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Form I-9 in the Digital Age: Employer Compliance and Enforcement Challenges

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FORM I-9 IN THE DIGITAL AGE: EMPLOYER COMPLIANCE AND ENFORCEMENT CHALLENGES

BY SARI LONG* AND CATHERINE BETTS**†

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I. INTRODUCTION

More than 187,000 jobs were added to the U.S. economy each month in 2016.¹ For every new employee hired into one of those jobs, employers must complete and retain a Form I-9.² The I-9 requirement applies to every employee hired after November 6, 1986, including U.S. citizens as well as foreign national employees.³ Compliance with I-9 requirements has long posed challenges for employers, and because employer enforcement initiatives have increased in the past eight years (with no signs of slowing), employers are obliged to continuously review and update their onboarding processes, training, and retention practices. Some employers have opted to address these challenges by using an electronic system for completing the I-9.⁴ Others have decided to continue completing the form in its paper format, but retain it electronically for ease of record-keeping and file management.⁵ These electronic solutions can increase employer compliance with I-9 rules, but present new challenges and issues as electronic I-9 systems are governed by a separate, specific set of regulations and guidance.⁶

Over the past decade, there has been an increase in both the number of companies providing electronic I-9 products and the number of employers using some kind of electronic form generation or retention system.⁷ These include highly sophisticated electronic I-9 systems that are integrated with the employer's HRIS platform and E-Verify, as well as basic electronic retention systems involving document scanning.⁸ The spectrum of electronic

1. *Employment Up 156,000 in August, Averaging 176,000 per Month So Far This Year*, DOL BUREAU OF LAB. STAT. (Sept. 6, 2017), <https://www.bls.gov/opub/ted/2017/employment-up-156000-in-august-averaging-176000-per-month-so-far-this-year.htm>.

2. *Who Needs the Form I-9*, USCIS, <https://www.uscis.gov/i-9-central/complete-correct-form-i-9/who-needs-form-i-9> (last updated July 17, 2017).

3. *See id.*

4. *See generally 4 Benefits of Completing E-Verify Through an Integrated Form I-9 Solution*, HIRERIGHT (Apr. 2, 2012) [hereinafter *4 Benefits*], <http://www.hireright.com/blog/2012/04/4-benefits-of-completing-e-verify-through-an-integrated-electronic-form-i-9-solution/> (explaining that electronic I-9 forms increase efficiency and reduce possible errors with respect to completing the Form I-9).

5. *See Storing Form I-9*, USCIS, <https://www.uscis.gov/i-9-central/retain-store-form-i-9/storing-form-i-9> (last updated Feb. 13, 2017).

6. *See Ben Olson, The Growing Challenge of I-9 Compliance for HR*, ESSIUM (Jan. 25, 2017), <http://essium.co/2017/01/the-growing-challenge-of-i-9-compliance-for-hr/>.

7. *See Dave Zielinski, Automating I-9 Verification*, SOC'Y FOR HUM. RESOURCE MGMT. (May 1, 2011), <https://www.shrm.org/hr-today/news/hr-magazine/pages/0511zzielinski.aspx>.

8. *See What Is HRIS?*, HR PAYROLL SYS., <https://www.hrpayrollsystems.net/hris/> (last visited Oct. 15, 2017) (noting that HRIS, or human resource information system, "is basically an intersection of human resources and information technology through HR software"); *4 Benefits*, *supra* note 4 ("E-Verify is an online system that compares

I-9 generation and/or retention systems are subject to specific regulation and enforcement standards and require in-depth review to ensure compliance.⁹ Not only must the I-9s produced by these systems meet basic standards for I-9 compliance, but the systems and associated processes themselves must be compliant with electronic I-9 regulations.¹⁰

The cost of non-compliance can be high, as employers who cannot produce compliant I-9s to government officials within three business days of a Notice of Inspection (“NOI”) are at risk of substantial fines.¹¹ Each I-9 could potentially contain many errors, particularly between what the employee is required to complete in Section 1 and what the employer is required to complete in Section 2.¹² Even one error on a single I-9 can result in fines between \$216 and \$2,156.¹³

Multiplied over the size of an employer’s workforce, these numbers can add up quickly. This is assuming, of course, that there exists a Form I-9 for every employee and that there are no unauthorized workers in the workforce. With the latter, additional fines and civil and criminal penalties will accrue.¹⁴ Beyond errors on the face of the Form I-9 itself, employers can incur fines and other penalties related to the compliance of their electronic systems.¹⁵

This Article will provide an overview of the regulatory structure for I-9s generally, enforcement trends since the I-9 became mandatory for all employers, an analysis of current enforcement actions, additional electronic I-9 system requirements, and recommendations for employers considering

information from an employee’s I-9 form against data from the U.S. Department of Homeland Security (DHS) and Social Security Administration records to confirm an individual’s eligibility to work in the United States.”).

9. See *Statutes and Regulations*, USCIS, <https://www.uscis.gov/i-9-central/about-form-i-9/statutes-and-regulations> (last updated Nov. 14, 2016) (highlighting the federal statutes and regulations that govern Form I-9 compliance and employment verification).

10. See *Handbook for Employers M-274*, USCIS, <https://www.uscis.gov/book/export/html/59502/en> (last updated July 14, 2017) [hereinafter *Handbook for Employers*] (explaining that electronic Form I-9s must comply with regulations included in 8 C.F.R. pt. 274a.2(e)-i)).

11. *Form I-9 Inspection Overview*, USCIS (June 26, 2013), <https://www.ice.gov/factsheets/i9-inspection> (“Penalties for substantive violations, which includes failing to produce a Form I-9, range from \$110 to \$1,100 per violation.”).

12. See Allen Smith, ‘Smart’ I-9 Form Comes Up Short, SOC’Y FOR HUM. RESOURCE MGMT. (Jan. 20, 2016), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/proposed-smart-i-9.aspx> (explaining that electronic Form I-9s are effective, but are not capable of catching all potential errors).

13. See 28 C.F.R. § 85.5 (2018).

14. See *id.*

15. *Penalties*, USCIS, <https://www.uscis.gov/i-9-central/penalties> (last updated Sept. 14, 2017) (noting that penalties may be imposed on an employer who fails to comply with employment verification requirements, including Form I-9 issues).

electronic I-9 systems.

II. STATUTORY AND REGULATORY FRAMEWORK

Congress introduced the employment eligibility verification requirements captured in the Form I-9 as part of the Immigration Reform and Control Act of 1986, otherwise known as IRCA.¹⁶ When President Reagan signed IRCA into law on November 6, 1986, he “ushered in the most far-reaching changes in immigration law since the passage of the 1965 Immigration and Nationality Act.”¹⁷ IRCA established sanctions for employers who hire workers without work authorization and also “held out the promise of legal status and eventual citizenship to millions of unauthorized immigrants, marking the first large-scale legalization program in U.S. immigration history.”¹⁸

IRCA established new federal criminal and civil penalties for employers who knowingly hired unauthorized workers, as well as fines for failure to correctly complete and retain Form I-9.¹⁹ Congress also rolled back a provision that had previously protected employers from criminal liability for employing unauthorized workers and extended criminal prohibition on the use of fraudulent documents used to gain lawful employment.²⁰ Until IRCA, employers had no federal penalty for employing unauthorized workers.²¹

The Code of Federal Regulations (“CFR”) sets forth requirements for the Form I-9 and employer practices for verifying the employment authorization of its workforce.²² The regulations dictate acceptable documentation for proving worker identity, provide standards for completing the Form I-9, and

16. See Immigration Reform & Control Act of 1986, 8 U.S.C. § 1101 (2012).

17. Muzaffar Chishti et al., *At Its 25th Anniversary, IRCA's Legacy Lives On*, MIGRATION POL'Y INST. (Nov. 16, 2011), <http://www.migrationpolicy.org/article/its-25th-anniversary-ircas-legacy-lives>.

18. *Id.*

19. See Immigration & Nationality Act, 8 U.S.C. § 1324a(e)(5) (“With respect to a violation of subsection (a)(1)(B), the order under this subsection shall require the person or entity to pay a civil penalty in an amount of not less than \$100 and not more than \$1,000 for each individual with respect to whom such violation occurred.”); see also 8 C.F.R. § 274a.10(a) (2018) (“Any person or entity which engages in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2) of the Act shall be fined not more than \$3,000 for each unauthorized alien, imprisoned for not more than six months for the entire pattern or practice, or both, notwithstanding the provisions of any other Federal law relating to fine levels.”).

20. See *United States v. Kim*, 193 F.3d 567, 573-74 (2d Cir. 1999) (affirming criminal conviction under harboring statute for factory owner who knowingly employed workers without authorization).

