

DURHAM  
JONES &  
PINEGAR

DURHAM JONES & PINEGAR, P.C.  
111 East Broadway, Suite 900  
P O Box 4050  
Salt Lake City, Utah 84110

Timothy M. Wheelwright  
Attorney at Law  
Direct: (801) 297-1456  
twheelwright@djplaw.com

1104 Country Hills Drive, Suite 710  
Ogden, Utah 84403  
801.297.1456  
801.415.3500 Fax  
www.djplaw.com

September 7, 2011

Mr. Michael Johnson, Executive Director  
Utah Hotel & Lodging Association  
P.O. Box 1028  
Kaysville, UT 84037

**RE: Form I-9 Audits by Immigration and Customs Enforcement (ICE)**

Dear Michael:

Immigration and Customs Enforcement (“ICE”) has targeted many Utah employers for Form I-9 audits since July 2009 when ICE announced that it would begin a nationwide strategy of auditing U.S. employers. Members of the Utah Hotel & Lodging Association (“Association”) may have questions about the potential implications for their businesses of ICE conducting these audits and they are understandably concerned about how they can be prepared if they become the subject of an ICE audit. Over the past few years I have represented several Utah employers who have been targeted by ICE in Form I-9 audits and other worksite enforcement actions, including criminal prosecution for harboring illegal workers through employment. As someone who has been involved with these audits and other ICE enforcement actions firsthand, I hope that my perspective and recommendations will be useful for the Association and its members.

**ICE’s Worksite Enforcement Strategy since April 2009**

On April 30, 2009, ICE outlined its worksite enforcement strategy in a headquarters memorandum to its field agents. I have attached a copy of this memo at **Tab 1**. I recommend that your members review the entire memo, however, the following highlights are particularly noteworthy:

1. *The prospect for employment in the United States continues to be one of the leading causes of illegal immigration.*
2. *DHS has extensive but finite resources which it must effectively allocate. Arresting and removing illegal workers must be part of a strategy to deter unlawful employment, but alone is insufficient as a comprehensive worksite enforcement strategy. Of the more than 6,000 arrests related to worksite enforcement in 2008, only 135 were of employers. Enforcement efforts focused on employers better target the root causes of illegal immigration. An effective strategy must do all of the following: 1) penalize employers who knowingly hire illegal workers; 2) deter employers who are tempted to hire illegal workers; and 3) encourage all employers to*

*take advantage of well-crafted compliance tools. To accomplish these goals, ICE must prioritize the criminal prosecution of the actual employers who knowingly hire illegal workers because such employers are not sufficiently punished or deterred by the arrest of their illegal workforce. [emphasis added]*

3. *Although criminal prosecution of employers will efficiently advance the stated goal of worksite enforcement, ICE will not rely solely on that approach...ICE will use all available civil and administrative tools, including civil fines and debarment, to penalize and deter illegal employment.*
4. *ICE will strategically approach worksite enforcement efforts to maximize their impact.*
5. *The criminal prosecution of employers is a priority... ICE is committed to targeting employers, owners, corporate managers, supervisors, and others in the management structure of a company for criminal prosecution through the use of carefully planned criminal investigations. ICE [utilizes a] range of reasonably available investigative methods and techniques, including but not limited to: confidential sources and cooperating witnesses, undercover agents, consensual and nonconsensual intercepts, and I-9 audits. [emphasis added]*
6. *The most important administrative tool is the Notice of Inspection (NOI) and the resulting administrative Form I-9 audit. The Form I-9 audit process will be utilized in both criminal and administrative investigations to identify illegal workers, including criminal aliens employed at a business.*

In likely the vast majority of cases, ICE targets employers for no other reason than to conduct an administrative audit of the company's I-9 forms. Keep in mind, however, that under its worksite enforcement strategy outlined in the attached memo, ICE uses the Form I-9 audit as an entry point for not only identifying illegal workers, but also for determining whether an employer has engaged in any criminal conduct with regard to employing illegal workers. Because ICE defines "employer" so broadly to include not just the business entity itself, but also its owners, managers, supervisors, etc., it is imperative that anyone involved in a company's hiring process take this responsibility seriously.

