



white paper

# UNITED STATES V. R&SL, INC.: A CAUTIONARY TALE IN FORM I-9 PREPARATION AND MAINTENANCE

Learn how to prevent Form I-9 mistakes and avoid costly penalties and legal fees.

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*On January 6, 2022, a Judge ordered respondent R&SL, Inc. to pay over \$1.5 million in penalties for over one thousand Form I-9 violations.*



In this case study, **BIG** explores why the judge served the respondent such a hefty fine – and how employers can bolster their Form I-9 compliance program to safeguard against litigation.

## WHAT HAPPENED?

Immigration and Customs Enforcement (ICE) commenced a Form I-9 audit on September 7, 2016 demanding that R&SL produce all Forms I-9 within the retention period by September 16, 2016. ICE initially alleged 2,000 violations and assessed a fine of more than \$3 million. R&SL challenged the assessment and litigation ensued. In an [Order on Motion for Summary Judgement](#) on November 25, 2020, a Judge found R&SL liable for some violations, dismissed others and held a significant number of violations for trial. On June 15 and 17, 2021, a hearing was held and on January 6, 2022, a second Judge issued a [Final Decision and Order](#). In her decision, the Judge found R&SL liable for a number of violations while holding that ICE had failed to meet its burden of proof with regard to over 500 other violations.

## ICE's Allegations and the Judge's Decision

ICE's Complaint accused R&SL of the following:

- Continued employment of an individual after learning he was no longer authorized to work in the United States;
- Failure to prepare or present (to ICE) 513 Forms I-9;
- Failure to prepare 276 Forms I-9 in a timely fashion; and
- Substantive or paperwork violations on 1,224 Forms I-9.

### Count I: Continuing to Employ an Unauthorized Alien

**ICE alleged that R&SL continued to employ an individual despite knowing that the employee lacked work authorization, violating Section 1324a(a)(2) of the Immigration and Nationality Act (INA).** The Judge determined that a Tentative Nonconfirmation (TNC) – a result indicating that the information entered in E-Verify does not match SSA records or data available to the U.S. Department of Homeland Security (DHS) - can occur for a variety of reasons. The U.S. Citizenship and Immigration Services (USCIS) E-Verify Memorandum of Understanding (MOU) explicitly states that an employer may not rely on a TNC in terminating an employee. Additionally, the Judge highlighted that R&SL never received a Final Nonconfirmation. As such, the court

ruled that ICE had not met its burden of proof that the individual was not employment authorized.

## Count II: Failure to Prepare or Present Forms I-9

**ICE alleged that R&SL failed to prepare or present Forms I-9 for 518 employees.** R&SL argued that it provided the Forms I-9 to ICE as demanded in the Notice of Inspection (NOI) and supported this assertion through evidence detailing how the Forms I-9 were collected and turned over to ICE. R&SL stated that it stored Forms I-9 in several offices in two states and that the payroll manager drove to each location and collected the Forms I-9. The payroll manager noted whether a Form I-9 was placed in the box to be turned over to ICE as she collected the Forms I-9. When R&SL turned the documents over, ICE issued a property receipt for “3 Large Boxes of Forms I-9.” ICE argued that the Forms I-9 in question were never turned over and further asserted that had they been, the ICE auditor would have found and reviewed those documents. In support of this assertion, the ICE auditor detailed her process for determining how many Forms I-9 should have been surrendered per an examination of weekly and quarterly payroll records.



The Judge found that even though the evidence equally supported both sides, the burden of proof resided with ICE. Ultimately, the Judge ruled in favor of R&SL regarding Count II.

## Count III: Failure to Timely Prepare Forms I-9

**ICE alleged that R&SL failed to prepare 274 Forms I-9 in a timely fashion.** In support of its allegation, ICE referenced the Forms I-9 in evidence depicting Section 1 completion more than one day after hire or Section 2 completion after three days of hire. R&SL was found liable for 213 timeliness violations.