21. See *De Canas v. Bica*, 424 U.S. 351, 360 (1976).

22. 8 C.F.R. § 274a.2.

instruct employers on retaining and inspecting Form I-9s, as well as the standards for electronic retention of Form I-9s.²³ Section 270.3 of the CFR delineates criminal and civil penalties for employees who present fraudulent documents.²⁴

The regulations outlining the requirement for U.S. employers to verify the identity and work authorization of employees are found at title 8, section 274a.2. These regulations describe requirements for completing each section of the I-9 and outline the acceptable identification documents that employees may present to verify their identity and work authorization, respectively.²⁵

U.S. Citizenship and Immigration Services (“USCIS”) and Immigration and Customs Enforcement (“ICE”) establish and ensure compliance with I-9 regulations and processes. Both agencies are part of the Department of Homeland Security (“DHS”), created in 2002.²⁶ USCIS has authority over Form I-9 and related guidance, as well as E-Verify, whereas ICE oversees enforcement of the penalty provisions of section 274A of the Immigration and Nationality Act (“INA”) and other immigration enforcement.²⁷

A. Regulations Governing Electronic I-9s

Congress enacted legislation in 2004 allowing employers to complete, sign, and retain electronic versions of the Form I-9.²⁸ Up until 2004, I-9s could only be retained in their original paper format, on microfilm, or microfiche. The form could not be completed or signed electronically.²⁹

23. *See id.* § 274a.2(b) (providing requirements for employment verification).

24. *See id.* § 270.3.

25. *See id.* § 274a.2(b) (explaining the numerous employment verification requirements imposed on employers, including, among other things, examining documentation presented by the prospective employee and completing Section 2 of the Form I-9 within three business days of the hire).

26. Homeland Security Act of 2002, 6 U.S.C. § 101 (2012).

27. *See Handbook for Employers, supra* note 10 (noting that “USCIS is responsible for most documentation of alien employment authorization, for Form I-9, and for the E-Verify employment eligibility program”); *see also id.* (“ICE is responsible for enforcement of the penalty provisions of section 274A of the INA and for other immigration enforcement within the United States.”).

28. H.R. Rep. No. 108–731, at 1 (2004) (proposing amendments to “Section 274A of the Immigration and Nationality Act to improve the process for verifying an individual’s eligibility for employment”); *see also* Consolidated Appropriations, Act, Pub. L. No. 108–399, 118 Stat. 2292 (2005).

29. *See* William E. Hannum III, *Navigating the Form I-9 Maze: Tips for Complying with the Changing Employment Eligibility Verification Process*, SCHWARTZ HANNUM PC (Aug. 2006), <http://www.shpclaw.com/Schwartz-Resources/navigating-the-form-i-9-maze-tips-for-complying-with-the-changing-employment-eligibility-verification-process?p=11399> (explaining that DHS and ICE issued rules in 2006 to implement electronic signature options).

Interim regulations published by DHS on June 15, 2006 did not specifically identify what electronic I-9 systems would be acceptable under the law.³⁰ The final rule amending the interim rule became effective on August 23, 2010, enabling employers to electronically complete and/or retain the Form I-9.³¹

The electronic I-9 regulations permit (but do not require) employers to complete, sign, and/or store I-9s electronically, which includes scanning and retaining paper I-9s. The electronic I-9 regulations require:

- (i) Reasonable controls to ensure the integrity, accuracy and reliability of the electronic generation or storage system;
- (ii) Reasonable controls designed to prevent and detect the unauthorized or accidental creation of, addition to, alteration of, deletion of, or deterioration of an electronically completed or stored Form I-9, including the electronic signature if used;
- (iii) An inspection and quality assurance program evidenced by regular evaluations of the electronic generation or storage system, including periodic checks of the electronically stored Form I-9, including the electronic signature if used;
- (iv) In the case of electronically retained Forms I-9, a retrieval system that includes an indexing system that permits searches consistent with the requirements of paragraph (e)(6) of this section; and
- (v) The ability to reproduce legible and readable hardcopies.³²

In the event of an ICE audit, electronic I-9s must be made available for review (either printed or on-screen), along with associated audit trails that show who has accessed the system and the actions performed within or on the system during a given period.³³

Section H of the electronic I-9 regulations specifically outlines requirements for electronic signatures:

- (1) If a Form I-9 is completed electronically, the attestations in Form I-9 must be completed using a system for capturing an electronic signature that meets the standards set forth in this paragraph. The system used to capture the electronic signature must include a method to acknowledge that the attestation to be signed has been read by the signatory. The electronic signature must be attached to, or logically associated with, an electronically completed Form I-9. In addition, the system must:
 - (i) Affix the electronic signature at the time of the transaction;
 - (ii) Create and preserve a record verifying the identity of the person

30. See Electronic Signature and Storage of Form I-9, Employment Eligibility Verification, 71 Fed. Reg. 34510 (June 15, 2006) (to be codified at 8 C.F.R. pt. 274a).

31. See 8 C.F.R. § 274a.2 (2018).

32. *Id.* § 274a.2(e)(i)-(v).

33. *Id.* § 274a.2(e)(8)(i).

producing the signature; and

(iii) Upon request of the employee, provide a printed confirmation of the transaction to the person providing the signature.

(2) Any person or entity who is required to ensure proper completion of a Form I-9 and who chooses electronic signature for a required attestation, but who has failed to comply with the standards set forth in this paragraph, is deemed to have not properly completed the Form I-9, in violation of section 274A(a)(1)(B) of the Act and 8 CFR 274a.2(b)(2).³⁴

The electronic signature requirements apply both to the employee signature and interpreter/preparer signature in Section 1, and to the employer's signatures in Sections 2 and 3.³⁵ Merely typing a name in a signature box does not constitute a compliant electronic signature.³⁶

B. Completing and Retaining Form I-9

Employees are required to complete Section 1 of the Form I-9 and attest to their status as it relates to U.S. work authorization.³⁷ The employee must sign and date the form, attesting under penalty of perjury that the information is true and correct.³⁸ Employees must complete Section 1 "at the time of hire."³⁹

The employee must then present original identity and/or work authorization documents from a prescribed list of documents.⁴⁰ An employer representative must examine the original documents and assess whether the documents relate to the person presenting them and whether the documents presented appear to be genuine.⁴¹ The employer representative must then

34. *Id.* § 274a.2(h).

35. *See Handbook for Employers, supra* note 10 (highlighting section 10.3.2 of the Handbook for Employers).

36. *See United States v. Agri-Sys. D/B/A ASI Indus.*, 12 OCAHO no. 1301, 14-15 (2017).

37. *See* 8 C.F.R. § 274a.2(b)(1)(i)(A) (noting that employers must ensure that employees complete Section 1 "on the Form I-9 at the time of hire and [sign] the attestation with a handwritten or electronic signature").

38. *See Instructions for Form I-9, Employment Eligibility Verification*, USCIS 4 (2017) [hereinafter *Instructions for Form I-9*], https://www.uscis.gov/system/files_force/files/form/i-9instr.pdf?download=1 (noting that when an employee signs the Form I-9, the employee attesting under penalty of perjury all of the information contained therein is true and correct); *see also Declaration under Penalty of Perjury*, USCIS, <https://www.uscis.gov/tools/glossary/declaration-under-penalty-perjury> (last updated Dec. 15, 2010) (defining "Declaration under Penalty of Perjury" as "[a] statement by a person, in which the person states that the information is true, to support his or her request or application").

39. 8 C.F.R. § 274a.2(b)(1)(i)(A).

40. *Id.* § 274a.2(b)(1)(i)(B), (b)(1)(B)(v).

41. *See id.* § 274a.2(b)(1)(ii)(A) (noting that employers are not required to be

complete Section 2 of the form within three business days of hire, entering in the details from the document(s) presented by the employee.⁴²

As with the employee's signature requirement, the employer representative must sign and date Section 2, attesting under penalty of perjury "that (1) I have examined the document(s) presented by the above-named employee, (2) the above-listed document(s) appear to be genuine and to relate to the employee named, and (3) to the best of my knowledge the employee is authorized to work in the United States."⁴³

If a translator or preparer is required, he or she must also sign an attestation that the information is true and correct to the best of his or her knowledge.⁴⁴ Once the form is complete, the employer must retain the form securely, either (1) the original "wet ink" paper version, (2) an electronic version, which could be a scan of the paper original,⁴⁵ or (3) as an on-screen version generated by an electronic system that can be printed in paper as necessary.⁴⁶ The form must be retained throughout the employee's period of employment with the employer and then for one year after the date the employee ends employment with the employer or three years after his or her date of hire, whichever is later.⁴⁷ The form can then be destroyed or deleted from the electronic system.⁴⁸

If an employee presents work authorization documents that have a future expiration date, the employer is required to re-verify those expiring documents and either complete Section 3 with new documents or create a new Form I-9, retaining both the original I-9 and the new one.⁴⁹

C. E-Verify

E-Verify is a free online tool developed and maintained by USCIS that

document experts capable of identifying counterfeit or fraudulent documents, but that the standard is whether the documents "appear" to be genuine).

