M+K Education Series

Maggio Kattar — *The immigration solution you need. The immigration support you deserve.*

ICE Immigration Compliance Audits:
The game is the same ...but the rules have changed

Investigation Trends and Tips for Preparation

Topics

ICE Audit Trends - What is new?

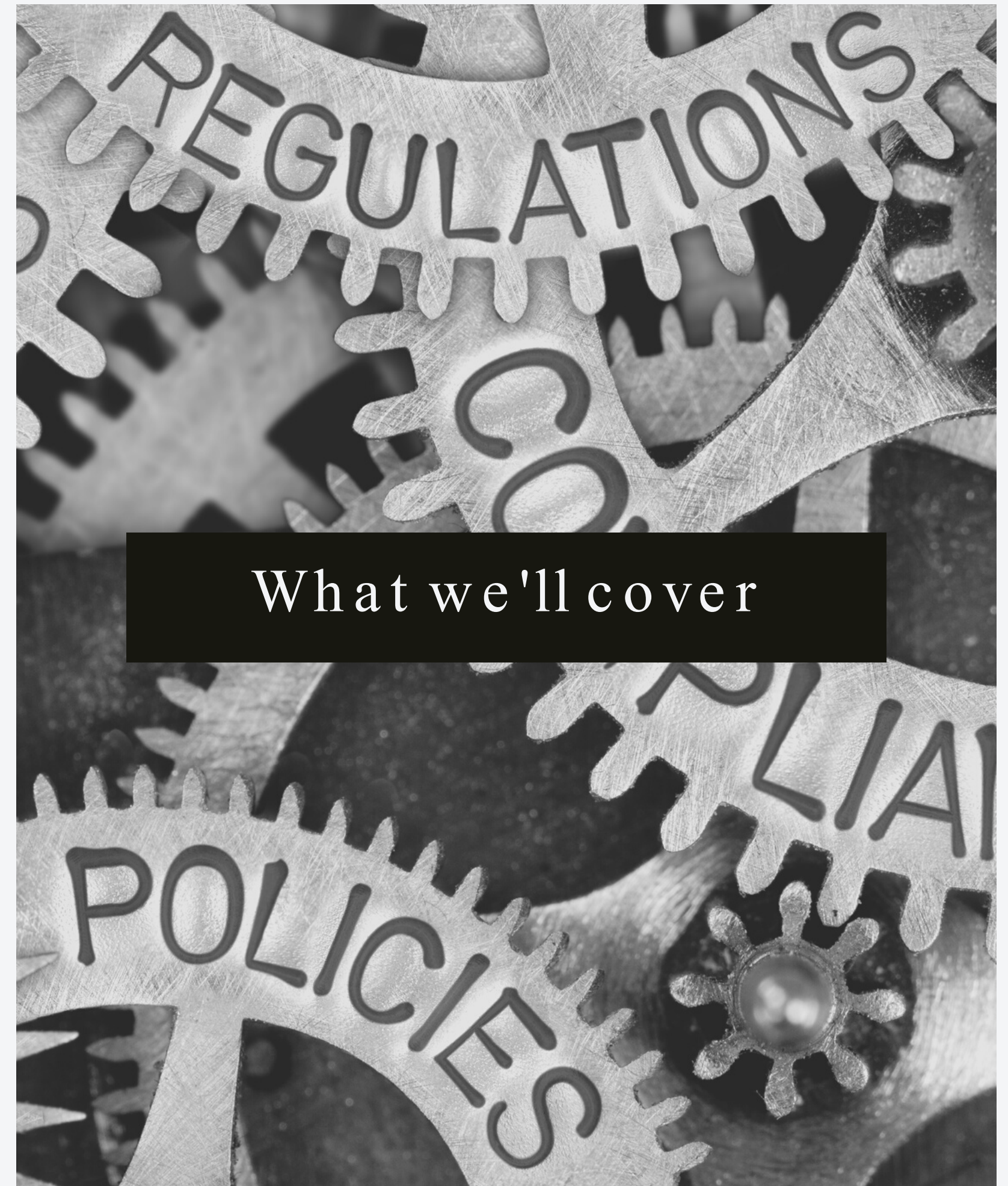Social Security No Match Letters

What happens during an ICE Audit?

