

Seyfarth Special Delivery: Unwelcome Outreach from the Government

Part 3: Dear Seyfarth, How Do Employers
Avoid Pitfalls With the Simple, Two Page I-9
Form?

December 14, 2022

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Seyfarth Shaw LLP

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Homeland Security Investigations
Office of the Special Agent in Charge

U.S. Department of Homeland Security
123 Any Street, Floor 1
Washington, D.C. 00000

NOTICE OF INSPECTION

December 14, 2022

Incorporation Example, Inc.
10 Street, Suite 1
City, ST 12345

Dear Sir/Madam:

Section 274A(b) of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), requires employers to verify the identity and employment eligibility of all individuals hired in the United States after November 6, 1986. 8 C.F.R. Section 274a.2 designates the Employment Eligibility Verification Form I-9 (Form I-9) as the means of documenting this verification.

Pursuant to Section 274A of the INA, the U.S. Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE), Homeland Security Investigations (HSI) Washington, D.C. is serving this Notice of Inspection to commence an inspection of your company's Forms I-9.

Federal regulations afford employers three business days' notice prior to the start of a Form I-9 inspection. This Notice of Inspection serves as advance notice that HSI has scheduled an inspection of your company's Forms I-9 for November 1, 2022, 9:00 AM EST at 10 Street, Suite 1, City, ST 12345. An HSI Special Agent will either come to your office to collect your company's Forms I-9 and any related supporting documentation, or will provide instruction for sending the material to our facility at 123 Any Street, Floor 1, Washington, D.C. 00000. This inspection will cover all your current employees and those employees terminated on or after December 14, 2021. This inspection is for employees who are/were employed by Incorporation Example, Inc. at 10 Street, Suite 1, City, ST 12345.

During the inspection, HSI Special Agent will discuss the requirements of the applicable federal laws and regulations with you. In addition to presenting your company's Forms I-9, your company will need to present any documents copied as part of the employment eligibility verification process. If your company utilizes software for the electronic generation and storage of Forms I-9, you will need to present: the name of the software and vendor utilized; the internal business practices/protocols related to the generation, use, storage, security, and inspection of, and quality assurance programs for, your electronically-generated Forms I-9; the indexing system identifying how the electronic information contained in the Form I-9 is linked to each

Legal Disclaimer

This presentation has been prepared by Seyfarth Shaw LLP for informational purposes only. The material discussed during this webinar should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The content is intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have.

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Agenda

- 01** Form I-9 Ownership
- 02** Sources of I-9 Authority and Regulations
- 03** Responding to Notices of Inspection
- 04** Electronic I-9 concerns during HSI I-9 Investigation
- 05** Administrative Appeals of Adverse Determinations
- 06** Role of Voluntary, Internal I-9 Compliance Reviews



USCIS issues most alien employment authorization documentation and also administers Form I-9 and E-Verify, the electronic employment eligibility verification program. ICE enforces the penalty provisions of section 274A of the INA as well as other immigration requirements within the United States.

Handbook for Employers M-274



Form I-9 Responsibilities- What You Need to Know

Department of Homeland Security

- US Citizenship and Immigration Services – Issues Form I-9, Operates E-Verify and administers employment eligibility requirements
- Enforced by Homeland Security Investigations, Immigration and Customs Enforcement

Other agencies that can request to review your Form I-9s

- Department of Justice
- Department of Labor

Consider state laws – including California

**Legal Authority-
*What we need to
know so you
don't***

I-9 compliance is governed by federal immigration laws, statutes, rules, codes, orders and regulations:

- Immigration Reform and Control Act of 1986 (IRCA)
- Immigration and Nationality Act (INA) § 274A
- Provisions added to the INA by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) including:
 - including the “Basic Pilot” which was eventually renamed “E-Verify”
 - The Federal Acquisition Regulation (FAR) Subpart 22.18, “Employment Eligibility Verification” and Executive Order 12989

Many Sources of I-9 Authority

Handbook for Employers M-274

- How to properly complete Form I-9, which helps you verify that your employees are authorized to work in the United States
- Outlines Acceptable Documents
- Dynamic
- Updates are not currently tracked
- Review often

I-9 Central

- I-9 related News
- How to Complete & Correct Form I-9
- E-Verify and Employee Rights and Resources
- Form I-9 Resources

Other

- DOJ's IER site and their materials
- Announcements/Alerts
- Press releases
- Memos & Internal Guidance
- Emails to E-Verify participants

List of Acceptable Documents- The LOAD

Employees must provide documentation to their employers to show their identity and authorization to work.



