. Immigration and Customs Enforcement must consider when determining the total penalties?

Yes. U.S. Immigration and Customs Enforcement will consider the following statutory factors in mitigating or aggravating the fine by 5 percent per factor:

- Business's size (large or small);
- Employer's good faith or bad faith;
- Seriousness of the violation;

[1] ICE published its new penalties effective February 13, 2024, with the low point being $281 and high point being $2,789. ICE did not publish its full matrix.

- Whether the individual was unauthorized to work; and
- History of violations by the employer as found by ICE or the legacy Immigration and Naturalization Service (INS).

17.29 Can the Notice of Intent to Fine be appealed?

Yes, an employer may contest an NIF if the employer provides appropriate notice within 30 days of the NIF. (See Question 17.23A.)

17.30 If an employer appeals the Notice of Intent to Fine, will the matter be immediately set for trial?

No. The appeal notice just preserves the employer's right to litigate if a settlement on the penalties cannot be reached. If an employer fails to provide a timely appeal notice, it has lost all leverage in negotiations—ICE knows it does not need to alter its position in negotiations because the employer cannot litigate the matter without timely notice.

17.31 Should an employer seek to negotiate to lower the penalty?

Yes. Employers are well advised to seek to negotiate a lower dollar amount of penalties with ICE in almost all circumstances. If the fine is for $5,000 or less, the effort may not be worth it because the lower fine could be offset by the cost of attorney's fees. However, in almost all cases, ICE will offer a 10 percent reduction without any negotiations. In almost all cases, the 10 percent reduction is just the starting point for ICE in negotiations.

17.32 How can an employer successfully negotiate for lower penalties?

To negotiate successfully with ICE for lower penalties, an employer should first analyze the allegations within the NIF. There may be errors made by ICE within the audit. An ICE forensic auditor conducts many Form I-9 audits and, being human, makes errors. These are common errors by the ICE forensic auditor:

- Timeliness errors that are beyond the five-year statute of limitations;
- Finding that an owner failed to complete a Form I-9, even though case law states that an owner with an interest in the company and managerial authority does not need to complete a Form I-9 (*see United States v. Santiago's Repacking, Inc.*, 10 OCAHO no. 1153 (2012));
- Counting the same allegations twice in the NIF;

- Citing the failure to have a Form I-9 for an employee who is grandfathered in—meaning that no Form I-9 is needed because he or she was hired before November 7, 1986;
- Counting a technical error as a substantive error (*e.g.*, an employee's failure to write his or her full address in Section 1);
- Failing to use mitigating factors, such as the small size of an employer or no prior history of violations, to lower the penalties;
- Using bad faith as an aggravating factor (it is exceedingly difficult for ICE to prove bad faith); and
- Citing the 5 percent aggravating factor of employment of undocumented workers on all violations, instead of just on violations involving undocumented workers.

17.33 Can an employer's financial condition be used to lower penalties?

Yes. However, an employer must be able to document this argument with financial records. A statement from a management official is insufficient. A company must be able to show that it is in poor financial shape and how payment of the penalties would mean that it had to shut down.

17.34 Are there any other arguments that can be made to attempt to lower the penalties?

Yes. It can always be argued that the penalties are excessive and punitive toward the employer.

17.35 Can the employer negotiate to pay the penalties over time and how much time is possible?

Yes. Usually, ICE is amenable to having penalties paid over time if an employer can show, through financial records, an inability to pay. The payment period is usually two to three years, although it could be as long as five years. However, there is an important caveat: do not negotiate time payments until a penalty amount has been agreed. Negotiating time payments before the amount is agreed may lead ICE to say that it will lower the amount of the penalty, or agree to time payments, but it will not do both. Alternatively, after the settlement agreement, a company can negotiate for time payments with ICE's financial office in Burlington, VT.