Preparing for an Audit

Creating policy and procedure

Conducting an internal audit

What we'll cover

Think About This

TOTAL ICE I-9 AUDITS:

2017= 1,360
2018= 5,981
2019= 3,382   *AS OF JULY*

Maggio Kattar

Who we are and what we do

Leading Immigration Law Firm since 1981

4 Offices
(Washington DC, San Diego, Los Angeles, Dayton, OH)

60+ Employees

20 Attorneys

Attorneys Included in:

Super Lawyers : 4

Best Lawyers: 5

Washingtonian Top Lawyers: 4

Who's Who Legal: 6

Chambers: 3

Kimberley Best Robidoux

Shareholder Attorney, Maggio Kattar

What's New?

Total Audits
2017 = 1,360

2018 = 5,981

2019 = 3,382 as of July

No Match Letters
Recommenced in Spring 2019

Goal of sending 225,000 letters every 2 weeks

Target Employers

Numbers matter: ICE targeting small employers, or subsets of large employers. No longer focusing only on just the usual high risk employers

Interpretation of the Rules
A dramatic increase in ICE auditors has made it more difficult for ICE to retain consistency in how each auditor applies the rules.

What Happens During an ICE Audit?

Note: CA and OR require that employees be notified of the investigation

Notice of Inspection

Notice, often delivered in person. By law, this notice must allow at least 3 days to provide Form I-9 and documents . Be sure your reception and other first -line receivers know how to respond

Preparation of Documents

Employer will collect requested documents. Sometimes the ICE/HSI auditor will want original Form I -9s - other times copies - sometimes on a thumb drive. ICE will also ask for documentation related to training, policies and procedures, and Online I -9 system information

Review of Documents and Results

The ICE Auditor will send results of their review to include a notice of technical or procedural failures , a notice suspect documents and/or a notice of discrepancies - note - this could take months. The ICE auditor may also decide to interview employees.

Penalty assessment

ICE will submit a Warning Notice or a Notice of Intent to Fine which could be appealed /negotiated

Penalties

Substantive and uncorrected technical violations

Minimum = $230 per violation

Maximum = $2,292 per violation

*These amounts increase every April based on COLA

For 1st audit

Minimum = $230 per violation

Maximum = $1,948 per violation

Other Calculation Factors

ICE may adjust fines up, or down, up to 25% based on:

Employee Population Size

Good Faith Efforts

Seriousness

Prevalence of Unauthorized Aliens

History

Social Security "no-match" letters

Recommenced in the Spring of 2019, the "no-match" letter is issued when there is a discrepancy between the information on an employee's W-2 and the information on file with the Social Security Administration

Don't jump to conclusions, anyone can get a "no-match" letter

Reasons for a "no-match"

