

IMMIGRATION LAW UPDATE

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Form I-9: Purpose, Process and Best Practices

Form I-9, Employment Eligibility Verification, is designed to verify an individual's identity and authorization to work in the United States. The law requires employers to complete and retain a Form I-9 for each individual hired to work in the United States on or after November 6, 1986. This applies to both U.S. citizens and non-citizens. The purpose of this requirement is to 1) protect U.S. workers by ensuring every employee has proper work authorization and 2) protect foreign nationals by prohibiting hiring practices that unlawfully discriminate based upon immigration status.

All new hires must complete Section 1 at the time of hire or before the end of the first day of work. It is the employer's responsibility to ensure this section is properly completed. The employer completes Section 2 within three (3) business days of the date of hire, or on the first day of hire if the job will last less than three (3) days. The current version of the Form I-9 has a revision date of 08/07/09 (see bottom right corner for revision date). The 02/02/09 version is also acceptable. Previous editions of the I-9 are no longer valid, meaning that employers must use the new form for all new hires.

As part of the I-9 process, employees must present document(s) establishing both their identity and their employment eligibility. Employees may present any document or combination of documents acceptable by law (as set forth on the lists attached to the form). An employer cannot require a document not on the lists or prefer one document over another. Further, the employer may not request documentation establishing identity and employment eligibility before the individual has accepted the job offer. The I-9

process may not be used to screen applicants. While immigration laws prohibit use of citizenship and immigration status against a potential employee at the interview stage, it is permissible to inquire during an interview as to whether the individual is authorized to work in the U.S.

Employees must present original documents. The only exception is a certified copy of a birth certificate. The employer must physically examine the documentation presented by the individual. 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. However, employers are not required to be document experts; the standard is reasonableness. If a document does not meet the authenticity standard, the employer should reject it and ask the employee to produce other acceptable I-9 documentation. Tip: Rejecting genuine documentation could result in a violation of the anti-discrimination provisions of immigration law. Thus, employers should be careful not to over-scrutinize the employee's documents. A good faith determination that a document is genuine and relates to the person is all that is required under the law. Employers may refer to the document illustrations found in the "Handbook for Employers: Instructions for Completing Form I-9" (M-274), if they are unsure of what the document should look like. Be sure to obtain the most recent edition, which was revised as of January 5, 2011. The Handbook is available on the USCIS website and provides an extremely practical tool for employers who are faced with a document they have never seen or who have questions about completing and retaining the Form I-9.

Occasionally an employer may discover that an employee presented documents that are counterfeit or belong to someone else. If this happens, the employer should reverify work authorization by allowing the employee to present acceptable authorization and then complete a new I-9. In this situation, the employer is not required to terminate the employee, however individual personnel policies regarding provision of false documentation may pertain. Note that an employer who knowingly continues to employ an unauthorized worker, or who fails to comply with I-9 requirements, may be subject to serious penalties.

In the case of a re-hire after a separation or leave of absence within three (3) years of the date of the initial execution of the original Form I-9, an employer may simply complete Section 3, Block B, of that form, indicating the date of rehire, so long as that version of the form is still current. If the original Form I-9 is an expired version, the employer may either 1) complete an entirely new form at the time of re-hire, or 2) complete Section 3 of the current version of the form, and attach it to the original I-9. If the re-hire 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.

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 (known as "reverification"). If the original Form I-9 is an expired version, the employer should complete Section 3 of the current version of the form, and attach it to the original I-9.

Employers must retain I-9s for the longer of three years after the date of hire or one year after the employment terminates. Employers are not required to keep copies of I-9 verification support documents. The I-9 process simply requires that employers verify that they have seen the support documents presented by the employee. If an employer does request a copy of a support document (which is permitted by law), the copy must be retained and attached to the I-9 form. Employers should adopt a uniform policy on this issue and consistently implement such policy with regard to all employees.

The forms must be available for inspection by authorized U.S. Government officials upon request. Employers are generally given three (3) days' notice to prepare for such inspection. A good practice is to keep all I-9s and related documents together, separate from individual personnel files. It is also advisable to conduct periodic internal audits and address errors, omissions and other issues by correcting in a different color pen (initialed and dated) or attaching a brief corrective memo to the original I-9. The internal audit also provides an opportunity to calculate retention dates for each employee's form, and destroy old I-9s soon as appropriate.

In recent years, there has been a strong policy shift from the Bush administration, targeting illegal workers with immigration raids, to the Obama administration, targeting employers who hire illegal workers, by significantly increasing Immigration and Customs Enforcement (ICE) audits. From 2009 to 2010, ICE audits more than doubled. By all accounts, this trend is expected to continue. In January 2011, ICE established 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.

ICE audits are resulting in heavy civil penalties for employers. In December 2010, a company was fined over \$27,000 for its I-9 violations, despite the audit revealing no unauthorized employment. Employers should be advised that a legal workforce alone will not absolve them from liability for I-9 violations. 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 and whether the employer has a history of hiring unauthorized workers or failing to comply with I-9 requirements.