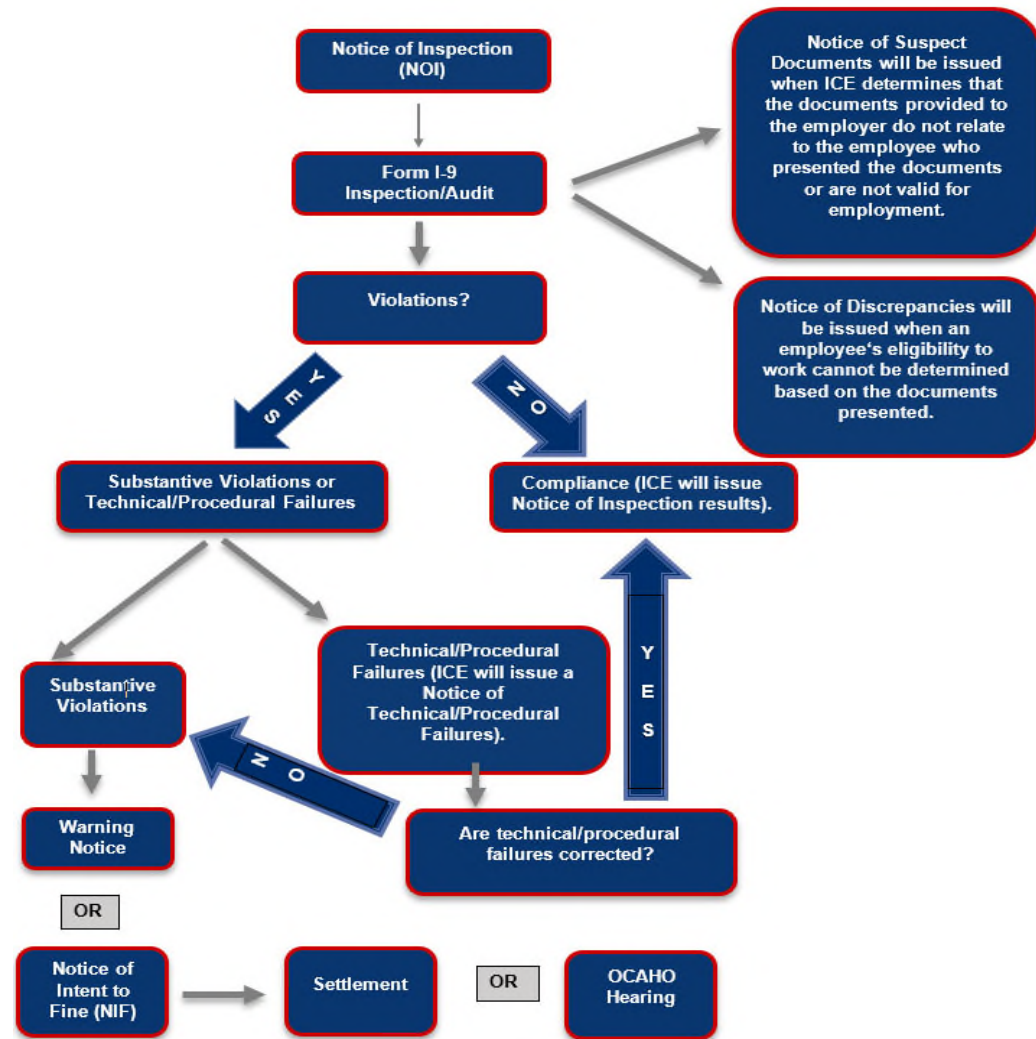
- Over 40 documents or documents combinations not listed on the LOAD
- So, where do you have to look?
- What are you looking for?

LISTS OF ACCEPTABLE DOCUMENTS All documents must be UNEXPIRED

Employees may present one selection from List A or a combination of one selection from List B and one selection from List C.

