

MITRATECH

Your Comprehensive Guide to I-9 and E-Verify



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01 The I-9

Background on the I-9

The I-9 came about as a result of the [Immigration Reform and Control Act \(IRCA\) of 1986](#). This act was established to accomplish two things: prevent the employment of undocumented immigrants or others not authorized to work in the United States, and to prevent workplace discrimination based on citizenship or national origin.

In order to comply with federal law, U.S. based employers must verify the identity and employment authorization of each person they hire, complete and retain a Form I-9 for each employee, and refrain from discriminating against individuals on the basis of national origin or citizenship. I-9 compliance is mandatory for all employers and significant fines can be incurred in the event of an audit by [Immigration and Customs Enforcement \(ICE\)](#) or other federal bodies.

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There are regular updates to the Form I-9. Many of these revisions either add/remove data fields, modify requirements for documentation needed in Section 2/Section 3, and/or often include rule changes that impact the Form I-9 process. For this reason, it's imperative that employers use the most recently revised form.

Failure to utilize the most updated version of the Form I-9 can easily lead to severe penalties in the event of an audit. View a full history of [previous versions of the Form I-9](#).

What is it?

The Form I-9 is a federally mandated, two-page document used for verifying the identity and employment authorization of individuals hired for employment within the United States. Every employer is responsible for ensuring proper completion of the Form I-9 for all individuals hired for employment in the United States. Once completed, employers must retain these forms for a designated period of time for the purpose of future inspections sanctioned by the U.S. government.



Why should Employers care about Form I-9?

Just like any federal document, the Form I-9 is not to be taken lightly. In fact, the Form I-9 is more than just a form that must be completed upon hiring a new employee – it is a covenant between employer, employee, and the U.S. government which attests that the employer is in fact hiring an employee who stands in compliance with the federal and state guidelines for legal employment at the time of the completion of the I-9.

Breach of this agreement – accidental or intentional – could be a big problem for the employer and employee that can lead to the following and more:

- 1 Warning Notice
- 2 Monetary Fines
- 3 Criminal Prosecution
- 4 Workplace Raids
- 5 Office of Chief Administrative Hearing Officer (OCAHO) hearings
- 6 Court Settlements

The varying degrees of violations and penalties noted above are administered by the Immigration and Customs Enforcement Agency (ICE) after a Notice of Inspection (NOI).



Sections of the Form I-9

The Form I-9 has three sections:

Section 1

Section one must be completed by the employee no later than the first day on the job (i.e. first day of work for pay). This includes work trainings. In Section 1, the employee must offer simple personal information such as his or her date of birth, address, and citizenship status.

Section 2:

The second section must be completed by the employer no later than third business day after the employee begins work for pay.* In Section 2, the employer must verify the new-hire's identification by reviewing a [USCIS-approved form of ID](#). Section 2 must be completed by the employer, or employer-approved representative, in person.

** Please note that if the employee will work for three days or fewer, Section 2 must be completed no later than the first day of work for pay.*



Section 3:

Section three must be completed by the employer if the employee's work authorization expires or if the employee is rehired within 3 years of the date the Form I-9 was originally completed. In Section 3, an employer will re-verify an employee's work authorization to resume work for pay. A new Form I-9 may also be completed in place of completing Section 3.

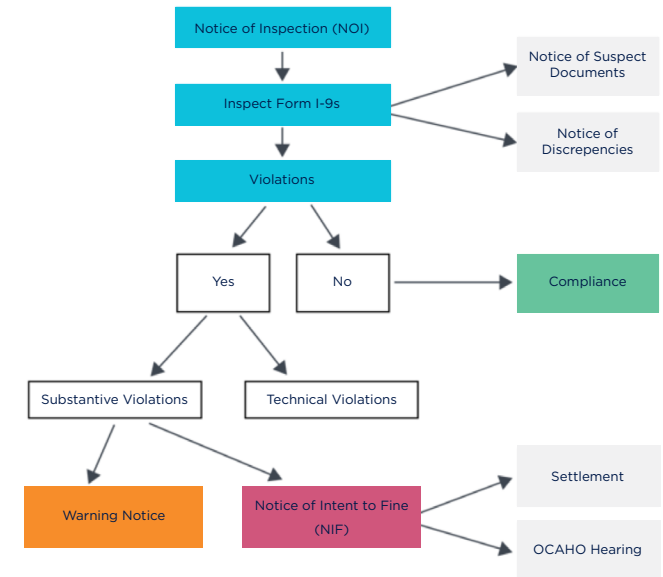
**Following the proper completion of Section 2, an Employer may choose to, or be required to, submit the completed Form I-9 to E-Verify.*