A "no -match" letter is not evidence that an employee is undocumented
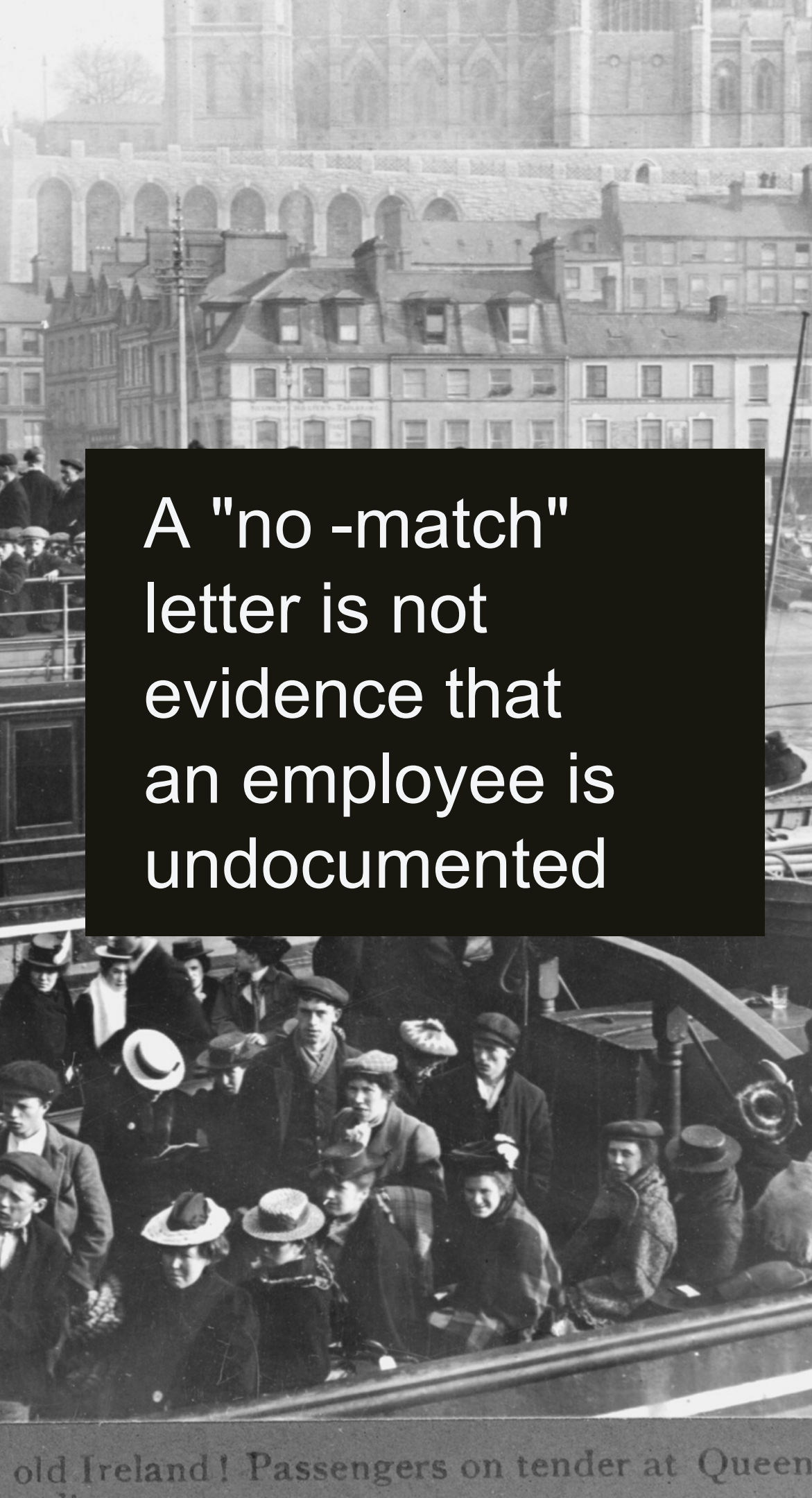
Data Entry Error

Can occur at multiple points:
Payroll/HR
Employee
Social Security

Complex Names

Failure to update a name change, hyphenated names and two last names can cause a "no-match"

Identity Theft

Employee may be a victim of identity theft - or they have assumed someone else's identity.
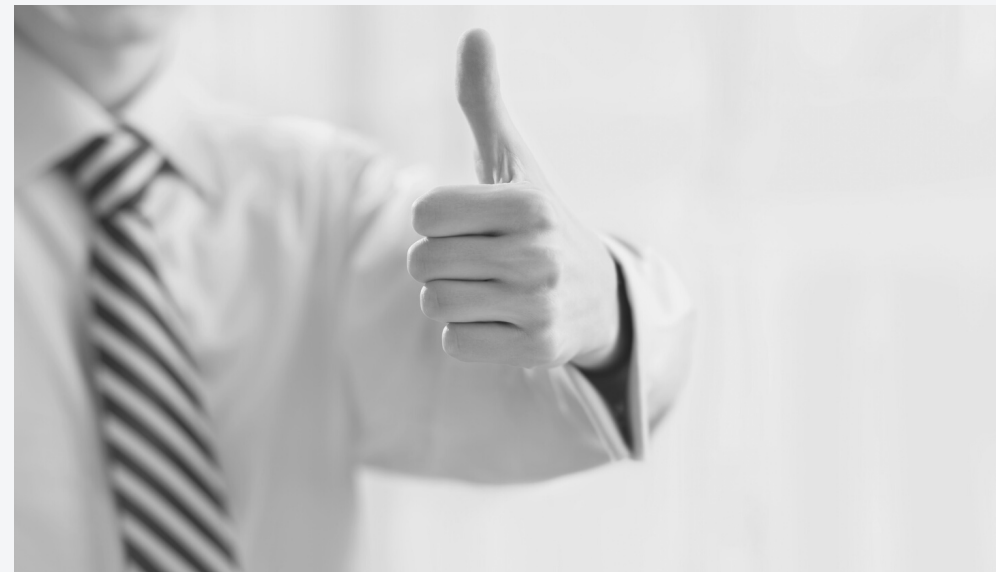
old Ireland! Passengers on tender at Queen

HOW TO RESPOND TO A "NO -MATCH"

Check for clerical errors

Check all information supplied or payroll against SSA information

Have Employee Confirm

Notify employee of the receipt of the no -match letter in writing.

