



## **Advising Your Clients on the Selection of an Electronic I-9 Software Provider<sup>1</sup>**

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The purpose of this practice alert is to provide an overview of the requirements in the regulations that allow employers to retain and create Forms I-9 electronically. Based on the regulatory requirements, the practice advisory proposes a series of questions that you can ask of electronic I-9 vendors in conducting due diligence to assess whether the vendor's system meets the regulatory requirements while also providing a functionality that best suits the needs of your client.<sup>2</sup>

### **Legal Background**

On October 30, 2004, President George W. Bush signed legislation into law (Pub.L. 108-390) authorizing employers to retain Forms I-9 in electronic format. Before the change in the law, "electronic Forms I-9" had been limited to images of paper Forms I-9 stored to microfilm or microfiche. Interim final regulations<sup>3</sup> published by the Department of Homeland Security (DHS) on June 15, 2006 mirrored previous guidance but did not specifically identify which system(s) would be acceptable under the law. While DHS acknowledged in its guidance that there was no single government-wide electronic signature or storage protocol, it did suggest following standards set by the Internal Revenue Service for record-keeping of their transactions with the public. To date final regulations have not been published and it is critical that attorneys remind their clients that such final regulations are forthcoming and could require updates or significant changes to any current system.

DHS has identified three advantages that they note employers are likely to realize through the use of a truly electronic Form I-9:

- Employers may experience cost savings by storing Forms I-9 electronically rather than using conventional filing and storage of paper copies or transferring the forms to microfilm or microfiche;
- Electronic forms will allow employers to better ensure that each Form I-9 is properly completed and retained. Electronic completion and storage may render the process less prone to error; and

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<sup>1</sup> Neither AILA or the authors intend to endorse any particular software vendor or product through the publication of this article.

<sup>2</sup> This article will not discuss the costs and benefits of recommending that a client move from a traditional paper-based employment verification practice to one consisting of electronic Forms I-9.

<sup>3</sup> 8 CFR Part 274a [BICE 2345-05; DHS-2005-0046] RIN 1653-AA47

- Electronically retained Forms I-9 are more easily searchable, which is important for re-verification, quality assurance and ease of inspection.<sup>4</sup>

The first two items are assumptions—that software providers will incorporate software logic to ensure ease of use and storage. The final rationale identifies a potential advantage for the government where employers move to an electronic I-9 system—namely, electronic records will be easier for agencies, including Immigration and Customs Enforcement (ICE) and U.S. Citizenship and Immigration Services (USCIS), to review in its inspections of employers' Forms I-9 as well as for use with an integrated E-Verify system. With these benefits in mind, the interim regulation was promulgated with an eye toward ensuring overall compliance. However, the strong advantage that the government may gain through proper compliance with the storage and indexing requirements of the regulation is something that practitioners must also carefully consider on behalf of their clients prior to deciding to go paperless.<sup>5</sup>

### Minimum Requirements

The Code of Federal Regulations in 8 C.F.R. § 274a.2(e) outlines the requirements of electronic verification software applications. Any person or entity which is required to complete and retain Forms I-9 may complete or retain them electronically, if that system includes:

1. Reasonable controls to ensure the integrity, accuracy and reliability of the electronic generation or storage system;
2. Reasonable controls designed to prevent and detect the unauthorized or accidental creation of, addition to, alteration of, deletion of, or deterioration of an electronically completed or stored Form I-9, including the electronic signature, if used;
3. An inspection and quality assurance program evidenced by regular evaluations of the electronic generation or storage system, including periodic checks of the electronically stored Form I-9, including the electronic signature, if used;
4. In the case of electronically retained Forms I-9, a retrieval system that includes an indexing system that permits searches by any data element; and,
5. The ability to reproduce legible and readable hardcopies.<sup>6</sup>

The government did not intend to establish specific requirements for the application of new products, but rather to require that they meet *minimum* performance standards. Accordingly, a vendor's product must meet the following minimum requirements:

- Secure database
- Password-protected, unique user profiles
- Indexing
- Audit trails
- Electronic summary files/spreadsheet

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<sup>4</sup> See <http://www.ice.gov/pi/news/factsheets/i-9employment.htm> (2 of 2)8/9/2006 9:21:27 AM

<sup>5</sup> Id at 2

<sup>6</sup> See 8 C.F.R. § 274a.2(e)(1).

- Backup redundancy
- Confirmation of electronic signature at the time of the transaction.