### **Overview of Notice of Inspection Process**

ICE has prepared a document called the *Form I-9 Inspection Overview*, a copy of which I have attached at **Tab 2**. Not only does this document provide a detailed overview of the Form I-9 inspection process, it also outlines the methodology ICE uses to calculate potential civil monetary fines for Knowing Hire and Continuing to Employ violations and Substantive and Uncorrected Technical violations on the Form I-9, including what ICE considers to be potential mitigating and aggravating factors in calculating a potential fine. This document provides valuable information to help employers know what to expect if they become the target of an ICE Form I-9 audit.

Something not addressed in ICE's *Form I-9 Inspection Overview* is the potential impact of losing key and valuable employees during the course of the audit that a company did not suspect lacked employment authorization in the United States. Many employers being audited by ICE find themselves in this predicament. Whether the employer loses 20 or 120 employees does not much matter. The financial and personal impact of losing workers under these circumstances is likely to be significant and far reaching. This can strain a business, especially if the losses occur at critical times during the year, such as during a high season or if it involves long-term employees who have

become a valuable part of the business operations. Such losses could make it difficult to find replacement workers, as well as result in the complete loss of time and money that a business has invested in the affected workers.

### ICE's Worksite Enforcement Activities in Utah

To my knowledge, ICE has not released statistics about the number of Form I-9 audits it has conducted in the state of Utah since July 2009 nor information about civil monetary fines or other penalties that it has imposed in connection with those audits. I have represented several clients during that period of time who ICE has fined due to I-9 form paperwork violations. Fines have ranged from approximately \$7,000 to approximately \$160,000. To be sure, ICE has targeted at least dozens of Utah employers in several sectors, including the hospitality sector, and we expect that ICE will continue targeting Utah employers for the foreseeable future. ICE currently employs 2 forensic auditors who are assigned exclusively and full-time to conduct Form I-9 audits in Utah. Although ICE has dedicated significant resources to its worksite enforcement efforts in Utah, companies should remember that those resources are limited. With tens of thousands of employers in Utah and only 2 ICE auditors available to conduct audits, it is unlikely that members of the Association would be targeted by ICE for an audit, especially after the unprecedented level of publicity that the hospitality industry has recently received. No one can predict, however, whether their business will be audited so it is important that all Utah employers take steps to be prepared just in case ICE targets their business.

### Recommendations

I have found that there are a few relatively simple steps that companies can take to help them be prepared for an ICE audit. By following these recommendations, employers will limit their legal liability and protect themselves against civil monetary and other potentially more severe penalties. I recommend the following:

1. **Do not overreact.** I suspect that many in the hospitality industry are concerned each time they hear about another Utah company being audited by ICE. While this is concerning, no one should panic or overreact to such news. Although the government has identified the hospitality industry as a potential haven for illegal workers, there is no indication that ICE is targeting the hospitality industry at this time. Just in case ICE continues to target the hospitality industry, however, now is a good time for members of the Association to methodically examine their Form I-9 practices and procedures, determine their compliance level, and make adjustments as necessary.
2. **Have a properly completed I-9 form for every current employee who was hired after November 6, 1986.** The governing regulations provide that any employer who shows good faith compliance with the Form I-9 process has a rebuttable affirmative defense to a charge that it has knowingly hired or continued to employ someone who lacks employment authorization in the United States. [8 Code of Federal Regulations §

274a.4] Therefore, the single most important action a U.S. employer can take is making sure it has a properly and fully completed Form I-9 for each one of its current employees who were hired after November 6, 1986. This sound practice alone should reassure employers that even if a worker is later determined by ICE not to be authorized to work, the employer will be protected from legal liability, assuming of course the employer does not possess contrary information about the individual's employment authorization.

