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THE I-9 FORM: EVERYTHING HR PROFESSIONALS NEED TO KNOW ABOUT THE I-9 EMPLOYMENT VERIFICATION PROCESS

By Dawn Lurie

Edited by Letty Kluttz, PHR

March 2005

In 1986, the U.S. Congress passed the Immigration Reform and Control Act (IRCA) and enacted the I-9 employment verification requirement. IRCA was designed to discourage the employment of illegal immigrants and, in so doing, discourage illegal immigration into the United States. The I-9 form is used to verify both the identity of all employees hired after November 6, 1986, and their eligibility to work in the United States.

I-9 Form Requirements

Whenever an employer hires an individual (U.S. citizen or non-U.S. citizen) as an employee, the employer is required to complete the I-9 form. An “employee” is defined as “any person who performs labor or services in return for wages or other remuneration.” *If an employee does not have the proper documentation within three business days of his or her start date, the employer must terminate the employee.* (Please note that “three business days” requires an employer to count weekends and holidays as business days if the employer is open for business on those days.)¹ If within this time the employee produces a receipt showing that he or she has applied for a work authorization or identification document, the employee must be given 90 days to produce the required documentation.²

There are certain individuals, however, who are generally exempt from the I-9 requirement. These are:

- Employees hired prior to November 7, 1986, and continuously employed by the same employer.
- Employees hired for private, casual domestic work on an irregular basis.
- Independent contractors, for whom the employer has not set work hours, provided tools for the job, or whom the employer does not have the authority to hire and fire.
- “Dual employer” or “joint employer.” In light of recent high-profile enforcement actions, it is important to determine if you are a “dual employer” or a “joint employer”. This is defined as the relationship between a professional employer organization (PEO) or employee leasing firm and an employer, based on a contractual sharing of liability and responsibility for employees.

Compliance With and Completion of the I-9 Form

There are three important sections on the I-9 form that must be accurately completed in order to comply with the I-9 requirement:

Section 1: The employer must complete section 1 at the time of hire (no later than the date the employee starts). It is the employer’s responsibility to assure that the employee fills in the correct information and signs and dates the form. Failure to provide accurate information on the I-9 can make the employer liable. Within Section 1, employees must indicate their current status, either as citizens/nationals of the U.S., lawful permanent residents (“green card holders”) or aliens eligible to work with temporary work authorization.

Section 2: The employee must present original documents (not photocopies) that establish identity and employment eligibility. The employee may present the necessary documentation in one of two different ways:

1. Present one document from List A on the I-9 form, establishing both identity and employment eligibility;
OR
2. Present one document from both List B (establishing identity) and List C (establishing employment eligibility) on the I-9 form.

The employer may not specify which documents an employee is required to present. Such a requirement can be considered “document abuse” and is an unlawful immigration-related employment practice. After reviewing the employee’s documentation, the employer must accept the documentation presented by the employee if the documents reasonably appear to be genuine. If the employee is hired for less than three business days, both sections 1 and 2 must be completed at the time of hire. The copying of documents is discussed in a later section of this paper, [Copying Documents](#).

Section 3: Employers must ensure that employees maintain employment eligibility by renewing expiring status that the employee indicated in Section 1. Additionally, employees must renew expiring employment authorization documents presented in Section 2. Identification, however, does not need to be reverified. The employer must complete Section 3, “Updating and Reverification,” before the employee’s reverification date. An employer may be required to reverify employment eligibility for a particular employee when an employee’s work authorization document has expired or when an employee is rehired within the retention period of his or her original I-9 form, but the basis of employment authorization has changed or expired. Reverification on the I-9 form must occur before the date of the expiration date.

Reverifying Work Authorization for Current and Rehired Employees

An employer can reverify a current employee’s employment authorization on the original I-9 form or a new I-9 form when necessary. If a new form is used, the employer should note the employee’s name in Section 1, complete Section 3 and attach the new form to the original I-9 form. The employee must present documentation showing an extension of his or her employment authorization or new work authorization.

When an employer rehires an employee, the employer must verify that the employee still possesses work authorization. Depending on the circumstances, the employer may complete a new I-9 form or reverify/update the original form using Section 3.

If a rehired employee’s basis for employment eligibility has changed/expired, the employer must reverify. In order to reverify a rehired employee, the employer must record the following on the I-9 form:

- Date of rehire.
- Document title, number and expiration date of reverification documentation form List A or C originally presented.
- Sign and date Section 3.

It would benefit an employer to create a system that will produce reminders when an employee’s work authorization document is due to expire. Early notice of expiration will give employees adequate time to renew authorization. Employees should usually reapply for work authorization 90 days before the expiration date.

