

Kate Kalmykov ([00:12](#)):

Hello everyone, and welcome to the Immigration Insights Podcast, hosted by Greenberg Traurig. My name is Kate Kalmykov, and I co-chair the Global Immigration and Compliance Group at Greenberg Traurig. I'm delighted to be joined today by my partner, Miriam Thompson, who is based in our Atlanta office and we are going to be talking about I-9 enforcement, and how it's intensifying. What employers need to fix now and the new guidance that came out in March related to I-9s and how the government is going to view I-9 compliance. So Miriam, thank you so much for joining me today. Can you please introduce yourself to our listeners?

Miriam Thompson ([01:00](#)):

Hi there, Kate. Thank you so much for having me today. My name is Miriam. I'm an attorney in GT's Atlanta office, and my practice focuses on business immigration and compliance. Thanks for having me today.

Kate Kalmykov ([01:15](#)):

Thank you. And I know we've talked on this topic before, and a lot has changed. So in March, on March 16th specifically, the government issued new guidance, specifically ICE issued new guidance, on how they are going to treat substantive versus technical violations on the form I-9 and what now has changed, and how are technical violations different from substantive violations. Can you tell us a little bit about that?

Miriam Thompson ([01:50](#)):

Yeah. Yeah. So historically the distinction between technical or procedural violations or substantive violations, technical procedural have been more minor paperwork violations that are generally correctable, and unless uncorrected, do not trigger fines in an I-9 audit. Common examples are if the employee misses their address in section one, or if the employer completes the I-9 on an expired I-9 version.

([02:22](#)):

Now substantive violations, those are the more serious errors that go to the heart of the I-9 process. The verification process, substantive violations trigger fines in an I-9 audit. And common examples are no completed I-9s or if the employer has completed the I-9 late. Now historically we've seen that many employers view paperwork, technical procedural, insubstantive violations as curable errors. However, in an audit then, the assumption was that most of these can be corrected, that the employer would have the opportunity to correct the issues and then avoid penalties. But then, Kate, in this new memo, we have really seen ICE take a more aggressive approach because they reclassified many of these previously deemed technical violations to be now substantive violations.

Kate Kalmykov ([03:39](#)):

I think when we look at the motivation and the thinking behind that is the administration has very much been focused on all things immigration since they took office, and they really want to make sure that people aren't abusing our employment laws. So they want to make sure that the people that are working in the US are work authorized, and that the employers are in compliance with the requirements of the Immigration Reform and Control Act of 1986, so that they're checking the employment eligibility of their employees, they're checking the identity of their employees, and they're not sort of taking the requirements not seriously.

[\(04:23\)](#):

I think sometimes because you and I do audits, and we work with employers across the country, there are employers who think, oh, it's a one-page form. What are they going to do? We didn't complete it or we completed it but we lost it. We don't fill out all the sections. But it's not a big deal. Most of our workforce speaks English, and there's not a lot of foreign nationals. And that's a huge misconception because it's not about foreign nationals or not foreign nationals. It's a requirement for everyone.

[\(04:56\)](#):

Everyone, every new hire has to complete an I-9. They have to do section one, that's self-attestation where they're listing their biographic information and their status in the United States. And then the employer is required to verify them. And the government is really going to go after employers is what this signals who flaunt the requirements and who don't care about maintaining the I-9s properly.

[\(05:26\)](#):

It also really signals that they are going to be less forgiving for curable violations. So in the past, I think when we've dealt with employers who may not have complied, whether willfully or they just weren't aware of the requirements, the government has not always imposed fines. They've given them periods to cure the deficiency, and they've even come back year after year and done snapshot audits after the initial one to make sure that they've complied. And if they haven't always complied, they've given them a slap on the wrist and said, "Oh, it's okay."

[\(06:05\)](#):

But here I think they're signaling no more slaps on the wrist. We're really, really, really intent on going after you. So let's talk about that. What is a violation, and what kind of penalties are we really looking at for companies? Certainly if you're a small company versus a large company, the numbers are going to be different, but it can impact business operations nonetheless.

Miriam Thompson [\(06:32\)](#):

Right. [inaudible 00:06:33] is important. It is yet another piece of evidence that the government will be more narrowly interpreting what is permissible here, more narrowly interpreting what is a technical violation, and make a broader category out of those violations that may now trigger immediate liability. So I-9 fines, they are periodically adjusted for inflation. And currently, for a substantive violation per form, you're looking at fines from 288 to \$2,861 per form. So for employers with a large workforce, this can become significant quickly.

