

MY EMPLOYER TOLD ME THEY ARE REVIEWING MY WORK AUTHORIZATION DOCUMENTS. NOW WHAT?

There are several reasons an employer may review your Form I-9 and work authorization documents. The Form I-9 is a document employees fill out to show their work authorization and identity when they are first hired. This is an overview of some of the most common reasons an employer might review or say it is reviewing your I-9 and related documents.

Reason	Description	Rights	Risks
<p>Immigration I-9 Audit</p> <p>For more information about the Immigration I-9 audit, please click here.</p>	<p>Immigration officials contact an employer and request copies of all employees' I-9 forms. Immigration officials then inspect the I-9 forms for issues or discrepancies with immigration records.</p>	<ul style="list-style-type: none"> • In California, employer must tell employees in writing that it received a Notice of Inspection¹ within 72 hours of receipt. • In California, employer must give employees written notice of the results of the audit within 72 hours.² • The opportunity to resolve any differences between employer records and immigration records. • The right to choose which documents to present to establish work authorization. • The right to not discuss your immigration status with an employer. • The right to have someone else (such as a lawyer, another worker, or a union rep) present during any meeting scheduled with the employer.³ • The right to be silent. • The right to not sign any documents. • The right to speak to an attorney before answering any questions from immigration officials. 	<ul style="list-style-type: none"> • If immigration officials identify an employee as not having work authorization, an employer may legally fire that employee if he/she/they do not provide additional documentation to prove eligibility to work.⁴ • Immigration officials may try to speak with or arrest employees when they enter the workplace to deliver a Notice of Inspection or to inspect I-9 forms.⁵ • Immigration officials may ask to meet with the employer and the employee to resolve issues with the employee's I-9 form. There is a risk immigration officials might arrest the employee at this type of meeting.
<p>Employer's Internal I-9 Audit</p>	<p>An employer decides to audit itself on a voluntary basis. An employer may legally</p>	<ul style="list-style-type: none"> • Employers may not discriminate based on race, language, citizenship or national origin in the audit process – are <i>all</i> employees' I-9 forms being audited, or only certain ones? How is the employer choosing which 	<ul style="list-style-type: none"> • Once an employer knows or should know that an employee is not authorized to work, it may

¹ Cal Lab Code § 90.2(a)(1).

² Cal Lab Code § 90.2(b)(1).

³ Cal Lab Code § 90.2(b)(1)(A)-(D).

⁴ 8 U.S.C § 1324(a)(1).

⁵ However, if the immigration officials' true purpose is to question, arrest, or detain workers, instead of audit the employer's records, any arrests made may be illegal. *See Perez Cruz v. Barr*, No. 15-70530, 2019 WL 2454850 (9th Cir. June 13, 2019) (holding that immigration officials may not use a judicial search warrant to obtain an employer's records, when there was no evidence that those records were even seized, as a pretense to question, arrest, and detain workers).

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	<p>do so as long as it reviews <i>all</i> employees' forms, and is not conducting the audit in a discriminatory manner or to retaliate against employees.</p> <p>Employers should inform employees in writing that an internal audit will take place, and state that the audit is independent of any government action.⁶</p>	<p>employee forms to audit? Is the employer reviewing all I-9 forms under the same standards? If the employer identifies issues with employees' I-9 forms, is it requiring some employees to present specific types of documents?</p> <ul style="list-style-type: none"> • Employers may not use an internal I-9 audit to retaliate against employees for exercising their rights (see below). • Employees must be given a “reasonable amount of time” to correct any issues with their I-9s.⁷ 	<p>risk penalties if it continues to employ the employee.⁸</p> <ul style="list-style-type: none"> • An employer might break the law by conducting an audit in a discriminatory manner (e.g. only auditing the I-9s of Latina/o employees). • An employer might conduct an audit in retaliation for employees asserting rights (e.g. complaining about or discussing wages, labor organizing or union activity). This would be illegal. Employees who have been retaliated against may file charges with agencies such as the U.S. Equal Employment Opportunity Commission (EEOC), the California Department of Fair Employment and Housing (DFEH), or the Immigrant & Employee Rights Section of the U.S. Department of Justice (IER), and may be eligible to receive compensation and other remedies. An employee may also be able to file a civil lawsuit against the employer.
<p>“No-Match” Letter from Social Security Administration (“SSA”)</p> <p>For more information on SSA “no-match” letters, please click here.</p>	<p>A letter from the SSA that merely states that the name or social security number the SSA has on file for an employee does not match the information the employer reported on its taxes.</p>	<ul style="list-style-type: none"> • Employees may not be disciplined, put on leave or be fired based solely on the no-match letter. • Employees should ask for a copy of the no-match letter. • Employers must give employees a reasonable amount of time to correct any errors. If the employee is unable to correct the errors, the employer does <i>not</i> need to take any other action.¹⁰ 	<ul style="list-style-type: none"> • An employer who disciplines or fires an employee based solely on a no-match letter may be unlawfully engaging in discrimination or retaliation, depending on the individual circumstances. • Employees who have been discriminated or retaliated against can file charges with agencies such as the EEOC, DFEH or IER, and may be eligible to receive compensation and other remedies. An employee may also be able to file a civil lawsuit against the employer.