42. *Id.* § 274a.2(b)(1)(ii)(B).

43. *Id.*; see also *Instructions for Form I-9*, *supra* note 38, at 12.

44. § 274a.2(b)(1)(i)(A).

45. *Id.* § 274a.2(b)(2)(i).

46. *Id.* § 274a.2(e)(8)(i).

47. *Id.* § 274a.2(b)(2)(i)(A).

48. See *I-9 Retention Worksheet*, GOFFWILSON, <https://www.goffwilson.com/CMSTemplates/Goff/pdfs/RetentionWorksheet20111.pdf> (last updated June 14, 2010) ("On the retention date, destroy [the I-9 Retention Form] and the I-9 form.").

49. See *Completing Section 3, Reverification and Rehires*, USCIS, <https://www.uscis.gov/i-9-central/complete-correct-form-i-9/completing-section-3-reverification-and-rehires> (last updated July 17, 2017) (noting that when employee employment authorization or authorization documentation expires, employers must reverify that the employee remains authorized to work. In doing so, the employer will have to complete Section 3 of the Form I-9 or complete a new Form I-9).

employers may use in conjunction with the I-9 practices outlined above to verify work authorization.⁵⁰ E-Verify does not replace the requirement to complete and retain a Form I-9 for all employees, but rather supplements it.⁵¹ Employers are required to sign a Memorandum of Understanding (“MOU”) with E-Verify agreeing to comply with certain technical and procedural rules.⁵² Employers take the information entered on an employee’s I-9, create an E-Verify case for the employee, and transfer the data from the I-9 into the E-Verify online system.⁵³ The information is checked against databases at DHS and the Social Security Administration (“SSA”).⁵⁴ Employers then receive either a “work authorized” result or a Tentative Non-Confirmation (“TNC”).⁵⁵ The employee then has the option to contest the TNC, at which point the system generates instructions on how to resolve the issue (i.e., by contacting DHS or the SSA). If the employee can resolve the TNC, the E-Verify system produces a “work authorized” result.⁵⁶ If the employee is unable to resolve the TNC, however, E-Verify produces a Final Non-Confirmation (“FNC”).⁵⁷

50. See *E-Verify*, USCIS, <https://www.uscis.gov/e-verify> (last visited Oct. 15, 2017) (“E-Verify is an Internet-based system that allows businesses to determine the eligibility of their employees to work in the United States.”).

51. See *About the Program*, USCIS, <https://www.uscis.gov/e-verify/about-program> (last updated May 10, 2017) (explaining that employers “submit information taken from a new Form I-9 . . . through E-Verify . . . to determine whether the information matches government records and whether the new hire is authorized to work in the United States”).

52. See generally *The E-Verify Memorandum of Understanding for Employers*, DHS, https://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify_Native_Documents/MOU_for_E-Verify_Employer.pdf (last updated June 1, 2013).

53. See *E-Verify and Form I-9*, USCIS, <https://www.uscis.gov/i-9-central/about-form-i-9/e-verify-and-form-i-9> (last updated Nov. 14, 2016).

54. See *What Is E-Verify?*, USCIS, <https://www.uscis.gov/e-verify/what-e-verify> (last updated July 20, 2017) (explaining that the information in the Form I-9 is compared with data from DHS and the SSA).

55. See *Tentative Nonconfirmations*, USCIS, <https://www.uscis.gov/e-verify/employers/tentative-nonconfirmations> (last updated May 11, 2017) (“Generally, if the information matches, the employee receives an ‘Employment Authorized’ response in E-Verify . . . [but if] the information from an employee’s Form I-9 does not match government records . . . E-Verify will display a temporary case status . . . [and] E-Verify will return a response called a ‘Tentative Nonconfirmation (TNC).’”).

56. See generally *How to Correct a Tentative Nonconfirmation*, USCIS, <https://www.uscis.gov/e-verify/employees/how-correct-tentative-nonconfirmation> (last updated May 18, 2017).

57. See *3.5 SSA or DHS Final Nonconfirmation*, USCIS, <https://www.uscis.gov/e-verify/publications/manuals-and-guides/35-ssa-or-dhs-final-nonconfirmation> (last updated June 12, 2017) (stating that an SSA or DHS Final Nonconfirmation case result is received when E-Verify cannot verify an employee’s employment eligibility after an employee has visited a SSA field office or contacted DHS during the TNC referral

Employers may choose to continue to employ an individual who receives an FNC.⁵⁸ Nonetheless, the employer risks being fined for employing an unauthorized worker.⁵⁹

E-Verify's Monitoring and Compliance Unit "observes system use to help users comply with the E-Verify Memorandum of Understanding, E-Verify Manuals, Form I-9 instructions, and applicable laws."⁶⁰ The Monitoring and Compliance Unit may perform "desk audits" with employers, highlighting trends in system usage that could signal noncompliance.⁶¹ Such signals could include: a statistically significant number of permanent residents who have presented permanent resident cards as part of the I-9 process (as opposed to other possible documents), indicating an unlawful practice of requiring certain documents from certain employee populations; not printing TNC notices when E-Verify produces a TNC result; not closing E-Verify cases in a timely manner; or routinely opening E-Verify cases more than three days after the employee's first day, among other trends or patterns.

Although the Monitoring and Compliance Unit cannot issue fines for noncompliance, they may refer employers to other agencies for further investigation.⁶²

Some electronic I-9 systems can integrate with E-Verify, keeping all I-9 and E-Verify information for each employee in one electronic location.⁶³

Congress mandated that the program be freely available to employers in all states in 2003,⁶⁴ and in 2007, all federal employers were required to use

process).

58. *See id.* (noting that the employer "may terminate employment" based on the employee's receipt of an FNC).

59. *See id.* (explaining that the employer may terminate employment without civil or criminal liability).

60. *Monitoring and Compliance*, USCIS, <https://www.uscis.gov/e-verify/employers/monitoring-and-compliance> (last updated Mar. 7, 2017).

61. *See SAVE Program Guide*, USCIS 11, <https://save.uscis.gov/web/media/resourcescontents/saveprogramguide.pdf> (last updated July 2017).

62. *See Settlements and Lawsuits*, DOJ, <https://www.justice.gov/crt/settlements-and-lawsuits> (last updated Nov. 28, 2017) (stating that in American Cleaning Company the employer agreed to a \$195,000 settlement for implementing a pattern or practice of requesting different List A documents from non-citizens); *see also id.* (stating that in Infinity Group the employer agreed to pay \$53,880 in civil penalties and be subject to ongoing monitoring, and noting that in Washington Potato Company DOJ brought a complaint against the employer for unfair documentary practices on a referral from E-Verify).

63. *See I-9 Complete Overview*, TRACKER COMPLETE COMPLIANCE, <http://www.trackercorp.com/i9-compliance.php> (last visited Oct. 15, 2017) (stating that I-9 Complete is a product that allows you to integrate the Form I-9 with other HR processes).

64. Marc Rosenblum & Lang Hoyt, *The Basics of E-Verify, the U.S. Employer Verification System*, MIGRATION POL'Y INST. (July 13, 2011), <https://www.migrationpolicy.org/article/basics-e-verify-us-employer-verification-system> ("In 2003, Congress

E-Verify.⁶⁵ E-Verify is not federally mandated for private employees, but several states mandate that employers use E-Verify for all hires, and some states mandate E-Verify for all state employees and contractors.⁶⁶ Although federal immigration law preempts “any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ . . . unauthorized aliens,”⁶⁷ the United States Supreme Court upheld state laws mandating E-Verify through this licensing exception.⁶⁸

Attorney General Jeff Sessions has advocated for mandatory E-Verify for all employers.⁶⁹ It is likely that any Congressional action on immigration reform will include mandatory E-Verify for all employers. Indeed, President Donald Trump’s Fiscal Year 2018 budget calls for an additional \$131.5 million to make E-Verify mandatory in the next three years, although Congress must vote to pass this budget.⁷⁰

D. Enforcement from Bush to Trump

As mentioned, the requirement that employers verify the work authorization of employees stems from IRCA. President Reagan signed IRCA in 1986 to address the employment of undocumented immigrants and prevent, or significantly reduce, the future hiring of undocumented immigrants within the U.S.

Congress amended IRCA with the Immigration Act of 1990, which

expressed its support for electronic verification by expanding Basic Pilot from the five states in which it was first tested . . . to make it available on a national basis . . .”).

