

Form I-9 Compliance



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Immigration Reform and Control Act of 1986

Core requirements are:

- › Verification of employment eligibility
- › Prohibition against discrimination based upon citizenship or national origin
- › Prohibition against retaliation

Who is Covered?

- Verification rules apply at hiring to every employee hired after November 6, 1986
- Every employer is covered, along with certain entities that recruit or refer for fees

Key Definitions

- “Hire” is defined as “the actual commencement of employment of an employee for wages or other remuneration”
- “Employment” defined by reference to a multi-factor control test

Two-Pronged Prohibition

- Prohibition against employing aliens or recruiting or referring them for a fee, knowing that they are unauthorized (unauthorized employment)
- Prohibition against hiring any individuals, or recruiting or referring them for a fee, without following a prescribed system of verification (“paper work” violations)

Authorized Workers Under IRCA

- United States citizens
- Aliens authorized for employment incident to status
- Aliens authorized for employment with a specific employer incident to status authorized for approved employer/employment
- Aliens who must apply for employment authorization authorized subject to approval

Basic Verification Process

Step 1: Employee completes Section 1

Step 2: Employee presents documents

Step 3: Employer completes Section 2

Step 4: Employer retains Form I-9

Step 5: ICE may inspect

Form I-9: Employee Attestation

- At the time employment begins (between acceptance of offer and by COB of hire date), every employee must complete and sign Section 1 of Form I-9, and
- Must attest on Form I-9 under penalty of perjury that he or she is a U.S. citizen, lawful permanent resident, or an alien authorized to work, and
- Must acknowledge federal criminal sanctions for false statements or false documents

Form I-9: Employer Attestation

- At the time employment begins, the employer or employer's agent must complete and sign Section II of Form I-9 after examining one document from List A or one document each from List B and List C, and
- Must record the title, issuing authority, number and expiration dates, and
- Must attest on Form I-9 under penalty of perjury that s/he examined the documents, that they appear genuine and to relate to the employee, the date employment began, and that to the best of his/her knowledge the employee is eligible to work

Determining Document Validity

- The standard in reviewing the prospective employee's documents is reasonableness
- Employer is not attesting to the legitimacy of the documents (or the person), but only that the employer has reviewed the original document(s) and it reasonably appears to him or her, upon reasonable inspection of its features and the information it contains, to be genuine and to relate to the employee

Check for Form I-9 Updates

- Must use version in effect at time of hire
- Must use current version for any re-verification
- USCIS has released a new Handbook for Employers (Form M-274)
- The new Form I-9 and Handbook are available online at <http://www.uscis.gov>

When Must Process Be Completed?

- Form I-9 must be completed and document(s) must be presented within three business days of the date of hire
- In very limited circumstances, if the employee is work authorized and lacks a document but has applied for it, presentation of a receipt for the application within three business days gives the employee 90 business days from the date of hire to present the document

Recurring Issues

- Employer is responsible for making sure that Section I is properly completed on time (before end of hire date)
- Section I IS to be completed first, then Section II
- Documents presented and examined by the employer must be originals
- Can refuse documents if they are not on List A, B, or C, or do not appear valid, or do not appear to relate to the employee, but cannot specify the documents to be presented
- Person who signs for the employer must examine the documents

Prohibition Against Discrimination

- If an individual is authorized to work, it is illegal to discriminate because of national origin or citizenship status
- Employers cannot specify which documents they will accept from an employee
- Employers cannot require more or different documents than the documents specified on Form I-9
- It can be illegal discrimination to refuse hire of an individual because employment authorization is subject to expiration
- USCIS acknowledges that unnecessary verification may violate the anti-discrimination provision

Re-verification

- If an employment authorization expires, the employer must update the Form I-9, using Section 3, to reflect that the individual is still authorized to work in the United States; otherwise the individual may no longer be employed.
- To comply with the re-verification requirements, the employee must present a document that either shows continuing employment eligibility or is a new grant of work authorization.
- It is not necessary to present a new identification (List B) document during the re-verification process

Re-Hires

- When re-hiring an employee for whom the verification requirements were earlier met, an employer may, instead of doing a new form, use the previous Form I-9, providing the following conditions are observed:
 - › If the I-9 is no more than three years old, it relates to this individual, and he or she is eligible to work, the employer may update the I-9 by listing the date of rehire and signing Section 3.
 - › If it appears from the I-9 that the individual's work authorization has expired, rehiring requires re-verification on section 3 of the I-9 or the execution of a new I-9.

