



PROGRAM MATERIALS
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Don't Freeze Up: Know What to Do When ICE Comes Knocking

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Welcome and thank you for joining us for today's seminar. In today's Roundtable, our topic is, "Don't Freeze Up: Know What to Do When ICE Comes Knocking." We have just a few announcements before we get started.

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Don't Freeze Up: Know What to Do When ICE Comes Knocking

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August 6, 2019



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TODAY'S AGENDA

- The Return of Social Security No-match Letter
- Managing Staffing Needs:
After Receiving A No-match Letter
- Why Do We Care About Form I-9?
- Enforcement: Does The Government Really Care?
- What to do if ICE Shows Up
- What Else Can I Do? Planning and Best Practices
- Q&A





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IMMIGRATION COMPLIANCE

The Return of the SSA No-Match Letter

THE RETURN OF SSA NO MATCH LETTERS

- Since March 2019, Social Security Administration has sent more than 570,000 no-match letters
- Businesses identified as having a name and Social Security Number combination submitted on a Form W-2 that do not match SSA records
- Company must take proper steps address no-match letter.
- Receipt of no-match letter is not proof of an unauthorized or undocumented employee
- Do not take adverse action, on the basis of the letter alone, against any employee
- Can be used as evidence in ICE investigation



SOCIAL SECURITY MISMATCHES: PROCEDURE

- Check the reported no-match information against personnel records
- If the discrepancy cannot be resolved, inform the employee in writing of the no-match letter and ask the employee to confirm his or her name/SSN
- If the discrepancy still exists, ask the employee in writing to contact the SSA to correct and/or update their information and give the employee a reasonable period of time to resolve it
- Submit corrections to the SSA
- Contact counsel to discuss employees who do not respond and/or act to resolve the issue
- General timing: 60 days? From when? Reasonable period of time?



SOCIAL SECURITY MISMATCHES: CORRECTION PROCEDURES

- Complete a W-2c online or in hard copy with the correct information
 - When correcting only an employee's name and/or Social Security number, complete Form W-2c boxes d through i. Do not complete boxes 1 through 20
- If the employee is given a new Social Security card following an adjustment to his or her immigration status that shows a different name and Social Security number, file a Form W-2c for the most current year only
- Advise the employee to correct the Social Security number and/or name on his or her original Form W-2
- Have the employee complete a new W-4 form with the correct name and/or Social Security number



SOCIAL SECURITY NO-MATCH LETTERS & FORMS I-9

- Failure to address a no-match letter AND/OR failure to follow-up with an employee and their progress towards resolving the no-match could lead to a finding by ICE of Constructive Knowledge of employing unauthorized workers
- During ICE inspection (audit), government usually requests employer records concerning receipt of No-Match Letters and evidence as to how the company responded
- No government confirmation (to-date) of sharing information between agencies...but...
- Best practice: ensure accurate Forms I-9 and wage-reporting records





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MANAGING STAFFING NEEDS

After Receiving a No-Match Letter

MANAGING STAFFING NEEDS

- Be Proactive
- Educate your management and leadership teams
- Recruiting is Everyone's Job
 - Networking
 - Social Media
- Career paths – develop and promote



HR TIPS: COMMUNICATING WITH EMPLOYEES

- Coordinate a plan with leadership
- Confer with your employment counsel
- Prepare your communication templates now
- Set up record keeping and follow up procedures
- Educate your managers
 - Employee FAQs
 - Conversations with employees
- Be transparent and consistent





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THE FORM I-9

Why do we care?

WHO MUST COMPLETE A FORM I-9 AND FOR WHOM?

- Employers must verify and document the identity and work authorization of all new hires, including US citizens
- U.S. Employers are responsible for completing / ensuring the completion of and retaining Forms I-9 for:
- All new hires for employment in the US after Nov. 6, 1986 if the individual works for pay or other type of payment
 - Re-verified Employees
 - Re-hired Employees
 - But there are a few limited exceptions...