ICE audits and the I-9

An ICE Audit is initiated when an ICE agent arrives at an organization to serve a Notice of Inspection (NOI). The person receiving service of the NOI will need to sign a document acknowledging receipt. *Tracker has supported companies through dozens of I-9 audits and we suggest that you take NOI's very seriously.* If you receive an audit notice, it is imperative that you act immediately and seek out the guidance of a compliance professional who can guide you through the ICE inspection process.

Below is a rough overview of what the I-9 inspection process looks like from a high level and what you can expect in the event that you receive an NOI.

Form I-9 Inspection Process



*Source: I-9 Inspection Process - [ICE.Gov](https://www.ice.dhs.gov/i-9)

Once an NOI is received, the employer has 72 hours to produce the requested I-9s and any other accompanying documentation dictated by the subpoena that accompanies the NOI. Additional documentation required by ICE typically includes payroll records and tax filings, lists of active and inactive employees, business information (EIN's, articles of incorporation, business licenses, etc.), E-Verify information (case numbers for I-9s), and other employment documentation. Although the employer typically has 72 hours to respond to the NOI, extensions may be granted with good reason.

As a next step, ICE agents/auditors conduct an inspection of an employer's I-9s for compliance. If no corrections are needed and the employer is found to be compliant, the ICE agent will inform the organization of their status and close the case. However, if technical or substantive violations are found, an employer is typically granted ten business days to correct the non-compliant I-9s. Time extensions are rarely provided and employers may receive a Notice of Intent to Fine (NIF) for all substantive and uncorrected technical violations found on the I-9s.

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Employers who have been found to knowingly hire or continue to employ unauthorized workers will be required to cease unlawful activity, may incur an NIF, and may also see criminal persecution. **Fines for knowingly hiring employees who are not authorized to work range from \$375 to \$16,000 per violation**, with repeat offenders receiving penalties weighted toward the higher end of the spectrum. **Penalties for substantive violations range from \$216 to \$2,156 per violation.**

An important thing to note here is that ICE assesses violations per error or omission, not per Form I-9. **A single I-9 can easily contain multiple violations**, each of which can result in a fine.

The greatest factors that ICE considers in its determination of penalty amount are:

1. Size of the business
2. Evidence of good faith effort to comply
3. Seriousness of violation
4. Whether the violation involved unauthorized workers
5. History of previous violations

If an NIF is served, ICE will provide charging documents which specify all violations committed by the employer. The employer then has option to negotiate a settlement with ICE or request a hearing before the



[Office of the Chief Administrative Hearing Officer \(OCAHO\)](#) within 30 days of the NIF.

[According to ICE](#), an Administrative Law Judge is assigned to the case, however, many OCAHO cases do not reach the hearing stage due to parties reaching a settlement, parties subjecting to the approval of the ALJ, or the ALJ reaches a decision on the merits through dispositive pre-hearing rulings.

A cautionary tale? In September 2017, Asplundh Tree Expert Co was sentenced to pay a whopping \$95 million in forfeitures and civil claims for knowingly employing undocumented immigrants. Although this is an extreme example, this case shows that violators who manipulate hiring laws and support the acceptance of fraudulent documentation when hiring new employees will be caught and penalized accordingly. [Read more about this case.](#)

The I-9 is ever-changing and continues to be updated every few years. At a minimum, it is imperative to [use the most recent Form I-9 mandated by USCIS](#) and ensure that all sections of the I-9 are completed in a compliant and timely manner. Tracker offers the only I-9 Compliance Platform to maintain a perfect track record of zero client fines in federal and ICE audits.

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How are I-9 penalties calculated?