3. **Retain I-9 forms of former employees according to the retention rules.** An employer is required to retain the I-9 forms of a former employee for 3 years from the date it hired the individual or 1 year from the date the individual's employment was terminated, whichever is later. [8 CFR § 274a.2(b)(2)(i)(A)] Keep in mind that this rule only applies to former employees and it does not apply to current employees. Here are a couple of examples. If Employee A was hired on October 1, 2010 and his employment terminated on October 15, 2010, the employer must retain the former employee's I-9 form and related paperwork until October 1, 2013, which is 3 years from the date of hire and the later of the two periods. On the other hand, if Employee B was hired on October 1, 2010 and her employment was terminated on October 1, 2013, the employer must retain the I-9 form until October 1, 2014, which is 1 year from the date the employment was terminated and the later of the two periods. Employers should have a system for tracking when I-9 forms and related documents can be purged from their files.
4. **Periodically evaluate compliance through secondary checks and internal audits.** I have observed that most companies that ICE fines do not have internal controls or an internal evaluation process for its I-9 forms, which is unfortunate because, had they done so, they could have limited their liability significantly. I recommend that employers have a system where I-9 forms that are completed in connection with the new hire process go through a secondary review by someone who is familiar with the I-9 process and requirements. This provides a second perspective to confirm that the form has been filled out properly and completely. Additionally, I recommend that employers periodically audit internally their I-9 forms to evaluate their compliance and to spot and correct any deficiencies. Whether the company hires an outside firm or uses experienced employees to conduct an internal audit does not matter nearly as much as making sure it periodically monitors and assesses its compliance. It is best that the first audit of a company's I-9 forms not be conducted by ICE.
5. **Anyone involved in the I-9 process should be adequately trained.** At first glance, the I-9 form seems to be simple and straightforward, which for the most part it is. Anyone who has experience dealing with I-9 forms, however, knows that there are a myriad of complex issues that sometimes arise with this seemingly simple form. I recommend that anyone who is involved in a company's I-9 form process receive I-9 form training no less than annually. This training ought to include review and discussion of the company's written I-9 Form Compliance Plan (see below). Often it is productive

to hold a training session in connection with an internal audit so that deficiencies identified in the audit can also be addressed and resolved in the training.

6. **Prepare, implement, and follow a written I-9 Form Compliance Plan.** Each company will have its own process and procedures for completing the I-9 form in the new hire process. Although each company's approach to the I-9 form process is likely to be unique and adapted to best suit its needs and operating conditions, there are certain best practices that ought to be incorporated into such a plan. No matter how large or small the company, it is important to reduce the company's I-9 form process and procedures to writing, whatever they may be. The plan does not need to be complex or lengthy, but it ought to be written. Having a written plan will help a company be consistent in its I-9 form process and procedures, will communicate management's expectations regarding this important process, will help train those who are involved in the process, and will demonstrate a company's commitment to having a legal workforce.
7. **Prepare, implement, and follow a procedure for dealing with "No Match" letters received from the Social Security Administration.** After a long hiatus, the Social Security Administration ("SSA") on April 6, 2011 once again started sending "No Match" letters that advise employers when their workers are using a social security number that does not coincide with SSA's records. Employers have been, and continue to be, unsure about what action, if any, they should take when they receive one of these "No Match" letters. Gone should be the days of employers doing nothing when they receive such letters. On the other hand, employers should be cautious to not run afoul of the anti-discrimination laws when they deal with these letters. If and when a company receives a "No Match" letter from the SSA, I recommend it work with legal counsel to develop strategies to properly balance the company's obligations to follow up regarding the "No Match" letter while treating its employees in a manner that does not run afoul of the anti-discrimination laws.
8. **Consider using electronic tools such as E-Verify and the Social Security Number Verification System (SSNVS).** Many experts predict that it will not be long before every U.S. employer is required to use electronic employment eligibility verification. Most of the Association's members are probably familiar with E-Verify, which is the electronic employment eligibility verification system that the U.S. Department of Homeland Security offers to U.S. employers, and I suspect that some may already use this system. While E-Verify is not yet mandatory, except for certain federal and state contractors, we should expect that it will become mandatory for all U.S. employers sometime in the next few years. Although E-Verify cannot be used to verify the employment eligibility of a company's current workforce, it can be a valuable tool for U.S. companies looking to protect their investment in human capital by making sure that their new hires are authorized to work shortly after they are hired rather than several years later. Alternatively, or in addition to E-Verify, the SSA offers an electronic system that verifies that a social security number matches a particular individual. This system is