EXCEPTIONS TO COMPLETING THE FORM I-9

- Individuals hired on or before Nov. 6, 1986, but only if:
 - they are continuing in their employment and
 - have a reasonable expectation of employment at all times
- Casual domestic workers in private homes on a sporadic, irregular or intermittent basis
- Independent contractors or those who provide labor and are employed by a contractor that provides contract services such as Employee leasing or temp agencies
- Employees not physically working in the U.S.



INDEPENDENT CONTRACTORS

- If a business or an individual knows or should have known its independent contractors have undocumented individuals working for them, they will be fined
- Cannot move hiring responsibilities to contractors who may hire undocumented workers



CONSTRUCTIVE KNOWLEDGE

- An employer is in violation of the law if it employs a worker knowing that the individual is not authorized to be employed.
- Knowing is a broad definition which includes constructive knowledge, not only actual knowledge



DO YOU HAVE CONSTRUCTIVE KNOWLEDGE?

- You may have constructive knowledge of hiring and / or continuing to employ an unauthorized worker if:
 - Form I-9 is not completed in good faith
 - Failure to prepare an I-9 is equivalent to knowingly hiring an unauthorized alien
 - Employer continues to employ an alien after time-limited work authorization has expired and not renewed
 - Employer has information available to it that indicates the person is not authorized to work
 - Employer acts with reckless disregard for allowing another individual to introduce unauthorized worker to its workforce
- Potential for heavy fines!



WHAT IS A FAILURE?

- Employers are penalized for failing to comply
 - Not doing a good job
 - Paperwork errors/mistakes
 - Ignoring the job/REALLY not doing a good job
 - Failing to verify or to do an I-9 at all



WHAT IS A FAILURE?

- Not completing an I-9 properly
 - Mistakes in completing form
 - Mistakes in documenting employment or identity documentation
 - Mistakes in types of documents accepted
- Not completing an I-9 on time
- Not following up on expiring work authorizing documents
- Hiring/employing someone without authorization
 - Knowingly / Should have known



WHAT IS A FAILURE?

- Contracting to obtain the services of someone without authorization
- Accepting false documents
- Excessively documenting employees
- Discriminating



PENALTIES: ADMINISTRATIVE FINES

- Administrative Fines
 - Substantive/Uncorrected Technical Violations:
 - \$220 - \$2,191 per violation
 - Employing unauthorized aliens:
 - \$548 - \$21,916 per violation



PENALTIES: ADMINISTRATIVE FINES

- Discrimination (authorized individual):
 - \$445 to \$17,816 per individual
- Participating in Document Fraud:
 - \$445 - \$8,908 per document
- Requiring Indemnification (of an individual):
 - \$2,156/indv +restitution
- Document Abuse:
 - \$181- \$1,811 per individual



PENALTIES

- The U.S. Department of Justice can separately bring discrimination charges for:
 - E-Verify violations
 - I-9 violations for:
 - Citizenship Status
 - Immigration Status
 - National Origin
 - Retaliation



PENALTIES: CALCULATING FINES

- Fine Matrix: (Knowing)

Knowing Hire and Continuing to Employ Violations	1st Offense	2nd Offense	3rd Offense
0% - 9%	\$548	\$4,384	\$6,575
10% - 19%	\$1,140	\$6,322	\$8,547
20% - 29%	\$1,754	\$7,232	\$11,177
30% - 39%	\$2,411	\$8,174	\$13,807
40% - 49%	\$3,069	\$9,094	\$16,568
50% or more	\$3,726	\$10,026	\$19,242



PENALTIES: CALCULATING FINES

- Fine Matrix: (Standard)

Substantive / Uncorrected Technical Violations	1st Offense	2nd Offense	3rd Offense
0% - 9%	\$220	\$1,096	\$2,191
10% - 19%	\$548	\$1,315	\$2,191
20% - 29%	\$876	\$1,534	\$2,191
30% - 39%	\$1,205	\$1,753	\$2,191
40% - 49%	\$1,534	\$1,972	\$2,191
50% or more	\$1,862	\$2,191	\$2,191



PENALTIES: CALCULATING FINES

- Enhancement/Mitigation Matrix:

Factor	Aggravating	Mitigating	Neutral
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%