In 2008, ICE issued a memorandum which required ICE agents to *follow specific procedures for calculating I-9 related fines*. The policy procedures are as follows:

Use the number of violations of each type (paperwork, hiring or continuing-to-employ) as the numerator and the number of total employees as the denominator. For example, if you have 100 employees with 10 substantive paperwork violations and 20 hiring or continuing-to-employ violations, you'd have $10/100 = 10$ percent for paperwork and $20/100 = 20$ percent for hiring or continuing-to-employ violations, leading to a fine of \$40,560 using the [2017 penalty matrices](#).

The fines could then be adjusted up or down 5 percent for each of five factors—business size, good faith, seriousness, employment of unauthorized aliens, and prior history with ICE.¹

ICE has begun adding the number of paperwork violations to the number of hiring or continuing-to-employ violations as the numerator, which can often increase the level of fine.

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For example, if you have 100 employees with 10 substantive paperwork violations and 20 hiring or continuing-to-employ violations, you'd have $10 + 20 = 30$ to calculate 30 percent violations, leading to a fine of \$60,270, using the 2017 penalty matrices.

Mythbusters: Common I-9 misconceptions

1) Participation in E-Verify replaces the Form I-9. We don't need to do both.

This is **false**. The E-Verify program does not replace the Form I-9 and participating in E-Verify does not remove an employer's obligations to comply with the I-9 process. The I-9 is mandatory to all employers, while E-Verify is required for an employer if they are a Federal Contractor or employ people in certain states where state law mandates the use of E-Verify.

2) If I-9s are in an electronic system, this means the I-9s are fully compliant.

This is **false**. Whether you're on an electronic system that is home-grown, provided as a stand-alone system, bundled into an onboarding package, or tied into an HRIS/ATS/HCM, it must still adhere and comply in accordance to the record keeping standards that ICE requires. Ultimately, the responsibility



for completing I-9s lies in the hands of the employer. Even with an electronic system, errors can easily loom in the system until exposed during an ICE inspection.

When evaluating I-9 vendors, it is critical to ask the right questions. Here are some suggested considerations as you evaluate electronic platforms:

- Does the I-9 vendor have a dedicated team of attorneys who inform product improvements?
- Who is the existing client base? Is the I-9 vendor able to produce references in the same industry and of the same employee size as your own company?
- How long has the vendor been in the market & how many of their clients have been audited? How many have received fines?
- Does the vendor allow for third parties to audit their system?
- Does the vendor document audit trails?

Since compliance is the central aspect of the Form I-9, every vendor should be able to showcase a history of successfully supporting clients through multiple federal audits. As evidenced by the Abercrombie & Fitch ICE audit, having an electronic I-9 system in place does not guarantee that ICE will give a company two thumbs up when it comes to compliance.

3) For a remote employee, Section 2 verification of the I-9 can be completed via video chat or by sending section 2 documentation via email.

This is **false**. Verifying Section 2 of the I-9 must be done in person by either the employer or its representative. It is not compliant to hire an employee without having the employer or employer representative view the documentation in the physical presence of the employee.

If using an advanced electronic I-9 management platform, employers may opt to use remote Section 2 features, such as Tracker's I-9 Remote workflow, to compliantly complete document verification anywhere in the United States.

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4) I-9s are no longer needed after an employee has quit or has been terminated.

This is **false**. It's absolutely **critical that an employer retains I-9s for both current and ex-employees**. The 3 year rule applies: I-9s must be kept three years from the date of hire or one year from the date of termination, whichever is later.

Watch out for these...

Common employee errors:

- Failure to enter name, date of birth, or address
- Failure to enter initial day of employment
- Failure to indicate residency status
- If employee chooses "Lawful Permanent Resident" they do not enter the USCIS number
- If I-9 form was completed with the help of a translator, the employee fails to have the translator sign, print name, and date form



Common employer errors:

- Failure to enter the approved documentation on the I-9 form
- Failure to submit Section 2 after the third business day of initial employment
- Failure to enter the initial start date of employment
- Failure to not enter the name, address, or title of the business
- Using the incorrect/outdated version of the I-9 form
- Asking employee for specific documentation on Section 2 - this is discrimination
- Copying of documentation - The employer cannot discriminate. If the employer wishes to keep copies, he/she must make copies for all the employees
- Employer incorrectly submits Section 3 after employee has had his/her work authorization expire. They must request the documented evidence with the listed expiration date



Common I-9 Errors

- Timeline of completion is ignored. USCIS maintains strict timeline requires that cannot be overlooked.
- Failure to complete both sides of the I-9. There are two sections that must be properly completed.
- Using White-Out. White-Out is never permitted.



