

# WORKSITE COMPLIANCE AND ENFORCEMENT UPDATE

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CLARK HILL

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## CLARK HILL PRESENTATION TEAM

**Jennifer Cook:** Senior Counsel in Clark Hill's Immigration Practice Group; represents individuals and businesses in immigration proceedings before federal courts and agencies, and has particular expertise in the areas of I-9 compliance and enforcement. Her clients include Fortune 500 companies, small businesses, non-profit organizations, families, and individuals on all major employment-based temporary and permanent visa categories.

**Rebecca Mancini:** Senior Attorney in Clark Hill's Immigration Practice Group; represents clients in a wide spectrum of complex corporate immigration matters for professionals and their families across a variety of industries including automotive, engineering, technology, health care, energy, academic, and financial services on all major employment-based temporary and permanent visa categories. Rebecca also provides outbound visa services to clients that need effective solutions for managing a global workforce, and has particular expertise in the areas of I-9 compliance and enforcement.

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# INTRODUCTION AND PRESENTATION OUTLINE

## I-9 COMPLIANCE

- What is I-9 compliance? And why does this matter anyway?
- Special considerations: Remote hires, document verification, automatic extensions
- Nondiscrimination law in the immigration context – screening, over documentation, and reverification concerns
- E-Verify – special considerations

## ENFORCEMENT

- Meteoric Rise in Enforcement Activity since 2017
- Employer-Focused Enforcement: I-9 Audits, civil and criminal penalties
- Special considerations: What constitutes constructive knowledge?

## SSA NO MATCH LETTERS

- History and intersection with I-9 Compliance
- Employer responsibilities and responses to SSA

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# BASIC I-9 COMPLIANCE


- Form I-9 is required for every employee hired since November 7, 1986
- Only use the current version of Form I-9 (Edition Date 7/17/2017) – use this version even though it “expired” 8/31/2019
- Employee completes **Section 1 on or before 1<sup>st</sup> day of employment.**
  - *Common error: Remind the employee to check the box regarding whether a preparer/translator was used or not!*
- Employer physically examines original documents and completes **Section 2 on or up to 3 business days after the first day of employment**
  - Employer may not complete Section 2 before the first day of employment
  - Note: E-Verify may not be run until Section 2 is completed by the employer
  - *Common error: Remember to insert the employee’s name and immigration status at the top of page 2!*


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## BASIC I-9 COMPLIANCE

- Employer (or its agent) completes Section 3 with information on name change, date of rehire, and/or new expiration date for expired documents that must be reverified, then signs and dates Section 3
  - In cases where a document expiration must be reverified more than once, the employer may complete Section 3 only of a new Form I-9, and retain that document along with the original Form
  - *Best Practice: Create reminder system for reverification of expiring employment authorization documents*
- Do not reverify documents provided by U.S. Citizens, U.S. Permanent Residents, or Asylees/Refugees with unrestricted SS card
  - Exception: If U.S. Permanent Resident provides temporary I-551 stamp or I-751 receipt extending his/her status for one year
- After employment ends, must retain I-9 for *either* three years after the first day of employment or one year after termination, whichever date is **later**