There are many software vendors in the marketplace. Some are stand-alone providers and some vendors offer an I-9 module that integrates with either their traditional HR personnel management software application or an employment screening/background check application. Regardless of the business model, it may be to your client's advantage for you not only to inquire regarding the nine areas of discussion detailed below, but also to consider requesting a demonstration of the application so that you can see the application interface and features first-hand.

### **Accessibility of electronic information**

The Forms I-9 reproduced from the data in the software application must be legible, readily producible to the Government, and "indexible." 8 C.F.R. § 274a.2(e)(2-8). Moreover, if requested by the Government during an inspection of the electronic Forms I-9, the employer is also required to provide an audit trail—showing who has accessed a computer system and the actions performed within or on the computer system during a given period of time. 8 C.F.R. § 274a.2(e)(8)(i). The government agency is also permitted by regulation to request an electronic summary file, such as a spreadsheet, containing **all** of the information fields on all of the electronically stored Forms I-9. 8 C.F.R. § 274a.2(e)(iii).

- How are documents maintained in the system? How easy or difficult is it to upload into the product and how easy or difficult is it to access such records concurrently with the Form I-9?
- What types of reporting features do you provide? Are reports run automatically or manually?

### **Business process and integrity**

A business that chooses to complete and retain Forms I-9 electronically must also maintain and make available upon request evidence of the provider's business processes that document the (i) creation, (ii) modification, and (iii) authenticity of the Forms I-9 within the database. 8 C.F.R. § 274a.2(f).

- What type of indexing system and printing functions are available in the product?
- What type of tracking does the system provide for changes made to the Form I-9 post initial completion?

### **Security program**

Additionally, a business that chooses to complete or retain Forms I-9 electronically must implement an effective records security program that (i) limits access to authorized personnel; (ii) provides a backup for recovery of records to protect against data loss; (iii) ensures that employees are trained to minimize the risk of alteration of the data; and (iv) ensures the audit trail tracks dates and times of access, identification of the "accessor," and the particular action taken. 8 C.F.R. § 274a.2(g).

Security is undoubtedly the most critical part of the assessment on your client's behalf. Because breaches of security expose your client to potential private actions by employees, it is important to know whether the vendor will provide:

- Assurances against security breaches
  - An affidavit of no breach.
  - Review contractual damage limitations/provisions.
  - Review indemnification provisions.
  - Information on any previous security breaches, if any.
  - Protocol to notify customers of any breach (i.e. timelines, remediation, etc.)
- Single tenant architecture where data is not co-mingled from multiple customers within a database.
  - If the data is comingled how is it protected?
- Appropriate and specific insurance.
- Encryption "at rest" of employee Personal Identification Information (PII) data – e.g., social security number and date of birth.
- Detailed audit trail of Forms I-9 and E-Verify including who accessed records, when access was granted and what changes were made to the system by the user.
- Encryption of all communication over the Internet using 128-bit Secure Socket Layer (SSL) or higher.
- Confirmation that employee profiles require a unique one-time-only link or a private Uniform Resource Locator (URL) rather than accessing a public website to enter Form I-9 data.
- Explanation of the format of a complete data export if your client terminates service, including whether it automatically includes the Forms I-9 in Portable Document Format (PDF) , E-Verify results and complete detailed audit trails and details of any additional cost associated with the data export.
- Certification that the data is housed at secure, audited and certified data center (Statement on Auditing Standards No. 70: Service Organizations (SAS 70) Type II (or higher)).
- Information on whether the vendor offers on-premises hosting. For example, is the application only available over the Internet, or may a client elect to place the application behind its firewall? If so, what are the charges associated with this and what features, if any, will not be available should it be utilized on a client's server?
- An overview of the vendor's security and data protection process, including whether testing was done for cyber security, who performed such testing, and what specific safeguards are integrated into the product.
- Information concerning security and notice protocols surrounding a government request for document production. In addition, consider provisions related to what party bears what costs related to responding to government requests for production or informal inquiries.

### **Electronic signature**

Finally, any electronic system allowing for an electronic signature to represent the affirmation of sections 1-3 of the Form I-9 must (i) affix the signature to the record at the time of the transaction; (ii) create and preserve a record of the identity producing the

signature; and (iii) provide a printed confirmation of the transaction, at the time of the transaction, to the person providing the signature. 8 C.F.R. § 274a.2(h).