- called the Social Security Number Verification System or SSNVS. Although SSNVS cannot be used to verify employment eligibility like E-Verify does, it can be used for payroll purposes and it may even be used for any current employee, not just new hires. Current Utah law requires that all employers with 15 or more employees use a “status verification system,” which the statute defines as E-Verify, SSNVS, or a similar system. I do not necessarily recommend that a company rush out and enroll in either or both of these electronic systems, however, a company ought to be aware that these systems are available and consider when would be the most appropriate time to begin using either or both of them.
9. **Avoid unlawful discrimination.** This recommendation is related to my first and seventh recommendations, above. While it is essential that a company take its obligation to employ a legal workforce seriously, it is also important that it do so in a way that does not violate the anti-discrimination laws. To be clear, the anti-discrimination laws do not protect illegal workers. They do protect, however, U.S. Citizens, Permanent Residents, and other legal workers who an employer may ill-advisedly assume are illegal workers and against whom it takes some form of disciplinary action. Employers should be careful because the potential civil monetary penalties for violating these anti-discrimination laws could be just as substantial, if not more so, than the potential penalties for paperwork violations or knowingly hiring or continuing to employ someone who is not authorized to work in the United States. Employers should proceed with caution and restraint.
  10. **Consider opportunities to legally utilize foreign workers through visa programs such as the H-2B visa.** In some cases, members of the Association may determine that they cannot find enough U.S. workers to fill the number of jobs they have available in their operations. If that occurs, and if the jobs in question are temporary in the sense that the need for them is seasonal, peak-load, intermittent, or one-time, then a company may be able to hire foreign workers to fill those jobs under the H-2B visa program. This program will not work for every member, but it is something each member ought to at least consider. The H-2B program has its flaws and significant deficiencies, however, utilizing this, or perhaps other visa programs, is yet another way a U.S. employer can ensure that it has a legal workforce.

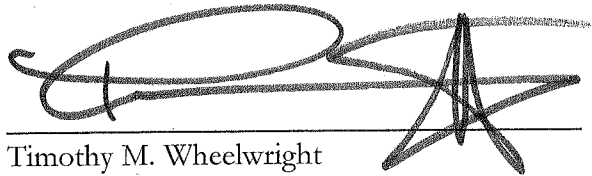
### Conclusion

No one wants to be audited by ICE or have their I-9 forms, processes, and procedures reviewed and scrutinized. Although it is unlikely that many members of the Association will be targeted by ICE for such an audit, it is important that each member take steps to make sure it is prepared for an audit just in case. Following the ten recommendations listed above will help the Association members to be prepared for an ICE Form I-9 audit and will likely limit their legal liability significantly.

If I can be of any assistance to the Association and/or its members as they take steps to implement these recommendations or as they deal with ICE in these audits and other enforcement actions, please feel free to contact me. In addition to the contact information listed above, the most direct way to reach me is by email at [twheelwright@djplaw.com](mailto:twheelwright@djplaw.com) or on my mobile telephone at 801.499.7717.

With warm regards,

DURHAM JONES & PINEGAR

A handwritten signature in black ink, appearing to read 'Timothy M. Wheelwright', is written over a horizontal line. The signature is stylized and somewhat abstract.

Timothy M. Wheelwright  
Shareholder

TMW:wt  
Attachments

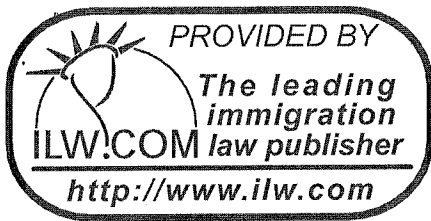
DISCLAIMER: The foregoing letter is not intended to be legal advice, nor should it be construed as such. Anyone seeking legal advice regarding the matters discussed herein should consult with legal counsel and consider the foregoing recommendations in light of their specific situation and circumstances.

