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The Form I-9: Refresher and Reminder of Recent Changes

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Recent changes to the Form I-9 and its completion procedures have brought employee onboarding to the forefront for many employers. This article provides a primer on the Form I-9 generally, recent changes to the process, and tips to address instances of non-compliance.

What is the Form I-9?

On November 6, 1986, the Immigration Reform and Control Act was enacted to require employers to verify the identity and employment eligibility of their employees to work in the United States and created criminal and civil penalties for employer violations. The Form I-9 is a required form issued by U.S. Citizenship and Immigration Services of the Department of Homeland Security (DHS) used to document this verification. A new model Form I-9 was released on August 1, 2023, though the previous Form I-9 may still be utilized through the end of October. The new Form I-9 has two sections (Section 1 for employee information and attestation, and Section 2 for employer review and verification) and two supplements (Supplement A for preparer/translator certification for Section 1, and Supplement B—formerly Section 3 on the previous Form I-9—for reverification and rehire).

The employee must complete Section 1 no later than the employee's first day of employment, which involves providing their name, address, date of birth, social security number, contact information, citizenship/immigration status, and signature. The employer must complete Section 2 within three business days after the employee's first day of employment. Section 2 requires the employee to provide the employer

with unexpired, original documentation specified on the List of Acceptable Documents such as a passport, driver's license, or social security card, to establish their identity and authorization to legally work in the United States. The employer must review these documents, identify them in Section 2, and certify under penalty of perjury that they have accurately verified these documents. The document verification process required for Section 2 is the subject of the recent I-9 procedural changes discussed below.

What are the New Document Verification Requirements for Form I-9 Completion?

The U.S. Immigration Customs Enforcement (ICE) had temporarily allowed remote I-9 verification after March 20, 2020, during the COVID-19 pandemic for employees working remotely. Many employers accomplished remote verification via a video conference with the employee where the employee held up their documentation on camera for virtual inspection. After several extensions, these permitted flexibilities ended on July 31, 2023. As of August 1, 2023, employers must now resume physically inspecting the Form I-9 and employment eligibility documentation for new employees. ICE announced that employers will have a 30-day grace period until August 30, 2023, to **reverify in person all employment eligibility documents for employees who were hired after March 20, 2020 with virtual or remote examination.** For all new hires moving forward, the in-person verification requirements resumed on August 1, 2023. The DHS recently approved alternative procedures to allow remote verification to continue only for employers who are registered users in good standing of the government-run, web-based platform E-Verify.

Employers now have three options to accomplish the document verification required by Section 2 of the Form I-9.

1. Employers may perform the inspections in-person themselves by requesting that these employees visit the office or by sending

another employee to perform the inspection in person.

2. Employers are permitted to designate an authorized representative, including non-employees such as third-party notaries, to conduct the in-person inspection on behalf of the employer. In fact, DHS permits **any** person other than the employee in question to act as an employer's authorized representative. Some employers utilize third-party services for this function, and others request contact information for a friend or family member of the employee to have them perform this role. Using the employee's friend or family member in this capacity is certainly the most cost effective and the least administratively burdensome option, but employers should be cautious of potential pitfalls as ICE requires strict compliance and employers will be held liable for any violations, whether intentional or unintentional.
3. Employers can become registered users on E-Verify and utilize this online process for new remote verifications moving forward. Note, however, that for the required re-verifications by August 31 of employees hired during the pandemic via remote verification, employers can only utilize E-Verify to become compliant if they were enrolled in E-Verify at the time they originally completed the Form I-9 for that employee and remain currently enrolled. Otherwise, reverification must be done in person by one of the two options listed above.

To ensure reverification compliance by August 30, 2023, employers should (1) make a list of all employees hired after March 20, 2020 who only received a remote inspection of their employment eligibility documents, (2) determine if it can use E-Verify to accomplish reverification and if not, decide whether and how it will use authorized agents to do so, (3) notify the affected employees of what will now be required, and (4) create a plan for dealing with employees who do not make themselves or their documentation available by the deadline. Due to the risk of monetary fines discussed below, if an employer wishes to use an authorized representative to conduct in-person verification on the employer's behalf, they should consult an attorney to ensure they set up appropriate procedure and instructions. Employers should also note that some state laws have additional requirements concerning authorized representatives—for example, remote employees located in California generally cannot have a notary act as the authorized agent, as notaries in California are prohibited by the

California Secretary of State from completing or certifying I-9 forms unless they are bonded immigration consultants.

For unionized workforces, employers should notify the union's representatives about the approaching deadline and the steps the employer plans to take to address reverification for those employees whose papers were verified remotely since March 2020. Detailed instructions should be given to any authorized representatives, and as a best practice the employer should retain a copy of the email or other communication by which the employer assigned someone to act as the authorized representative.

Penalties and Ongoing Compliance

ICE utilizes an administrative inspection process to compel production of Form I-9s within three business days. ICE issues thousands of Notices of Inspection to employers every year, and any employer can be subject to inspection. During such an inspection, ICE will review the employer's Form I-9s and supporting documentation for compliance. While employers are given at least 10 business days to make corrections to any technical violations found on the forms, they are subject to monetary fines for all substantive violations, and uncorrected technical violations. Furthermore, employers that are found to have knowingly hired or continued to employ unauthorized workers will be required to cease the activity and may be civilly fined and/or criminally prosecuted. In 2015, an event planning company in California was fined over \$600,000 for technical violations on I-9 forms, with the majority of the violations stemming from the employer's consistent failure to sign Section 2 of the Form I-9.

If an employer has not performed a Form I-9 self-audit in the recent past, this would be an ideal time to do so. A self-audit should determine if the employer possesses accurate and complete Form I-9s for every current employee and former employee within the required retention period hired after November 6, 1986. Employers must retain the Form I-9 (and any supplement pages and photocopies made of documentation provided) for each employee for one year from the last date of employment or three years after the first date of employment, whichever is later. The employer should take the following steps based on the audit results:

- For current employees with no Form I-9 on file whatsoever:
 - Immediately have the employee complete Section 1 of the current Form I-9.
 - Inspect the employee's employment

eligibility documents and complete Section 2.

- Do not backdate anything on the form, but be sure to specify the employee's original hire date where requested in Section 2.
- For former employees with no Form I-9 on file whatsoever:
 - Do not recreate the form.
 - Complete a memo to file with an explanation as to why there is no Form I-9 and when/how you realized the error.
- For current employees with inaccurate or incomplete Form I-9s on file, two options can be used:
 - Draw a single line through the incorrect information, enter the correct information, and put your initials and date next to the correction.
 - If Section 2 is not filled out, this would be considered a major error for which a completely new Form I-9 can be filled out. Attach this to the original Form I-9, with an explanation describing why the change was made via a short memo.
- For former employees with inaccurate or incomplete Form I-9s on file, two options can be used:
 - Draw a single line through the incorrect information, enter the correct information, and put your initials and date next to the correction
 - You can fill out previously incomplete sections, also putting your initials and date, but you cannot add any information that requires the former employee (such as documentation verification or their signature). Note instances where you were unable to make corrections on a memo and attach it to the Form I-9.

This is an ideal time for employers to review their compliance with the Form I-9 requirements, both generally and in light of the new verification rules.



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