Updating Work Authorization for Rehired Employees

If a rehired employee’s basis for employment eligibility has remained the same as indicated on the I-9 form, the employer must still perform an update. When updating rehire documentation, employers should record the rehire date and sign and date Section 3. If a new I-9 form is used, the employee’s name should be written in Section 1 and attached to the original I-9 form.

Employer Obligations for Document Retention

Employers must retain the I-9 form for every employee for the full duration of that individual's employment, with the exception of the individuals previously classified as exempt from the I-9 requirement. Additionally, every employer must keep each employee's I-9 form on file for either three years after the date of hire or for one year after employment is terminated, whichever is greater. Employers should accurately organize and maintain all I-9 records. The Department of Homeland Security and/or the Department of Labor may ask to review I-9 documentation. I-9 documents must be provided to these federal agencies upon request.

Past practices indicate that the I-9 forms should be kept separate from employee personnel files to avoid charges of discrimination based on the information contained on the forms concerning an employee's age and/or national origin. In addition, keeping I-9 forms separate from personnel files facilitates the ability to produce them at the time of an audit. It also eliminates the necessity of separating the I-9 forms from the personnel files at the time of an audit or producing personnel files for the U.S. Citizenship and Immigration Services (USCIS) that may contain sensitive information that the employer would not want to disclose to other parties. The I-9 employment verification process is an integral part of an employer's compliance with U.S. Immigration Laws. As human resource managers recruit and hire foreign employees to meet their companies' needs, they must also ensure that these employees are authorized to work in the United States.

Copying Documents

Although copying documents is not required (and does not relieve the employer of the obligation to complete the I-9 forms), in certain circumstances such a practice *may* be advisable. If copies of the documents are made, the copies must be retained with the I-9 form. Copies of documents may assist an employer and its counsel in preparing for a USCIS audit and in defending against claims that appropriate documentation was not demanded or presented. In addition, maintaining copies of documents may aid an employer in defending against assertions that it accepted fraudulent documents that it should know were not genuine. Finally, maintaining photocopies of documentation that the employer has examined in the course of completing the I-9 makes it easier for the employer to conduct periodic audits of its IRCA compliance effort.

The Office of the Chief Administrative Hearing Officer (OCAHO) has found photocopying documents and attaching those documents to the I-9 forms to be a mitigating factor in the imposition of a fine. Please note that if a decision is made to photocopy documents, copies must be made for *all* employees to avoid discrimination claims. Furthermore, these copied documents must only be used for I-9 purposes. The decision to copy forms should be made after discussing the issue with immigration counsel.

1.I-9 Audits and Reviews

Every I-9 form that the employer has prepared should be reviewed. When an audit is conducted, typically the employees hired (or rehired) after November 6, 1986, are identified first, using payroll or other records.

One way to track such information is to create two main lists. One list should highlight all active employees, with their dates of hire noted, and the second list should highlight all terminated employees for whom I-9 forms are required. Their hire dates and termination dates should be noted.

Immigration and Customs Enforcement (ICE) recognizes that to inspect every I-9 may be burdensome for large employers. An option for large employers would be to review a random sample. This may be sufficient in revealing common errors. These problems can be corrected on the spot and prevented in the future.

An example of performing a random sample would be to choose employees in a random manner i.e., all employees whose first names begin with the letter “T.” Once these employees have been identified, create and complete an I-9 audit tracking form for each randomly selected employee with their name, date of hire and, if applicable, date of termination. Once this is complete, there are three steps to follow:

1. Collect all the I-9 forms.
2. Match each I-9 to its corresponding I-9 audit tracking form.
3. Reconcile the differences.

If the organization has an audit tracking form without a matching I-9 form, it should conduct another search for the missing I-9 form. If the form cannot be found, the employee and employer must complete a new I-9 form. The new I-9 should not be backdated.

For small employers, USCIS and ICE recommend a “binder system” for maintaining I-9 forms. In such a system, the employer keeps two large three-ring binders, one for current employee I-9 forms and one for terminated employee I-9 forms. Employers should organize the I-9 forms alphabetically by employee within the binders. When a new employee is hired, her or his I-9 form is to be placed in the current employee binder. If an employee is terminated, her or his I-9 form should be transferred to the terminated employee binder with the date of termination noted in the margin of the I-9 form. ICE and USCIS suggest periodic review of the terminated employee binder to determine which I-9 forms may be discarded and which must be retained pursuant to the requirements of current regulations.

