

Compliance Overview

Highlights

Best practices for preparing for a Form I-9 audit include the following:

- Comply with Form I-9 requirements;
- Train staff;
- Conduct regular internal audits; and
- Enroll in E-Verify.



Best Practices to Prepare for Form I-9 Audits

Federal law requires employers to hire only individuals who may legally work in the United States—either U.S. citizens or authorized foreign nationals. To comply with the law, employers must verify the identity and employment authorization of each individual they hire by completing and retaining the Employment Eligibility Verification form (Form I-9). Employers must have a completed Form I-9 for every employee hired after Nov. 6, 1986.

To monitor employers' compliance with Form I-9 obligations, the U.S. Department of Homeland Security (DHS) and U.S. Immigration and Customs Enforcement (ICE) conduct audits. These audits—also known as inspections—are often an in-depth review of an employer's completed Forms I-9 and supporting documents for current and former employees. Recently, the federal government has greatly increased Form I-9 audits, exposing more employers to fines and penalties for Form I-9 violations. Therefore, it's important that employers understand the basics of a Form I-9 audit and how to properly prepare for a government audit.

This Compliance Overview provides employers with a broad overview of Form I-9 audits to help them comply with legal requirements and reduce the risk of costly civil and criminal penalties.

Links and Resources

- USCIS [Handbook for Employers](#)
- USCIS [I-9 Central](#) website
- ICE's [Guidance for Employers Conducting Internal Employment Eligibility Verification Form I-9 Audits](#)

Provided by **Connor & Gallagher OneSource**

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Overview of Form I-9

The Immigration Reform and Control Act (IRCA) took effect in 1986 to prevent the employment of individuals living in the United States illegally. IRCA requires employers, regardless of size, to hire and retain only individuals authorized to work in the United States and imposes strict penalties on those who knowingly employ immigrants lacking permanent legal status. To enforce these guidelines, the IRCA requires employers to verify a newly hired employee's eligibility to work in the United States by completing Form I-9. By completing this form, employers are certifying that they have inspected documents verifying that a newly hired employee is authorized to live and work in the United States.

Employers must make the Form I-9 instructions and List of Acceptable Documents available to their employees. All employees must provide original documents that verify their right to live and work in the United States for physical examination and sign a verification form (Form I-9). If an employee cannot verify their right to work within three business days of their first day of work for pay, the employer must not permit that individual to work and can terminate the individual's employment or place them on unpaid leave. Employers may also be required to reverify an employee's employment eligibility under certain circumstances.

Despite an employer's best efforts, compliance with Form I-9 requirements can be complex and is rarely foolproof. In recent years, the federal government has stepped up enforcement efforts, increasing employers' potential risk of noncompliance. Employers risk severe consequences for failing to comply with Form I-9 requirements, including government audits.

Form I-9 Audits

Form I-9 Violations

There are two types of Form I-9 violations under the IRCA. The first is recordkeeping violations, and the second is hiring or continuing to employ unauthorized individuals.

Form I-9 Paperwork Violations

Paperwork violations are among the most common Form I-9 violations. There are two types of paperwork violations: substantive and technical or procedural. Substantive violations, such as failing to verify identity and employment authorization documents, carry immediate fines. Technical errors, such as missing a date or failing to complete a field, can be corrected within 10 business days of receiving notice of the errors. However, after the correction period ends, uncorrected technical errors become substantive violations.

Examples of substantive paperwork violations include:

- Failure to timely prepare Form I-9;
- Failure by the employee to sign Section 1; and
- Failure by the employer to sign Section 2.

Technical or procedural paperwork violations may include:

- Failure by the employee to list their other last names used (if any) or a physical address in Section 1;
- Failure by the employer to provide the business name and address in Section 2; and
- Failure to record the employee's full name at the top of Supplement A.

Knowingly Hiring, Recruiting, Referring or Retaining Unauthorized Employee Violations

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The IRCA prohibits employers from knowingly hiring, recruiting, referring or continuing to employ an individual who is not authorized to work in the United States. Employers who knowingly hire or continue to employ unauthorized worker are required to cease their unlawful activity and may be fined and criminally prosecuted. These employers may also be debarred, meaning they may not conduct business with the federal government.