# FORM I-9: CURRENT VERSION

	<b>Employment Eligibility Verification</b> Department of Homeland Security U.S. Citizenship and Immigration Services	<b>USCIS</b> <b>Form I-9</b> OMB No. 1615-0047 Expires 08/31/2019																		
<p>▶ <b>START HERE:</b> Read instructions carefully before completing this form. The instructions must be available, either in paper or electronically, during completion of this form. Employers are liable for errors in the completion of this form.</p> <p><b>ANTI-DISCRIMINATION NOTICE:</b> It is illegal to discriminate against work-authorized individuals. Employers <b>CANNOT</b> specify which document(s) an employee may present to establish employment authorization and identity. The refusal to hire or continue to employ an individual because the documentation presented has a future expiration date may also constitute illegal discrimination.</p>																				
<p><b>Section 1. Employee Information and Attestation</b> (Employees must complete and sign Section 1 of Form I-9 no later than the first day of employment, but not before accepting a job offer.)</p>																				
<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td colspan="2">Last Name (Family Name)</td> <td colspan="2">First Name (Given Name)</td> <td>Middle Initial</td> <td>Other Last Names Used (if any)</td> </tr> <tr> <td colspan="3">Address (Street Number and Name)</td> <td>Apt. Number</td> <td>City or Town</td> <td>State ZIP Code</td> </tr> <tr> <td>Date of Birth (mm/dd/yyyy)</td> <td>U.S. Social Security Number</td> <td colspan="2">Employee's E-mail Address</td> <td colspan="2">Employee's Telephone Number</td> </tr> </table>			Last Name (Family Name)		First Name (Given Name)		Middle Initial	Other Last Names Used (if any)	Address (Street Number and Name)			Apt. Number	City or Town	State ZIP Code	Date of Birth (mm/dd/yyyy)	U.S. Social Security Number	Employee's E-mail Address		Employee's Telephone Number	
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<p>I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.</p> <p>I attest, under penalty of perjury, that I am (check one of the following boxes):</p> <p><input type="checkbox"/> 1. A citizen of the United States</p> <p><input type="checkbox"/> 2. A noncitizen national of the United States (See instructions)</p> <p><input type="checkbox"/> 3. A lawful permanent resident (Alien Registration Number/USCIS Number): _____</p> <p><input type="checkbox"/> 4. An alien authorized to work until (expiration date, if applicable, mm/dd/yyyy): _____ Some aliens may write "N/A" in the expiration date field. (See instructions)</p> <p>Aliens authorized to work must provide only one of the following document numbers to complete Form I-9: An Alien Registration Number/USCIS Number OR Form I-94 Admission Number OR Foreign Passport Number.</p> <p>1. Alien Registration Number/USCIS Number: _____ <b>OR</b></p> <p>2. Form I-94 Admission Number: _____ <b>OR</b></p> <p>3. Foreign Passport Number: _____ Country of issuance: _____</p>																				
<p>Signature of Employee _____ Today's Date (mm/dd/yyyy) _____</p>																				
<p><b>Preparer and/or Translator Certification (check one):</b></p> <p><input type="checkbox"/> I did not use a preparer or translator. <input type="checkbox"/> A preparer(s) and/or translator(s) assisted the employee in completing Section 1. (Fields below must be completed and signed when preparers and/or translators assist an employee in completing Section 1.)</p> <p>I attest, under penalty of perjury, that I have assisted in the completion of Section 1 of this form and that to the best of my knowledge the information is true and correct.</p>																				
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<p><b>Section 2. Employer or Authorized Representative Review and Verification</b> (Employers or their authorized representative must complete and sign Section 2 within 3 business days of the employee's first day of employment. You must physically examine one document from List A OR a combination of one document from List B and one document from List C as listed on the "Lists of Acceptable Documents.")</p>																																			
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<p><b>Certification:</b> I attest, 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.</p> <p>The employee's first day of employment (mm/dd/yyyy): _____ (See instructions for exemptions)</p>																																			
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<p><b>C.</b> If the employee's previous grant of employment authorization has expired, provide the information for the document or receipt that establishes continuing employment authorization in the space provided below.</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td>Document Title</td> <td>Document Number</td> <td>Expiration Date (if any) (mm/dd/yyyy)</td> </tr> </table>			Document Title	Document Number	Expiration Date (if any) (mm/dd/yyyy)																														
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<p>I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.</p>																																			
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# FORM I-9: LIST OF ACCEPTABLE DOCUMENTS

## LISTS OF ACCEPTABLE DOCUMENTS All documents must be UNEXPIRED

Employees may present one selection from List A  
or a combination of one selection from List B and one selection from List C.

LIST A Documents that Establish Both Identity and Employment Authorization	OR	LIST B Documents that Establish Identity	AND	LIST C Documents that Establish Employment Authorization
1. U.S. Passport or U.S. Passport Card		1. Driver's license or ID card issued by a State or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address		1. A Social Security Account Number card, unless the card includes one of the following restrictions: (1) NOT VALID FOR EMPLOYMENT (2) VALID FOR WORK ONLY WITH INS AUTHORIZATION (3) VALID FOR WORK ONLY WITH DHS AUTHORIZATION
2. Permanent Resident Card or Alien Registration Receipt Card (Form I-551)		2. ID card issued by federal, state or local government agencies or entities, provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address		2. Certification of report of birth issued by the Department of State (Forms DS-1350, FS-645, FS-240)
3. Foreign passport that contains a temporary I-551 stamp or temporary I-551 printed notation on a machine-readable immigrant visa		3. School ID card with a photograph		3. Original or certified copy of birth certificate issued by a State, county, municipal authority, or territory of the United States bearing an official seal
4. Employment Authorization Document that contains a photograph (Form I-766)		4. Voter's registration card		4. Native American tribal document
5. For a nonimmigrant alien authorized to work for a specific employer because of his or her status: a. Foreign passport; and b. Form I-94 or Form I-94A that has the following: (1) The same name as the passport; and (2) An endorsement of the alien's nonimmigrant status as long as that period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the form.		5. U.S. Military card or draft record		5. U.S. Citizen ID Card (Form I-107)
		6. Military dependent's ID card		6. Identification Card for Use of Resident Citizen in the United States (Form I-170)
		7. U.S. Coast Guard Merchant Mariner Card		7. Employment authorization document issued by the Department of Homeland Security
		8. Native American tribal document		
		9. Driver's license issued by a Canadian government authority		
		<b>For persons under age 18 who are unable to present a document listed above:</b>		
		10. School record or report card		
		11. Clinic, doctor, or hospital record		
		12. Day-care or nursery school record		
6. Passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI				

Examples of many of these documents appear in Part 13 of the Handbook for Employers (M-274).