Retention of the form I-9

Employers must be prepared to produce all Form I-9s in the event of an NOI.

There are no specific legal restrictions to where and how an employer may choose to store their I-9s; however, it is recommended to avoid storing I-9 records in decentralized locations due to the difficulty of attaining those records in the event of a sudden audit. Common solutions include centralizing the process and uploading I-9s to a secure, cloud-based I-9 system.

Keep in mind that during an NOI, I-9 records requested can be those of employees who are currently employed, as well as terminated employees who fall within the termination retention period of [USCIS' rule](#): three (3) years from the date of hire or one (1) year from the date of termination, whichever is later.

Do not destroy an I-9 simply because an employee is no longer employed.



02 E-Verify

Some background on E-Verify

The year is 1986. Scenes from Ferris Bueller's Day Off and Top Gun may flash into your mind, but this year also saw an enormous change for the future working generations of the United States. In November of 1986, Ronald Reagan signed the [Immigration Reform and Control Act of 1986 \(IRCA\)](#) which required employers to examine documentation from each newly hired employee to prove his or her identity and eligibility to work within the United States. This Act served as the cornerstone for the creation of the [Form I-9](#) and future employment verification processes.

The U.S. government took the second step toward employee workplace eligibility compliance in September of 1996. A second Act - The [Illegal Immigration Reform and Immigrant Responsibility Act \(IIRIRA\) of 1996](#) required the then Immigration and Naturalization Service (INS, now a part of DHS) to conduct three distinct pilot programs for determining the most effective method in verifying an employee's employment documents.



From 1996 to 2004, the Pilot Program saw voluntary implementation across California, Florida, Illinois, Nebraska, New York and Texas. It's here that for the first time, information from the employee's Form I-9 began to be compared to the information in INS and SSA records. By late 2004, the program was entirely online.

In 2007, the program was renamed to what we know of today as E-Verify while the other two programs launched by the government were discontinued. This year also marked an additional step in the employee verification of [photo matching](#), which continues to be utilized today. This step was developed for employees presenting a Permanent Resident Card or Employment Authorization Document, and allows the employer to match the photo on an employee's document with the photo in USCIS records. Just a year later in 2008, USCIS and [Immigration Customs Enforcement](#) (ICE) entered into a bilateral agreement which granted privileges to shared data. From this year moving forward, misuse, abuse, or fraudulent use of E-Verify is now regulated and monitored by ICE.

In 2011, E-Verify launched the Records and Information from DMVs for E-Verify (RIDE) program. [RIDE](#) enables states to validate the authenticity of driver's licenses presented as Form I-9 identity documents. In order to ease the process on employers, E-Verify launched "Self-Check" service which



allows individuals to self-check their employment eligibility in the United States. As of December of 2018, this service is available in 21 states.

Popularity and use of E-Verify continues to grow every year. In 2008, USCIS reported a figure of around 88,200 employers using E-Verify. As of December 2018, nearly 750,000 employers use E-Verify.

What is it?

E-Verify is an online employee verification system administered by the Social Security Administration (SSA), U.S. Department of Homeland Security (DHS), and [U.S. Citizenship and Immigration Services \(USCIS\)](#). The purpose of this program is to allow businesses in the United States that are hiring paid employees to have an additional safeguard for verifying that new-hires are legally eligible to work in the U.S.

Is E-Verify mandatory?

E-Verify is only mandatory for certain Federal Contractors, and in some states. Here's a helpful overview of E-Verify Laws by State. Nonetheless, E-Verify has become popular as an additional safeguard for companies across the U.S. to maintain a legal workforce and lessen instances of fraudulent documentation submissions.