Kate Kalmykov [\(07:27\)](#):

By the way, sometimes you may have a smaller workforce, maybe you have a bunch of different entities, and one entity gets an audit notice, a notice of inspection, and the government sees that you're not in compliance. They will go after the owners and see what other entities they have. They will issue notices of inspection for them as well. They are working in tandem with other government agencies, including the IRS, to really link together and to make sure that people are in compliance.

[\(08:02\)](#):

So they're not going to stop at, I'm thinking, for example, of real estate developers. In real estate development, for every development you do, you have an entity. But if you have a lot of different entities and they're all not in compliance, as you said, it can really, really add up. And they are very much mining information from other agencies. So they will compare, are the I-9s all there for all of the employees that you're reporting on payroll?

[\(08:29\)](#):

And they're also going after companies, for example, that try to get around those rules. Maybe they pay in cash, maybe they're giving cashier's checks that are being cashed elsewhere to try to employ people who are not authorized to work in the US. And the government is attuned to that. They're using AI robustly in investigations in trying to gather data about employers. And we see that in the types of requests that we're getting, in notices of inspection, the language has changed.

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Kate Kalmykov ([09:00](#)):

[inaudible 00:09:00] we're getting in notices of inspection, the language is changing. It is definitely more robust, more expansive, and asking for more information. So let's go through the kind of deficiencies, and you mentioned some initially, but that we often see in the different sections of the I-9. So you mentioned if an employee misses something about their biographic information in Section 1, that can be considered a technical violation. That HR should have told them when they got the I-9 back, "Hey, you didn't complete this box, this one you checked incorrectly. Let's fix it." But what about the employer violations that we often see in Section 2 or in terms of record keeping or reverification? Let's discuss that a little bit.

Miriam Thompson ([09:51](#)):

Right. So in Section 2, one of the big ticket items of the memo is many employers continue to rely on copies of employee identity and work authorization documents to then support an incomplete Section 2 and be under the assumption that they can correct Section 2 based on those document copies. So this recent memo has clarified that document copies generally do not cure any missing information on the I-9. So the required information must appear on the form and must be properly documented.

[\(10:35\)](#):

So on the memo, in addition, several deficiencies on Section 2 were moved from previously technical violations to be now be deemed a substantive violation. To give you an example, as mentioned, the document copies. If there is a missing document title, issuing authority, a missing document number, even if the employer has document copies on file, this is no longer a technical meaning correctable deficiency. It was reclassified as substantive. Also, if the employer representative who completed the I-9 or the employer's authorized representative is missing to place their title on Section 2, this is also now deemed a substantive violation.

[\(11:29\)](#):

Similarly, missing date of hire or a missing employer or authorized representative signature is also a substantive violation. So for example, for Section 1, the employees missing their date of birth is now a substantive violation. The A number is required depending on the employee status. The I-94A number or foreign passport number is required. And then also the Section 1 employment authorization expiration date is required. If that is not there, would also be a substantive violation.

[\(12:13\)](#):

So we are really seeing that employers can no longer assume that missing information is correctable in an audit, but it should be addressed ahead of time to minimize risk.

Kate Kalmykov ([12:31](#)):

Absolutely. And oftentimes when we do do an audit and we're working with employers, we are coming in where we notice that there's sections missing. We are helping them fill it in on the I-9. We have to initial and date the date of the correction, because ICE really does examine things to make sure that they are bonafide. So if you're coming in and you're not initialing and dating and saying, "Mea Culpa, this was a mistake. We understand," you can face even more enhanced penalties because they work with forensic document specialists to see when the ink is dated on a paper I-9, for example, or when an electronic I-9 record is edited to make sure it wasn't done once you got the audit notice.

[\(13:23\)](#):

Likewise, as counsel, we will often explain the situation in a memo to file. We really recommend proactive audits, before the government ever comes in, to get your I-9s in order. And if there are deficiencies, we will often address them in a memo to file. So we tell the government, "We made a mistake, we acknowledge the mistake. We are now implementing X, Y, and Z process," such as annual training, such as creating a hiring handbook that the employer uses when they onboard or reverify employees for the I-9 purposes, that they are themselves engaging in different training with their HR or onboarding specialists regularly to make sure that mistakes don't happen in the future. And in the past, we've been very successful in minimizing liabilities in getting the government to say, "Okay, we're going to take you at your word and we're going to not penalize you right now, but we may check up later to make sure you've implemented everything you said you were going to."