Continuing Employment

- Approved paid or unpaid leave;
- Temporary lay off for lack of work, with reasonable expectation of recall;
- Disciplinary suspension;
- Transfers from one distinct unit of an employer to another distinct unit of the same employer; or
- An individual continues his or her employment with a related, successor, or reorganized employer, provided that the employer obtains records and Forms I-9 where applicable from the previous employer, and maintains them.

Independent Contractors

- Need not complete I-9s for an independent contractor or the contractor's employees
- If, however, have actual or constructive knowledge that the contractor or the contractor's employees are unauthorized, become liable as the “employer”
- Test for “independent contract” status is a “control” test based upon all the surrounding circumstances

Agents and Remote Hire

- Document the agency arrangement
- Written instructions to the agent, including guidance in the proper completion of Section 2 of Form I-9
- Agent acknowledgment and signature
- Written notice and instructions to employee
- Photocopies
- Prompt secondary review

EADs and Re-verification

- EAD is an I-9 List A document, but only for the duration of validity of the EAD
- USCIS rules allow the foreign worker to continue working for up to 90 days if the worker produces a receipt for an application for a "replacement" document, but this applies only where the document has been lost, stolen or destroyed
- Certain EADs are eligible for auto-extension

Corrections

- Correct verification errors even after the initial three-day verification period has passed
- Corrections should be made conspicuously so as to avoid allegations of evidence tampering
- The benefits of corrective action can be significant, since it may eradicate the violation, or establish good faith

Copying

- Nothing requires the copying of any document presented for verification purposes (exception if employer is in E-Verify)
- However, an employer is permitted to copy any document presented for verification, including a naturalization certificate, notwithstanding any other provision of law
- The copy may be retained, but only for the purpose of complying with the verification requirements and must be kept with the corresponding I-9
- The copy can act as documentary evidence that the employee supplied the document described in the I-9 against later disavowal, but cannot substitute for the I-9.

Record Retention

- The employer must keep Form I-9 available for government inspection for a year after the employee leaves the job, and a minimum of three years
- It is never permissible to destroy an I-9 for an existing employee, no matter how many years have passed since its completion
- The forms may be retained on microfilm or microfiche

Record Keeping

- Nothing in the Act or regulations specifies where the forms are to be kept
- Form should be kept separate from the individual's personnel file and insulated from supervisory persons, thereby reducing the likelihood of a charge of discrimination regardless of whether it is justified
- Failure to keep I-9s separate will cause problems at the time of an ICE audit because the employer will then have to separate I-9s to keep from turning the entire personnel file over to ICE

Sanctions

- Hiring unauthorized worker
- Hiring without complying with verification requirements subjects the employer to a civil penalty that is separate from the penalty for knowingly hiring an unauthorized worker

Civil Fines: Unauthorized Employment

- First violation--\$559-\$4,473 for each unauthorized alien
- Second violation--\$4,473-\$11,181 for each unauthorized alien
- Third violation--\$6,709-\$22,363 for each unauthorized alien

Civil Fines: Verification

- Employers who fail to comply with the employment verification system are now subject to a civil fine of at least \$224, but no more than \$2,236, for each employee concerned in the violation
- Federal civil monetary penalties have been increasing pursuant to the Federal Civil Penalties Inflation Act of 1990, as amended by the Debt Collection Improvement Act of 1996

E-Verify

- Formerly known as Basic Pilot
- DHS internet-based employment verification system operated in conjunction with SSA
- Allows employers to check I-9 data against DHS/SSA databases
- Employer must register and sign MOU agreeing to comply with I-9 and E-Verify requirements
- No safe harbor and not a substitute for I-9 compliance
- Now required of all federal contractors with FAR E-Verify provision

Corporate Compliance Best Practices

- Policy statement
- Internal compliance manual
- Designated I-9 compliance responsibility
- IRCA and I-9 training, with annual refresher training
- Secondary level review
- Non-discrimination practices
- “No match” response
- Contractor program

Audit

- Comprehensive or spot?
- Self or external?
- Privilege
- Document corrective action on Form I-9, with attached written explanation
- Internal investigation
- Disciplinary action
- Directed training

Electronic I-9 vendors

- Know your vendor
- Continue to train
- Avoid discrimination pitfalls
- Plan ahead
- Common issues:
 - Audit trails
 - Electronic signature
 - Keyboard pass

Presenters

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