Even if an unauthorized employee is working for an employer, it does not necessarily mean the employer has committed a violation or crime. Employers must either have actual or constructive knowledge that the individual being hired or permitted to continue work is unauthorized for it to constitute a violation or crime.

Government Audit

Authorized federal officials can conduct worksite enforcement investigations and request copies of all Forms I-9 for various reasons. Many worksite enforcement investigations are initiated in response to the following:

- Reports of fraud, misuse of visas, human trafficking, and other forms of exploitation and abuse from employees or competitors;
- Complaints from current or former employees;
- Complaints from job applicants who were denied employment;
- Allegations from competitors;
- A systematic review of Form I-9 data from the DHS and ICE; or
- Information obtained from confidential informants or co-conspirators.

Employers that experience frequent workforce fluctuations may be particularly susceptible to government audits. Form I-9 audits may also be the result of random or targeted audits or referrals from other government agencies—such as the U.S. Department of Labor, the U.S. Citizenship and Immigration Services (USCIS) and IRS—that discover issues during the course of their normal activities. Understanding potential triggers of Form I-9 government audits can provide insight into how best to prepare for and even prevent audits in the first place.

If ICE believes an employer has committed a violation, it will serve the employer with a **Notice of Inspection**. This notice requests a review of the employer's Forms I-9 and other related documents, such as payroll records. The employer has **three business days** to provide the requested documents to ICE. An employer may request an extension to produce the documents, but granting the request is at ICE's discretion. ICE will review each Form I-9 to identify any potential paperwork violations and all employees the employer knowingly hired or continued to employ without authorization. After ICE reviews the employer's documents, it may provide the employer with other notices. These notices may include:

- **Notice of Inspection Results**—This notice is used to notify a business that it is in compliance with applicable employee eligibility verification requirements. This is also known as a **Compliance Letter**.
- **Notice of Discrepancies**—This notice advises the employer that, based on a review of the Forms I-9 and any related documentation submitted by employees, ICE has been unable to determine an employee's eligibility to work in the United States. The employer should provide the employees with a copy of the notice and an opportunity to present ICE with additional documentation establishing valid U.S. work authorization.
- **Notice of Suspect Documents**—This notice advises the employer that, based on a review of the Forms I-9 and documentation submitted by relevant employees, ICE determined that the documentation presented by those employees does not relate to them or is otherwise not valid for employment. This notice also advises the employer of possible criminal and civil penalties for continuing to employ unauthorized workers. ICE provides the employer and

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employees with an opportunity to provide documentation demonstrating valid U.S. work authorization if they believe the finding is in error.

- **Notice of Technical or Procedural Failures**—This notice identifies technical or procedural failures found during the inspection of Forms I-9 and gives the employer **at least 10 business days** to correct the forms. After this correction period ends, uncorrected technical or procedural failures will become substantive violations.
- **Warning Notice**—This notice is issued when substantive verification violations are identified, but the employer is expected to comply in the future. However, a Warning Notice will not be issued in the following circumstances:
 - The employer was previously the subject of a Warning Notice or a Notice of Intent to Fine;
 - The employer was notified of technical or procedural failures and failed to correct them within the allotted 10-business-day period;
 - The employer had a 100% failure to prepare and present Forms I-9;
 - The employer hired unauthorized workers as a result of substantive violations; and
 - There is any evidence of fraud in the completion of Forms I-9 (e.g., backdating) on the part of the employer.
- **Notice of Intent to Fine**—This notice may be issued for substantive violations, uncorrected technical or procedural failures, knowingly hired violations and continuing-to-employ violations. When a Notice of Intent to Fine is served, the charging documents specifying the alleged violations committed by the employer will be provided.
- **Final Order to Cease Violations and Pay Fine**—This notice contains the total amount of the fine or penalty the employer must pay.