As of November 30, 2012, a total of 20 states required the use of E-Verify for at least some public and/or private employers: Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Carolina, Oklahoma, Pennsylvania, South Carolina, Tennessee, Utah, Virginia, and West Virginia.

Why should employers care about E-Verify?

Every employer in the United States must complete a Form I-9 for each of its paid employees. The E-Verify system aids employers in submitting proper Form I-9s while preventing the hiring of individuals who are not authorized to work within the United States.

Employing workers without a properly completed I-9 could lead to a plethora of problems, including significant fines to your organization of up to \$2,191 per *improperly filed Form I-9*. Across an organization of hundreds or thousands of employees, you could be looking at hefty fines of hundreds of thousands of dollars. Built-in safeguards have never looked more appealing.

Employing workers without a properly completed I-9 could lead to a plethora of problems, including significant fines to your organization of up to \$2,191 per *improperly filed Form I-9*.

Federal and ICE audits

U.S. Federal Agencies, including the [U.S. Immigrations and Customs Enforcement \(ICE\)](#), conduct thousands of employment eligibility inspections each year. These inspections typically include a robust audit of a company's Form I-9s to ensure proper filing and maintenance.

In 2018, Immigration and Customs Enforcement (ICE) served more than 5,200 NOIs, compared to 1,360 in 2017. This significant increase in audits is consistent with the Trump administration's continued focus on immigration enforcement. We can expect the number of annual I-9 audits to continue to increase.

Common misconceptions

E-Verify and the Form I-9 are separate steps in an employee verification process. Instances have occurred when employers have E-Verified an employee and then disregarded or discarded the Form I-9, making the assumption that both steps would be unnecessary or redundant. This is a major red flag and leaves companies prone to fines by federal agencies.

The Form I-9 and E-Verify are separate processes that must be documented independently of one another.



E-Verify may confirm that an employee is eligible for work, but keep in mind it is not a replacement for the Form I-9. In addition, E-Verify may return a status of “Authorized to Work” (see E-Verify Case Results below) but portions of the employee’s Form I-9 may still remain non-compliant to federal regulations and thus remain prone to fines conducted in an audit.

As of December, 2018, fines by ICE range from \$220 to \$2,191 per Form I-9.

Pros and cons of E-Verify

Pros

1. In most cases, E-Verify helps companies steer clear of hiring an individual who is actually not eligible to work within the United States, and therefore avoid potential federal fines.
2. Due to the growing popularity of this program, E-Verify has the potential to become mandatory for employers across the nation. By embedding this step in all employee verification processes, employers are able to become more accustomed to the expectations/requirements of the program and stay ahead of the curve.
3. E-Verify can easily be included as an automated step within your HRIS Management or ATS platform. Tracker is a proud partner of E-Verify and makes integration with E-Verify seamless through a simple API.

E-Verify may confirm that an employee is eligible for work, but keep in mind it is not a replacement for the Form I-9.

Cons

1. E-Verify serves as a direct line into the U.S. government's citizenship database. By submitting new-hire information, the U.S. government has the capability to catch employers making mistakes (intentional or otherwise) in the employee verification process. Information from Form I-9s consistently not submitted by the third business day after a new hire's first day of work to E-Verify serves as potential ground for audits and potential fines. In other words, there are strict guidelines and timelines put into place to help protect your workforce, but it can often be difficult to adhere to all timeline and data requirements.
2. The E-Verify system is not perfect. Cases have occurred where TNC's (Tentative Non-Confirmations) and FNC's (Final Non-Confirmations) occurred for an individual who was authorized to work. Those authorized to work may also encounter TNC's and FNC's.
3. E-Verify may expose employers to legal risks. Employees can sue for discrimination if employers do not provide proper notice of or appropriate assistance with TNC's.
4. Training employees and manually managing the E-Verify process can take time. Keep costs for labor in mind for this process and consider automated Form I-9 solutions.



5. Although rare, government shutdowns can cause issues with the E-Verify system. In a government shutdown, the E-Verify platform is technically shut down as well. Employers manually entering new-hire info must await E-Verify's active status before finally submitting all of the verification details. E-Verify.gov is typically flexible in the event of a shut down and allows employers a larger window of time to submit the information. In the event of a shutdown, please refer to information provided to you by [E-Verify](#) for system expectations.