Have Employee Contact SSA

Note that it may take 120 days (or more) for SSA to resolve
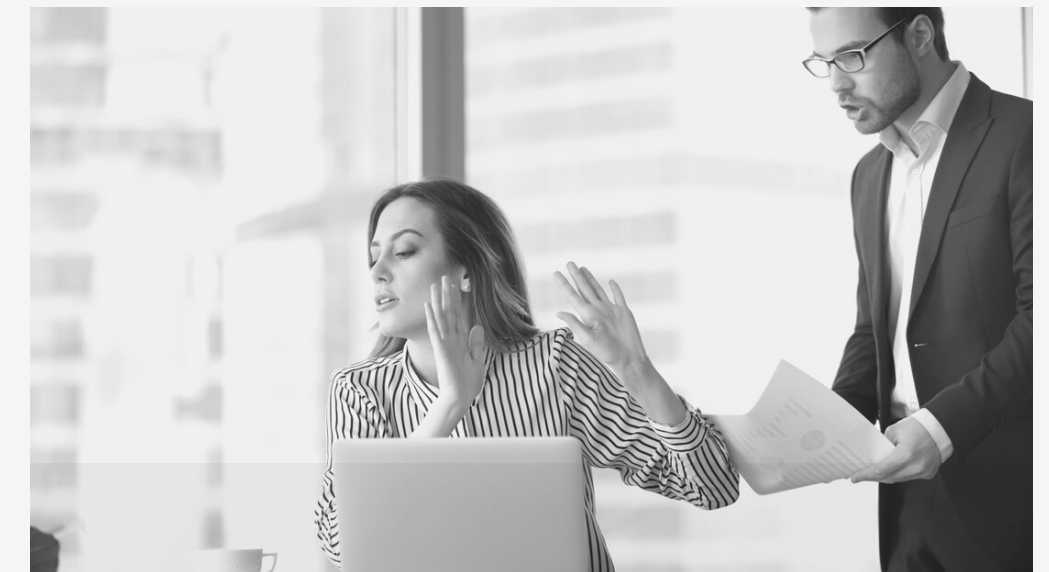
HOW *NOT* TO RESPOND TO A "NO‑MATCH"

Don't Assume

Do not require the employee to present documents to prove work authorization (unless you don't have an I‑9)

Do Not Retaliate

You may not terminate an employee simply because a "no-match" was received

Do Not Ignore It

You need to take action to resolve a no-match. ICE will ask about no-match letters and actions taken

When your employee provides a "new" social security number

Are they eligible to work?

An employee who provides totally new information upon receipt of a "no-match" letter is not necessarily currently unauthorized for work.

New Identity, New I-9

If the employee represents that the old documents didn't apply to them, you have to take a new I-9

Should you terminate?

An employee who previously provided false documents, but can currently provide new acceptable documents for the Form I-9 is NOT an immigration issue. A decision to terminate an employee who can otherwise prove work authorization is an employment-law/business decision.

Preparing for an Audit

Put the following in place to stay audit-ready

COMPANY POLICY

COMPANY PROCEDURE

FRIENDLY AUDITS

TRAINING

A policy is simply a statement what the company intentions/goals are, not how .

For Example : [Employer] only employs individuals authorized to work in the United States without discrimination based upon citizenship, immigration status, national origin or any other protected category . [Employer] complies with the Form I-9 Employment Eligibility Verification completion and retention requirements and has developed the following processes to support the timely completion and accurate retention of the Form I-9 for all its employees hired after November 6, 1986 . As [Employer] also participates in E-Verify, [Employer] has created additional processes to support compliance with the additional procedural requirements of this program .