Refer to the instructions for more information about acceptable receipts.

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# BASIC I-9 COMPLIANCE: SPECIAL CONSIDERATIONS

- The employer may designate an agent to inspect the documents and complete Section 2 on its behalf:
  - Bank employees are common Section 2 agents
  - Notaries are not always permitted to complete Section 2
  - In California, Section 2 may only be completed by a notary IF the notary is also certified and bonded as an immigration consultant
- USCIS receipt notices are acceptable as evidence of employment authorization only in limited circumstances. See information on automatic extension of employment authorization (including extensions for those with temporary protected status) here: <https://www.uscis.gov/working-united-states/automatic-employment-authorization-document-ead-extension>).
- Documents presented must appear reasonably genuine and appear to reasonably relate to the employee. See examples of acceptable List A, B, and C documents at <https://www.uscis.gov/i-9-central>
  - See *also*: What constitutes “constructive knowledge”?



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# ELECTRONIC COMPLETION AND STORAGE OF FORMS I-9

- Requires controls for the integrity, accuracy, and reliability of the electronic storage system including:
  - Controls for preventing tampering or unauthorized access
  - Accidental altering and/or deterioration of the stored I-9s
  - Inspection and quality assurance procedures
  - A retrieval system that includes indexing capabilities
  - The ability to print paper copies
  - Protection against information loss and providing for backup
- When reviewing I-9s, a permanent record must be created to identify the person who accessed the record
  - Must be able to document the entire system
  - Employees must be trained in the system – user error is a common problem
- **Consult with counsel when considering use of electronic I-9 systems: Not all systems are compliant, no matter what the vendor tells you!**

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## E-VERIFY: BASICS

- E-Verify builds on the I-9 process, and is designed to ensure that the documentation presented is valid
  - *Note: If SS card presented for E-Verify purposes, it does not need to be included in Section 2 of the Form I-9 if a List A document, or other List B and C documents are presented*
  - Note: The process does *not* confirm that the documents presented are for that person
- Only for new hires, not for current employees:
  - Must complete E-Verify within three days of first day of employment (DHS is watching this!) consistent with the date on the Form I-9
  - Anti-discrimination rules apply: Cannot use E-Verify to “screen” new hires and cannot fire for “tentative nonconfirmation”
  - Once enrolled must run all new hires through E-Verify for that worksite
- Follow Tentative Non-Confirmation process to the letter
  - *See also: What constitutes “constructive knowledge”?*

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## I-9 BASICS: RESOURCES

For more information on remaining I-9 compliant:

- M-274, Handbook for Employers:  
<http://www.uscis.gov/sites/default/files/files/form/m-274.pdf>
- USCIS I-9 Central: [www.uscis.gov/i-9-central](http://www.uscis.gov/i-9-central)
  - Searchable electronic Handbook for Employers
  - Email updates on I-9 matters and E-Verify
  - Learning Resources and Webinars
- E-Verify Central: <https://www.e-verify.gov/>
  - Updates, compliance tools, webinars, and more

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# ENFORCEMENT ACTIVITY: NO END IN SIGHT

- ICE takes pride in its enforcement activity: <https://www.ice.gov/news/releases/ice-worksite-enforcement-investigations-fy18-surge>
- Between 2017 and 2018, meteoric rise in worksite enforcement activity:
  - Cases Initiated: Up 305%
  - I-9 Inspections: Up 340%
  - Criminal Arrests: Up 460%
  - Administrative Arrests: Up 787%
- Data still out on 2019, but expect that the activity has continued to increase
- ICE considers itself an investigatory agency – and they are looking to find anything that can lead to criminal sanctions
  - Most investigations start with tips
  - Don't assume your employees are not cooperating with ICE