[\(14:37\)](#):

Now, I think we still have to do that because we want to show good faith compliance to the government, but employers need to recognize that the costs may be higher because the government may not forgive some of the violations like they have in the past based on this March guidance.

[\(14:55\)](#):

Now, Miriam, I think one of the things that we have to acknowledge is different in the new memo as well is that the Form I-9 violations are considered to be continuing violations and that if they are not cured or they are not cured properly, which sometimes happens. Sometimes the employer does a self-audit and they're still getting it wrong. They're trying to do the right thing, but they still don't have the training, they're not working with counsel and they're still doing it wrong. The memo basically says that, "Hey, okay, good faith, but you still got it wrong. This is a continuing violation." So what is going to be the impact of that?

Miriam Thompson [\(15:40\)](#):

Right. So, Kate, as you mentioned, often overlooked concept by employers is that most of these deficiencies are, yes, indeed in fact considered continuing. So what this means is that a violation doesn't just occur when the I-9 is initially completed at the time of hire and then disappear. However, it continues until it is either corrected or until the employer's legal obligation to retain the I-9N, which is at the time the employee is terminated, the I-9 must be retained for the longer of three years from the date of hire or one year from the date of termination at that time the retention obligation ends. So what this means for current employees where the employer must retain the I-9, the incomplete I-9 may represent an ongoing compliance issue for several years. And if ICE comes in and audits and serves the notice of inspection, they can then evaluate deficiencies that may have originated many years ago if these remain uncorrected.

Kate Kalmykov [\(16:56\)](#):

And in fact, a lot of the technical violations, if it's an ongoing problem, if it's not resolved, if sort of HR says, "Oh, okay, we fixed it for the audit, but the problems are continuing after the audit and the government is inspecting again," they may, at a certain point, be reclassified as substantive by the government if they're not timely corrected and if they continue. They're basically saying, "You have to learn how to do this, do it correctly and implement it."

[\(17:27\)](#):

Now, Miriam, they've also explained that there's a five-year statute of limitations. So for those listening to the podcast, can you explain how does that toll and how does that work?

Miriam Thompson ([17:42](#)):

So the five-year statute limitation. In the I-9 context, that is a five-year statute of limitation and that does not necessarily begin when the original error occurs. So instead, we've seen that courts and administrative decisions generally treat it-

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Miriam Thompson ([18:03](#)):

... administrative decisions generally treated I-9 paperwork violations as continuing until correction of the deficiency or until the employer's expiration of their retention obligations. So as a result, uncorrected legacy forms can remain actionable by ICE for years beyond the original completion date. And that then makes remediation via an internal audit or similar efforts specifically important, because correcting deficiencies can help start the limitations clock running and then reduce future exposure.

Kate Kalmykov ([18:50](#)):

Now, in terms of the industries targeted, it's pretty broad, right? We see that high-volume employers are targeted. We see a lot of employers where there's high turnover, home healthcare, manufacturing-

Miriam Thompson ([19:04](#)):

[inaudible 00:19:07] companies.

Kate Kalmykov ([19:07](#)):

... packing companies, meat-packing companies, landscaping companies. But besides that, other employers, other high-volume employers, employers with staffing models, they're also quite subject. We've seen the government really expand its enforcement in the past year and a half to not just the regular industries that you think are subject to I-9 audits that may have a lot of unauthorized employees, but we've seen them come to a lot of very sophisticated companies. So who do you think should really be aware and take stock of this right now?

Miriam Thompson ([19:45](#)):

I think they could come to any employer, while there are certain targeted industries that could be, in the current environment that is so immigration-focused, that could be a higher risk. Really, any employer in any industry could be the target of this. So preparation is key to, before anyone comes in and audits, be in the best position and proactively address issues. So internal audits are more important than ever, and it is one of the most effective compliance tools available to employers. So any employer should do a well-structured internal I-9 audit to identify errors on the I-9s before ICE does, and make those

permissible corrections now. Make them correctly. Also, improve procedures and reduce future liability. So just as importantly, you are correcting existing errors, but also, it does help employers identify patterns, what causes training issues, and so on, instead of just focusing on correcting individual I-9s. So there's a real benefit to engage in those internal I-9 audits.