## Count IV: Substantive or Paperwork Violations

**ICE alleged that there were substantive or paperwork violations on 1,224 Forms I-9, consisting of the following:**

### Section 1:

- Checking incorrect (or conflicting) work authorization status selected;
- No employee attestation;
- No alien number listed or apparent;

### Section 2:

- Backdated Forms I-9;
- Lack of Printed Name of Employer Representative;
- Attestation Signed with Signature Stamp;
- No attestation at all;
- Untimely completion;
- No or invalid List A, B, and/or C documents;
- Incomplete or partial expiration dates;
- Incomplete, partial, or missing document numbers

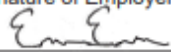
### Section 3:

- No reverification when required;

### Other:

- Missing or completely blank Form I-9 page or section.

In her decision on Motion for Summary Decision, the Judge found that of the 1,224 violations alleged by ICE, 1,015 were proven noncompliant upon visual inspection

Section 2. Employer or Authorized Representative Review and Verification				
<i>(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.")</i>				
Signature of Employer or Authorized Representative 		Today's Date (mm/dd/yyyy) 12/01/2014	Title of Employer or Authorized Representative	
Last Name of Employer or Authorized Representative	First Name of Employer or Authorized Representative		Employer's Business or Organization Name	
Employer's Business or Organization Address (Street Number and Name)		City or Town	State	ZIP Code

of the Form I-9 itself and did not require a hearing. At a hearing, the Judge sustained ICE’s allegation that 177 of the 1,224 forms had substantive violations because ICE had proven that the Forms I-9 at issue were backdated. ICE further argued that one individual, “E.B.” (later known as “E.E.”), completed many of the Forms I-9 in question. These 177 Forms I-9 were completed between 2014 and September 2015 using the initials “E.E.” The Judge determined that these Forms I-9 were backdated because E.B. only began using the initials E.E. after her name change in October 2015. Put simply, E.E. was listed on Forms I-9 purportedly completed *before* E.B. changed her name to E.E.

The Judge stated that “[t]he primary focus for assessing penalties is ‘the reasonableness of the result achieved.’” Regarding the seriousness and flagrancy of the backdating violations, the Judge refused to mitigate the proposed penalty concerning those violations.

***After a thorough analysis, the Judge imposed a fine of \$1,527,308.90.***

## COMPLIANCE TECHNIQUES FOR EMPLOYERS

Below are five different techniques employers can utilize to avoid a situation like R&SL’s. In reading this far, you have already taken the most important step in avoiding compliance risk for your organization by investing in your

Form I-9 compliance knowledge base. **Below are a few ways that, if methodically executed, can help you maintain Form I-9 compliance.**

### 1. Technology

The most efficient way to avoid Form I-9 penalties is to eliminate errors; employing technological resources is an effective way to support this mission. Utilizing a correctly designed electronic Form I-9 ecosystem can prevent many human errors because the Forms I-9 themselves mitigate the types of errors employers can make. **BIG’s** electronic Form I-9 system, i9Success, accomplishes this by restricting choices (i.e., if an employee selects “Alien Authorized to Work” they cannot choose U.S. Passport as a supporting document) and utilizing in-line validations. In-line validations significantly reduce recording errors by enforcing rules regarding expected alphanumeric document number combinations and only accepting unexpired documents. By employing these features and others, **BIG** helps clients avoid costly “unforced” errors.

### 2. Education

Employers and Human Resources professionals can benefit greatly by reviewing publicly available Form I-9 materials, as published by USCIS and by **BIG**.

USCIS’s [Form M-274](#), Handbook for Employers is valuable, searchable resource. The Handbook is a wealth of information for all Form I-9 issues and a great primer for those just beginning to work with Form I-9. The [Form M-775](#) E-Verify Manual is also publicly available, along with specialty



manuals for [federal contractors](#). USCIS is also required per congressional mandate to conduct [periodic webinars](#) on Form I-9 and E-Verify completion. There are also the [Form I-9 Instructions](#), which discuss the handling of common scenarios. The Virtue Memorandum is a comprehensive resource to research violations and how to correct Forms I-9. Lastly, USCIS's [I-9 Central](#) is a fantastic repository for a variety of content, including information pertaining to special cases.<sup>1</sup> Each of the aforementioned represents excellent starting points for those working with Form I-9 and E-Verify.

