

GUIDE TO I-9 SELF AUDITS

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IMMIGRATION SOLUTIONS

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I-9 self audits are not required by law but employers are encouraged to conduct internal audits to ensure ongoing compliance and to spot troublesome trends. Meltzer Hellrung recommends that employers review all I-9 forms created since the last audit for all employees or a random sampling of I-9s to ensure it is on a neutral and non-discriminatory basis.



Why should a company conduct a self-audit?

The purpose of self audits is to ensure ongoing I-9 compliance. As of 2024, civil fines for I-9 violations range from \$272 to \$2,701 per violation, and the fines increase with each repeated violation. If an employer knowingly hired or continued to employ a worker without work authorization, the penalties to pay range from \$676 to \$27,018 per worker.

During an I-9 audit or inspection, Immigration and Customs Enforcement (“ICE”) will review a company’s I-9 forms and supporting paperwork to ensure compliance. An audit is usually triggered by one of the following situations:

- ⇒ Complaints from current or former employees.
- ⇒ Complaints from job candidates who did not get an offer.
- ⇒ ICE targeting based on industry (e.g. industries with significant numbers of employees in manual labor positions, such as restaurants, manufacturing facilities, and landscaping companies).

ICE officials can inform the owner, designee, senior management official or registered agent of the business entity of an inspection in person or by certified U.S. mail, return receipt requested. ICE officials will provide a letter requesting the I-9 forms within 3 days of the notice date. Officials may also use subpoenas and warrants to obtain the forms without providing 3 days’ notice.

When responding to an audit, the employer will be responsible for the following:



- ⇒ Retrieving and reproducing all electronically stored and paper Form I-9’s and any other documents the officer requests. Additional documents typically include payroll records.
- ⇒ Providing the officer with the necessary hardware and software to inspect electronic documents.
- ⇒ Providing the officer with any existing electronic summary of the information recorded on the employer’s Form I-9. Employers who refuse or delay an inspection may be in violation of the law.

What should an employer consider before conducting an internal I-9 audit?

Before conducting an audit, an employer should consider the purpose and scope of the audit. The employer should consider how it will document its communications with employees, if necessary, and how it will ensure consistent standards when addressing any Form I-9 deficiencies revealed by the audit.

How often should a company conduct an audit?

We recommend all employers to conduct internal audits at least once a year. Depending on how many employees a company hires and who handles the I-9 process, more frequent auditing may be recommended.

Where should I-9 records be kept?

I-9 forms should always be maintained separately from personnel files. They can be kept in digital or physical form.

Why should employers purge old I-9s?

Employers are allowed to remove certain I-9 forms from their files. I-9 forms should be retained for three years after the date of hire, or one year after the date employment ends—whichever is later. Should an employer be audited, ICE will review all existing I-9's on file. It is in the employer's interest to purge I-9's, when permissible, as it limits an employer's potential liability in the case of an audit.

Refer to I-9 Overview Collateral.

Tips on assessing requirements:

- ⇒ A sticky note with the words “retain until” should be placed on the terminated employee's Form I-9, with room to write two dates: the three-years-after-hire date and the one-year-after-termination date, if the employee has been terminated.
- ⇒ If I-9s are being retained in digital format, Include purge date in file name (e.g.05.14.2022_I-9_Employee Last name, Employee First Name). The I-9s can then be organized by date and easily identified as ones that can be purged.

How long should companies have to keep I-9s?

I-9 forms should be retained for three years after the date of hire, or one year after the date employment ends—whichever is later.

- **Determine the one-year-after-termination date** - All I-9s must be retained for at least one year after termination. The one-year-after-termination date should be written on the sticky note.

Example: If Employee A terminates on 2/9/21, then the one-year-after-termination date for Employee A is 2/9/22.

- **Determine three-years-after-hire date** - All I-9 forms must also be retained for at least three years after the date of hire. Therefore, the second date to write on the sticky note is the three-years-after-hire date (the employee's hire date should be on the Form I-9 in the certification section).

Example: If Employee A was hired on 05/14/2019, then the three-year-after-hire date to write on the sticky note is 5/14/22.

- **Establish the latest retention date** - Next, employers circle the date that is later (or cross off the earlier date).

Example: Employee A's Form I-9 retention dates are:

- ⇨ 02/09/2022 (one year after termination).
- ⇨ 05/14/2022 (three years after hire).