Kate Kalmykov ([21:12](#)):

I think in addition to what we already mentioned, doing a snapshot audit, working with counsel, you may have counsel, especially if you're a large employer, audit 20 to 30% of your workforce. HR then begins to see the patterns that emerge, and you can actually do the rest in-house, because you start to understand what sort of patterns there are in failing to complete the I-9s. Even by the person completing the I-9, you may see they never date section two, they never fill in the date of hire. Patterns start to emerge. But in addition to actually taking care of the I-9s... We've talked a little bit about it, but having a handbook in place to really go through when somebody's doing the I-9 process, particularly if you have a lot of employees, you have multiple locations, to centralize your process to clearly outline what you can ask for, what you can't ask for, the timelines, and when the I-9 needs to be completed.

([22:16](#)):

The process for reverification of people who have temporary work authorization, that's also a big pain point for people, where they really miss the opportunity to re-I-9 timely or to complete it correctly. Even when they themselves, for example, are engaging in a visa extension process, it doesn't always translate necessarily, because one may go through the department to also updating the I-9 when that is completed. So really making that structure of having a handbook as a tool to rely on, in addition to the government's M-274 handbook, that's very important. We always tell employers, "Have that at your desk. Have it printed out. This is the guidance from the government." They actually have pictures of the different forms of IDs that can be presented to you for verification. So if you suspect something may not be genuine, you can quickly look it up. That is a very good tool to have.

([23:16](#)):

Having an annual training in place, very important. Having a way to update your hiring staff about these changes, just like the ones we're talking about today, is very important, so that they really understand the severity that these mistakes can have and take it seriously, and so that they're updated when new I-9 forms come out, when requirements change, when penalties change. And there've been a lot of changes in the past five, six years. For example, for E-Verify employers, you can do remote verification after COVID. We never had that before. That is something very new. Periodically, we have new editions of the form I-9. It's back to being a one-page form with a Supplement B from being a three to four-page form over the past 20 years or so.

([24:08](#)):

The other thing I wanted to talk to you about is how to really prepare the staff for if the government comes. What can they ask for? What is the notice of inspection, and what is the process in place that you have when the government shows up to triage that? Because many companies don't understand you get 72 hours to respond to that notice. And it is critical that it gets to the right person, that counsel is called and brought in. Oftentimes, we can negotiate an extension to get the files in order. So Miriam, can you talk a little bit about what I like to call a rapid response plan?

Miriam Thompson ([24:50](#)):

Yeah. Response plan indeed needs to be rapid, because this three business day turnaround requirement... They have been in more recent audits much less likely been given an extension of that

three-day timeline. So on a whole, audits early in 2025, the offices were much more inclined to grant a week, or two even, of an extension to produce these I-9s. But recently, whenever we asked for extensions, they declined to approve that. So you need to have your I-9s ready to go. Once that notice comes in, there's not much time to look for the I-9s. Everything needs to be ready to go. And in addition to I-9s, they're also asking for more documents. For example, earlier, we discussed about company groups and how they may audit one company, and then they may audit all the related companies. In recent audits, they have requested a corporate org chart with listing of related companies, any parent company subsidiaries, and so on, so then they could audit these next.

[\(26:15\)](#):

In addition, they will ask for payroll reports, for an employee census, anyone who is currently employed, of course, and also who was terminated in the past year. Recent audits all have requested at least a good-size sample of I-9s for current employees, but then also I-9s for anyone terminated in the year preceding the notice of inspection. So there's really not much time once that notice comes in to pull the documents. That's why best practice would be to have a so-called audit ready file prepared, so you know where your I-9s are, you know where those documents are that are commonly requested in a-

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Miriam Thompson [\(27:03\)](#):

... your I-9s are, you know where those documents are that are commonly requested in a notice of inspection to then be ready to go.

Kate Kalmykov [\(27:09\)](#):

So I think we've talked a lot almost in the context of paper I-9s, but the reality is also that employers have obviously drifted towards and migrated onto electronic I-9 systems, but they're not foolproof and there's a lot of audit risks with those as well. So when the government comes in and they request the records, you also want to make sure that the electronic I-9s are in order, and there's a lot of risk areas in those as well, Miriam. Let's discuss what those are.

Miriam Thompson [\(27:46\)](#):

Right. So many employers assume that if they use an eI-9 software platform, that platform automatically ensures compliance. However, unfortunately, that is not always the case. And these electronic systems, while generally they can increase the likelihood that the I-9 is completed correctly, it can create risk if there's incomplete audit trails, e-signatures are not meeting DHS requirements, historical records are not preserved, or some system-specific workflow doesn't permit incomplete forms to be finalized.