PENALTIES: CRIMINAL

- Federal Criminal Charges:
 - aiding and abetting
 - harboring illegal aliens
 - knowingly hiring illegal aliens
 - money laundering
 - aggravated identity theft
- Responsibility
 - Company <-> Individual
 - Officers in the C-Suite; HR Personnel; others involved with hiring are exposed to criminal sanctions



PENALTIES: CRIMINAL

- Criminal Violation for pattern or practice:
 - \$3,000 per unauthorized alien + 6 months in prison
- Major fines
 - \$10,000 - \$250,000
- Incarceration (Company Representatives)
 - 6 months – 20 years
- Seizure of personal and company property



Presenter to read NY Code

This code is required for all attorneys wishing to receive CLE credit in the state of NY

Please notate it carefully

The presenter will only be able to read the code twice and will not be able to repeat it or email it to you.

Thank you!



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ENFORCEMENT: Does the Government Really Care?

SURGE IN WORKSITE ENFORCEMENT

- FY 2017:
 - 1,691 Worksite Investigations
 - 1,360 I-9 Audits
 - 139 Criminal Arrests
 - 172 Administrative Worksite Related Arrests
 - 71 managers indicted/55 managers convicted
 - \$10.2 million in judicial fines, forfeitures and restitutions
- FY 2018 (through 12/11/2018)
 - 6,848 Worksite Investigations
 - 5,981 I-9 Audits
 - 779 Criminal Arrests
 - 1,525 Administrative Worksite Related Arrests
 - 72 managers indicted/ 49 managers convicted
 - \$97.6 million in judicial forfeitures, fines and restitution



ENFORCEMENT AGENCIES

- Multiple Agencies
 - Interagency Cooperation
- Investigative Agencies
 - Department of Homeland Security (DHS)
 - U.S. Immigration and Customs Enforcement (ICE)
 - Office of Special Counsel (OFSC)
 - Department of Labor (DOL)
 - Internal Revenue Service (IRS)
 - Social Security Administration (SSA)
 - Federal Bureau of Investigations (FBI)
 - Local Law Enforcement



IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE)

- Immigration and Customs Enforcement (ICE)
 - New records set annually – investigations, arrests, deportations, penalties and criminal charges of employers
 - More Personnel
 - Seizures = \$Millions
- Current ICE Strategy
 - Key component = targeting businesses
 - Remove financial incentives/ infrastructure
 - Achieve DETERRENCE
 - Current administration's focus includes employers (employment infrastructure) AND the unauthorized aliens



HOW ENFORCEMENT IMPACTS BUSINESS

- More than just fines
 - Disruption to business activities
 - Loss of workforce
 - Bad press
 - Damage to trust/relationships



INSPECTION VERSUS RAID

- Inspection
 - Appear unannounced.
 - ICE serves Notice of Inspection (NOI) requesting documents.
 - Require production within 3 business days.
- Raid
 - Appear unannounced.
 - ICE Homeland Security Investigations (HSI) appear in large numbers at employer's premises without warning with intent of catching employer and employees off guard.
 - ICE surrounds the building (usually with aerial support).
 - ICE enters with criminal search warrant.



NOTICE OF INSPECTION

- Inspection: Notice of Inspection (NOI)
 - Inspection (aka audit) by the government
 - Typical administrative review process
 - Issued at workplace
 - Three days to produce original I-9s (may waive/not recommended)
 - Other records requested
 - ICE does not need a subpoena or warrant for I-9 inspection



NOTICE OF INSPECTION

- ICE will typically request:
 - Original I-9 Forms, with supporting documents, if kept (strict timing)
 - Payroll records
 - Quarterly wage and hour reports
 - Business Information
 - Business Licenses
 - E-Verify records
 - Employee Listing
 - Copies of any SSA Mismatch correspondence
 - System information regarding electronic record keeping, if used.
- ICE may require Company Representative make appearance to give testimony and provide documents