⁶ <https://www.nilc.org/wp-content/uploads/2015/11/I-9-audits-primer-2009-07-23.pdf>

⁷ What a “reasonable amount of time” is depends on a variety of factors, including whether new documents must be presented, and may be extended. Previously, employers were instructed to give at least 90 days. However, because some documents may take more than 120 days to obtain, employers should be flexible in setting the reasonable time period. See <https://www.ice.gov/sites/default/files/documents/Document/2015/i9-guidance.pdf>

⁸ 8 U.S.C. § 1324a(a)(1).

¹⁰ See https://www.ssa.gov/employer/notices/EDCOR%20Letter%20-%20Final%20-%20Attachment%20-%2009-16-19_508.pdf; <https://www.nilc.org/issues/workersrights/no-match-letter-toolkit/social-security-no-match-letters-faq/>.

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	<p><i>This letter does not relate to immigration status or work authorization in any way.⁹</i></p>		
<p>“Tentative Nonconfirmation” Letter (“TNC”) from E-Verify</p>	<p>E-Verify is a system employers may use to verify <u>new</u> employees’ work authorization. In general, it may not be used for existing employees.¹¹ California employers, except for federal government contractors, are not required to use E-Verify.¹²</p> <p>A TNC is a letter stating that the information on a Form I-9 does not match the information contained in SSA or Department of Homeland Security (“DHS”) records.¹³</p> <p><i>This letter does not necessarily mean an employee is not</i></p>	<ul style="list-style-type: none"> • Employees cannot be fired based solely on the TNC. • Employees must have the opportunity to “contest” (challenge) the TNC. • Employees who want to contest a TNC have 8 business days to go to or call an SSA or DHS field office to start the process of correcting those records.¹⁵ 	<ul style="list-style-type: none"> • If an employee does not contest a TNC, or unsuccessfully contests one, a Final Nonconfirmation letter (“FNC”) is issued, and the employer may then terminate or refuse to hire the employee.¹⁶ • Once an employer knows or should know an employee is not authorized to work, it may risk fines and/or sanctions by continuing to employ the employee.¹⁷ • An employer who disciplines or fires an employee based solely on receiving a TNC may be engaging in discrimination or retaliation. • Employees who have been the victims of discrimination or retaliation may file charges with agencies such as the EEOC, DFEH or IER, and may be eligible to receive compensation and other remedies. An employee may also be able to file a civil lawsuit against the employer.

⁹ <https://www.nilc.org/issues/workersrights/no-match-letter-toolkit/social-security-no-match-letters-faq/>

¹¹ See Cal. Lab. Code § 2814 and <https://www.e-verify.gov/employees/employee-rights-and-responsibilities>

¹² Cal. Lab. Code § 2814

¹³ <https://www.e-verify.gov/employees/tentative-nonconfirmation-tnc-overview>

¹⁵ <https://www.e-verify.gov/employers/verification-process/tentative-nonconfirmations/ssa-and-dhs-tncs>

¹⁶ <https://www.e-verify.gov/e-verify-user-manual-30-case-results/36-final-nonconfirmation>

¹⁷ 8 U.S.C. § 1324a(a)(1).

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	<i>authorized to work in the U.S.</i> ¹⁴		
Retaliation	<p>Sometimes, an employer may claim an audit or one of the other above possibilities as an excuse to fire employees for exercising their rights.</p> <p>Consider the timing of an announcement of an audit, no-match letter or TNC; who is being targeted; what employee actions or activities have preceded it; and whether this is the first time one of the above situations has occurred.</p>	<ul style="list-style-type: none"> • The right to organize a union and engage in concerted activity. • The right to complain about working conditions, unpaid wages, etc. • The right to complain about discriminatory treatment and practices. 	<ul style="list-style-type: none"> • An employer may unlawfully terminate an employee in retaliation for exercising one of those rights. • Depending on the situation, employees may file a complaint with an agency such as the California Labor Commissioner, EEOC, DFEH or IER, and may be eligible to receive compensation and other remedies. An employee may also be able to file a civil lawsuit against the employer.

¹⁴ *Id.*