

What Worker Advocates Should Know About I-9 Audits

JULY 2009*

On July 1, 2009, U.S. Immigration and Customs Enforcement (ICE) publically introduced a new interior enforcement initiative by announcing that 652 businesses nationwide were being sent notices of inspection in preparation for I-9 audits. These are audits of employers' records "to determine whether or not they are complying with employment eligibility verification laws and regulations." According to ICE, "the new initiative illustrates ICE's increased focus on holding employers accountable for their hiring practices and efforts to ensure a legal workforce." Below is an overview of the I-9 process, I-9 audits, and the rights of workers during each.

■ The I-9 Process: Verifying Employment Eligibility

As a result of the Immigration Reform and Control Act of 1986 (IRCA), it is unlawful for any employer in the U.S. to *knowingly* hire a worker who is not eligible to work in this country. To comply with the law, employers are required to verify the identity and employment eligibility of all employees and to complete a special government form—the I-9 Employment Eligibility Verification Form—for each new hire. This procedure is binding on all employers, regardless of size.¹ The law requires that the employer complete I-9 forms for all new hires, not just those the employer believes are non-U.S. citizens or undocumented. Workers generally must be allowed three business days after they are hired to produce documentation, and they should not be required to produce any documents until they have actually been hired for a position.

¹ The definition of "employee" exempts certain persons from the I-9 requirement, for example, independent contractors, casual domestic workers, etc. For more information, see 8 C.F.R. § 274a.1

The employer is required to keep completed I-9 forms on file for three years or one year after a worker's employment ends, whichever is later, and must make them available for inspection, if requested, by the U.S. Department of Homeland Security, ICE, the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), or the U.S. Department of Labor (DOL). Note that employers are not required by law to keep copies of documents presented by workers during the I-9 process. Employers who fail to complete the I-9 forms, or who continue to employ workers they know lack valid employment authorization, are subject to civil and criminal penalties. For more information about the I-9 process, see "I-9 Process and Antidiscrimination Protections in the INA"² and "Know Your Rights about the Revised Form I-9."³

■ I-9 Audits and Investigations

To enforce some of IRCA's provisions, ICE can conduct random or targeted investigations of employers, including reviewing and inspecting the employer's I-9 form documents as well as conducting investigations into the employer's hiring practices. The penalties that can be imposed upon employers found to have violated the law include cease-and-desist orders, civil penalties for each offense of employing unauthorized workers, civil penalties for failure to fill out and maintain I-9 forms correctly, debarment from federal contracts, and criminal penalties.⁴ To initiate an investigation, ICE needs "articulable" facts that would give ICE "reasonable suspicion" that the employer is violating the law.

² www.nilc.org/wp-content/uploads/2015/11/The-I-9-Process-2009-09-08.pdf.

³ www.nilc.org/wp-content/uploads/2015/11/I-9-form-rev-1pager-2009-09-08.pdf.

⁴ 8 U.S.C. §§ 1324(a); 1324(c); 1324(a)(b)

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Articulate facts cannot be based solely on a worker's ancestry (such as national origin), but they can include race or ancestry when coupled with other facts, and the reasonable suspicion must be based on information that an "objective reasonable" person would find suspicious and not the "subjective impression of a particular officer" or the individual bias of the officer.⁵ Articulate facts that could lead to a worksite investigation include ICE's knowledge that there is a high concentration of undocumented workers in the area, the industry or type of employment involved, the workers' excessive nervousness or that the worker appears to be too indifferent or too cool around the ICE officials, and the inability of the workers to speak English.

Under the law, employers must be provided with at least three days' notice prior to an inspection of I-9 forms by ICE officers, OSC, or DOL.⁶ However, ICE does not need a warrant to inspect or conduct an I-9 audit. Any refusal or delay in presentation of the I-9 forms for inspection is a violation of federal immigration law.⁷ In addition, if the employer does not comply with a request to present the I-9 forms, ICE may compel production of them and any other relevant documents by issuing a subpoena.

■ Workers' Rights During an I-9 Audit

Often, workers may not be aware that an I-9 audit is being conducted at their workplace until they are being called into a meeting by management. This usually happens after ICE has conducted an initial investigation and provides the employer with a list of workers for whom there appear to be discrepancies or whose documents ICE is questioning. During an I-9 audit it is useful to remember the following:

- Workers should try not to panic! Workers who have questions or concerns about the I-9 audit should, if possible, immediately consult a union representative or workers' rights organization that can answer their questions.
- Workers have the right to choose not to speak about their immigration status with their employer.

- Workers should always try to have another worker or a union representative (if they are represented by a union) present when meeting with management or human resources regarding I-9 audit issues.
- Workers who are informed that there are problems with their work authorization should ask (or their advocate should ask) what the basis is for the discrepancy. If possible, they should get this information in writing.
- Keep an eye out for discriminatory patterns. Is the audit being conducted on all workers? Is the employer singling out only some workers? Is ICE singling out only some workers? Is everyone given the same amount of time to correct their records?
- All workers have the right to remain silent and not admit or sign anything when encountering ICE. Workers also have the right to speak to an attorney before providing any information or signing any documents. For more information, see "Immigration Enforcement: Know Your Rights at Home and at Work."⁸

■ Reverification Issues

In certain instances, an employer must ask workers to show their work authorization documents again (after the worker has already filled out the I-9 form when first hired) if the work authorization document that they originally presented had an expiration date. This is also true if the employer being audited by ICE is told by ICE that its I-9 forms contain mistakes or other problems. This is called "reverification" because the employer is checking again to make sure the worker is still authorized to work. Once again, it is the worker's choice which document(s) to present to prove that he/she can continue working. If the worker has shown documents that prove that he/she is a lawful permanent resident (he/she has a green card), then an employer should not ask for documents again. For more information on reverification, see "Proving Work Authorization and Reverification."⁹

⁵ *Orhorhaghe v. INS*, 38 F.3d 488 (9th Cir. 1994); *Nicacio v. INS*, 797 F.2d 700 (9th Cir. 1985).

⁶ See 8 C.F.R. § 274a.2(b)(2)(ii).

⁷ Failure to present the Form I-9 is a violation of the retention requirements. See 8 U.S.C. § 1324a(b)(3).

⁸ www.nilc.org/imm_enfrmt_homework_rts_2008-05-2/.

⁹ www.nilc.org/provworkauth/.