**Ten Best Practices to be Prepared for an ICE Form I-9 Audit**

by  
Timothy M. Wheelwright / Durham Jones & Pinegar

1. **Do not overreact.**
2. **Have a properly completed I-9 form for every current employee who was hired after November 6, 1986.**
3. **Retain I-9 forms of former employees according to the retention rules.**
4. **Periodically evaluate compliance through secondary checks and internal audits.**
5. **Anyone involved in the I-9 process should be adequately trained.**
6. **Prepare, implement, and follow a written I-9 Form Compliance Plan.**
7. **Prepare, implement, and follow a procedure for dealing with “No Match” letters received from the Social Security Administration.**
8. **Consider using electronic tools such as E-Verify and the Social Security Number Verification System (SSNVS).**
9. **Avoid unlawful discrimination.**
10. **Consider opportunities to legally utilize foreign workers through visa programs such as the H-2B visa.**

**Tab 1**



Office of Investigations

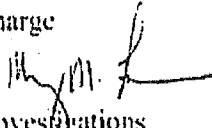
U.S. Department of Homeland Security  
500 12<sup>th</sup> Street, SW  
Washington, DC 20536



U.S. Immigration  
and Customs  
Enforcement

APR 30 2009

MEMORANDUM FOR: Assistant Director  
Deputy Assistant Directors  
Special Agents in Charge

FROM: Marcy M. Forman   
Director, Office of Investigations

SUBJECT: Worksite Enforcement Strategy

### Worksite Enforcement Strategy

#### I. The Purpose and Priorities of Worksite Enforcement

The prospect for employment in the United States continues to be one of the leading causes of illegal immigration, creating a market for criminal smuggling organizations who exploit people willing to pay high fees and take great risks to enter the United States without detection. Immigration and Customs Enforcement (ICE) has a vital responsibility to engage in effective worksite enforcement to reduce the pull of illegal employment, ease pressure at the border, and protect employment opportunities for the nation's lawful workforce.

DHS has extensive but finite resources which it must effectively allocate. Arresting and removing illegal workers must be part of a strategy to deter unlawful employment, but alone is insufficient as a comprehensive worksite enforcement strategy. Of the more than 6,000 arrests related to worksite enforcement in 2008, only 135 were of employers. Enforcement efforts focused on employers better target the root causes of illegal immigration. An effective strategy must do all of the following: 1) penalize employers who knowingly hire illegal workers; 2) deter employers who are tempted to hire illegal workers; and 3) encourage all employers to take advantage of well-crafted compliance tools. To accomplish these goals, ICE must prioritize the criminal prosecution of the actual employers who knowingly hire illegal workers because such employers are not sufficiently punished or deterred by the arrest of their illegal workforce.

Although criminal prosecution of employers will efficiently advance the stated goal of worksite enforcement, ICE will not rely solely on that approach. ICE will continue to fulfill its responsibility to arrest and process for removal illegal workers encountered during worksite enforcement operations. Furthermore, ICE will use all available civil and administrative tools, including civil fines and debarment, to penalize and deter illegal employment.

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ICE will strategically approach worksite enforcement efforts to maximize their impact. To that end, ICE offices should refer to this Worksite Enforcement Strategy when beginning any worksite enforcement investigation. ICE offices also must refer to the reporting requirements and humanitarian guidelines applicable to worksite enforcement operations.

## **II. Criminal Prosecution of Employers**

- The criminal prosecution of employers<sup>1</sup> is a priority of ICE's worksite enforcement (WSE) program and interior enforcement strategy.
- ICE is committed to targeting employers, owners, corporate managers, supervisors, and others in the management structure of a company for criminal prosecution through the use of carefully planned criminal investigations.
- ICE offices should utilize the full range of reasonably available investigative methods and techniques, including but not limited to: use of confidential sources and cooperating witnesses, introduction of undercover agents, consensual and non-consensual intercepts and Form I-9 audits.
- ICE offices should consider the wide variety of criminal offenses that may be present in a worksite case. ICE offices should look for evidence of the mistreatment of workers, along with evidence of trafficking, smuggling, harboring, visa fraud, identification document fraud, money laundering, and other such criminal conduct.
- Absent exigent circumstances, ICE offices should obtain indictments, criminal arrest or search warrants, or a commitment from a U.S. Attorney's Office (USAO) to prosecute the targeted employer before arresting employees for civil immigration violations at a worksite. In the absence of a timely commitment from a USAO, ICE offices should obtain guidance from ICE Headquarters prior to proceeding with a worksite enforcement operation.

## **III. Administrative and Civil Tools**

ICE offices should use administrative tools to advance criminal cases and, in the absence of criminal charges, to support the imposition of civil fines or other available penalties.

### **A. *Form I-9 Audits***

The most important administrative tool is the Notice of Inspection (NOI) and the resulting administrative Form I-9 audit.