AFTER ICE INSPECTS DOCUMENTS

- After ICE reviews records provided, ICE may issue the following:
 - Notice of Inspection Results (if found in compliance)
 - Notice of Technical or Procedural Failures
 - Notice of Suspect Documents
 - Notice of Intent to Fine
 - Warning Notice
- If ICE issues Notice of Intent to Fine, the company may
 - Pay (payment plans are possible)
 - Negotiate a reduced fine/settlement OR
 - Request a hearing





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What to Do When ICE Comes Knocking

WHAT TO DO WHEN ICE SHOWS UP

- Retain Legal Counsel in advance
 - immigration compliance + white collar criminal (to prepare for the worst type of investigation)
- Be Prepared: Have a Plan
 - In place in advance = ready when you need it (always short notice)
 - Similar to disaster planning
 - Each person should know his/her role and what to do



WHAT TO DO WHEN ICE SHOWS UP

- If Agents Appear at the Door
 - Call your attorney immediately
 - Get the name, title and contact information of the lead investigator
 - Determine the purpose of the agents' visit
 - a search of the facility, a criminal search warrant, an administrative warrant or an Inspection?
 - DO NOT sign a Consent to Search document or to waive the required three day period without approval of legal counsel



WHAT TO DO WHEN ICE SHOWS UP

- If Agents Appear at the Door
 - If serving a Notice of Inspection (NOI):
 - Accept service of the document (may include a subpoena)
 - Clarify/confirm the due date
 - Remain cooperative, however, do not answer questions posed by the agents – politely advise them that you will have your attorney respond



WHAT TO DO WHEN ICE SHOWS UP

- If Agents Appear at the Door
 - If serving a warrant:
 - Do not interfere with their search
 - Request a copy of the warrant
 - READ IT
 - Accompany the agents at all times
 - Take careful notes of all that is said and done
 - Make a list of every file that is searched or seized
 - Do not answer questions posed by the agents – politely advise them that you wish to await the arrival of your counsel



WHAT TO DO WHEN ICE SHOWS UP

- If Agents Appear at the Door
 - If serving a warrant:
 - Instruct employees not to interfere with searching agents
 - Let employees know that they are not required to answer agents' questions and
 - Let employees know they have the right to have counsel present
 - It may be necessary to arrange for separate counsel for employees





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WHAT ELSE CAN I DO?

Plan, Protect, Follow Best Practices

HELP YOURSELF! PROACTIVE MEASURES

- Self- Audit
- Audit with Counsel
- Training
- Establish Immigration Compliance SOPs
- Use Electronic System
- Establish Tickler System for Employee Reverification



HOW TO PROTECT YOURSELF

- Audit
 - Less arduous than the 3 day audit period forced by an inspection notice.
 - Can uncover problems early - in time to be corrected before the imposition of sanctions.
 - Improve Compliance
 - Alert as to common errors
 - Reveal systemic problems in an employer's IRCA compliance program
 - Documentation issues
 - Calendaring/updating
 - Habitual Mistakes
 - Misunderstanding
- Advantage of having Counsel: Privilege



HOW TO PROTECT YOURSELF

- Train – in depth training
 - Educate/teach front line personnel
 - Develop and implement a compliance program including:
 - Procedures/Instructions/Guidelines
 - Levels of responsible personnel
 - Secondary review
 - Centralized vs. non-centralized human resource processing



TOP 10 TIPS: RECOMMENDED BEST PRACTICES

-
- | | |
|---|--|
| 1. E- Verify | 6. What to do when USCIS issues New Form I-9 |
| 2. SSNVS | 7. Purge Logs |
| 3. Copying Supporting documents | 8. Limit Access to Paper and/or Electronic Forms I-9 |
| 4. Employees with New Identities | 9. Ensuring electronic system is compliant |
| 5. Completing Form I-9 for Remote Hires | 10. Review Section 1 before completing Section 2 |
-



1. E-VERIFY

- Only required in some States and certain situation- recommended best practice
- E-Verify only new hires or re-hires (unless federal contractor required to run existing employees)
- Submit E-Verify query no later than 3rd business day after employee starts work
- Use the information on Form I-9 for E-Verify query submission
- Do not take adverse action against employee for Tentative Non-Confirmation AND employee contests
- Close E-Verify case after receiving final result
- Maintain copies of E-Verify result with Form I-9
- USCIS E-Verify Monitoring and Compliance Unit: conducting E-Verify audits; do not misuse the program!