LIST A Documents that Establish Both Identity and Employment Authorization	OR	LIST B Documents that Establish Identity	AND	LIST C Documents that Establish Employment Authorization
1. U.S. Passport or U.S. Passport Card		1. Driver's license or ID card issued by a State or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address		1. A Social Security Account Number card, unless the card includes one of the following restrictions: (1) NOT VALID FOR EMPLOYMENT (2) VALID FOR WORK ONLY WITH INS AUTHORIZATION (3) VALID FOR WORK ONLY WITH DHS AUTHORIZATION
2. Permanent Resident Card or Alien Registration Receipt Card (Form I-551)		2. ID card issued by federal, state or local government agencies or entities, provided it contains a photograph or information such as name, date of birth,		2. Certification of report of birth issued by the Department of State (Form
3. Foreign passport that contains a temporary I-551 stamp or temporary I-551 printed notation on a machine-readable immigrant visa				
4. Employment Authorization Document that contains a photograph (Form				

Form I-9 Inspection Process



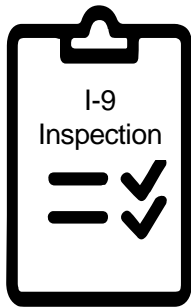
Responding to Notice of Inspection

- Notice of Inspection (NOI)
 - Employers receive at least three business days to produce the Forms I-9
 - Do not give up your 3 days
 - Be prepared, it's 9 pm do you know where your I-9s are?
 - Negotiate a longer time
 - Do not expand the request
 - Chain of Custody including copies
- ICE will request other things, you will be busy
 - Copy of payroll
 - List of all active and terminated employees
 - Articles of Incorporation
 - Business Licenses
 - Electronic I-9 Software Vendor Information



Listen Up!

Electronic I-9 Risks



Language from a Notice of Inspection

- “If your company utilizes software for the electronic generation and storage of Forms I-9, you will need to present:
 - ✓ the name of the software and vendor utilized;
 - ✓ the internal business practices/protocols related to the generation, use, storage, security, and inspection of, and quality assurance programs for, your electronically-generated Forms I-9;
 - ✓ the indexing system identifying how the electronic information contained in the Form I-9 is linked to each employee;
 - ✓ documentation describing the system used to capture the electronic signature, including the identity and attestation of the individual signing the Form I-9; and
 - ✓ the audit trail for each electronically-generated Form I-9.
- Further, pursuant to 8 C.F.R 274a.2(e)(8)(ii), the Special Agent may contact you to schedule a live demonstration of how an electronically-generated Form I-9 is created and retained by the software used by your company”

Electronic I-9 Concerns

- You can use an electronic system if:
 - The resulting Form I-9 is legible
 - No change to name, content or sequence of I-9 data elements & instructions
 - No additional data elements or language inserted
 - **The standards specified in the regulations are met** (8 C.F.R. § 274.2(e), (f), (g), (h), (i) (2012))
- The devil is in the details and systems reviews should include audit trails, electronic signatures, security, data indexes and controls to ensure integrity, accuracy and reliability of electronic generation storage system
- Vendor change over considerations, printing those I-9s out is not enough

Love Letters from ICE

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- **Notice of Technical or Procedural Violations:** Identifies technical or procedural failures found during the inspection
 - Not the end of the world
 - Requires resources for clean up
 - Employer will be given least 10 business days to correct the forms
 - After this correction period ends, uncorrected technical or procedural failures will become substantive violations
 - Copy or not?
- **Notice of Suspect Documents:** ICE has determined that the documentation presented by employee(s) do not relate to the employee(s) or are otherwise not valid for employment
 - Employer has 10 days to respond.
- **Notice of Discrepancies:** ICE has been unable to determine the employees' eligibility to work in the U.S.

Warnings, Settlements, NIFs, Oh My



- **Notice of Inspection Results:** Also known as a "Compliance Letter," used to notify a business that it is in compliance
- **Warning Notice:** Issued when substantive verification violations were identified, but circumstances do not warrant a monetary penalty and there is an expectation of future compliance by the employer
- **Notice of Intent to Fine (NIF):** May be issued for substantive violations, uncorrected technical or procedural failures, knowingly hire violations, and/or continuing to employ violations