65. See *For Federal Contractors*, USCIS, <https://www.uscis.gov/e-verify/federal-contractors> (last updated May 18, 2017) (stating that a presidential Executive Order and other regulations required “federal contractors to use E-Verify to electronically verify the employment eligibility of employees working under covered federal contracts”).

66. See generally *Findings of the E-Verify User Survey*, WESTAT (Apr. 30, 2014), https://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify_Native_Documents/Everify%20Studies/E-Verify_User_Survey_Report_April2014.pdf.

67. Immigration & Nationality Act, 8 U.S.C. § 1324a(h)(2) (2012).

68. See generally *Chamber of Commerce v. Whiting*, 563 U.S. 582, 587 (2011) (holding that Arizona’s law requiring employers to verify employees through an internet-based system is not pre-empted by federal law).

69. See Kate Morrissey, *Workplace Immigration Enforcement Could Come Roaring Back Under Trump*, SAN DIEGO UNION TRIB. (Feb. 17, 2017, 6:00 PM), <http://www.sandiegouniontribune.com/news/immigration/sd-me-worksite-enforcement-20170217-story.html> (“Attorney General Jeff Sessions . . . has pushed for requiring all employers to use a program called e-verify [sic] . . .”).

70. See *FY 2018 Budget in Brief*, DHS 5 (May 23, 2017), <https://www.dhs.gov/sites/default/files/publications/DHS%20FY18%20BIB%20Final.pdf> (stating that \$131.5 million was allocated for E-Verify “operations and upgrades”).

President George H. W. Bush signed into law on November 29, 1990.⁷¹ In terms of worksite enforcement, President George W. Bush's administration focused on high-profile raids and arrests of undocumented workers in factories and meatpacking plants.⁷² President Barack Obama's strategy for curbing employment of undocumented immigrants shifted the focus away from employees and squarely onto employers. Compliance audits, specifically, I-9 paperwork audits of employers increased four-fold under President Obama, which resulted in an uptick in civil and criminal penalties charged against employers.⁷³ I-9 audits skyrocketed in 2008, from 503 to more than 8,000 in 2009.⁷⁴ These include audits of large, high-profile companies, including Abercrombie and Fitch⁷⁵ and the Chipotle restaurant chain.⁷⁶ The goal of this shift in focus was to "deter illegal employment and create a culture of compliance," indicating that compliance was more important than ever before for employers.⁷⁷

President Trump has unequivocally indicated that his immigration enforcement priorities are sweeping, targeting individuals present in the United States without authorization, as well as their employers. In February 2017, DHS issued new orders outlining the implementation of President Trump's tougher stance on immigration.⁷⁸ Policy directives aimed at

71. See generally Immigration Act of 1990, Pub. L. No. 101-649, § 358, 104 Stat. 4978 (1990).

72. See Angelo A. Paparelli & Ted J. Chiappari, *Immigration Law*, N.Y.L.J. (Oct. 22, 2007), <https://www.law.com/newyorklawjournal/almID/900005493981/> ("[A]dministrative law judges in the Office of the Chief Administrative Hearing Officer (OCAHO) who hear civil immigration violations involving illegal employment are about as busy as the Maytag repairman. For example, of the 66 published OCAHO decisions from 2000 to 2007, only two involved unlawful employment of aliens . . .").

73. See News Release, ICE, ICE Assistant Secretary John Morton Announces 1,000 New Workplace Audits to Hold Employers Accountable for Their Hiring Practices (Nov. 19, 2009), <http://www.faegeb.com/webfiles/New%20Workplace%20Audits.pdf>.

74. See Amy Sherman, *Obama Holds Record for Cracking Down on Employers Who Hire Undocumented Workers, Says Wasserman Shultz*, POLITIFACT FLA. (July 3, 2013, 4:46 PM), <http://www.politifact.com/florida/statements/2013/jul/03/debbie-wasserman-schultz/obama-holds-record-cracking-down-employers-who-hir/>.

75. News Release, ICE, Abercrombie & Fitch Fined After I-9 Audit (Sept. 28, 2010) [hereinafter Abercrombie & Fitch], www.aila.org/File/DownloadEmbeddedFile/51319.

76. See generally Chipotle Mexican Grill, Inc., Annual Report (Form 10-K) (Feb. 8, 2013).

77. *Worksite Enforcement*, ICE (Apr. 1, 2013), <https://www.ice.gov/factsheets/worksite>.

78. See Memorandum from John Kelly, Sec'y, DHS, Implementing the President's Border Security and Immigration Enforcement Improvements Policies (Feb. 20, 2017) [hereinafter Border Security Memo], https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf; see also Memorandum from John Kelly, Sec'y,

enhancing “interior enforcement” through proposed budget increases for ICE were implemented to achieve policy goals. These new policy directives, coupled with statutory increases for I-9 compliance and I-9 related discrimination violations, make I-9 paperwork violations riskier than ever before.⁷⁹ Consequently, employers are bracing for an expected increase in document audits and potential worksite raids.⁸⁰

	FY2011	FY2012	FY2013	FY2014	FY2015
I-9 Audits (“Notices of Inspection”) ⁸¹	2,496	3,000	3,127	1,320	435
Worksite Enforcement Cases	3,291	3,904	3,903	2,022	Unavailable
Fines ⁸²	\$10.4 million \$7.1 million criminal fines and forfeitures	\$12.4 million \$14.2 million criminal fines and forfeitures	\$15.8 million \$2.2 million criminal fines and forfeitures	\$16.2 million \$35.1 million criminal fines and forfeitures	\$4.62 million \$35.5 million criminal fines and forfeitures
Individuals Arrested on Administrative Charges ⁸³	1,471	1,118	868	541	Unavailable
Individuals Arrested on Criminal Charges ⁸⁴	713	520	452	362	Unavailable

DHS, Enforcement of the Immigration Laws to Serve the National Interest, (Feb. 20, 2017) [hereinafter National Interest Memo], https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf.

79. See generally 28 C.F.R. § 85.5 (2018).

80. Alexia Elejalde-Ruiz, *Illinois Businesses Prepare for Possibility of Dramatic Immigration Raids*, CHI. TRIB. (Mar. 9, 2017, 10:12 AM), <http://www.chicagotribune.com/business/ct-workplace-raids-primer-0309-biz-20170308-story.html> (noting that aggressive enforcement of immigration laws under a new administration worries employers in many industries); see also National Interest Memo, *supra* note 78 (“Facilitating the efficient and faithful execution of the immigration laws of the United States—and prioritizing [DHS] resources—requires the use of all available systems and enforcement tools . . .”).

81. See Jessica M. Vaughan, *ICE Records Reveal Steep Drop in Worksite Enforcement Since 2013*, CTR. FOR IMMIGR. STUD. (June 2015), <https://cis.org/sites/default/files/vaughan-WSE.pdf> (highlighting the precipitous decline in worksite audits from 2013 to 2015).

82. See ANDORRA BRUNO, CONG. RESEARCH SERV., R40002, IMMIGRATION-RELATED WORKSITE ENFORCEMENT: PERFORMANCE MEASURES 5, 9 (2015).

83. *Id.* at 5-6.

84. *Id.*

Other Penalties ⁸⁵	221 employers charged with violations related to employment; debarred 97 companies from federal contracts. ICE issued 347 criminal indictments and saw 364 convictions.	ICE made 520 criminal arrests tied to worksite enforcement investigations. ICE issued 318 criminal indictments and saw 292 convictions.	ICE made 452 criminal arrests tied to worksite enforcement investigations. 179 were owners, managers, supervisors, or HR employees. ICE issued 296 criminal indictments and saw 319 convictions.	ICE arrested 172 employer agents or representatives for criminal violations related to the knowing employment of aliens not authorized to work in the United States. ICE issued 327 criminal indictments and saw 312 convictions.	ICE arrested 65 employer agents or representatives.
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E. Anatomy of an ICE Audit and Fine

Although ICE has authority to enforce a variety of immigration laws, its Homeland Security Investigations (“HSI”) department focuses specifically on worksite enforcement, aiming to reduce the demand for unauthorized employment to protect employment opportunities for U.S. workers.⁸⁶

Under IRCA, ICE agents or auditors have the authority to enforce employer compliance with Form I-9 requirements.⁸⁷ Although any employer could be subject to an audit, several triggers appear to precipitate a visit from ICE:

- Credible tip
- High-risk industry (i.e., with high turnover, percentage of hourly workers)
- History of violations
- Geographic area with concentration of undocumented immigrants
- Referral from another government agency
- Public worksite observations

The administrative process begins when ICE presents an employer with an NOI that gives the employer seventy-two hours to present requested documentation, which may include a list of current employees for a certain

85. *Id.* at 7-8.

86. *See Worksite Enforcement, supra* note 77 (noting that HSI is charged with conducting worksite visits to reduce unauthorized employment in the United States). *See generally Homeland Security Investigations, ICE*, <https://www.ice.gov/hsi> (last updated Aug. 22, 2017).