If ICE concludes after completing its audit that the employer's documents contain fewer than 10% errors, it will typically issue a Warning Notice but no penalty. However, if ICE determines penalties are warranted, the penalty amount is determined by ICE attorneys and special agents. Employers can challenge the penalties within **30 days** of receipt of the Notice of Intent to Fine by requesting a hearing before an administrative law judge (ALJ) from the Office of the Chief Administrative Hearing Officer. The ALJ can adjust the penalty amount. If the employer does not request a hearing after receiving the Notice of Intent to Fine, ICE will issue the Final Order to Cease Violations and Pay Fine.

Form I-9 violations can result in civil monetary penalties. Fines can range from a few hundred dollars to several million dollars, depending on the offense (or frequency of offenses), the employer's size (e.g., number of employees, revenue and payroll), the seriousness of the violation, the employer's good faith, any of the employer's prior violations and the employee's eligibility to work in the United States. Criminal penalties may also apply in the event that the employer engages in a pattern or practice of knowingly hiring or continuing to employ unauthorized workers, engages in fraud or otherwise misuses identity documents. For engaging in a pattern or practice of knowingly hiring or continuing to employ unauthorized workers, employers may be subject to fines, up to six months of imprisonment or both; engaging in fraud or otherwise misusing identity documents may result in fines, up to five years of imprisonment or both. Form I-9 violations often can lead to additional fines and penalties from other government agencies. Once an employer is found to have violated Form I-9 regulations, referrals may be made to other federal and state governmental agencies, which can result in additional investigations, audits, penalties and fines.

Preparing for a Form I-9 Audit

Form I-9 audits may be triggered by various circumstances, and employers must be prepared to respond at any time. The following outlines best practices employers can implement to be prepared for a government Form I-9 audit.

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Ensuring Compliance With Form I-9 Requirements

Complying with Form I-9 requirements is often the best way for organizations to prepare for a government audit. There are specific requirements for completing, maintaining and retaining Forms I-9 that organizations must follow, including verifying employee identification and employment authorization documents.

Completing Form I-9

Employers are responsible for ensuring they have completed Form I-9 for all employees. Form I-9 has two sections that must be completed within a limited time frame. The first section is completed by the employee (**Section 1**), and the second is completed by the employer (**Section 2**). Employers must also physically examine and verify an employee's identity and employability from a list of approved documents.

The earliest an employer can ask a new hire to complete Section 1 of Form I-9 is **after an offer of employment is extended and accepted**. The latest a new hire can complete Section 1 is at the end of the employee's **first day of work for pay**. In addition to the form's two sections, there are two supplements that are completed only when a preparer or translator assists an employee in completing Section 1 (**Supplement A**) or when rehire, reverification or name changes apply (**Supplement B**).

Maintaining Form I-9

The IRCA requires employers to maintain Forms I-9 accurately, reliably and with integrity. This ensures no one alters an employee's form without proper authorization. This applies to both electronic and paper storage. Accordingly, employers may restrict access to completed Forms I-9 to a limited number of essential personnel. Because Forms I-9 may contain sensitive, personally identifiable information (PII), such as national origin, immigration status and marital status, employers may not want to permit managers and supervisors to have regular access to the forms and accompanying documents.

Retaining Form I-9

Employers must retain an employee's completed Form I-9 for **as long as the employee works for the employer**, regardless of citizenship or nationality. Once an individual's employment has terminated, the employer must retain the former employee's completed Form I-9 on file until **at least three years after the date of hire or one year after the date of termination**, whichever is later. Once the retention period for an employee's Form I-9 has passed, employers may destroy the form and any photocopies of the employee's identity and employability documents. Shredding is an acceptable way of destroying these documents. Purging a former employee's Form I-9 too early, however, is treated as if the employee's Form I-9 is missing.

Employers do not need to file completed Forms I-9 with any federal agency. Employers can store completed Forms I-9 and any copies of documents in a manner that fits their business needs—keeping in mind that the form requires the collection of PII—and facilitates the requirement to make Forms I-9 available for inspection. The USCIS recommends employers keep these files separate from employee personnel files. Additionally, employers may store Forms I-9 on paper, microfilm, microfiche or electronically. Employers may also store Forms I-9 onsite or at an offsite storage facility, in a single format or in a combination of formats.