Potential Consequences

Criminal Prosecution

Felony and
Misdemeanor

Imprisonment,
Fines &
Forfeiture

Fines

Hiring Violations
\$627 - \$25,076

Paperwork
violations \$252 -
\$2,507

Debarment

Prohibits Federal
Contractors for
1-3 years

Through
Executive Order
2.13.1996

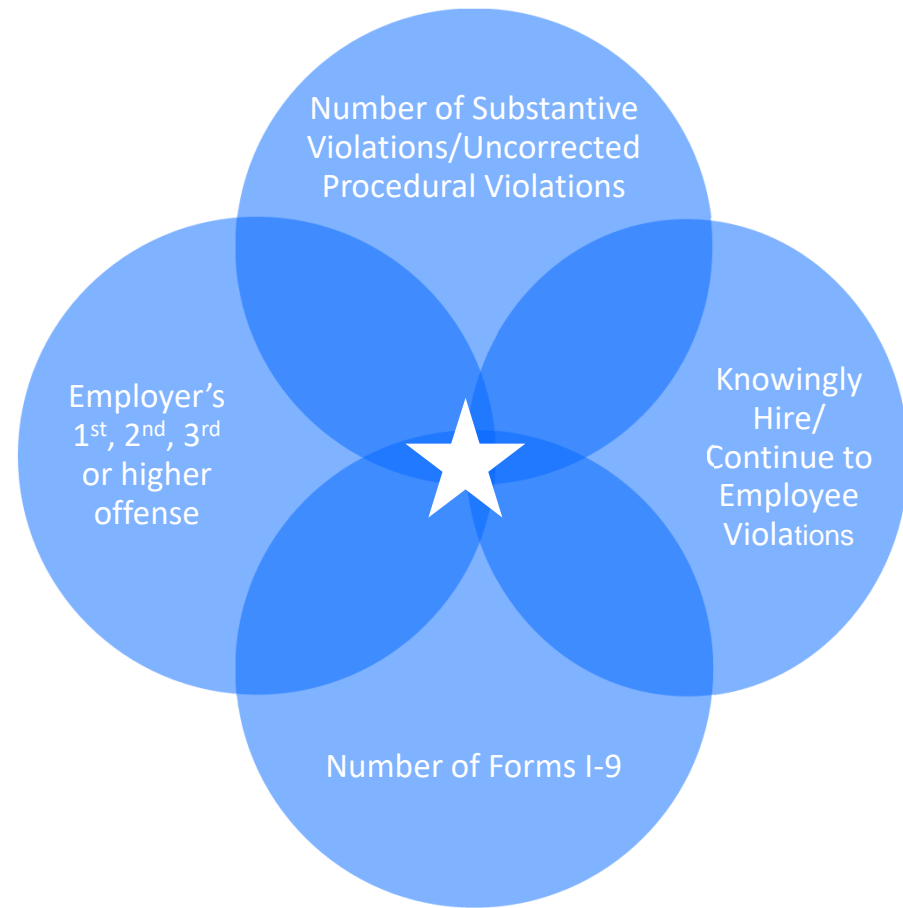
State Laws also carry penalties that need to be considered

Risk Assessments: Know Your Numbers

Immigration-Related Penalties	Penalty
Name/description	DHS or DOJ penalty assessed after 5/9/2022
Immigration Reform and Control Act of 1986 ("IRCA"); Unlawful employment of aliens, first order (per unauthorized alien)	\$627 to \$5,016
IRCA; Unlawful employment of aliens, second order (per such alien)	\$5,016 to \$12,537
IRCA; Unlawful employment of aliens, subsequent order (per such alien)	\$7,523 to \$25,076
IRCA; Paperwork violation (per relevant individual)	\$252 to \$2,507
IRCA; Violation relating to participating employer's failure to notify of final nonconfirmation of employee's employment eligibility (per relevant individual) E-Verify	\$874 to \$1,746
IRCA; Unfair immigration-related employment practices, first order (per individual discriminated against)	\$517 to \$4,144
IRCA; Unfair immigration-related employment practices, second order (per individual discriminated against)	\$4,144 to \$10,360
IRCA; Unfair immigration-related employment practices, subsequent order (per individual discriminated against)	\$6,215 to \$20,719
IRCA; Unfair immigration-related employment practices, unfair documentary practices (per individual discriminated against)	\$207 to \$2,072



Determining Minimum and Maximum Civil Penalty Fine



Fine Matrix (Unpublished)