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## EMPLOYER-FOCUSED ENFORCEMENT: ICE I-9 AUDIT PROCESS

- ICE Homeland Security Investigations (HSI) provides Notice of Inspection and/or Immigration Enforcement Subpoena to employer compelling production of all Forms I-9 and related business information (usually within three business days)
- ICE reviews all Forms I-9 for technical and substantive violations, and verifies that all employees are authorized to work in the US by cross-referencing SSNs and other databases
- At conclusion of audit, ICE provides one or more of the following:
  - Notice of Inspection Results (i.e. “Compliance Letter”)
  - Notice of Suspect Documents
  - Notice of Discrepancies
  - Notice of Technical or Procedural Failures
  - Warning Notice
  - Notice of Intent to Fine

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# ENFORCEMENT: CIVIL AND CRIMINAL PENALTIES

- **Civil Penalties:**

- *Paperwork Violations:* Civil fines for substantive or uncorrected technical errors on Forms I-9 range from **\$230-\$2292** per form for first offense
- *“Knowingly\* Hiring or Continuing to Employ” Violations:* Civil fines range from **\$559-\$4384** per unauthorized worker for first offense
  - Employers must not employ individuals who lack valid work authorization
  - \**“Knowingly”* = actual *or constructive* knowledge
  - Employers must not use a subcontractor relationship (staffing company or independent contractor) to employ someone the employer has reason to believe is not work authorized

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# ENFORCEMENT: CIVIL AND CRIMINAL PENALTIES

- Recent examples
- Largest civil fine - \$95 million
- Prohibited use of staffing company to circumvent I-9 process
- Know your local office's enforcement priorities
- Investigations no longer limited to “target” industries (restaurants, hotels, landscaping, light manufacturing, agriculture) with low skilled labor, high percentage of foreign national employees: Employers across a range of industries in every part of the country

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# ENFORCEMENT: CIVIL AND CRIMINAL PENALTIES

- “*Knowingly*” Hiring or Continuing to Employ” Violations: Civil fines range from **\$559-\$4,384** per unauthorized worker for first offense
  - \**“Knowingly”* = actual or constructive knowledge
  - Employers must not use a subcontractor relationship (staffing company or independent contractor) to employ someone the employer has reason to believe is not work authorized
  - What exactly is constructive knowledge? When *should* an employer have known?
    - SSA No match letters
    - ACA notifications
    - 401K plan notifications



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# ENFORCEMENT: CIVIL AND CRIMINAL PENALTIES

- **Debarment:**

- DHS also may pursue debarment, preventing the employer from engaging in federal contracts, or acting as a subcontractor on a federal contract for a period of time
- Upon proposed debarment, employer name entered into public database

- **Criminal Penalties:**

- Pattern or practice of hiring, recruiting, or referring for a fee aliens unauthorized to work
- Up to \$3,000 fine per unauthorized worker and/or a prison sentence of up to six months for entire pattern or practice

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# EMPLOYER-FOCUSED ENFORCEMENT: PENALTIES

- Mitigating factors that ICE considers when assessing civil fines (can increase or decrease the fines by up to 25%):
  - Business size
  - Good faith effort to comply
  - Seriousness of violations
  - Presence of unauthorized workers
  - Employer's history of violations

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# EMPLOYEE-FOCUSED ENFORCEMENT: EMPLOYER RESPONSIBILITIES AND EMPLOYEE RIGHTS

- **“ICE workplace raid”**: Any action by immigration officers to arrest one or more noncitizens at a worksite, designed to apprehend removable noncitizens, apprehend individuals – citizens and noncitizens alike – that ICE suspects of violating federal criminal laws relating to unauthorized immigration; and to gather evidence
- After a workplace raid, ICE will likely detain and seek to remove (deport) noncitizens subject to removal. ICE also may pursue criminal charges against prosecutable individuals, including the employer:
  - 8 U.S.C. § 1324 (harboring certain noncitizens)
  - 8 U.S.C. § 1324a(f) (pattern or practice of unlawful employment of noncitizens)
  - 8 U.S.C. § 1324c (document fraud)
  - 18 U.S.C. § 1546 (fraud and misuse of visas)
- ICE may continue to surveil and investigate employer after a raid

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# SSA NO MATCH LETTERS: LET ME PLEASE (RE)INTRODUCE MYSELF

- Letter is sent by the Social Security Administration (SSA) as an “Educational Correspondence (EDCOR)/Employer Correction Request”, stating that the employee’s name and social security number do not match in SSA’s system, as reported on a Form W-2, and so the employee’s SSA earnings are not being credited to the employee’s account properly
- Requires employer to create an account and log-in to see which employees are listed
- SSA reinstated letters in 2019 for 2018 tax year no-matches:
  - As of April 2019, 577,349 letters were mailed to employers, and remainder of 2018 no-matches to be mailed to employers Fall 2019
  - Sent to all employers who had at least one no-match in 2018
  - Asks employers to correct issue with the employee and provide any corrections on Form W2-C within 60 days
- **What is really going on here?** Is the SSA providing this information to ICE?