- The Form I-9 audit process will be utilized in both criminal and administrative investigations to identify illegal workers, including criminal aliens employed at a business.
- Although auditors will assume primary responsibility for conducting Form I-9 audits, ICE special agents and auditors must coordinate closely because this process will often serve as an important step in the criminal investigation and prosecution of employers.

<sup>1</sup> In this context, "employer" refers to someone involved in the hiring or management of employees. This includes owners, CEOs, supervisors, managers and other occupational titles.

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- ICE offices may issue documents to employers, including Discrepancy and Suspect Document letters, for the purpose of fostering prompt corrections in hiring and documentation practices and also laying the groundwork to establish probable cause to support subsequent criminal charges if corrections are not made.

***B. Civil Fines***

Civil fines, although not as key as criminal prosecution, are an important part of an effective worksite enforcement strategy. These fines provide a penalty when the evidence is not sufficient to support a criminal prosecution or as otherwise appropriate. In the mid-1990's, employers received notices of intent to fine (NIFs) totaling \$26 million.

- ICE offices should work with attorneys in OPLA when issuing a NIF, to facilitate the collection of civil fines for each worker employed in violation of the law.

***C. Debarment Proceedings***

Debarment precludes companies that have knowingly hired illegal workers from securing work on federal contracts. Debarment, therefore, carries highly significant consequences. As ICE increasingly pursues debarment, the practice may have a significant deterrent effect.

- ICE offices should initiate the debarment process, if appropriate, following the successful prosecution of an employer or the occurrence of another trigger to debarment.

***D. Outreach***

Through the ICE Mutual Agreement between Government and Employers (IMAGE) program and other means, ICE will continue to seek out employers who want to comply with our nation's immigration laws and provide them with the training and tools they need to minimize the risk of unwittingly hiring illegal workers.

**IV. Critical Infrastructure and National Security Sites**

- ICE has a responsibility to help assure a legal workforce at America's critical infrastructure workplaces and other security-sensitive locations. Based on careful investigative work, ICE will initiate audits, searches, and targeted employee interviews to remove unlawful workers from such worksites.
- Whenever possible, critical infrastructure protection enforcement operations also will target the employer, including contractors, for criminal or administrative penalties.

**V. Executing a Worksite Enforcement Operation**

Historically, ICE's worksite enforcement operations receive significant attention from Congress, non-governmental organizations, the press, and the public. In addition, particularly because the arrest of a number of illegal workers at the same site can have rippling

**SUBJECT: Worksite Enforcement Strategy**

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consequences on others in the community, ICE offices must refer to and comply with the following:

***A. Reporting Requirements***

All worksite investigations will adhere to pre-existing reporting requirements, including providing 14-day notice to ICE Headquarters in advance of developing or executing enforcement activity. Advance reporting should include a comprehensive operational plan with a section dedicated to the prosecution plan as well as the worksite operation checklist. Requests for exceptions due to exigent circumstances will require immediate telephonic notification to the Assistant Director, Operations.

***B. Humanitarian Guidelines***

The existing humanitarian guidelines, found on the Office of Investigation's intranet, remain in effect, except they will apply to all worksite enforcements involving 25 or more illegal workers rather than 150.

**VI. Conclusion**

ICE is committed to robust worksite enforcement. The above guidance re-prioritizes and refines the existing ICE worksite enforcement strategy and methodology, in order to emphasize the criminal prosecution of employers who violate the law. This strategy is subject to further refinements and improvements as deemed necessary. Additional guidance will be issued in the Special Agent Handbook, currently under revision. While ICE is re-focusing efforts to develop criminal cases against employers who hire and use illegal workers, the administrative arrest of the illegal workforce under ICE's existing immigration authorities continues to be an integral aspect of the overall ICE worksite enforcement strategy. To ensure maximum deterrence, ICE also will pursue all other available tools to encourage employers to utilize and rely on this nation's lawful workforce.