17.36 What happens if the parties fail to reach a settlement after issuance of a Notice of Intent to Fine?

Here are the steps if there is no settlement:

- A complaint is filed with OCAHO and served on the employer.
- The ALJ issues a notice of case assignment to both parties.
- The employer files an answer to the complaint.
- The government files a motion for summary judgment, which the employer usually opposes.
- The employer may file its own motion for summary judgment.
- The ALJ issues a decision.
- The ALJ's decision can be appealed to the chief administrative hearing officer.

17.37 Where is the hearing held?

A hearing is not usual; rather, each party files documents on why the facts support or do not support the finding of Form I-9 violations. If material facts are in dispute, there must be a hearing.

17.38 If a settlement is not reached, can an employer anticipate a reduction in penalties when the case is heard by an administrative law judge?

Every case is different; some employers do not receive any reduction in penalties through a hearing at OCAHO. However, studies show that most employers do get lower penalties—from 25 percent to 40 percent.

17.39 Can the final decision of the Office of the Chief Administrative Hearing Officer be appealed? If so, to whom?

A decision from OCAHO may be appealed. The employer would file a petition for review to the appropriate federal circuit court of appeals. The appropriate circuit court may be the one with jurisdiction over the employer's location or it may be the D.C. Circuit Court of Appeals (OCAHO's location).

18

ICE Raids

18.1 What is an ICE raid on an employer?

A U.S. Immigration and Customs Enforcement (ICE) raid (called a targeted enforcement operation by ICE) is what it sounds like: ICE, through its investigative component, Homeland Security Investigations (HSI), arrives at an employer's premises without warning, hoping to catch employers and employees off guard. (Note that since 2021, the Biden administration has stopped the ICE raids that had been resumed by the Trump administration in 2018.)

When ICE arrives at an employer's premises, its agents surround the building or buildings, and there is usually an aerial presence—an airplane or helicopter. The HSI agents enter the business with a criminal search warrant. The search warrant will have a detailed description of where and what the agents are going to search and what they may seize.

In addition, if ICE finds unauthorized workers during a worksite raid, ICE will arrest and detain those workers. They may be routed to immigration court, or to federal court if a federal crime, such as identity theft, has occurred.

18.2 What kind of records are sought in a criminal search warrant served by ICE in a raid?

In a worksite raid, ICE is looking primarily for evidence of employment of unauthorized workers and of identity and financial fraud. It will seek the following:

1. All documents, records, and implements (whether in electronic or hard-copy form), information, and communications relating to violations concerning unlawful employment of aliens; fraud or misuse of visas, work permits, and other documents to gain employment; fraud in connection with identification documents, authentication. features, and information; false statements made to obtain benefits or employment, and unauthorized use of a Social Security number.
2. Labor and employment records, including service agreements, independent contractor agreements, Forms I-9 and any supporting documents, volunteer worker agreements and statements, lists of workers (paid or unpaid), job assignment sheets, duty rosters, employment applications, personnel files, worker identification documents, and related electronic communications.
3. Business records, including payroll records, time sheets, lists of employees, and communications with outside payroll services providers; bank records, financial statements, bookkeeping and accounting records and notes, including records disclosing the identity and purpose of all deposits, withdrawals, debit and credit memoranda, and interest received on the accounts.
4. Identification documents, including driver's licenses, state identification cards, birth certificates, Social Security cards, permanent resident cards, and any other documents that may have been used to enter, remain, or work in the United States, including counterfeit immigration documents and seals.
5. All correspondence to or from the employer and the U.S. Department of Labor, Social Security Administration, and the Internal Revenue Service regarding employee identification documentation provided by the employer.
6. Employee identification cards and copies of employee identification cards.
7. Documentation of business ownership, organization, and control, including articles of incorporation and corporate minutes.
8. Evidence of who used, owned, or controlled the computer at the time the things described in the warrant were created, edited, or deleted.

18.3 What is the difference between an ICE raid and an ICE audit?

An ICE audit occurs when an employer receives a Notice of Inspection (NOI) and, usually, a subpoena. (A few ICE offices do not usually issue a subpoena with an NOI.) The NOI demands that the employer produce the Forms I-9 of all current employees and all supporting documentation (such as passports, permanent resident cards, employment authorization documents, driver's licenses, Social Security cards, or birth certificates) and any E-Verify authorizations or other E-Verify paperwork. It may also seek the Forms I-9 of terminated employees, if they were terminated in the past one to three years. The NOI also seeks payroll records and other employer records.