- Does the system include an acknowledgment in the form of an attestation as to accuracy of the information on the form has been read by the employer, and provide for the attachment or association of the electronic signature to the Form I-9? Is a printout of such acknowledgment generated?
- What are the specifics of such a system?
- Does the vendor require that electronic signature pads be purchased?
- If Personal Identification Numbers (PINs) are used, how are they created?
  - Is the method acceptable and secure (i.e. is a random number/password assigned or do the user and employee need to create their own PIN)?
  - Are biometric identifiers available to be used or integrated?
- Do they use "click to accept" dialog boxes?
  - Is the method acceptable and secure?
  - How can the employer be sure that the document is signed by the person whose "signature" appears on the I-9 with this "click to accept"?
- How is the identity of a signatory maintained and how is it presented upon an inspection to a government agency?

### **Additional Features Beyond the Minimum Requirements**

After you have made a determination that one or more of the vendors provide an application that is compliant with the minimum requirements of the regulations, the decision may be determined by cost and by an application's features that improve the client's internal I-9 processes.

### **Corporate capacity and long term viability of product**

While this may not be important to all clients, and may not necessarily be indicative of the quality of the product, the client may prefer a provider with a proven track record of service and business continuity. Accordingly, the following are recommended questions:

- How long has your company been in business?
- How many total full-time employees are dedicated to I-9 and E-Verify support services?
- How many total Forms I-9 were created in 2009?
- How many companies are currently using the specific I-9 and E-Verify product?
- What is the total number of worksites where the I-9 and E-Verify product is deployed?

### **Reference requirements**

Just as our clients inquire regarding favorable references of our service, you should similarly require references of the selected vendors. Recommended areas of request and discussion for companies considering electronic I-9 usage include:

- Information on accounts across various market segments that are currently using the I-9 product (and E-Verify product, if applicable). For example, if you represent a company with a high number of new hires who speak a particular foreign language, has the vendor represented similarly situated employers and know whether there are any unique challenges servicing this type of customer? Or, perhaps the employer has a sizeable number of professional foreign workers such as H-1Bs, or H-2Bs. Does the vendor have an automatic system in place to record work authorization for porting H-1B workers or track new hires without social security numbers?
- Information on whether the vendor retained a third-party legal expert to evaluate the product.
- Information on, and reports from, any certified third-party penetration testing for systems and environment. For example, did the vendor engage a cyber security firm to attempt to hack the site or disrupt the application from outside of the database? What was the outcome of such report if completed?
- The number of customers, if any, that ended their contract with the electronic I-9 vendor, and information on whether they returned to paper or switched to another vendor, if known.

### **Migrating errors on previously completed forms I-9**

As a related matter, the most challenging aspect of moving to an electronic verification software application may be moving existing Form I-9 and employee data into a new database. It is not required under the regulations to migrate existing Forms I-9, but many companies consider this option in their efforts to go completely paperless. Alternatively, companies should seriously consider the benefits of maintaining Forms I-9 in paper format for the time period before the electronic migration and in electronic format thereafter.<sup>7</sup> If the client decides to consider data migration and integration with existing systems, the following questions will help to understand the vendor's services and costs related to moving existing data into the new application:

- What type of current I-9 migration services do you offer? In other words, how does the vendor integrate the existing Forms I-9 into the system on a going forward basis?
- Is all of the data transferred and tracked in such a way that it will meet the regulatory indexing requirements upon conversion?
- Can an I-9 error be audited and corrected during such migration?
- What is the role of the client's attorney in such an audit and is the exclusive use of a vendor to audit I-9s promoting the unauthorized practice of law?<sup>8</sup>
- Will the original Forms I-9 be preserved or destroyed?
- Will the company's existing payroll and human resource systems integrated such that the vendor will know if an I-9 has not been completed for a new hire?
- Will the company's human resources information system (HRIS)/payroll/applicant tracking software (ATS)/background screening/on-boarding system be fully integrated with the electronic I-9 software?

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<sup>7</sup> If migrating previously completed Forms I-9 to an electronic data base, it is critical to review the importance of auditing such forms and making necessary corrections prior to the conversion. This is a serious decision that must be carefully reviewed and is beyond the scope of this article.

<sup>8</sup> In addition, it is important to review the issue of the application of attorney-client privilege and potential government discoverability to any such I-9 reviews by non-lawyers.

- Which, if any, of the major brand applications have been successfully integrated (Oracle, PeopleSoft, SAP, SunGard, etc.)?
- Does the integration enable automated notification?
- Does the integration use a secure web service such as Application Programming Interface (API) or File Transfer Protocol (FTP)?
- Does the integration employ accepted standards, such as EXtensible Markup Language (XML), Human Resources EXtensible Markup Language (HR-XML), and secure Hyper-Text Transport Protocol (HTTP) with 128-bit SSL encryption?
- How many total successful audit/migration/merge projects have you completed?