**Tab 2**



## U.S. Immigration and Customs Enforcement

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### Form I-9 Inspection Overview

On November 6, 1986, the enactment of the Immigration Reform and Control Act required employers to verify the identity and employment eligibility of their employees and created criminal and civil sanctions for employment related violations. Section 274A (b) of the Immigration and Nationality Act (INA), codified in 8 U.S.C. § 1324a (b), 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. § 274a.2 designates the Employment Eligibility Verification Form I-9 (Form I-9) as the means of documenting this verification. Employers are required by law to maintain for inspection original Forms I-9 for all current employees. In the case of former employees, retention of Forms I-9 are required for a period of at least three years from the date of hire or for one year after the employee is no longer employer, whichever is longer.

The administrative inspection process is initiated by the service of a Notice of Inspection (NOI) upon an employer compelling the production of Forms I-9. U.S. Immigration and Customs Enforcement (ICE) typically will allow 3 business days to present the Forms I-9. Often, ICE will request the employer provide supporting documentation, which may include a copy of the payroll, list of current employees, Articles of Incorporation, and business licenses.

ICE agents or auditors then conduct an inspection of the Forms I-9 for compliance. When technical or procedural violations are found, pursuant to INA §274A(b)(6)(B) (8 U.S.C. § 1324a(b)(6)(B)), an employer is given ten business days to make corrections. An employer may receive a monetary fine for all substantive and uncorrected technical violations. Employers determined to have knowingly hired or continued to employ unauthorized workers under INA § 274A(a)(1)(a) or (a)(2) (8 U.S.C. § 1324a(a)(1)(a) or (a)(2)) will be required to cease the unlawful activity, may be fined, and in certain situations may be prosecuted criminally. Additionally, an employer found to have knowingly hired or continued to employ unauthorized workers may be subject to debarment by ICE, meaning that the employer will be prevented from participating in future federal contracts and from receiving other government benefits.

Monetary penalties for knowingly hire and continuing to employ violations range from \$375 to \$16,000 per violation, with repeat offenders receiving penalties at the higher end. Penalties for substantive violations, which includes failing to produce a Form I-9, range from \$110 to \$1,100 per violation. In determining penalty amounts, ICE considers five factors: the size of the business, good faith effort to comply, seriousness of violation, whether the violation involved unauthorized workers, and history of previous violations.<sup>1</sup>

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<sup>1</sup> See INA §274A(e)(5) (8 U.S.C. 1324a (e)(5))

Prepared by: Worksite Enforcement Unit  
Office of Investigations

ICE will notify the audited party, in writing, of the results of the inspection once completed. The following are the most common notices:

- Notice of Inspection Results – also known as a “compliance letter,” used to notify a business that they were found to be in compliance.
- Notice of Suspect Documents - advises the employer that based on a review of the Forms I-9 and documentation submitted by the employee, ICE has determined that the employee is unauthorized to work and advises the employer of the possible criminal and civil penalties for continuing to employ this individual. ICE provides the employer and employee an opportunity to present additional documentation to demonstrate work authorization if they believe the finding is in error.
- Notice of Discrepancies - advises the employer that based on a review of the Forms I-9 and documentation submitted by the employee, ICE has been unable to determine their work eligibility. The employer should provide the employee with a copy of the notice, and give the employee an opportunity to present ICE with additional documentation to establish their employment eligibility.
- Notice of Technical or Procedural Failures – identifies technical violations identified during the audit and gives the employer 10 business days to correct the forms. After 10 business days, uncorrected technical and procedural failures will become substantive violations.
- Warning Notice - issued in circumstances where substantive verification violations were identified but circumstances do not warrant a monetary penalty and there is the expectation of future compliance by the employer.
- Notice of Intent to Fine (NIF) - may be issued for substantive, uncorrected technical, knowingly hire and continuing to employ violations.

In instances where a NIF is served, charging documents will be provided specifying the violations committed by the employer. The employer has the opportunity to either negotiate a settlement with ICE or request a hearing before the Office of the Chief Administrative Hearing Officer (OCAHO) within 30 days of receipt of the NIF. If the employer takes no action after receiving a NIF, ICE will issue a Final Order. If a hearing is requested, OCAHO assigns the case to an Administrative Law Judge (ALJ), and sends all parties a copy of a Notice of Hearing and government’s complaint, thus setting the adjudicative process in motion.