Given that 05/14/2022, is later than 02/09/2022, employers would circle 05/14/2022. This I-9 cannot be shredded until after 05/14/2022. The sticky note should read "Retain until 05/14/2022."

Tip on shortcut for those employed more than three years:



Because all current employees must have a Form I-9 on file, the three-years-after-hire retention requirement is already met for any employee who has been employed with the organization for three years. Therefore, I-9s for all employees who terminate after three years of employment are simply retained for one year after termination. For those employed for less than three years, the above calculations would be made to ensure the employer has the Form I-9 in its possession for a minimum of three years from the date of hire.

Should an employer use a third party auditor when conducting an internal Form I-9 audit?

An employer is not required to use a third-party auditor to conduct an internal I-9 audit. Meltzer Hellrung provides this service if a client would like to use a third-party auditor.

What should an employer do to correct an error?

An employer may only correct errors made in Section 2 and Section 3 of the Form I-9. The best way to correct the form is to:

- Draw a line through the incorrect information.
- Enter the correct or omitted information.
- Initial and date the correction or omitted information.

An employer should not conceal any changes made on the Form I-9—for example, by erasing text or using correction fluid, nor should the employer backdate the Form I-9.

An employer that made multiple errors in Section 2 or 3 of the form may redo the section(s) containing the errors on a new current Form I-9, and attach it to the previously completed form. An employer should attach an explanation of the changes made to an existing Form I-9 or the reason a new Form I-9 was completed, and sign and date the explanation.

An employer may not correct errors or omissions in Section 1. If an employer discovers an error or omission in Section 1 of an employee's Form I-9, the employer should ask the employee to correct the error. The best way to correct the error is to have the employee:

- Draw a line through the incorrect information.
- Enter the correct or omitted information; and
- Initial and date the correction or omitted information.

Employees needing assistance to correct or enter omitted information in Section 1 can have a preparer and/or translator help with the correction or omitted information. The employee, preparer, or translator should:

- Draw a line through the incorrect information and enter the correct information or note the omitted information;
- Have the employee initial and date the correction or omitted information if able; and
- Initial and date the correction or omitted information next to the employee's initials.

If the preparer and/or translator who helped with a correction or noted omitted information completed the preparer and/or translator certification block when the employee initially completed the Form I-9, he or she should not complete the certification block again. If the preparer and/or translator did not previously complete the preparer and/or translator certification block, he or she should:

- Complete the certification block; or
- If the certification block was previously completed by a different preparer and/or translator:
 - ⇒ draw a line through the previous preparer and/or translator information; and
 - ⇒ enter the new preparer and/or translator information (and indicate "for corrections").

If the employee is no longer working for the employer, the employer should attach to the existing form a signed and dated statement identifying the error or omission and explain why corrections could not be made (e.g., because the employee no longer works for the employer).

Employers who are enrolled in E-Verify

WHAT WOULD AN EMPLOYER WHO USES E-VERIFY DO IF THEY DISCOVER THEY DID NOT CREATE E-VERIFY CASES FOR ALL EMPLOYEES HIRED AFTER THE EMPLOYER ENROLLED IN E-VERIFY?

Unless an employer is a federal contractor with a federal contract that contains an E-Verify clause, it generally cannot use E-Verify for employees that were hired prior to enrollment of the E-verify program. Where the employer was enrolled in E-Verify but did not use the system as a business practice, it should not go back and create cases for any employees hired during the time there was deliberate non-use of E-Verify. However, if an employer learns that it inadvertently failed to create a case in E-Verify, the employer should bring itself into compliance immediately by creating a case for the employee. An employer should consult with Meltzer Hellrung immediately.

Keep in mind if an employer uses E-verify, the employer must also check for E-verify confirmations along with the I-9 when conducting self-audits.



MH Recommendations:

- ⇒ If you have less than 100 new I-9s per year, we recommend completing self-audits once a year.
- ⇒ If you complete more than 100 new I-9s per year, we recommend completing a self-audit a few times a year by selecting a random set of I-9s.
- ⇒ We recommend completing an audit at the time an I-9 reverification is needed to make sure no other corrections of the I-9 are necessary.
- ⇒ If you see a recurring error that relates to a particular person or practice, it's important to remedy that immediately, and contact your MH attorney.

For additional information and questions, please contact your MH attorney.



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