Employers do not need to complete or retain a Form I-9 for the following circumstances:

- Employees hired on or before Nov. 6, 1986, who are still employed and have a reasonable expectation of employment at all times;
- Employees hired for employment in the Commonwealth of Northern Mariana Islands on or before Nov. 27, 2009, who are still employed and have a reasonable expectation of employment at all times;

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- Independent contractors and individuals providing services who are employed by a contractor providing contract services (i.e., employee leasing or temporary agencies);
- Individuals not physically working in the United States;
- Self-employed individuals performing work on their own behalf and not for a business entity;
- Unremunerated interns;
- Individuals employed for casual domestic work—such as a handyman, babysitter or cleaning person—in a private home on a sporadic, irregular or intermittent basis; and
- Employees referred by a state employment agency, as long as the agency provides the employer with a certificate.

This list is not exhaustive, and state or local laws may impact these requirements.

Storing Form I-9

Employees may keep paper copies of employee identification and eligibility documents with the employee's original, signed Form I-9. Employers may use a paper system, an electronic system or a combination of paper and electronic systems to store original, signed Forms I-9. USCIS recommends that employers keep completed Forms I-9 separate from personnel records to facilitate an inspection request.

Storing Form I-9 Electronically

If employers choose to retain copies of completed Forms I-9 electronically, the electronic storage system must:

- Include reasonable controls to ensure the system's integrity, accuracy and reliability;
- Include reasonable controls to detect and prevent the unauthorized or accidental creation, alteration, addition to or deletion, or deterioration of a completed or stored Form I-9, including electronic signatures, if any;
- Include controls to ensure an audit trail so any change or alteration to the form since its creation is electronically stored and can be accessed by a government officer during an inspection;
- Include an inspection and quality assurance program that regularly evaluates the electronic-storage system and includes periodic checks of electronically stored Form I-9, including electronic signatures, if any;
- Include an index so any particular record can be accessed immediately; and
- Produce legible and readable records when displayed on a video-display terminal or reproduced on paper.

Storing Form I-9 on Microfilm or Microfiche

Employers may also keep copies of original, signed Forms I-9 on microfilm or microfiche. If employers choose to retain copies of completed Forms I-9 on microfilm or microfiche, the microfilm or microfiche should be legible and readable when displayed on a viewer or reproduced on paper, and indexed so any particular record can be accessed immediately. Employers may destroy the original, signed Forms I-9 once they have preserved them on microfilm or microfiche.

If a government officer notifies an employer of an inspection, the employer must provide the officer with the microfilm or microfiche and a reader-printer that provides safety features, is in good working order—clean condition and properly maintained—and can display and print a complete page of information.

Correcting Form I-9

Completed Forms I-9 may contain errors or have missing information. If employers discover errors or missing information, they need to correct or add the information promptly and document their actions. It's important for employers not to conceal any changes to Form I-9, including erasing text or whiting it out. Employers using an electronic Form I-9 need to

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create an audit trail documenting all corrections and additions made to the form. Corrections may be made in a different color for clarity.

If there are errors or omissions in Section 1, only employees (or their preparer and/or translator) may correct or add information. In those situations, employers need to ask the employee to draw a line through the incorrect information, enter the correct or missing information, and initial and date the correction. If the employee is no longer working for the employer, the employer must attach a signed and dated memo to the former employee's form, identifying the errors or omissions, and explaining why corrections could not be made.

When correcting errors or omissions in Sections 2 or Supplement B, employers need to draw a line through the incorrect information, enter the correct or missing information, and initial and date the correction or missing information. If employers failed to date Section 2 or Supplement B of the completed form, they should not backdate these sections. Instead, they need to enter the current date and initial by the date field. For any corrections, the employer must attach a memo outlining why the information needed correcting or was missing.