2. SSNVS

- Social Security Number Verification Service (SSNVS) may be used by employer to verify names and Social Security numbers of current and former employees for wage reporting purposes
 - May not be used as a pre-screening tool
 - May not be used for immigration purposes
- If name + number do not match IRS records:
 - Check company records
 - Ask employee to provide exact info as shown on SSC
 - If it matches, ask employee to visit local Social Security office to resolve issue
 - Once resolved, the employee must report to employer any-all changes



3. COPYING SUPPORTING DOCUMENTATION

- Not required under law, but strongly recommended. If do copy, must copy for everyone AND retain with Form I-9
- The employer representative should make double-sided and clear copies of the documentation presented and examined during the Form I-9 process
- Copies should be made of the documents presented by each employee and stapled to the Form I-9
- Document copies can reduce Substantive Violations to less serious Technical/Procedural Violations
- NEVER a substitute for completing the Form I-9



4. EMPLOYEES WITH NEW IDENTITIES

- Current employees may contact employer presenting new identity—different from that previously used to complete Form I-9. This occurs where employee previously working using false identity and now has work authorization, etc.
- Form I-9 rules do not require termination; treat consistently
- Complete new Form I-9, include original date of hire in Section 2, and attach it to the Form I-9 previously completed; attach Memo to File explaining
- E-Verify Employers: if a new Form I-9 is completed, create a new E-Verify case; ask employee to record legal name changes with SSA to avoid E-Verify mismatch



5. COMPLETING FORM I-9 FOR REMOTE HIRES

- Form I-9 process may not be handled via scan/fax/email
- Company may use an authorized representative to fill out Form I-9 on behalf of company including notary public, agents, officer
 - No requirement the authorized representative has specific agreement with company
- Authorized representative must physically examine documents; cannot review via webcam
- A notary public is acting as an authorized representative of the company; not as a notary (no notary seal on Form I-9)
- Company still liable for any violations on Form I-9 or the process



6. USCIS ISSUES NEW FORM I-9

- Always ensure you are using most current version of Form I-9 found at www.uscis.gov
 - Paper Form or Smart Form– both must be signed
 - Electronic version through HRIS system may be signed electronically
- When USCIS issues new version of Form I-9, DO NOT re-I-9 all existing employees
- Do not print multiple Forms I-9 for easy completion as this results in incorrect version being completed



7. PURGE LOGS

- I-9 retention requirements
- Once the retention period ends, the company may purge Form I-9 records for those employees outside the retention period.
- Best practice: maintain a simple purge-log spreadsheet which may help in the event of an ICE audit.
 - Record:
 - Name
 - Date of Hire
 - Date of Term
 - Date of Purge



8. LIMITING ACCESS TO PAPER/ ELECTRONIC FORMS I-9

- Electronic system must have controls for security / integrity and ability to ensure audit trail to detect any alteration or change to the Form I-9 post-creation
- Paper Form I-9 must be kept under lock and key due to highly sensitive and confidential nature of information contained within



9. ENSURING ELECTRONIC SYSTEM IS COMPLIANT

- The system must require Section 1 completed by employee and Section 2 by employer
- The system may not add additional data fields or language to Form I-9
- Electronic signature is 'ok' so long as system allows signatories to acknowledge they read the attestation and attach the electronic signature to electronically completed Form I-9 at the time of the transaction; create and preserve a record verifying the identity of the person producing the signature; and upon request of the employee, print out confirmation
- Electronic retention is 'ok'



10. REVIEW SECTION 1 BEFORE SECTION 2

- Employee should complete Section 1 in presence of employer; employer should review Section 1 for any errors in presence of employee before moving to Section 2
 - Employer should work with employee to remediate any errors immediately
- Remember, Form I-9 is the employer's responsibility and errors subject the employer to significant monetary and criminal penalties





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Q&A

Thank You!

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