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## POSSIBLE REASONS FOR A NO MATCH:

- Typographical error by the employee, the employer, or the SSA
- Employee's name may have changed and SSA was not updated (i.e., marriage or otherwise)
- Employee may be listed incorrectly in the SSA system due to multiple last names or other error
- Employee may have provided documents that were not legitimate
- **A no-match letter by itself is not an indication of an employee's work authorization or immigration status**
- **Cannot take adverse action against an employee for a no-match alone**

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# POTENTIAL PROBLEMS ALL AROUND

- Taking no action on the letter means the SSA funds are not deposited properly for the employee, and potential IRS penalties
- Potential IRS penalties for continued uncorrected errors
- Potential for discrimination claims if you take action and do not have reasons other than the no-match letter for taking adverse action against an employee
- Not documenting steps employer took to notify employee of necessary correction options exposes employer to discrimination claims
- **Impact on I-9 process:**
  - Taking no action potentially creates *constructive knowledge*, as interpreted by ICE in an I-9 audit, of continuing to employ unauthorized workers
  - Potential for creating *actual knowledge* of unauthorized employment based on interactions with employee

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## POTENTIAL PROBLEMS ALL AROUND (CONT.)

- Register for Business Services Online (BSO) to obtain the names of the no-match employees
- Once you receive the names of the employees, confirm that employer information matches the name and Social Security number on the employee's Social Security card.
  - If it does not match, ask your employee to provide you with the exact information as it is shown on the employee's SS card
  - If the error was not a typo, work with employees to resolve the mismatch
- Keep a separate SSA file that documents what actions you have taken to address the SSA's "Employer Correction Request Notice," including any correction made, letters sent out, letters returned as undeliverable, etc. To avoid possible discrimination on the basis of the no-match letter, do not place the no-match letters in an employee's personnel file

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# SAMPLE LETTER TO EMPLOYEE

We verified the following information with Social Security on this date: \_\_\_\_\_.

Name: \_\_\_\_\_

Social Security Number: \_\_\_\_\_

According to Social Security, the information above does not match Social Security's records. You should:

- Check to see if the information above matches the name and Social Security Number on your social security card. If it does not match, please provide me with the exact information as it is shown on your Social Security card.
- If the information above matches your card, please check with any local Social Security office to resolve the issue. Once resolved, please inform me of any changes. Go to [www.ssa.gov](http://www.ssa.gov) or call 1-800-772-1213 to find the office nearest you.

**NOTE:** This notice does not imply that you intentionally provided incorrect information about your name or Social Security Number, nor does this adversely affect your employment.



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## NEXT STEPS

- Hire counsel prior to taking any adverse action such as laying off, suspending, firing, or discriminating against the employee – Remember, an employer **cannot take an adverse action based on the non-match letter itself**
- If the employee does not come back to work after you advise of the no-match, you may be able to terminate for violating your attendance policy
- If the employee tells you “I cannot resolve the no-match because I am not here legally in the US and the documents I previously provided are fake and I do not have work authorization” you are able to (and required) terminate because you gained actual knowledge that the person does not have work authorization
- Trickier situations are where the employee tells you they will fix it and then they do not and they keep stalling – critical that you have documented interactions prior to taking adverse actions

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# DO AND DON'T

- DO:
  - Give employees a generous amount of time to respond and allow for extensions of time for reasonable explanations
  - Give same timelines and treat all employees the same
  - Hire counsel if you suspect an employee does not have work authorization
  - Carefully document all notifications to employee, follow up actions, and responses from employee, including all oral responses
  - Limit your review to the no-match employees, don't review all of one race, ethnicity, national origin, etc. in addition to the no-match employees
  - Allow for legitimate name change updates and work status change updates on Form I-9
- DO NOT
  - Continue to employ someone you know does not have work authorization and switch to paying them cash to keep them off the books
  - Transfer an employee you know does not have work authorization to a subcontractor or staffing company, you are still on the hook

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# PROACTIVE MEASURES

- Make sure all paperwork is filled out correctly to avoid typographical errors
- Promptly address no-match letters
- Keep records of all interactions with employees regarding no-match letters
- Hire counsel if you believe you may have issues with unauthorized workers
- Conduct a yearly internal audit of your Form I-9s
- Conduct company compliance policy and training, and **keep records**

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# THANK YOU – ANY QUESTIONS?



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Legal Disclaimer: This presentation/document is not a substitute for or intended to give legal advice. It is comprised of general information. Employees facing specific issues should seek the assistance of an attorney.

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