

*I See What This Says, But How Do I Know You Are
Who You Say You Are?*
I-9 Compliance Tips

by

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Introduction

- Every U.S. employer is required by law to complete and retain a Form I-9 for each individual hired on or after **November 6, 1986** for employment in the U.S.
- Form I-9, Employment Eligibility Verification, is designed to verify an individual's identity and authorization to work in the United States. This applies to **everyone**, not just foreign individuals.
- Current version of the Form I-9 is dated **08/07/09** (find revision date in the lower right hand corner). Note that the **02/02/09** edition is also acceptable. Previous editions are no longer valid.
- Purposes of the Form I-9:

- Protect U.S. workers by ensuring every employee has proper work authorization.
- Protect foreign nationals by prohibiting hiring practices that unlawfully discriminate based upon immigration status.

New Hire Issues/Process

- All new hires must complete Section 1 at the time of hire or before the end of the first day of work. Note: the employer must ensure this section is properly completed by the employee; mistakes may be attributed to the employer and result in fines.
- Employers must examine the employee's document(s) and complete Section 2 before the end of the third day of work (unless the employment will last less than three days; then complete on the first day).
- Employees may present any document or combination of documents acceptable by law (see lists A, B and C at the end of the Form I-9)
- Employees must present original documents. Exception: see Receipt Rule below.
- Documents must be accepted as long as they are on one of the lists, appear to be genuine on their face and relate to the person.
- Expired documents are unacceptable.

How and When to Reverify

- Where work authorization document has an expiration date, the Form I-9 must be updated (known as "reverification").
- At time of reverification, employer must accept any valid documents the individual chooses to present, whether or not they are the same type of documents provided initially.
- In the case of a rehire after a separation or leave of absence within three (3) years of the date of the initial execution of the previously completed Form I-9:

- If the original Form I-9 is still the current version of the form, the employer may simply complete Section 3, Block B, of the original Form I-9, indicating the date of rehire.
- If the original Form I-9 is an expired version, the employer may complete Section 3 of the current version of the form and attach it to the original I-9.
- In either case, the employer may opt to complete an entirely new Form I-9 at the time of rehire.
- If the employee's work authorization has expired or is about to expire, the employer should examine the new document for work authorization, record the document in Block C and complete the signature block (or in Section 2 if completing an entirely new form).
- If the rehire date of the individual is more than three (3) years after the date of the previously executed I-9, a new form must be completed.

The Receipt Rule

- The employee may present receipts for replacement of lost, stolen or damaged documents in lieu of original documents. If employee presents a receipt, he or she must present the actual document(s) within ninety (90) days of hire (or date of previous employment expiration).
- Indicate it is a receipt on the I-9 and update when actual document is provided.
- Receipt for initial grant or renewal of employment authorization not acceptable.

Photocopies or Originals?

- Employer must physically examine the original document(s).
- No requirement to keep copies of I-9 verification support documents.
- If an employer does request a copy of a support document, the copy should be retained and attached to the I-9 form.
- Adopt a uniform policy on this issue and implement consistently with regard to all employees.

- Keep all I-9s and supporting documents together and separate from individual employees' personnel files.

Record Retention

- Calculate retention date for each employee as either three years after the date of hire or one year after employment terminates, whichever is later.
- Forms and copies of supporting documents may be retained in paper, microfilm, microfiche or electronically.
- Forms must be available for inspection by authorized U.S. Government officials upon request. Employers are generally given at least three (3) days' notice to prepare for such inspection.

E-Verify

- A free online system operated jointly by the Department of Homeland Security ("DHS") and the Social Security Administration ("SSA").
- Allows participating employers to electronically verify employment eligibility of new hires. Note: Once enrolled, employers must E-Verify all new hires, but may not E-Verify existing employees.
- Does not replace the I-9 process; I-9 compliance remains mandatory for all U.S. employers.
- Voluntary for most employers (exceptions: certain federal contractors and subcontractors; employers of STEM graduates).
- While use of E-Verify does not create a "safe harbor" to worksite enforcement, it does create a rebuttable presumption that the employer has not knowingly employed an unauthorized alien.

How and Why to Conduct Periodic Internal Audits

- Date and initial corrections with a different color pen.
- If problems cannot be fixed by simply looking at the form and the documents on file, call the employee so you can address the issue together.

- As necessary, attach short memos to individual I-9s explaining issues and steps taken to correct them.
- Keep track of retention and reverification dates and act accordingly.
- Why internal audits? These actions will likely mitigate penalties in the event of an ICE audit.

ICE and How Things Can Heat up Fast

- In recent years, strong policy shift from Bush administration (targeting illegal workers with immigration raids) to Obama administration (targeting employers who hire illegal workers, by significantly increasing ICE audits).
- In 2010, ICE audits more than doubled from 2009. By all accounts, this trend is expected to continue.
- Recent events:
 - December 2010, a company was fined over \$27,000 for I-9 violations (although ICE initially sought \$110,000) despite the fact that the audit revealed no unauthorized employment. A legal workforce alone will not absolve employers from significant civil penalties in the event I-9 violations are discovered.
 - January 2011, ICE establishes the Employment Compliance Inspection Center, signaling its intent to continue its practice of increased auditing and imposition of civil penalties. The Center will be staffed by highly trained auditors who will assist local auditors and attempt to bring consistency in employer sanctions.
- Penalties range from \$110-1,100 per violation. ICE often seeks the highest possible fines. Mitigating factors include: size of employer, good faith attempts to comply with the law, seriousness of violations, whether any employees are unauthorized to work and whether the employer has a history of hiring unauthorized workers or failing to comply with I-9 requirements.
- Employers may request up to 10 days to correct “technical” violations. Substantive violations may not be corrected. The test for whether something is technical or substantive is the seriousness of the violation and whether it could

have led to the hiring of an unauthorized worker. The application of this test is sometimes subjective and can vary by auditor.

- Increased agency cooperation; investigators are now being cross-trained to recognize potential violations of other laws that they do not enforce, but would tip off the appropriate agency for another audit. For example, a wage and hour audit could lead to an I-9 audit if the auditor notices potential issues and alerts ICE.

“OK, where do we go from here? What should we do?”

- Relax, but not too much.
- Review your files and record keeping system.
- Make sure your I-9 files are easily accessible.
- Designate a procedure and one or more trained individuals to manage the I-9 process.
- Consider an internal audit.
- Identify and fix problem documents and procedures.
- Have a game plan.
- Consider getting help.

Questions?

***This is intended as a general summary only
and is not a substitute for specific legal advice.***