If employers need to correct multiple errors in a section, they may redo the section on a new Form I-9 and attach it to the originally completed form. Employers may also do this if a completed Form I-9 contains major errors, such as leaving entire sections blank or using unacceptable documents to complete Section 2. In these situations, employers need to attach a memo to the original Form I-9 describing why they created a new Form I-9. All corrections need to be initialed and dated with the current date.

Training Staff

Form I-9 compliance is difficult and rarely error-free. Untrained staff leaves an organization open to risk, and their mistakes can be extremely costly. Training individuals responsible for an organization's Form I-9 process is critical for complying with federal requirements and reducing risks of fines, penalties and audits.

Individuals involved in an organization's Form I-9 process should be trained on the following:

- Completing Form I-9;
- Maintaining completed forms;
- Storing completed forms;
- Correcting errors;
- Re-verifying expired employee documents or documents for rehire;
- Purging old forms; and
- Conducting internal audits.

Training individuals once is not enough due to the complex nature of Form I-9 requirements. Ideally, these employees should be trained regularly to ensure they are knowledgeable of Form I-9 requirements and processes and can address any issues that may arise. Training must be updated to address changes to the form and the most current guidance from the USCIS and other federal agencies. While training may be costly and time-consuming, it can pay dividends by helping employers stay compliant. Employers can take advantage of the USCIS' [free employer training](#).

Conducting Regular Internal Audits

Employers can ensure their organizations comply with federal law by conducting internal audits of their completed Forms I-9. Despite being time-consuming and labor-intensive, internal audits typically are the best and sometimes the only systematic means to ensure compliance with federal law. Both the USCIS [Handbook for Employers](#) and [I-9 Central](#) provide

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resources for employers conducting internal audits. Alternatively, some employers hire vendors to assist with internal audits because they are so burdensome.

No matter how employers conduct internal audits, they need to be systematic and thorough to safeguard against any government inspections and enforcement actions. Employers can take the following steps while performing an internal Form I-9 audit:

- Collect all Forms I-9;
- Verify there is a completed Form I-9 for all current employees (employers do not need completed Forms I-9 for nonemployees, such as independent contractors or volunteers);
- Complete Forms I-9 for current employees who do not have a completed Form I-9;
- Audit Forms I-9 for current employees to ensure each section is properly completed and accurate;
- Correct errors on completed Forms I-9 for current employees;
- Audit Forms I-9 for terminated employees; and
- Document the audit.

Employers can demonstrate their good-faith efforts to comply with federal law—in the event of a government audit—by making a list of all Forms I-9 that contain errors. This list can identify the employee’s name, the errors and the actions the employer took to correct the errors. By conducting internal audits, keeping audit logs, documenting errors and corrections, and retaining employee communications, employers can demonstrate their good faith if they are ever audited by the government. Employers should document all steps taken during an internal audit in an audit log.

Additionally, regular internal audits provide employers with opportunities to improve Form I-9 practices by identifying and eliminating errors. To avoid potential fines and penalties, it’s critical for employers to understand which Form I-9 errors are being committed and their root causes. Employers can then adjust their Form I-9 practices to avoid these errors in the future.

Enrolling in E-Verify

E-Verify is a free web-based system that allows enrolled employers to verify the identity and employment eligibility of their newly hired employees. E-Verify is intended to simplify the process of verifying employee identity and employment eligibility and improve compliance with federal law by quickly determining whether an employee is authorized to work in the United States. The program provides employers with training, customer support, error checking and usage reports. It can also protect employers from penalties relating to hiring workers who are not authorized to work in the country. It can be a valuable tool for employers to verify their workers’ employability.

While E-Verify is voluntary for many employers, it is required for federal contractors with contracts that include the Federal Acquisition Regulation E-Verify clause. However, employers may be required to participate in E-Verify due to a court order. Additionally, some states require employers to use E-Verify as a condition of business licensing.

Summary

Form I-9 requirements impact all employers. As enforcement actions continue to escalate, Form I-9 compliance appears to be especially vital. By understanding Form I-9 requirements and implementing effective strategies and processes to prepare for and navigate government audits, employers can potentially avoid costly penalties and fines.