18.4 What should employer representatives do during a raid?

Employers are not required to answer ICE questions during a worksite raid. However, employer representatives may not obstruct the raid or provide false or misleading information. An employer whose worksite was raided should immediately call both general counsel and immigration counsel. Even if counsel is out of state, he or she may be able to speak by phone with the ICE agent in charge and provide valuable advice to the employer.

During an ICE raid, employers should:

- Record the names of the ICE supervising agent and the U.S. Attorney assigned to the case.
- Assign company representatives to accompany the ICE agents as they move around the workplace.
- Provide ICE agents with access to the facility in accordance with the warrant.
- Object to any searches that are outside the scope of the warrant and ask the ICE agent to make note of the objection.
- Protect privileged documents to the extent possible.
- Obtain a list of items seized during the search.

18.5 What causes ICE to conduct a raid?

Raids often occur after an ongoing investigation shows that a number of undocumented workers are employed at a worksite, often with the knowledge or assistance, or both, of the employer. In addition, HSI may receive tips that unlawful activity is being committed by various individuals. Raids may occur in conjunction with an investigation by another federal agency, such as the Internal Revenue Service.

After ICE receives information, it often uses a confidential informant to infiltrate the workforce and gather further information. The confidential informant may clandestinely record audio, or shoot video, of incriminating evidence. In one case, an informant used aerial photography to demonstrate that an employer filed false quarterly tax returns on the size of his workforce. In another case, ICE reviewed records from its Alternatives to Detention program and determined that numerous undocumented workers, still wearing the ankle monitor bracelets they had been given on release from ICE detention, were employed at the plant in question. If the employees are wearing ankle monitors, there is a likelihood that they are undocumented.

18.6 How does ICE receive the authority to raid an employer?

The authority for a raid comes from a criminal search warrant issued by the appropriate federal district court. In its application for the warrant, ICE provides a detailed affidavit from a government official with knowledge of the situation. In one application, the affidavit was 29 pages long with 13 additional pages of attachments.

18.7 What can be done to minimize the chances of an ICE raid?

The way to avoid an ICE raid may sound simple—do not commit criminal or civil violations of law, such as paying employees in cash, not completing Forms I-9, committing tax fraud, or harboring undocumented workers. In most ICE raids, employers have committed one or more of these criminal or civil violations. Some employers have committed all of them.

18.8 Has ICE always conducted raids on employers?

No. From August 2008 to April 2018, ICE did not conduct raids on employers. The George W. Bush administration stopped ICE raids after raids at the Agriprocessors, Inc., slaughterhouse and meat-packing plant in Postville, IA, and the Howard Industries transformer plant in Laurel, MS, drew a tremendous amount of negative publicity. Children were left without their parents to care for them or even to pick them up from school. The raids were also very expensive, with the Howard Industries raid costing more than $5.2 million.

Worksite ICE raids returned under the Trump administration. The first of these renewed raids occurred on April 5, 2018, at the Southeastern Provisions slaughterhouse in Bean Station, TN.

18.9 What caused the return of ICE raids?

The return of worksite ICE raids can be attributed to the Trump administration's crusade to "get tough" on illegal immigration.

18.10 How many ICE raids occurred from April 2018 to January 2021?

There were more than 50 ICE worksite raids from April 2018 to January 2021.

18.11 What is the largest ICE raid since April 2018?

The seven worksite raids conducted at chicken processing plants in six small towns in middle Mississippi (Bay Springs, Carthage, Canton, Morton, Pelahatchie, and Sebastopol) caused a total of 680 workers to be detained. Other large ICE raids have occurred at CVE Technology Group in Allen, TX (280 workers detained), and Load Trail LLC in Sumner, TX (160 employees detained).

APPENDIX A

I-9 INSTRUCTIONS AND SAMPLE FORM I-9