Getting started with E-Verify

You may choose to utilize E-Verify directly, in which case the first step is to enroll in E-Verify through the [E-Verify](#) Website by providing your business and contact information. After enrolling, you'll have a direct link to the government database of employment authorized people within the U.S.

You may run a new-hire's information through E-Verify only after an employee completes the Form I-9. The employer must verify the employment eligibility and identity documents presented by the employee and record the document information on the Form I-9.

Although the Form I-9 is only two pages long, this document has *100s of rules and is among the most heavily audited forms by the U.S. Government.* For more information regarding the complex process of properly completing a Form I-9, consult your I-9 specialist or a platform specifically backed by an Immigration Law firm, such as Tracker I-9 Solutions.

Great, I'm enrolled in E-Verify! Now what?

The 'E-Verify Participation' and 'Right to Work' posters found on E-Verify.gov must be posted at the company's hiring location(s). If the posters cannot be displayed at the hiring location(s), they must be provided to an employee in an alternative manner.

From here, any time you have a new hire, you must go onto the E-Verify Website and confirm employee eligibility of the individual. E-Verify must only be run once after a Form I-9 has been completed and an offer of employment has been made and accepted, but no later than the third business day after the employee begins to work.

**Be sure to E-Verify all individuals.* Being selective with the process is grounds for federal intervention and potential fines.

**Be sure to E-Verify all individuals.* Being selective with the process is grounds for federal intervention and potential fines.

The employer must:

1. Download and print the Further Action Notice and confirm whether the information listed at the top is correct
2. Privately notify employee of the TNC
3. Have employee review and confirm whether the information listed at the top is correct
4. Instruct the employee to indicate his or her decision to take action or not and to sign and date the Further Action Notice
5. Provide the employee with a copy of the signed Further Action Notice in English (and a translated version, if appropriate)
6. Keep the original signed Further Action Notice on file with Form I-9

The employer must:

1. Confirm if the information on the Further Action Notice is correct
2. Decide whether to take action to resolve the TNC or not and indicate choice on the Further Action Notice
3. Acknowledge the TNC case result by signing and dating Further Action Notice



Depending on the decision of the employee, further action may need to be taken to contact DHS and SSA to resolve the TNC.

Employers may not take adverse action against an employee because the employee received a TNC.

- **Case in Continuance** - The employee has visited an SSA field office or contacted DHS, but more time is needed to determine a final case result. The employer may still not take adverse action against an employee because of the TNC while SSA or DHS is reviewing the employee's case.
- **Close Case and Resubmit** - SSA or DHS is unable to process the case and confirm eligibility. This requires that you close the case and create a new case for this employee. This result may be issued when the employee's U.S. passport, passport card, or driver's license information is incorrect.
- **Final Nonconfirmation** - E-Verify cannot confirm the employee's employment eligibility after the employee visited SSA or contacted DHS. The employer may terminate employment based on a case result of Final Nonconfirmation.



Can I automate E-Verify?

Yes, various ATS, HRIS, and standalone I-9 vendors will integrate with E-Verify.gov, thus once the Form I-9 process is completed, E-Verify can immediately check the given information on the form against the E-Verify database. If set up properly, this process will take a matter of seconds. Tracker specializes in I-9 Remediation and Management and is a proud E-Verify partner, ensuring seamless E-Verify integration and automation. Backed by an award-winning Immigration Law Firm, Tracker is the only I-9 Suite with a perfect 15+ year track record of zero client fines in federal and ICE audits.



About Mitratesch

Mitratesch is a proven global technology partner for corporate legal, risk & compliance, and HR professionals seeking to maximize productivity, control expense, and mitigate risk by deepening operational alignment, increasing visibility, and spurring collaboration across their organization.

With Mitratesch's proven portfolio of end-to-end solutions, organizations worldwide are able to implement best practices and standardize processes across all lines of business to manage risk and ensure business continuity.

Mitratesch serves over 1,500 organizations worldwide, including 30% of the Fortune 500 and over 500,000 users in 160 countries.

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