[\(28:30\)](#):

For example, the other day we had an employer who uses E-Verify ask how to complete the I-9 in their software if the employee does not yet have a social security number because the system would not allow them to proceed because it was interconnected with E-Verify and E-Verify requires that social security number. So there are many nuances of eI-9 systems where the employer then is under the obligation to make sure that that complies with DHS requirements.

[\(29:08\)](#):

So employers should understand how their systems function, what controls there are in the system, what limitations their system may have, and how and why that system complies with applicable

requirements. For example, in recent I-9 audits, the notice of inspection also asked for documentation regarding an eI-9 system the employer may use and an explanation as to how that system works. So ultimately, with eI-9s, important to keep in mind is liability always rests with the employer even if a third-party vendor provides the employer with the technology to complete the I-9.

Kate Kalmykov ([29:55](#)):

That's different than employers using the government E-Verify system. That's really the only thing that gives a safe harbor at this point. And that's one of E-Verify's selling points is you're opening up your books to audit to us at any time, but we're giving you a safe harbor if you're using the E-Verify system.

([30:16](#)):

Now, one of the other areas that obviously is a hot topic right now is remote workers. Post-COVID, remote work has just exploded. We deal with it a lot in the PERM context in the H-1B context, but it's an issue for I-9s as well. Many employers are allowing people to work remotely all over the country and there's a lot of I-9 obligations that come along with that. So obviously, the exception to allow the remote I-9 verification applies if you are an E-Verify employer. And I just said E-Verify gives you a safe harbor, but it's not foolproof. There's still a lot of things to consider in the I-9 context when you're hiring someone remotely, so why don't we talk about that a little bit?

Miriam Thompson ([31:06](#)):

Yeah. So as part of this new memo, there also have been some updates as to how ICE classifies mistakes for remote document examination and how we indicate that on the I-9. So the alternative procedure to examine documents remotely, such as via video call, you still must examine the originals though, that offers employers significantly more flexibility. However, there's some really important obligations, compliance obligations tied to that. For example, you must be an active E-Verify participant at the time the remote verification was done, and then also confirm on the I-9 via checking the alternative procedure checkbox that this alternative remote procedure was used to review the documents. And in the new memo, failure to check that procedure box if the company used an alternative procedure, that is now deemed a substantive violation.

([32:19](#)):

Similarly, for any employer who is not an active E-Verify participant, then they indicate that they used the alternative procedure, that is also a substantive violation. And sometimes they can tell, ICE can tell based on the simple fact that the employer representative is in one state, let's say in Georgia, and the employee is in California, that this was not or was very unlikely an in-person inspection of the document. Employer is not an E-Verify participant. So that would then ... The new memo clarified that this is a substantive violation to use that procedure while not being an active E-Verify participant.

Kate Kalmykov ([33:08](#)):

This is a huge area of confusion for people, and we often do audits where people are just verifying people remotely because they think it's okay and they're not members of E-Verify. So you really want to get into compliance with that.

([33:24](#)):

Now, ICE is definitely auditing. They're sending notices of inspection, they're ramping up. And the reasoning behind that is they're generating fees for the agency. They're meeting their agenda related to immigration. They want to rule out bad faith employers, but they also want to rule out those that are

just not compliant employers. Maybe they're not hiring illegal aliens, but they're not complying with the laws. And immigration-wise, they're just ramping up audits all across the board. So late last year, they announced the introduction of Project Firewall, so there's going to be increased H-1B LCA audits. I think PERM audits may follow. So all around compliance right now is really, really key for companies, whether you have a large foreign national workforce or not.

[\(34:16\)](#):

So Miriam, why don't we wrap up with some tips and suggestions for our listeners? And I think obviously, the primary one is if you're not compliant or you haven't looked at the I-9s, look at them now.

Miriam Thompson ([34:34](#)):

Yeah. So the big thing about remediation doing these internal audits, doing them correctly is that those ROI can support penalty mitigation. Also, correcting a violation, it doesn't erase that there was an error. However, if you're doing regular audits, you're doing those corrections correctly, you're training your team, you're implementing improvements, you're generally in a much stronger position when negotiating with ICE if there is a notice of fines. And the goal here is not necessarily to get to perfection. That is something very hard to get to in the I-9 context, but it is to demonstrate the company's genuine commitment to compliance and good faith compliance efforts.

Kate Kalmykov ([35:31](#)):

Absolutely. Well, thank you so much for joining me today. It's always a pleasure to have you on. You really have the I-9 stuff at your fingertips day in and day out helping many companies come into compliance to remediate, to respond to government notices, and it's always a pleasure to get your insight. Thank you.

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