

PREPARING FOR THE I-9 INSPECTION

ICE (Immigration Customs & Enforcement) may inspect your I-9 forms upon three days notice. Neither your consent nor a search warrant is required, but ICE must serve you with the required three day notice. Often, the notice takes the form of a written “Notice of Inspection.” In addition, ICE may ask you to waive the three day period. Usually, the three day notice period is very important to you as an employer. You may need the time to review and make copies of your I-9 forms.

In addition, before or during the I-9 inspection, ICE officials will ask you for a list of employees. Rather than providing ICE officials with copies of payroll or other records (which include information not relevant to the I-9 inspection), a list of employees (which includes the information requested by the Inspection Notice) is usually sufficient to comply with this request.

Tips for Navigating Through the I-9 Inspection Process:

- › Do not waive the three day notice period
- › Do not give consent to ICE to speak with employees
- › It's best to not have employees present during the inspection, otherwise, ICE may ask them questions about status
- › ICE may ask to use your office to review the I-9 forms. You have the discretion to grant or deny them permission to do so
- › You may insist upon a subpoena before granting ICE access to other personal information aside from I-9's (you can blame the attorney for this - “my attorney instructed me to only provide access to I-9 forms”)
- › Review and evaluate your present I-9 compliance to eliminate any major flaws. Ensure that:
 - Section 1 is completed at time of hire;
 - Verification documents are provided no later than the 3rd business day from date of hire;
 - Receipts which evidence current work authorization are being accepted and placed in the re-verification docket system;
 - Employer completed Section 2 within 3 business days of date of hire;
 - Employees are not required to produce specific documents or more documents than the law requires;
 - The I-9 forms are retained for the entire requisite period of time (1 year after employees period of employment has ended, or 3 years from date of hire, whichever is later); and
 - An adequate docketing/ tracking system is in place to ensure that employees whose work authorization will expire are re-verified.
- › Prepare a computer print-out or other simple list of all employees who worked during the period covered in the Notice of Inspection, including date of hire and termination
- › Separate those I-9 records which are requested by ICE
- › Separate out the remaining I-9 records from other personnel records and review them for completeness and technical mistakes

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Keep your I-9 records separate from other records if they have not been maintained separately, and they can be prepared for the inspection procedure. ICE should not be offered access to full personnel files of employees (unless they are served a search warrant for those records), since those files contain private data that should not be made available to the government.

Failure to complete I-9 forms for inadvertently omitted employees can be corrected at this point. ICE may view the employer's action a good faith attempt to comply.

If you discover errors in completing Section 1 of the I-9 form, you should have the employee correct the failure on the form, and initial/date the correction. With regard to errors in completing Sections 2 or 3, you should make the appropriate corrections, then initial and date each correction. While you cannot be fined for technical or procedural errors on I-9 forms unless ICE grants you an opportunity to cure the defect, you can still be fined for substantive errors without the benefit of prior notice.

After the completion of the employer's internal I-9 audit, the following steps should be taken to prepare for the ICE inspection:

- › Go through the physical premises of the employer to look for situations that might raise further questions (i.e. if there appears to be more workers onsite than I-9 forms completed).
- › Review personnel records and recordkeeping system to get a rationale for why records are maintained in certain ways, why different types of workers are classified in particular ways (e.g. independent contractors v. employees)

ICE is particularly looking for different payroll systems designed by employers for certain employees, such as cash payments as these are an indication of the employment of unauthorized workers.

- › Suspend workers for whom proper verification cannot be completed prior to the inspection

You must be sensitive to the labor law, union contracts, and discrimination in terminating an employee, even when unauthorized employment violations are suspected. If it is clear that an employee has not properly completed the verification procedure or has not produced acceptable employment verification documentation, the employer should call in the employee to him or her that it appears that the employee has not properly documented their right to work in the U.S. The employee should be asked to produce proper employment authorization documentation by a date prior to the inspection or be suspended from employment on that date. The employee's case can then be raised with ICE. Following this procedure probably meets the employer's duty to inquire about suspicious employment authorization cases, while protecting the employer under labor and discrimination laws and union contracts.

- › Decide on a response to ICE Requests for Other Personnel Records

Because most employers will comply with an inspection request for I-9 forms without the need for a subpoena or warrant, the real issue that needs to be resolved by the employer is an ICE request for further documents. Most employers should be reluctant to needlessly expose personnel records to ICE. The expense of complying with such a broad request and the possibility that other types of violations might be exposed that have nothing to do with the I-9 compliance should be considered before consenting to a broad ICE request for personnel records.

ICE may be agreeable to limit its initial request for records, which will have been framed in extremely broad terms. For example, providing ICE with federal or state withholding records listing the names of employees for whom payroll taxes were withheld might satisfy ICE in cases in which it has no cause to suspect that the employer may be paying employees off the books. ICE can compare this list to the available I-9 forms to determine whether there appear to be sufficient I-9 forms for the numbers of employees. This compromise serves to keep ICE inspectors out of individual employee personnel files while providing them with a basis to evaluate the completeness of I-9 forms.

- › Arrange for the ICE Inspector to be Accompanied at All Times When on the Employer's Premises

If an employer gives ICE permission to enter its premises to inspect the verification records, that permission is limited strictly to the inspection of such records. ICE agents should not take the permission to enter for this limited purpose to constitute permission to approach and canvas employees on the premises about their right to be in the U.S. or to constitute permission to examine other employer payroll or personnel records.