I-9 Forms That Are Lost, Destroyed or Not Maintained

Organizations should attempt to comply as soon as possible. However, past violations cannot be retroactively corrected. The employer has an ongoing responsibility to be in compliance. Missing information should be clearly inserted, initialed and dated contemporaneously with its insertion. The employee should provide any missing information in Section 1 of the I-9 form, and the employer should complete Sections 2 and 3 of the I-9 form. In cases where it is necessary to go back to the employee for additional information, the employer must make a special effort to avoid anti-discrimination violations. The employer should not require more documentation than is necessary to meet IRCA’s requirements. The employer should also allow the employee to present any document or combination of documents sufficient to satisfy the requirements of IRCA.

Incorrect information should be corrected, and the correction should be initialed and dated. If the employee remains employed by the employer, there is no paperwork error that cannot be corrected—other than the failure to complete the form within three days of the date of hire. If the employee has been terminated, however, it may be impossible to correct errors or omissions in I-9 forms that have been uncovered in an audit. If no I-9 forms were ever created, new ones will need to be generated. Such an action will not comply with IRCA’s three-day post-hire completion requirement. If done correctly, however, generating amended and/or new forms will negate all other violations and enhance a good-faith defense. The employer must retain the original I-9 forms.

Electronic Completion and Storage of I-9 Forms

On October 11, 2004, Congress passed legislation amending Section 274A of the Immigration and Nationality Act. This bill was signed by President Bush on October 30, 2004, and will take effect on April 28, 2005. The new legislation will improve the process for verifying an individual’s eligibility for employment by allowing employers the option of completing and storing I-9 employment verification forms electronically.

IRCA mandated that employers use Form I-9 in conducting employee verification. The current law allows for only three forms of record retention for I-9 forms: paper, microfilm or microfiche. This bill simply adds “elec

tronic format” to this list of methods for document retention. Employers may continue to use the previously accepted forms of record retention.

The bill also allows for, but does not mandate, the use of electronic signatures by the employee and the employer on the I-9 document. This would allow employers that wish to have the I-9 verification process completed online or on a computer to do so. Keep in mind that the regulations still mandate that an employer view the original documents presented by the employee to prove identity and work authorization, so the process could not entirely be completed remotely.

Of particular interest to large employers is the ability to transfer existing paper, microfilm or microfiche records to electronic format once the law takes effect. It is important to note that the retention requirements for previously completed I-9 forms, which must be retained by an employer for one year after the date of termination of the employee or three years from the date of hire, whichever is longer, will not change. Additionally, the legislation does not change any of the existing regulations governing audits of I-9 forms by the government.³

Fines and Penalties Against the Employer for Noncompliance

Failure to comply with the I-9 requirements can subject the employer to a variety of different civil penalties (such as monetary fines) and, in some cases, criminal penalties. Some examples of employer offenses are:

- Failure to properly complete an I-9 form.
- Knowingly hiring, continuing to employ or contracting to obtain the services of an unauthorized alien.
- Providing or knowingly accepting false social security cards.
- Pattern and practice of I-9 compliance failure.

Additionally, it is important that an employer not demand excessive documentation as this may lead to discrimination claims. IRCA’s anti-discrimination provisions prohibit employers of four or more employees from discriminating against certain protected individuals (including permanent residents, temporary residents, special agricultural workers, refugees and asylees) with respect to hiring, discharging, recruiting or referring for a fee. An additional related offense is the refusal to hire someone because of temporary work authorization. Not accepting other valid documents that can be used in lieu of certain USCIS documents can also constitute an offense. An example of this is when employers do not accept an I-551 stamp or a letter from the USCIS extending conditional resident’s authorized period of employment.

Failure to properly comply with immigration employment laws can result in the following fines and criminal penalties:

- *Paperwork violations* may result in fines between \$100 and \$1,100 for each individual for which a mistake is made.
- *Substantive violations* may result in fines between \$200 and \$2,000 for each unauthorized worker for first-time offenders. For second-time offenders, the fine rises to between \$2,000 and \$5,000, and for every subsequent offense offenders may be fined anywhere from \$3,000 to \$10,000. For violations that occurred after September 29, 1999, the penalties increase in each category range from \$275 to \$2,200 for first-time offenders, \$2,200 to \$5,500 per alien for the second violation and \$3,300 to \$11,000 for the third and subsequent violations.
- In February of 1996, Executive Order 12989 was passed and consequently imposed a one-year bar on federal contractors who knowingly hire unauthorized nonimmigrant workers.
- Criminal penalties, including fines and imprisonment, may also be imposed where there appears to be a pattern or practice of these violations or where an employer knowingly hires 10 or more nonimmigrant workers who were illegally brought into the United States in violation of the alien smuggling/criminal harboring provision.