The Notice of Hearing spells out the procedural requirements for answering the complaint and the potential consequences of failure to file a timely response. Many OCAHO cases never reach the evidentiary hearing stage because the parties either reach a settlement, subject to the approval of the ALJ, or the ALJ reaches a decision on the merits through dispositive prehearing rulings.

**Determination of Recommended Fine**

The cumulative recommended fine set forth in the Notice of Intent to Fine is determined by adding the amount derived from the **Knowing Hire / Continuing to Employ Fine Schedule** (plus enhancement or mitigation) with the amount derived from the **Substantive / Uncorrected Technical Violations Fine Schedule** (plus enhancement or mitigation). Typically, the date of the violation shall be the date ICE conducted the Form I-9 inspection and not the date the Form I-9 was completed by the employer.

**Penalties for Knowing Hire / Continuing to Employ Violations**

Employers determined to have knowingly hire or continuing to employ violations shall be required to cease the unlawful activity and may be fined. The agent or auditor will 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. This percentage provides a base fine amount depending on whether this is a First Tier (1<sup>st</sup> time violator), Second Tier (2<sup>nd</sup> time violator), or Third Tier (3<sup>rd</sup> or subsequent time violator) case. The standard fine amount listed in the table relates to each knowing hire and continuing to employ violation. The range of the three tiers of penalty amounts<sup>2</sup> are as follows:

**Knowing Hire / Continuing to Employ Fine Schedule**  
(For violations occurring on or after 3/27/08)

Knowing Hire and Continuing to Employ Violations	Standard Fine Amount		
	First Tier \$375 - \$3,200	Second Tier \$3,200 - \$6,500	Third Tier \$4,300 - \$16,000
0% - 9%	\$375	\$3,200	\$4,300
10% - 19%	\$845	\$3,750	\$6,250
20% - 29%	\$1315	\$4,300	\$8,200

<sup>2</sup> Since the passage of IRCA in 1986, federal civil monetary penalties have been increased on two occasions in 1999 and 2008 pursuant to the Federal Civil Penalties Inflation Act of 1990, as amended by the Debt Collection Improvement Act of 1996. These adjustments are designed to account for inflation in the calculation of civil monetary penalties and are determined by a non-discretionary, statutory formula. (See 73 FR 10130 (February 26, 2008))

30% - 39%	\$1785	\$4,850	\$10,150
40% - 49%	\$2255	\$5,400	\$12,100
50% or more	\$2,725	\$5,950	\$14,050

**Knowing Hire / Continuing to Employ Fine Schedule  
(For violations occurring between 9/29/99 and 3/27/08)**

Knowing Hire and Continuing to Employ Violations	Standard Fine Amount		
	First Tier \$275 - \$2,200	Second Tier \$2,200 - \$5,500	Third Tier \$3,300 - \$11,000
0% - 9%	\$275	\$2,200	\$3,300
10% - 19%	\$600	\$2,750	\$4,600
20% - 29%	\$925	\$3,300	\$5,900
30% - 39%	\$1250	\$3,850	\$7,200
40% - 49%	\$1575	\$4,400	\$8,500
50% or more	\$1,900	\$4,950	\$9,800

**Penalties for Substantive and Uncorrected Technical Violations**

The agent or auditor will divide the number of violations by the number of employees for whom a Form I-9 should have been prepared to obtain a violation percentage. This percentage provides a base fine amount depending on whether this is a first offense, second offense, or a third or more offense. The standard fine amount listed in the table relates to each Form I-9 with violations. The range of penalty amounts are as follows:

**Substantive / Uncorrected Technical Violation Fine Schedule**

Substantive Verification Violations	Standard Fine Amount		
	1st Offense \$110 - \$1100	2nd Offense \$110 - \$1100	3rd Offense + \$110 - \$1100
0% - 9%	\$110	\$550	\$1,100
10% - 19%	\$275	\$650	\$1,100
20% - 29%	\$440	\$750	\$1,100
30% - 39%	\$605	\$850	\$1,100
40% - 49%	\$770	\$950	\$1,100
50% or more	\$935	\$1,100	\$1,100

**Enhancement Matrix**

The following matrix will be used to enhance or mitigate the recommended fine contained on the Notice of Intent to Fine.<sup>3</sup>

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

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<sup>3</sup> *Id.*

## Form I-9 Inspection Process

