

ICE Changes Form I-9 Inspections and Reclassifies Certain Errors

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For the first time in almost 30 years, U.S. Immigration and Customs Enforcement (“ICE”), has updated its [Form I-9 Inspection Fact Sheet](#). These changes were issued without any notice in the Federal Register and there was no proposed rulemaking. The revisions replace many provisions of the 1997 Virtue Memorandum, which governed compliance until now, and reclassified many common or technical errors as substantive violations. As a result, employers now face an increased risk of violations and penalties.

Background of Form I-9 and Inspections

The Immigration Reform and Control Act requires employers to verify the identity and employment authorization of all employees hired in the United States by properly completing and retaining Form I-9 for each employee. ICE, through Homeland Security Investigations (“HSI”), enforces compliance with Form I-9. Failure to comply can expose employers to significant civil penalties and, in certain circumstances, criminal liability.

An ICE inspection is typically initiated through the service of a Notice of Inspection (“NOI”), which compels the employer to produce Forms I-9 and supporting documentation within a short timeframe—generally at least three business days. In addition to Forms I-9, ICE often requests supporting records such as payroll data, lists of current and former employees, and corporate formation documents. Once the documentation is produced, HSI investigators review the materials for compliance such as assessing whether forms were timely and properly completed and whether documentation appears valid and sufficient.

Errors fall into two categories: technical and substantive as detailed in the Virtue Memorandum. If ICE identifies technical or procedural deficiencies, employers are typically afforded at least ten business days to correct those issues before penalties are assessed. However, this grace period is not afforded for substantive violations which result in immediate liability.

Changes in Classifications for Certain Errors

The updated Fact Sheet changes many technical errors to substantive errors as detailed in the below chart. Importantly for employers, the changes also eliminate the document copy safe harbor rule. The safe harbor allowed an employer who missed or incorrectly entered certain fields in Section 2, such as the expiration date, but had maintained a legible copy of the document to treat this as correctable technical error, not a substantive error. This means any missing or incorrect document information for any List in Section 2 is now a substantive violation.

Error	Previous Classification	Current Classification
General I-9 Violations		
Failing to complete I-9	Substantive	Substantive
Not providing I-9 during inspection	Substantive	Substantive
Utilizing Spanish version of Form I-9 outside of Puerto Rico	Technical	Substantive
Not complying with electronic I-9 requirements	Technical	Substantive
Section 1: Employee Information		
Missing legal name or date of birth	Technical	Substantive
Checking more than one box for citizenship or immigration status	Substantive	Substantive
Missing Alien Registration of USCIS number	Technical	Substantive
Missing authorized to work date (anything in Box 4)	Technical	Substantive
Failure of employee to sign	Substantive	Substantive
Failure of employee to date	Technical	Substantive
Use of incorrect or outdated Form I-9 edition	Technical	Technical
Missing other last names	Technical	Technical
Incorrect or missing SSN for E-Verify employers only (otherwise substantive error)	Technical	Technical
Section 2: Employer Verification		
Failure to examine documents within 3 business days	Substantive	Substantive
Incomplete or incorrect document information including title, issuing authority, expiration date	Technical	Substantive
Failure to check alternative procedures box when using remote document inspection	Technical	Substantive
Use of alternatives procedures without being enrolled in E-Verify or another DHS-authorized program	Substantive	Substantive

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Missing name or title of authorized representative	Technical	Substantive
Missing date of hire	Technical	Substantive
Failure to sign Section 2 certification	Substantive	Substantive
Failure to date Section 2 certification	Substantive	Substantive
Missing employee's name at top	Technical	Technical
Missing employer's name or address	Technical	Technical

**** This chart only addresses errors in main Form I-9 and not any of the supplemental forms such as preparer's certification or reverifications.****

Employers should also be mindful of their document retention obligations. Forms I-9 must be retained for at least three years after the date of hire or one year after the date employment ends, whichever is later. Failure to retain required documentation can independently form the basis for penalties, even where employees are otherwise authorized to work and documentation correctly completed.

Electronic/Remote Verifications

The updated Fact Sheet makes clear that any deficiencies in an employer's electronic I-9 system are substantive errors. Some common deficiencies when using electronic verification include incomplete audit trails, failure to follow electronic signature protocols, and data security issues. Employers utilizing electronic I-9 systems should confirm enrollment in E-Verify, and verify any electronic systems meet regulatory requirements, including the ability to produce legible and complete records and maintain appropriate audit trails.

Potential Penalties

Employers might be wondering if there is any benefit to auditing and correcting I-9s if many errors are now substantive. The definitive answer is yes. Penalties for paperwork violations currently range from \$288 to \$2,861 for paperwork violations. Higher penalties are imposed for knowingly hiring or continuing to employ unauthorized workers. Penalties are adjusted annually, [with the 2026 rates being published on January 2, 2025](#).

With more errors classified as substantive, employers should correct errors to trigger the five-year statute of limitations. For current employees, as long as there is an employment relationship, any deficient or incorrect I-9 is a continuing violation. Courts have held that a paperwork violation begins at the time of the failure (so generally the completion of the Form I-9) and continues until (1) the error is corrected or (2) the statutory obligation to retain the form expires. Once one of these two events is triggered, the statute of limitations begins to run. Thus, assuming correctly done and documented, employers who correct deficient I-9s and five years pass will eliminate any civil liability for that form.

Next Steps for Employers

Given the heightened enforcement environment and the relatively short response timelines associated with an inspection, employers are strongly encouraged to take proactive steps to ensure compliance. Employers should consider conducting internal audits of their Forms I-9 to identify and correct errors in advance of any government inquiry, as well as implementing or updating standardized compliance policies to promote consistent and accurate completion practices across the organization. Employees involved in the I-9 process should be retrained on policies and on properly completing Form I-9. Employers should also establish a clear protocol for responding to a Notice of Inspection, including identifying responsible personnel and ensuring that required documentation can be produced promptly within the three-day timeframe.

Finally, employers should consult with experienced legal counsel when responding to ICE notices or addressing complex compliance issues, particularly when questions arise regarding employee authorization or potential exposure to fines.

By taking these proactive measures, employers can better position themselves to respond effectively to an ICE inspection and reduce the risk of penalties.

Please contact the author, [Christina Nechiporchik](#), or any member of Bodman's [Workplace Law Group](#) if you have questions regarding any of the information above. Bodman cannot respond to your questions or receive information from you without establishing an attorney-client relationship and clearing potential conflicts with other clients. Thank you for your patience and understanding.

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