**BIG** provides a host of resource and training materials as well. These consist of White Papers and additional resources that are available in the Learning Center. These resources are also available through your Account Manager. Additionally, **BIG** provides clients with timely legal updates through [News to Note](#) publications. Furthermore, **BIG** presents quarterly webinars on different aspects of the Form I-9 and E-Verify.

### 3. Infrastructure

Beyond education, an infrastructure designed for efficiency and success is key. An initial infrastructure issue to be tackled is completed Forms I-9 storage. Employers should take the time to ask and answer the following questions to arrive at a solution that is optimal for the organization:

- Will Forms I-9 be stored in one central location (if there are multiple offices involved)?
- Will documents be digitized and stored on the cloud?
- How is Form I-9 completion incorporated into the onboarding process?
- When during the onboarding process will Form I-9 be completed?

Designating team leaders – “internal” experts in Form I-9 – is a great way to build institutional knowledge in Form I-9 completion. These team leaders can not only train others involved in Form I-9 completion but also offer insight regarding Form I-9 issues as it relates to broader human

resource and onboarding conversations and decisions. These designated experts can also serve as coaches and trainers to other individuals who may be involved in the Form I-9 process. For organizations who tend to have new employees onboard in “waves” or “cohorts,” these individuals are able to cross-train other individuals within the organization to assist during these times. Cross-training employees is known to benefit both employees and employers; for example, the employee learns a new skill (Form I-9 completion) and the employer is more properly prepared to handle a mass hiring event.

### 4. Internal auditing

**BIG** recommends that each organization complete an internal Form I-9 audit at least annually, if not quarterly, to identify errors, enact correct and serve as a training tool. It is critical to keep in mind that employers must conduct internal audits indiscriminately; organizations cannot focus on auditing Forms I-9 completed only for individuals with a particular citizenship or immigration status or have presented a certain document.

Internal audits can leverage employment or payroll tax records to ensure that a Form I-9 exists for each employee within the retention period. They can also ensure timely and correct completion of Forms I-9 and determine whether a Form I-9 requires updating (i.e., name changes). Audits can also reveal if Section 3 Reverification have been completed in a timely fashion.

Identifying issues before ICE affords employers the opportunity to track errors, determine origins and enact corrections. For example, if an audit reveals that one particular field of the Form I-9 is a consistent issue across the organization, designated experts can retrain the organization on the completion and handling of that field. If one specific Form I-9 specialist is struggling to complete forms, an internal audit will identify that individual and employers can take the time to re-educate and re-train that staff member.

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<sup>1</sup> BIG also frequently consults the Immigration and Nationality Act and accompanying federal regulations.

In preparing to design and internal auditing program, **BIG** recommends that employers reference the checklist found in USCIS’s Virtue Memo.

### 5. Making corrections

Employers must correct errors identified on a Form I-9. If the error is in Section 1 of Form I-9, the employee must fix and initial the error. The employer can identify the error and inform the employee, but only the employee can correct the Form. If the error is in Section 2 of Form I-9, then only the employer may make the correction. In both cases, the incorrect information must be crossed-out and then the new information must be added and initialed. **Do not, under any circumstances, attempt to hide or obfuscate an error on a Form I-9.** As *R&SL* demonstrates, the Office of the Chief Administrative Hearing Officer (OCAHO) does not look kindly on attempts to hide errors.

For greater issues and/or situations in which a Form I-9 was never completed, the reviewer should draft and sign a dated memorandum to the file explaining the nature of the error, how it was discovered and how it was remedied. This memorandum should be attached to the defective Form I-9. If no Form I-9 was created, the memorandum should be attached to a blank Form I-9.

## COMPLIANCE IS THE EXPECTATION, NOT THE EXCEPTION

Unless you are a Form I-9 specialist, odds are good that keeping up with I-9 and E-Verify compliance is not your favorite task. HR professionals might find it difficult to give Form I-9 completion and policies the attention it requires due to competing priorities. The Form I-9 and changes from USCIS can be confusing, making the employee onboarding process cumbersome and challenging. **BIG** has developed **i9Success** – our Form I-9 and E-Verify services suite – using an in-house team of Form I-9 legal experts and IT developers. Our suite of services keeps our clients compliant using cutting-edge technologies, dedicated resources and constant monitoring. Please feel free to reach out today for more information on how **BIG** can help employers worry less and hire more.