87. *See BRUNO, supra* note 82, at 2 (explaining that ICE can inspect or audit an employer’s I-9 records “to determine whether they are in compliance with employment eligibility verification laws and regulations”).

location, all I-9s associated with those employees, payroll records, and related business documentation.⁸⁸

Once the employer provides the requested documentation, ICE will conduct a review and investigation of the documents to determine: (1) whether there is an I-9 on file for every employee; (2) whether the I-9s presented have substantive or technical errors; and (3) whether there are any suspect documents among the I-9s.⁸⁹ There are three categories of violations: (1) technical violations that can be corrected, such as entering the wrong date of birth in Section 1; (2) substantive violations that are not considered correctable, such as failure to sign the attestation in Section 1; and (3) violations where evidence shows that the employer either knowingly employed an employee that was not authorized to work or continued to employ a worker after finding out that he or she was not authorized to work.⁹⁰ If ICE discovers technical or procedural violations, an employer is typically given ten business days to make corrections.⁹¹

If substantive violations are discovered, or if an employer fails to make the necessary corrections to the technical violations, ICE may assess a monetary fine.⁹² If ICE determines that an employer knowingly hired or continued to employ unauthorized workers, the employer will be required to terminate those workers, may be subject to a fine, and may face criminal prosecution. Employers may also be subject to debarment from participation in future federal contracts.⁹³

For substantive violations and any uncorrected technical violations, ICE will issue a Notice of Intent to Fine (“NOIF”) assessed by analyzing the number of substantive errors compared to the overall number of I-9s

88. See *Form I-9 Inspection Overview*, *supra* note 11 (explaining that the NOI initiates the inspection process, and that employers have at least “three business days” to identify the requested forms, along with additional evidence).

89. See *generally id.*

90. See *id.* (“When technical or procedural violations are found . . . an employer is given ten business days to make corrections. An employer may receive a monetary fine for all substantive and uncorrected technical violations. Employers determined to have knowingly hired or continued to employ unauthorized workers . . . will be required to cease the unlawful activity, may be fined, and in certain situations may be criminally prosecuted.”).

91. Immigration & Nationality Act, 8 U.S.C. § 1324a(b)(6)(B) (2012); see also *Form I-9 Inspection Overview*, *supra* note 11 (noting that employers have ten business days to correct technical or procedural violations related to the Form I-9).

92. See 8 U.S.C. § 1324a(b)(6)(B); see also *Form I-9 Inspection Overview*, *supra* note 11 (noting that “[a]n employer may receive a monetary fine for all substantive and uncorrected technical violations”).

93. See *Form I-9 Inspection Overview*, *supra* note 11 (explaining that employers who knowingly hire and continue to employ unauthorized employees are barred from “participating in future federal contracts and from receiving other government benefits”).

reviewed.⁹⁴ Fines will also be assessed for knowingly hiring and continuing to employ workers without valid U.S. work authorization. Note that the I-9 fines in the second table pertain to fines assessed against one error on a single Form I-9.

Knowing Hire / Continuing to Employ Fine Schedule (effective 8/1/2016)⁹⁵

	Standard Fine Amount		
	First Tier	Second Tier	Third Tier
Knowing Hire and Continuing to Employ Violations	\$539 – \$4,313	\$4,313 – \$10,781	\$6,469 – \$21,563

Substantive / Uncorrected Technical Violation Fine Schedule (effective 8/1/2016)

	Standard Fine Amount		
	First Offense	Second Offense	Third Offense +
Substantive Verification Violations	\$216 – \$2,156	\$216 – \$2,156	\$216 – \$2,156

The total proposed fine provided in the NOIF is determined by adding the amount derived from the Fine Schedules for Knowing Hire / Continuing to Employ (plus enhancement or mitigation) and the amount derived from the Substantive / Uncorrected Technical Violations (plus enhancement or mitigation).⁹⁶ The agent or auditor will divide the number of violations by the number of employees for which a Form I-9 should have been prepared to obtain a violation percentage.⁹⁷ The percentage itself provides a base fine amount, and the fine is determined based on whether this is the employer's first offense, second offense, or third (or more) offense.⁹⁸

If an employer chooses to contest the fine, it must appeal to the Office of

94. See *id.* (noting that a NOIF “may be issued for substantive, uncorrected technical, knowingly hire and continuing to employ violations”).

95. See 28 C.F.R. § 85.5 (2018). See generally *Form I-9 Inspection Overview*, *supra* note 11 (providing that no information has been published since FY2014).

96. See *Form I-9 Inspection Overview*, *supra* note 11 (explaining how the agency determines the fine recommended in the NOIF).

97. See *id.*

98. *Id.*

the Chief Administrative Hearing Officer (“OCAHO”).⁹⁹ An Administrative Law Judge (“ALJ”) will review the facts and assess whether the fine assessed by ICE should be maintained or, as is often the case, lowered based on mitigating circumstances.

Five factors are considered when ICE assesses mitigating factors of civil penalties associated with failure to comply with I-9 regulations: (1) the size of the employer’s business; (2) the employer’s “good faith”; (3) the scope of the seriousness of the violations; (4) whether any unauthorized workers were involved; and (5) previous history of I-9 violations.¹⁰⁰ ICE bears the burden of proof in assessing penalties and liabilities. Note that these factors can both aggravate and mitigate the fines assessed.

F. OCAHO and Civil Penalties

As explained above, employers who receive a NOIF from ICE may seek review of the penalty by OCAHO, an administrative court with jurisdiction to review employer sanction cases brought under the INA.¹⁰¹ If an employer chooses to request a hearing, “DHS can decide to pursue the matter by filing a complaint with OCAHO.”¹⁰² An analysis of OCAHO decisions shows that employers continue to obtain significant decreases of I-9 penalties before this court. OCAHO decisions provide important insights on the costs of non-compliance, as well as how simple it is to commit substantive violations when completing I-9 forms.¹⁰³

OCAHO case law has long affirmed that there is no single preferred method of calculating penalties.¹⁰⁴ The penalty amount must be sufficiently meaningful to enhance the probability of future compliance,¹⁰⁵ without being

99. *See id.* (“The employer has the opportunity to . . . request a hearing before [OCAHO] within 30 days of receipt of the N[O]IF.”).

100. *See id.* (explaining that ICE will utilize several factors, including business size, good faith, seriousness, the number of unauthorized aliens, and history, to enhance or mitigate the recommended fine).

101. *See generally* *Office of the Chief Administrative Hearing Officer*, DOJ, <https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions#GeneralInformation> (last updated Nov. 20, 2017).

102. *Id.*

103. Shelby S. Skeabeck, *I-9 Violations Can Be Costly for Employers*, SOC’Y FOR HUM. RESOURCE MGMT. (Nov. 16, 2016), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/i-9-substantial-fines-awarded.aspx> (noting that Form I-9 violations can be very costly for employers and that it is crucial for employers to diligently ensure that new employees complete the Form I-9 correctly and on time).

104. *See* *United States v. Senox Corp.*, 11 OCAHO no. 1219, 4 (2014) (citing to *United States v. Filipe, Inc.*, 1 OCAHO no. 108, 726, 731 (1989)) (stating that “nothing . . . mandates or precludes the use of a mathematic formula to assess penalties . . .”).

105. *See* *United States v. Jonel, Inc.*, 8 OCAHO no. 1008, 1998 WL 804705, 19

unduly burdensome considering the employer's resources. The employer can show financial hardship in its pleading and through documentary evidence in the form of its tax returns.¹⁰⁶ Additionally, the court will consider a company's inability to pay in making the penalty assessment. OCAHO addressed this issue in *United States v. Wave Green, Inc.*,¹⁰⁷ where the court upheld ICE's penalty assessment of \$7,106, finding that the employer did not raise financial hardship.¹⁰⁸

The largest fine to date for failure to comply with I-9 documentation rules is \$605,250.¹⁰⁹ In that case, OCAHO ordered Hartmann Studios, an events-planning company, to pay the fine because of more than 800 I-9 violations.¹¹⁰ ICE notified Hartmann Studios in 2011 that it would conduct an audit of the company's I-9 forms and payroll records. ICE identified over 800 violations and issued Hartmann a NOIF—most of the violations at issue were failure to complete Section 2 of the I-9, which requires the employer to review employee documents proving identity and work authorization.¹¹¹ This section was left blank on almost all of Hartmann's I-9s. The penalty also hinged on the employer's failure to ensure that each employee check a box in Section 1 attesting to citizenship, which is also a substantive violation.¹¹²

Although Hartmann ramped up its I-9 processes and took steps to cure its I-9s after the ICE inspection, such steps did not constitute mitigating circumstances that would warrant lesser fines in the eyes of the ALJ.¹¹³ The ALJ noted that Hartmann did not cure its I-9s until after ICE notified the

(1998).