Procedures change frequently, policies do not

CREATING A PROCEDURE

Who is Responsible

Identify who is responsible, and at which level of the process:
Overall
Completion
Recordkeeping

Identify Tools

What tools are used and how? For example: Online application/onboarding software; paper I-9s; online I-9s, E-Verify

Define Steps

Who does what, when and with what tools?
Include the M -274 steps - but also identify who is responsible and how each step is accomplished

Measure

Adherence to a procedure should be measured to ensure success. Therefore procedures should include methodology for measuring the success of the process

Internal Audits

"TRUST, BUT VERIFY"

Ronald Reagan

"Friendly Audits" - The Form

Technical (Document) Errors

Some missing values (not signatures or dates), values in the wrong field. Online systems are very helpful in reducing technical errors.

Substantive Errors

Absent or late forms ; incorrect documentation accepted; failure to reverify timely. Online systems are of little assistance with substantive errors

E-Verify

Are cases being created for all applicable employees? Are TNCs being resolved? Are you consistently handling final TNCs? Do you have required postings and notifications?

"Friendly Audits" Discrimination

Over-Documentation

Requiring, or accepting more documents than are required for the Form I-9

Suggesting Documentation

Suggesting that an employee "bring your green card" or even any other specific document is a discriminatory practice. Give them the list and let them choose.

Appropriate Hiring Practices

Are employees involved in hiring trained on what they can and can't say with regard to immigration status, and the company's practices during the hiring process?

Deadlines

Important Dates to Track and Audit

Day One - Section 1

Employee completes Section 1 of the Form I -9. Employee can complete this any time after they accept their offer of employment.

Day Four - Section 2

On the third business day after their start date, the employee must present original, unexpired (generally) documents to be reviewed in their presence by employer

Day Four - E-Verify

If an employer participates in E -Verify, the case must also be created by EOB on day four

Prior to Work Authorization Expiration

For employees who indicated they are an Alien Authorized to Work until an expiration date, their work authorization must be reverified

Check the Form

Fields

Are all required fields complete? - Are any changes initialed and dated?

Form Version (paper only)

The Form I-9 changes from time to time: was the Form used, the Form that was in effect at the time is was completed (note current form was extended beyond Aug 31, 2019

Signatures and Dates

Missing Signatures and Dates could cause a timely taken form to be considered late

Check Section 2 to Section 1

Do the documents presented for Section 2 conflict with Section 1 representations (i.e. have they indicated they are an alien authorized to work until a specific date but they provide a permanent resident card ?)

What story do your forms tell an auditor?

Check the Process

Hiring Practices

Maintain a listing of which people involved in hiring (interviews) have taken I-9 prohibited discrimination training. Is anyone missing?

Onboarding Practices

Are employees physically present when their documents are reviewed? What are employees told regarding the documentation they are to present? Is the person who reviews the documents the same person who signs the certification? Are these company representatives trained?

Recurring Errors

Trends, such as missing forms, late forms and frequent errors will give you clues to process deficiencies

Recordkeeping

Do you retain copies of documents? All or which one? How are records maintained? How are reverifications tracked?

What story will interviews tell an auditor?

Keep Your Records Straight

I-9 Recordkeeping is not "set-it-and-forget-it"

Name Changes
Keep your forms up to date with name changes so that it is easy to match the form with payroll records

Reverifications
Be sure you are tracking expiration dates and ensuring timely reverification

Terminated I-9 Purge
For terminated employees, you should only keep the Form I-9 for the longer of 1 year from the termination date or 3 years from date of hire

Correcting a Technical Error

Removing erroneous information

Draw a single line through the wrong value, enter the correct value nearby and initial and date the change.

Adding Missing Information

You may not do this with signatures or dates, but you can add missing expiration dates in Section 2 or the employee may add missing address information, or select a value in the Preparer Translator section. All additions must be initialed and dated.

Only the Employee May Correct Section 1

Only the employee may make corrections to Section 1. The employer may not make these changes on their behalf.

WHEN CORRECTING FORMS

Note corrections may only be made to records of active employees

Do Not Erase History

The forms, and any corrections, should tell the story of what happened and the employer's attempt to comply - don't try to erase a mistake

Don't make it worse

If you are not entirely sure how to correct an issue - escalate it to counsel. You can make an even bigger mistake by "correcting" an error improperly

Initial and Date Everything

Any changes must tell the story of what happened with the form, including who and when. Any changes must be initialed and dated.

