THOMPSON HINE

Immigration Update

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ICE Reclassifies Common I-9 Errors as Substantive Violations — Immediate Action Recommended

Key Notes:

- ICE's March 17, 2026, guidance reclassifies numerous common Form I-9 technical errors as substantive violations subject to immediate monetary penalties.
- Conducting a proactive internal I-9 audit immediately is best practice.
- Employers should review internal I-9 policies and invest in training particularly as it relates to remote verification of identity and work authorization documents.

Summary

On March 17, 2026, U.S. Immigration and Customs Enforcement (ICE) issued new guidance to its I-9 auditors that dramatically changes enforcement priorities. The guidance reclassifies numerous common Form I-9 errors that were previously treated as minor, correctable "technical" violations as "substantive" violations subject to immediate monetary penalties of $288 to $2,861 per form. These changes eliminate the traditional 10-business-day cure period that employers historically relied upon for many mistakes and materially increase employer risk during inspections.

Background

The Immigration and Nationality Act requires all U.S. employers to verify the employment authorization of every employee within three days of reporting to work using Form I-9. ICE enforces this requirement through administrative inspections initiated by serving a Notice of Inspection (NOI) on the employer. Under prior guidance, I-9 violations fell into two categories: technical or procedural violations (minor, correctable errors such as missing dates or incomplete fields) and substantive violations (errors so severe they indicate the employer failed to discharge its verification duty, carrying monetary fines and enforcement actions). For nearly 30 years, the distinction between these categories was guided by the 1997 Virtue Memorandum and subsequent ICE guidance, which treated many omissions as correctable if the employer acted in good faith.

What Changed: Errors Now Classified as Substantive

ICE's March 17, 2026, guidance reclassifies the following previously technical or correctable errors as substantive violations, for which no correction period is available, and fines may be immediately assessed:

- An employee's failure to provide their date of birth in Section 1.
- An employee's failure to list an Alien Registration Number (as appropriate) in Section 1.
- Failure of the employee to record the date in Section 1 next to their signature.
- Use of the Spanish-language I-9 form outside of Puerto Rico.
- Failing to record, in Section 2, the name and title of the employer representative who verified the employee's documents.

- Failing to fully record or incorrectly recording the List A, B, and/or C documentation in Section 2, regardless of whether a copy of the document was retained.
- The employer's failure to list the first day of employment in the Certification section.
- Failure to ensure that the preparer and/or translator's complete name, address, signature, and date are provided on Form I-9 at the time of completion in Supplement A.
- The employer's failure to check the alternative procedure box in Section 2 or Supplement B if remote document verification was used.
- Use of the remote document verification procedure by a non-E-Verify employer.
- Failures of electronic I-9 system audit trails, electronic signature protocols, or security documentation that fall short of specific DHS standards.

Penalty Exposure

ICE calculates fines by determining the percentage of substantive violations relative to the total number of Forms I-9 required, establishing a base fine that is then adjusted based on five statutory factors: employer size, good faith, seriousness of violations, involvement of unauthorized workers, and prior history. Current penalties range from $288 to $2,861 per violation, adjusted annually for inflation. For example, an employer with 200 employees and a 50% error rate could face more than $200,000 in fines. For organizations managing hundreds or thousands of I-9s, the expanded exposure can add up quickly.

Recommended Actions

Considering the significantly heightened enforcement environment and the elimination of the cure period safety net employers previously relied upon, the following immediate steps are recommended:

Conduct Internal I-9 Audits Promptly. Employers should perform proactive self-audits of their I-9 records as soon as possible to identify their exposure before ICE issues a formal Notice of Inspection. Once ICE issues an NOI, no errors can be corrected – the employer is locked in with whatever the forms contain at that point. Employers that identify and address issues before any NOI is received will be better positioned to leverage statutory mitigating factors, such as good faith, to reduce fines. Additionally, making corrections now starts the statute of limitations running on any substantive errors that can be remediated, which demonstrates good faith and limits overall liability. Having performed corrections sooner speaks directly to mitigation in the event of a later audit.

Invest Heavily in Training. Immigration enforcement is a stated priority for the current administration, and ICE continues to conduct worksite inspections and audits with no advance notice and increased scrutiny. Given that many of the newly reclassified substantive violations arise from simple errors in filling out the form, employers must ensure that only properly trained personnel handle I-9 completion and verification. If the person completing your I-9s routinely makes a mistake that is now considered substantive, that simple mistake could cost even mid-sized employers hundreds of thousands of dollars. This is not a task that just anyone can perform. HR staff and authorized representatives should be retrained on the updated expectations, acceptable documents, proper verification procedures, and proper completion requirements for Sections 1 and 2 and Supplement B.

Consider Utilizing an Electronic I-9/HRIS System. Employers should explore electronic I-9 management software as part of their compliance strategy. I-9 software, if programmed correctly to comply with existing standards, removes the potential for human error from the process. For example, an employer cannot advance to the next field if a required prior field has not been completed. The cost-benefit analysis of implementing such a system has changed, given the expanded penalty exposure for administrative errors. Employers should be aware, however, that electronic systems are not a panacea; ICE now treats deficiencies in an I-9 platform's audit trail, electronic signature processes, or security documentation as substantive violations attributable to the employer. Accordingly, any electronic I-9 system must be reviewed for full compliance with federal regulatory requirements.

Review and Ensure Compliance with Remote Verification Procedures. ICE now classifies both (1) failing to check the alternative procedure box in Section 2 or Supplement B, and (2) using the alternative remote verification procedure without being an active E-Verify participant, as substantive violations. Employers must understand that remote document verification can only be used if the employer is enrolled in and actively using E-Verify. Furthermore, employers utilizing remote verification must retain copies of both the front and back of the documents presented by the employee for identity and work authorization verification purposes. Failure to comply with these requirements now carries immediate fine exposure with no opportunity to cure.

Conclusion

The landscape of I-9 compliance has fundamentally shifted. Errors that once could be corrected after the fact now carry immediate financial exposure, and the current enforcement posture suggests a lower tolerance for incomplete records and a greater willingness to impose penalties. Employers of all sizes, across all industries, are encouraged to act now, and before an NOI arrives, to audit, correct, train, and implement systems that minimize the now-expanded financial risk.

FOR MORE INFORMATION

For more information, please contact:

Kelli Hayes Anthony
614.469.3344
Kelli.HayesAnthony@ThompsonHine.com

David W. Leopold
216.566.5543
David.Leopold@ThompsonHine.com