106. See *United States v. Sols. Grp. Int'l, LLC*, 12 OCAHO no. 1288, 11-12 (2016) (citing to *United States v. Niche, Inc.*, 11 OCAHO no. 1250, 11 (2015)) (noting that an appropriate factor to consider is whether the imposition of a fine would cause the company financial hardship).

107. 11 OCAHO no. 1267, 15 (2016).

108. See *id.* 11 OCAHO no. 1267 at 16 (demonstrating that when the employer is unable to prove financial hardship, the government's fine may be upheld).

109. See Roy Maurer, *Company Hit with Largest I-9 Paperwork Penalties to Date*, SOC'Y FOR HUM. RESOURCES MGMT. (Aug. 3, 2015), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/largest-i-9-paperwork-penalties.aspx> ("Failure to thoroughly complete form I-9 paperwork has led to a fine of \$605,250—the largest amount ever ordered . . .").

110. See *United States v. Hartmann Studios, Inc.* 11 OCAHO no. 1255, 20 (2015) (holding Hartmann Studios, Inc. liable for 808 employment verification violations).

111. See *id.* at 2 ("Count IV alleged that Hartmann failed to properly complete section 2 of the I-9 forms for 797 named individuals.").

112. See *id.* at 5 (highlighting various employees that allegedly failed to check a box in Section 1 of the form I-9 to identify their immigration status).

113. See *id.* at 14 (indicating that Hartmann's conduct warrants no "reduction of a penalty").

company that it would be fined.¹¹⁴ The ALJ further acknowledged ICE's position that Hartmann's procedures (or lack thereof) evidenced a general disregard for ensuring its workers were authorized to work.¹¹⁵ Although the ALJ ultimately reduced the fine from ICE's recommendation of \$812,665 down to \$602,250, the judge still felt the seriousness of the violations merited a substantial penalty, noting that "the company does appear to need additional motivation to conform its employment verification processes to what the law requires."¹¹⁶ The judge noted that fines of this degree are reserved for the most egregious offenses: falsifying attestation, previous violations, and an overwhelmingly unauthorized workforce, showing blatant disregard for the employment verification process.¹¹⁷ The Hartmann decision reinforces the need for employers to take I-9 compliance seriously, and shows that extensive training and self-audits can help companies avoid penalties in the long run.¹¹⁸

OCAHO decisions show that employer size and business impact are mitigating factors that *may* reduce the ultimate fine. All U.S. employers are subject to I-9 employment verification and compliance requirements, and ICE enforcement trends show that small employers are particularly vulnerable to I-9 investigations.¹¹⁹ In 2016, thirteen of the sixteen cases litigated before OCAHO involved small employers—those with less than 100 employees. In one such case, the ALJ minimized the fine by \$44,987 to diminish the financial impact on the 55-employee cherry harvesting business.¹²⁰

Good faith comes into play even before the civil penalty amount is at issue, as the employer must make a good faith effort to make I-9 technical

114. *Id.* at 8-9.

115. *Id.* at 12.

116. *Id.* at 15.

117. *See id.* at 13 (stating that "OCAHO cases say penalties at [such a severe level] are reserved for the most egregious violations").

118. Mary G. Shukairy & Matthew O. Wagner, *Employer Slapped with \$600,000 Fine for I-9 Violations*, FROST BROWN TODD (July 28, 2015), <http://www.frostbrowntodd.com/resources-1827.html> ("Hartmann serves as a powerful reminder that the government takes I-9s extremely seriously, and companies must do the same.").

119. *See* Allen Smith, *SHRM: I-9 Paperwork Burdens Too Much for Small Businesses*, SOC'Y FOR HUM. RESOURCES MGMT. (Apr. 4, 2017), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/paperwork-burdens.aspx> (summarizing a congressional hearing, wherein Frank Cania, President of a human resource firm, stated that employers face particular restraints resulting from small I-9 errors because of significant fines).

120. *See* *United States v. SKZ Harvesting, Inc.*, 11 OCAHO no. 1266, 2, 16-17, 22 (2016) (stating that the parties should enter into a payment schedule to "minimize the impact on SKZ's business").

corrections following an ICE inspection.¹²¹ Good faith is one of the five mitigating factors that may be applied to reduce the civil penalty.¹²² Alternatively, an employer's bad faith may be considered an aggravating factor that increases the penalty. For example, failure on the part of the employer to improve its I-9 compliance until more than six years after receiving a warning notice from ICE does not establish good faith.¹²³

G. Civil and Criminal Penalties Motivate I-9 Compliance

Civil monetary penalties are assessed for paperwork violations according to the parameters set forth at title 8, section 274a.10(b)(2) of the CFR: the minimum penalty for everyone with respect to whom a violation occurred after September 29, 1999, and before November 2, 2015, is \$110, and the maximum is \$1,100. As of August 1, 2016, and effective for ICE audits conducted after November 2, 2015, the minimum and maximum penalties increased dramatically: the minimum penalty for each I-9 is \$220, and the maximum is \$2,191.¹²⁴ After issuing an NOI, ICE will conduct its inspection of the employer's Form I-9s with supporting documents. If, during this inspection, ICE identifies substantive violations and uncorrected technical violations, then the agency may levy a fine against the employer for each violation.¹²⁵ As an example, ICE HSI's investigation of Asplundh Tree Experts, Co. led to the largest civil settlement in ICE history, resulting in fines of \$95 million for knowingly hiring and retaining unauthorized workers.¹²⁶

H. Unique Electronic I-9 Pitfalls

The discussions above relate primarily to basic I-9 compliance, applicable both to paper-based I-9s and electronic I-9s. If compliance with "standard"

121. Immigration & Nationality Act, 8 U.S.C. § 1324a(b)(6)(B) (2012) ("[A] person or entity is considered to have complied with a requirement . . . notwithstanding a technical or procedural failure to meet such requirement if there was a good faith attempt to comply with the requirement.").

122. *Id.* § 1324a(b)(e)(5).

123. See *Ketchikan Drywall Servs. Inc. v. ICE*, 725 F.3d 1103, 1116 (9th Cir. 2013) (upholding ALJ's finding not to mitigate a penalty based on good faith when the employer waited more than six years to improve its I-9 compliance).

124. 8 C.F.R. § 274a.10(b)(2) (2018).

125. See 8 U.S.C. § 1324a(e)(5)(B) (explaining that violators are required to pay specified civil penalties for "each individual with respect to whom such violation occurred"); see also *Handbook for Employers*, *supra* note 10.

126. See News Release, ICE, Asplundh Tree Experts, Co. Pays Largest Civil Settlement Agreement Ever Levied by ICE (Sept. 28, 2017), <https://www.ice.gov/news/releases/asplundh-tree-experts-co-pays-largest-civil-settlement-agreement-ever-levied-ice>.

I-9 requirements seems fraught, consider the additional regulatory requirements involved with electronic I-9 systems. As outlined above, the regulatory requirements for electronic I-9 systems pose a substantial burden on employers to ensure that their electronic I-9 system complies.

The regulations governing electronic I-9s at title 8, section 274a.2 of the CFR provide guidance on system requirements, electronic signatures, security, audit trails, and general format. Despite the fact that good electronic I-9 systems are “smart” enough to prevent human errors in completing Sections 1 and 2, pitfalls specific to these electronic systems may give some employers pause.¹²⁷ Pros and cons of moving from a paper-based to an electronic system must be weighed against the type and size of an employer’s business, an employer’s current I-9 practices, its ability to learn and implement a compliant system, access to immigration counsel to review the system before implementation, and the reputation of the electronic I-9 provider.

Perhaps the most relevant cautionary tale in electronic I-9 systems is that of Abercrombie & Fitch. In November 2008, ICE issued an NOI to Abercrombie’s Michigan retail stores—Abercrombie was using an electronic I-9 system that it developed in-house for all stores nationwide.¹²⁸ The audit uncovered problems with the electronic system, and although there was no evidence that Abercrombie employed any workers without proper authorization, the company nevertheless paid a \$1,047,110 fine to settle the case.¹²⁹ Essentially, the electronic system defect meant that none of Abercrombie’s I-9s were compliant.

Given the various laws governing employer compliance with immigration and anti-discrimination in hiring, an electronic I-9 system poses specific risks, outlined below.

i. Risk: Discrimination

The Immigrant and Employee Rights (“IER”) section of the U.S.

127. See Matthew E. Orso & Susan C. Rodriguez, *The Compliance Risks of I-9 Software*, SOC’Y FOR HUM. RESOURCE MGMT. (Aug. 25, 2016), <https://www.shrm.org/hr-today/news/hr-magazine/0916/pages/the-compliance-risks-of-i-9-software.aspx> (explaining that I-9 electronic systems may still encounter integrity and compliance issues). See generally Abercrombie & Fitch, *supra* note 75 (noting that Abercrombie & Fitch paid a large fine because its I-9 electronic system had a defect).