Substantive/Uncorrected Technical Violation Fine Schedule (Effective for penalties assessed after January 11, 2022, whose associated violations occurred after November 2, 2015.)			
	Standard Fine Amount		
Substantive Verifications Violations	1st Offense \$252 - \$2,507	2nd Offense \$252 - \$2,507	3rd Offense + \$252 - \$2,507
0% - 9%	\$252	\$1,253	\$2,507
10% - 19%	\$627	\$1,504	\$2,507
20% - 29%	\$1,003	\$1,755	\$2,507
30% - 39%	\$1,379	\$2,005	\$2,507
40% - 49%	\$1,755	\$2,256	\$2,507
50% or more	\$2,131	\$2,507	\$2,507

Knowing Hire/ Continuing to Employ Fine Schedule (Effective for penalties assessed after January 11, 2022, whose associated violations occurred after November 2, 2015.)			
	Standard Fine Amount		
Knowing Hire and Continuing to Employ Violations	1st Tier \$627 - \$5,016	2nd Tier \$5,016 - \$12,537	3rd Tier \$7,523 - \$25,076
0% - 9%	\$627	\$5,016	\$7,523
10% - 19%	\$1,505	\$6,520	\$11,034
20% - 29%	\$2,383	\$8,024	\$14,544
30% - 39%	\$3,260	\$9,529	\$18,055
40% - 49%	\$4,138	\$11,033	\$21,565
50% or more	\$5,016	\$12,537	\$25,076

5 Factors Used to Enhance, Mitigate or Neutralize Fine

Enhancement Matrix

Factor	Aggravating	Mitigating	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%

Appeals of Notice of Intent to Fine

Request Hearing Before OCAHO



- Both HSI and the Employer have the right to request hearing before Office of the Chief Administrative Hearing Officer (OCAHO) in the DOJ
 - Pursuant to 5 U.S.C. §§ 554-557, employers are entitled to hearing
 - HSI will file a complaint to OCAHO is settlement agreement cannot be reached
- Request can be made concurrently with settlement talks

Appeals of Notice of Intent to Fine

Request Hearing Before OCAHO

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- Administrative appeals of adverse HSI I-9 fine determinations within **30 days of receipt of NIF**
 - If request is not timely received, HSI will issue a Final Order
- Many OCAHO cases never reach evidentiary hearing stage
- Many end in settlement negotiations
- OCAHO may look at 5 statutory factors that HSI uses as well as discretionary factors

Privilege Issues

- Distinguish Compliance Reviews or Assessments from Audits
- Even if counsel does not undertake the review directly, it is wise to consult with counsel at the outset of the review, in order for the attorney to direct the review
- Reviews undertaken by or at the direction of counsel are likely confidential and privileged under the attorney-client privilege
 - Self-incriminating information uncovered during the review may not have to be disclosed to the government

Voluntary Internal I-9 Compliance Reviews

- Internal I-9 review is best prevention tool to avoid costly penalties if HSI conducts an inspection
- Unless I-9 review is conducted under close supervision of an immigration compliance attorney, an employer may do more damage than good
- Conduct internal I-9 reviews yearly or less frequently, dependent on size of company and number of employees hired each year
- Have reviewing mechanisms in place if using authorized representative methods
- Employer may choose to initiate an assessment first
- May choose inventory review, sample or full review
- Form of Report to Management (if any)

Voluntary Internal I-9 Compliance Reviews

- Before conducting a review, an employer should consider:
 - The purpose and scope of the review (choices!)
 - How it will communicate information to employees
 - Reasons for the internal review
 - What employees can expect from the process
 - How it chooses Forms I-9 to be reviewed to avoid discriminatory or retaliatory reviews or perception
 - The end game-trigger for remediation and corrections
 - Using experienced counsel

Voluntary Internal I-9 Compliance Reviews

- “While not required by law, an employer may conduct an internal audit of Forms I-9 to ensure ongoing compliance with the employer sanctions provision of the INA.”
 - [DOJ-ICE Guidance for Employers Conducting Internal Employment Eligibility Verification Form I-9 Audits](#)
- Internal audits should not:
 - be conducted on the basis of an employee’s citizenship status or national origin, or in retaliation against any employee or employees for any reason.
 - Internal audits do not insulate employers from liability

thank
you

Please send your questions or comments to the
presenters or

I-9Compliance@seyfarth.com

Learn more about our [Immigration Compliance &
Enforcement](#) practice.