Finally, there has been a rapid increase in inter-agency cooperation. Investigators are being cross-trained to recognize potential violations of other laws that they do not enforce, so that they may 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. In light of these developments, employers need to be aware of their I-9 obligations and take care that such obligations are fulfilled accurately, completely and consistently.

E-Verify: Who, What, Why, How?

E-Verify is an Internet-based system that compares data from an employee's Form I-9 to U.S. Department of Homeland Security (DHS) and Social Security Administration (SSA) records to confirm employment eligibility. According to U.S.

Citizenship and Immigration Services (USCIS), the agency that administers the program, E-Verify is not only fast, free and easy to use, but it is the best way for employers to ensure a legal workforce. The USCIS position is that E-Verify has become the “best means available for employers to electronically verify the employment eligibility of their newly hired employees. E-Verify virtually eliminates Social Security mismatch letters, improves the accuracy of wage and tax reporting, protects jobs for authorized U.S. workers, and helps U.S. employers maintain a legal workforce.” See USCIS E-Verify FAQs.

E-Verify is a voluntary program (with the exception of some federal contractors and employers hiring certain recent graduates with “STEM” degrees), and it is free to participate. Although it is designed to verify work eligibility, it does not replace the I-9 process, and those participating in E-Verify must still complete the Form I-9 for each new hire. After completing the I-9, employers who E-Verify submit an electronic query that includes certain identifying information from the employee’s I-9. The employer receives an automated response regarding that employee’s work authorization. If the system is unable to instantaneously confirm authorization, the employer will be given specific steps to complete, in cooperation with the employee, to resolve the status of the query.

Keep in mind that any employer who chooses to participate in E-Verify must go through the entire process with all new hires, and may not use E-Verify selectively. Further, be advised that the earliest the employer may initiate an E-verify query is after an individual accepts an offer of employment and after the employee and employer

complete the Form I-9. Consistent with the timing requirements for completing the I-9, the employer must initiate the query no later than the end of three business days after the new hire's actual start date. See USCIS E-Verify FAQs. Also note that “although an employer may initiate the query before a new hire's actual start date, it may not pre-screen applicants and may not delay training or an actual start date based upon a tentative non-confirmation or a delay in the receipt of a confirmation of employment authorization. In short, an employee should not face any adverse employment consequences based upon an employer's use of E-Verify unless a query results in a final non-confirmation.” See USCIS E-Verify FAQs.

In the event of a Notice of Tentative Nonconfirmation (TNC) as a result of an E-Verify query, the employer should review the notice with the employee as soon as possible. If he or she contests the TNC, the employer should allow the employee to continue working but provide him or her with the information from DHS or SSA that accompanies the TNC. The employer should consistently monitor E-Verify for status updates.

Note that where an employee has not yet been issued an SSN, the employer should permit the employee to work during that period and should not run an E-Verify query until such time as the SSN is issued. Employers may not use the E-Verify program with regard to current employees (with the exception of certain federal contractors, in certain cases), use the program selectively or to pre-screen applicants, or take adverse action against an employee who contests a TNC. Further, employers may not request additional documentation of work authorization upon receipt of a TNC.

SSN No-Match: Why it Occurs and How to Handle It

A Social Security “No-Match” letter is a notice from the Social Security Administration (SSA) to inform an employer that an employee’s name and Social Security Number (SSN) do not match the SSA’s records. The letters are typically issued in response to an employee wage report. A no-match letter does not necessarily indicate fraud or identity theft, nor does it suggest a problem with the employee’s work authorization or immigration status. In fact, no-matches can result because of simple administrative errors, and it is important for employers to resist taking adverse action, including termination, suspension, retaliation or heightened scrutiny, against any employee based on a no-match letter alone. Otherwise, the employer could risk liability under the antidiscrimination provision of the Immigration and Nationality Act (INA) (see 8 U.S.C. § 1324b), or other state or Federal labor laws.

Common reasons for a no-match letter include an unreported name change due to marriage, divorce or naturalization; input or typographical errors at the SSA; and reporting errors by employers or employees. Of course, fraud and identity theft will also lead to a no-match.

An employer in receipt of a no-match letter should inform the employee of the issue and ask him/her to confirm or correct the name and SSN contained in the employer’s personnel records. The employer should advise the employee to contact the SSA to resolve the matter, and allow a reasonable amount of time to do so. There is no express rule about what constitutes a reasonable amount of time in this context, and it

will ultimately depend on the facts and circumstances of the individual case. Practically speaking, it can take up to 120 days or longer to correct SSA records. In that time, the employer may want to be in touch with the employee to get updates on his or her progress in resolving the no-match. The employer must review any document the employee offers to show that the no-match has been corrected. Further, the employer should treat all instances of employee SSN no-match letters according to the same procedures, irrespective of immigration status, citizenship or national origin. The receipt of a no-match letter does not permit the employer to ask the employee to complete a new Form I-9 or produce specific I-9 documents.

Note that a SSN No-Match letter differs from E-Verify Notices of Tentative Nonconfirmation in that while both draw from SSA databases, the E-Verify system is intended to verify an employee's work authorization, whereas a no-match letter, as stated above, makes no statement about work authorization or immigration status.

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