128. Abercrombie & Fitch, *supra* note 75 (noting that Abercrombie & Fitch’s electronic employment verification system, specifically its systems in the Michigan retail stores, were audited in November 2008).

129. See *id.* (stating that although ICE discovered “numerous technology-related deficiencies” in Abercrombie & Fitch’s electronic employment verification system, the company did not “knowingly” employ unauthorized individuals, but nonetheless settled the case for over \$1 million).

Department of Justice is tasked with enforcing the anti-discrimination provision of the INA.¹³⁰ IRCA created the Office of Special Counsel for Immigration Related Unfair Employment Practices, which became the IER in 2017, to oversee the provisions that made it unlawful for an employer to discriminate against a job applicant based on his or her national origin or citizenship status.¹³¹ Specifically, IRCA prohibits: “1) citizenship status discrimination in hiring, firing, or recruitment or referral for a fee, 2) national origin discrimination in hiring, firing, or recruitment or referral for a fee, 3) unfair documentary practices during the employment eligibility verification, Form I-9 and E-Verify, and 4) retaliation or intimidation.”¹³²

Electronic I-9 systems that limit the types of documents an employee may present relating to Section 2 of the I-9 based on the immigration status the employee entered in Section 1 could implicate employee rights protected by the IER and IRCA.

In *Rose Acre Farms*, IER filed suit against the egg producer “alleging that Rose Acre engaged in a pattern or practice of discrimination against work-authorized non-citizens in the employment eligibility verification process.”¹³³ The complaint indicated that the company purchased an electronic I-9 system that “may” have led human resources staff to request specific documents from non-U.S. workers.¹³⁴

ii. Risk: System Error

In 2010, ICE announced that it had reached a \$1.047 million settlement agreement with Abercrombie & Fitch following a 2008 I-9 audit that resulted in numerous “technology-related deficiencies” in the retailer’s electronic I-9 system.¹³⁵ Notably, the company was not found to have employed any workers who did not have U.S. work authorization, nor was the company found to have been aware of the problems with its I-9 compliance, but the

130. See generally 8 U.S.C. § 1324b (providing anti-discrimination rules for employers hiring immigrants).

131. *Id.* § 1324b(c)(2) (“The Special Counsel shall be responsible for investigation of charges and issuance of complaints . . . and in respect of the prosecution of all such complaints before administrative law judges . . .”).

132. *Immigrant and Employee Rights Section*, DOJ, <https://www.justice.gov/crt/immigrant-and-employee-rights-section> (last visited Nov. 29, 2017).

133. Press Release, DOJ Office of Pub. Affairs, Justice Department Files Lawsuit Against Rose Acre Farms in Indiana Alleging Discrimination Against Work-Authorized Non-Citizens (June 19, 2012), <https://www.justice.gov/opa/pr/justice-department-files-lawsuit-against-rose-acre-farms-indiana-alleging-discrimination>.

134. *Id.*

135. See *id.* (noting that Rose Acre’s electronic system “may have prompted [HR] officials to demand certain documents from non-U.S. citizens”).

system glitch was such that none of Abercrombie's electronic I-9s were compliant.¹³⁶ Widespread system glitches that may not be apparent to HR users until the event of an audit would impact the totality of an employer's I-9s.

iii. Risk: Gray Areas

Although the electronic I-9 regulations exist to provide clarity to employers in selecting a compliant electronic system, there are still gray areas that employers must accept as possible risks if embracing an electronic I-9 system.¹³⁷

a. Pre-population

One of the benefits of an electronic I-9 system, as mentioned above, is the possibility for integration with existing human resources systems and onboarding processes.¹³⁸ The ability to have information entered by an employee during the onboarding process to seamlessly transfer to the electronic I-9 is a tempting feature for many employers.¹³⁹ It saves time, it ensures that the information in the HRIS system and Form I-9 are consistent, and it reduces data entry errors that can occur when employees are required to re-type the same data in multiple places (i.e., name, address, telephone number, Social Security number, email address, etc.).

Although not part of any official guidance or regulation, ICE has referenced the issue of pre-population of employee data on Section 1 of electronic Forms I-9 to legal immigration stakeholders:

Prepopulation of the Form I-9 has never been approved and is not acceptable. Having a translator/preparer sign a prepopulated Form I-9 is not appropriate since, under the relevant regulation, this section is meant to be used when someone other than the employee is filling out the form in the presence of the employee. The translator/preparer reads the form to

136. See Abercrombie & Fitch, *supra* note 75 (noting that although Abercrombie & Fitch's electronic employment verification system was flawed, "[t]he company was fully cooperative during the investigation and no instances of the knowing hire of unauthorized aliens were discovered").

137. See generally Orso & Rodriguez, *supra* note 127 (emphasizing the importance of employers selecting I-9 systems that lack integrity issues and are compliant with the I-9 process).

138. See Aleksandra Michailov, *Paper or Electronic?*, HRO TODAY (Jan. 3, 2013), <http://www.hrotoday.com/news/talent-acquisition/paper-or-electronic/> (highlighting the general benefits of electronic I-9 systems); see also *4 Benefits*, *supra* note 4 (arguing that E-Verify's electronic input will help middle and large organizations eliminate human error during the data input process).

139. See Michailov, *supra* note 138 (noting that there are benefits to an electronic I-9).

the individual, and the individual provides responses. Prepopulating Form I-9 is considered a violation. HSI was not certain how it would charge prepopulation – as a substantive or technical violation - failure to prepare would be a possibility. Prepopulating Form I-9 and completing the preparer/translator section is ‘absolutely not’ acceptable to HSI.¹⁴⁰

IER has also issued guidance discouraging the use of pre-population of Section 1.¹⁴¹ Despite these warnings, electronic I-9 vendors continue to offer pre-population of Forms I-9 as part of their system capabilities, although the related service contracts sometimes explicitly disclaim any liability on the part of the vendor if an employer chooses to implement the pre-population capability.¹⁴² To date, no fines or other enforcement actions have referenced pre-population of employee information in Section 1 as a substantive violation.¹⁴³

b. Electronic signatures

For many electronic systems, the ability to sign the document electronically is the whole point. Employers could otherwise complete the Form I-9 “on-screen” and take advantage of the most recently-released free version that has “smart” attributes mimicked by many electronic I-9 systems (i.e., field validations for alpha or numeric characters, character limits, warnings for incorrectly completed fields, etc.). However, the regulations governing electronic signatures for electronic I-9s are far from clear. The system must “include a method to acknowledge that the attestation to be

140. *AILA Verification and Documentation Liaison Committee Meeting with ICE Homeland Security Investigations (HSI)*, AILA DOC. No. 13062401 4 (Apr. 11, 2013), <http://www.aila.org/File/DownloadEmbeddedFile/50415>.

141. See Technical Assistance Letter from Seema Nanda, Deputy Special Counsel, DOJ Civil Rights Div., to Lesley A. Carr (Aug. 20, 2013), <https://www.justice.gov/sites/default/files/crt/legacy/2013/08/23/169.pdf> (“From the perspective of the anti-discrimination provision, OSC discourages the practice of an employer pre-populating Section 1 with previously obtained employee information.”).

142. See Giselle Carson, *Employers: Answers to Your Top 10 FAQ About the New “Smart” Form I-9*, MARKS GRAY (Nov. 4, 2016), <http://www.marksgrey.com/wp-content/immigration/FAQ/FAQs%20about%20the%20New%20Smart%20I-9%20Form.pdf> (explaining that employers must use due diligence when selecting I-9 vendors); see also Roy Maurer, *Clearing Up Confusion over Prepopulating Your Form I-9s*, SOC’Y FOR HUM. RESOURCE MGMT. (Aug. 28, 2013), <https://www.shrm.org/resourcesandtools/hr-topics/global-hr/pages/confusion-prepopulating-form-i9s.aspx> (suggesting that employers should do their due diligence when selecting an electronic I-9 vendor).