A new form is a last resort

While it may feel easier to start from scratch, a new form requires that the employee also participate in the correction, and corrections only to forms completed by foreign nationals may raise discrimination concerns

Correcting a Substantive Error

Do Not Backdate

Do not try to "fudge" missing dates by backdating. Any missing signature dates need to be corrected by entering the current date.

## Do not sign Section 2 if you did not review the documents

The current version of the form I -9 requires that the person who reviewed the original document be the same person who completes the certification n Section 2. If that person is no longer available, the employee will need to newly present acceptable documentation for review.

Be Prepared to Explain

Some corrections will require a memo to explain further.

AUDITING ONLINE FORM I   -9
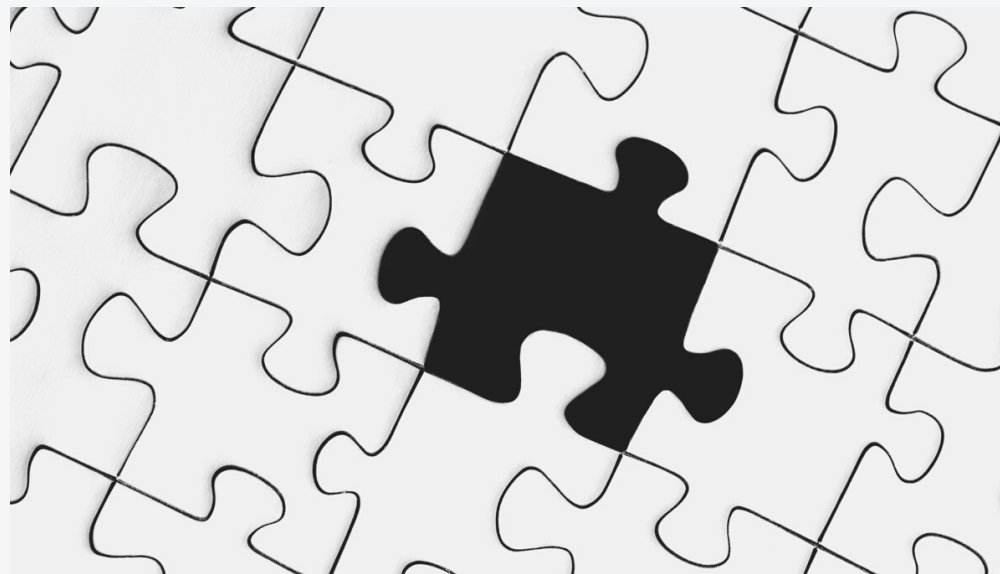
Missing I -9s

Compare I-9s to payroll records to ensure no missing records.

Late Forms and Reverifications

Review prevalence of late forms and reverifications to identify process improvements

Accepted Documents

The documents accepted may not be the title selected from the drop down box. An online system can't see if a SSC is restricted or if a passport is U.S. or not.

TRAINING

- Always keep records of training - what, when and who

Hiring Managers

It is important to train everyone involved in hiring employees; regardless of whether or not they participate in completing the form

Form Completion

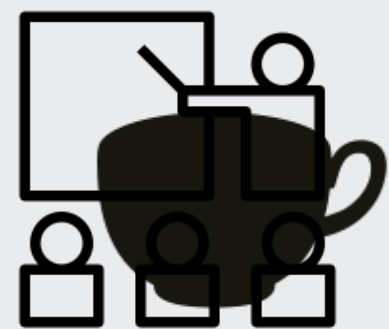Additional training is required for employer representatives completing Section 2 and/or 3 on behalf of employer

Recordkeeping

Staff involved in recordkeeping - whether online, or in paper, need to be aware of recordkeeping requirements

Training Resources

There are a number of ways to provide training

IN PERSON

USCIS ONLINE RESOURCES

M-274 HANDBOOK FOR EMPLOYERS

PRIOR EMPLOYER*

*If your employee says they received training at a prior employer, you may not assume that this training was complete or correct. This knowledge should be confirmed.

M+

MAGGIO KATTAR

www.maggio-kattar.com
phone: (202)-483-0053

We'd love
to hear
from you!