143. See Bruce Buchanan, *I-9 E-Verify Immigration Compliance: USCIS Offers New Guidance on Pre-Population of I-9 Forms*, ILW.COM (Nov. 8, 2016, 3:57 PM), <http://blogs.ilw.com/entry.php?9540-USCIS-Offers-New-Guidance-on-Pre-Population-of-I-9-Forms> (explaining that employers are subject to a civil penalty if ICE finds that the Section 1 violation is substantive).

signed has been read by the signatory” and that a record is created to “preserve a record verifying the identity of the person producing the signature.”¹⁴⁴ This, in addition to the requirement that no additional data elements or language are inserted,¹⁴⁵ makes the practical implementation of the signature uncertain. As far as the authors are aware, no fines have been assessed against employers specifically due to noncompliant electronic signatures, but it appears to be an area ripe for enforcement should ICE so choose.

c. Audit trails

Electronic I-9 regulations require that employers produce audit trails for each electronic I-9 under audit. Although ICE has issued explicit guidelines with respect to what audit trails must include, no fines or other enforcement actions have explicitly referenced inadequate audit trails.¹⁴⁶

d. Online security, data integrity, outages, and service provider issues

The electronic I-9 regulations clearly outline the requirements for system security, data integrity, and quality assurance procedures specific to electronic I-9 systems.¹⁴⁷ To date, ICE has not issued a publicly-noted fine for an employer’s failure to maintain system security or data integrity, but again, it is an area that is only likely to grow in importance as more and more employers adopt electronic I-9 systems. Relatedly, if an employer chooses to engage a commercial electronic I-9 service provider (as opposed to building an electronic I-9 system in-house), it is unclear how a system failure on the provider’s side (i.e., a hack, server breakdown, or other issue entirely outside the employer’s control) could be assessed and enforced by ICE.

e. Home or remote employees

Although not limited to electronic I-9 systems, home-based or remote

144. Verification of Identity and Employment Authorization, 8 C.F.R. § 274a.2(h) (2018).

145. *See id.* § 274a.2(a)(2) (“Alternatively, Form I-9 can be electronically generated or retained, provided that the resulting form is legible; there is no change to the name, content, or sequence of the data elements and instructions; no additional data elements or language are inserted; and the standards specified under 8 CFR 274a.2(e), (f), (g), (h), and (i), as applicable, are met.”).

146. *See generally* Memorandum from James Dinkins, Exec. Assoc. Dir., HSI, Guidance on the Collection and Audit Trail Requirements for Electronically Generated Forms I-9 (Aug. 22, 2012), https://www.ice.gov/doclib/foia/dro_policy_memos/collect-audit-forms-i9.pdf.

147. *See* 8 C.F.R. § 274a.2(e)(1)(i)-(v).

employees have always posed challenges for I-9 completion, specifically as it relates to the identification of an individual who can serve as a “designated representative” of the company to review the original identification and work authorization documents and complete Section 2.¹⁴⁸ In instances where an employee is not geographically proximate to a company office, he or she would not have access to corporate sites or even a computer upon which to enter the information for Section 2. Furthermore, the temptation for employers with remote employees is to “skip” the requirement that a company representative review the employee’s original documents for purposes of completing Section 2. Employers have asked whether documents can be reviewed by webcam frequently enough that USCIS added it as one of their Frequently Asked Questions.¹⁴⁹ Whether an employer uses a paper-based system or an electronic one, an in-person review of original documents must be conducted for all remote employees. Electronic I-9 systems do not alleviate this burden.¹⁵⁰

f. Reverification

Section 3 must be completed when re-hiring a former employee or when re-verifying expiring work authorization documents.¹⁵¹ Although employers may opt to complete a fresh Section 2 or an entirely new I-9, depending on the circumstances, Section 3 is available for that purpose. However, some electronic systems do not have the capability to re-open an I-9 for Section 3 completion. The internal “pathing” required for the system to make Section 3 available for completion is complicated, so companies with such systems must complete a new I-9 for re-verification. Ensuring the old I-9 and the new I-9 are “linked” for future document production is important. Otherwise, the system will only show the old I-9 with expired work

148. See *I Hire My Employees Remotely. How do I complete Form I-9?*, USCIS, <https://www.uscis.gov/i-9-central/i-9-central-questions-answers/faq/i-hire-my-employees-remotely-how-do-i-complete-form-i-9> (last updated Mar. 27, 2014) (explaining that “[y]ou may designate an authorized representative to fill out Forms I-9 on behalf of your company, including personnel officers, foremen, agents or notary public”).

149. See *I-9 Central Questions and Answers*, USCIS, <https://www.uscis.gov/i-9-central/questions-and-answers> (last updated Nov. 7, 2017) (answering the following question: “May I review my employees documents via webcam to complete Form I-9?”).

150. *Id.*

151. See *Completing Section 3, Reverification and Rehires*, *supra* note 49; see also *Questions and Answers: National Stakeholder Teleconference on the Revised Form I-9*, USCIS 3 (May 7, 2013), <https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2013/May%202013/FormI9-QAs-050713.pdf> (noting that if employers complete new Form I-9s for reverification, “only Section 3 of the new Form I-9 . . . should be completed”).

authorization documents, or the new “Section 2-only” version.

Employers are ultimately responsible for the compliance of their Form I-9s, regardless of whether those forms are completed in paper or created via an electronic I-9 system. The employer, not the third-party service provider, is responsible for ensuring that the electronic I-9 system is compliant with the applicable regulations.¹⁵² Furthermore, no electronic system can overcome poor training of HR administrators and managers responsible for managing and completing I-9s. No system is smart enough to resolve sloppy document review practices, discriminatory behavior (such as requesting certain documents from certain employees), or timeliness of I-9 creation.

III. CONCLUSION

Since President Trump took office, he has made it clear through executive orders and speeches that his highest priorities include enforcing immigration laws and discouraging unauthorized immigration.¹⁵³ Enforcement actions against employers who violated I-9 rules were at an all-time high under President Obama, so it stands to reason that the trend will continue. With Acting ICE Director Thomas Homan specifically citing plans to quadruple enforcement against employers, it is evident that the Trump administration and its agencies intend to use the letter of the law to address the issue of unauthorized employment.¹⁵⁴

152. Dave Zielinski, *Does Your Automated I-9 System Comply with ICE Regulations?*, SOC’Y FOR HUM. RESOURCE MGMT. (May 1, 2011), <https://www.shrm.org/hr-today/news/hr-magazine/Pages/0511zielinski2.aspx> (“In effect, the ICE ruling tells employers to ‘select an electronic I-9 system at your own risk’ [I]t’s up to HR leaders and their legal advisors to ensure that electronic systems comply with rigorous ICE regulations.”).

153. *See* Buy American and Hire American, Exec. Order No. 13788, 82 Fed. Reg. 76,18837 (Apr. 21, 2017) (citing Inadmissible Aliens, 8 U.S.C. § 1182(a)(5) (2012)) (“In order to create higher wages and employment rates for workers in the United States, and to protect their economic interests, it shall be the policy of the executive branch to rigorously enforce and administer the laws governing entry into the United States of workers from abroad, including section 212(a)(5) of the Immigration and Nationality Act.”); Protecting the Nation from Foreign Terrorist Entry Into the United States, Exec. Order No. 13780, 82 Fed. Reg. 45,13209 (Mar. 9, 2017) (“Recent history shows that some of those who have entered the United States through our immigration system have proved to be threats to our national security.”); Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13768, 82 Fed. Reg. 18,8799 (Jan. 30, 2017) (“[The] Secretary shall issue guidance and promulgate regulations, where required by law, to ensure the assessment and collection of all fines and penalties that the Secretary is authorized under the law to assess and collect from aliens unlawfully present in the United States and from those who facilitate their presence in the United States. . . . [The] Secretary . . . shall . . . hire 10,000 additional immigration officers . . .”).

154. *See* Tal Kopan, *ICE Chief Pledges Quadrupling or More of Workplace Crackdowns*, CNN (Oct. 17, 2017, 9:32 PM), <http://www.cnn.com/2017/10/17/politics/ice-crackdown-workplaces/index.html>; *see also* John Fay, *How Does Trump’s*

I-9 violations can be costly to employers, and complying with ever-changing I-9 rules is a constant challenge. Electronic I-9 systems are attractive to employers who hope to streamline the paperwork involved in onboarding a new employee, and as HRIS platforms evolve in sophistication and ubiquity, electronic I-9 “add-on” modules will become the norm. Nonetheless, it is incumbent upon employers to scrutinize any electronic I-9 system and seek guidance from an experienced immigration attorney to ensure that the system meets electronic I-9 standards. Failure to double-down on this due diligence at the outset of the implementation of an I-9 system can have costly implications—both civil and criminal—and any employer who thinks that a fancy electronic I-9 system is the silver bullet to sloppy I-9 practices and policies is in for a rude awakening.

Presidential Victory Impact I-9 and E-Verify Compliance?, L. LOGIX (Nov. 10, 2016), <https://www.lawlogix.com/how-does-trumps-presidential-victory-impact-i-9-and-e-verify-compliance/> (“Since 2009, ICE has audited more than 10,000 employers and imposed more than \$100 million in financial sanctions related to I-9 and worksite violations Mr. Trump may adopt a similar stance and increase (or at the very least maintain) ICE’s mission of creating a ‘culture of compliance’”).