**Efficiency and internal administration:**

- Does the system provide an “auto fill” or drop down feature to complete the employer’s standardized information in Section Two? Is such auto fill cleaned after each employee’s entry?
- Does the system provide drop downs or other similar features to automate input of Section 2 related documents?
- Does the system provide help text for newer users and accommodations that can simplify data entry for more experienced HR personnel?
- Is the system intuitive and user friendly?
- How do you handle a company with multiple Employer Identification Numbers (EINs) or hiring sites?
- Do you have different levels of privileges and administrative rights (e.g. for front-line HR employees vs. managers)? If so is there an additional cost for such access?
- Do you offer a remote hire interface for employees who are being hired at remote sites with one time access for notaries or others completing Section 2 on behalf of the company?
- Can multiple employees use the system simultaneously?
- What type of Form I-9 and E-Verify integration workflow do you provide?

**Tracking and reporting features:**

- Does your system provide a standardized notification system (“tickler”) for completion of Part Two? For document expirations? For receipt notices? E-Verify timeframes? E-Verify closeouts? Re-verifications? Receipt notice follow-ups? Missing Social Security Number reminders for E-Verify use?
- How does the notification system work? How can the notification system be customized?
- Which fields can be included in the reports? Can reports be customized? Can they be run only by an HR administrator or also at the worksite?
- Can reports be exported to Excel or other programs?
- Can you easily access an employee’s record directly from a report?
- Does the system alert administrators to concerning trends, issues or other issues?

**Quality control features:**

- Will the system prevent the employer from completing Section Two until Section One is fully completed?

- Is it a “smart” application that alerts the user to invalid input or skipped fields, using both error messages near the incorrect field and during a compliance check before the form is completed (such as when a worker fails to check one of the status boxes or fails to sign his or her name)?
- Does the application cross-check the immigration status response in Section One against the documents entered in Section Two?
- Does the application allow you to enter inconsistent information such as different alien registration numbers in Section 1 and Section 2?
- Does the application send email notifications to managers before front-line users are able to execute a Form I-9 that is not compliant, or does the system prohibit you from finalizing a non-compliant Form I-9?
- Does the application have any features to prevent users from over-documenting (i.e., accepting more documents than required by the I-9 rules)?

**Auditing features:**

- How will internal company review audits be conducted in the electronic system environment? Will there be additional charges for such audits?
- How difficult is it to compare information recorded in the electronic I-9 forms against verification and identity documents that are maintained with the employee’s electronic record?
- Are there standard auditing reports and protocols available in the product?<sup>9</sup>
- Does your company have experience working with U.S. Immigration and Customs Enforcement to deliver requested I-9 records?
  - How will our records be transmitted in case of an audit?
  - Will there be a cost associated with such transmittal?
  - Does the software product index all the I-9 fields and how is such information made available to ICE or any other relevant government agency?

**I-9 purging functionality:**

- Does the system conduct an automatic purge of Forms I-9 that are past the retention date, or are purges conducted manually? Can this be configured pursuant to a client preference?
- Is there a reporting function for Form I-9 purging?
- Are purged Forms I-9 completely eliminated from the system or are they archived within the system?

**Identity theft prevention:**

- Does the application include automatic validation of social security numbers and alien registration numbers against known validly issued numbers?
- Does the application offer other validations including a review of the Social Security Administration death record system?
- Does the system check internally whether a social security number or alien registration number is being used by another employee at the company?

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<sup>9</sup> As noted earlier, consider issues related to the unauthorized practice of law as well as the application of attorney-client privilege.



### **Outside counsel and third-party access:**

- Does the system allow an attorney, or third party, to have access to the data remotely?
- Does the system allow for one-time, secure access for a notary or other third party to complete an Form I-9 for an offsite employee?
- Does the application allow for the client to designate you as the client's legal counsel and electronically (or otherwise) forward complex questions and a link to the electronic Form I-9 from within the system in real time?

### **Integration with existing systems software:**

- To what extent can your product be integrated with human resources systems, payroll, immigration forms software and other applications?
- Can data from the existing system be pushed into the I-9s software?
- If it is integrated, what specific reports can be created to ensure the integrity and consistency of data?
- In the event of an ICE enforcement action, will the vendor be able to provide the required I-9 information to the government without compromising or exposing such unrelated data in such integrated systems?

### **Integration with E-Verify:**

- Will the vendor act as the client's Designated Agent for E-Verify?
- Will the client have its own E-Verify account? Can different accounts be set up for different work sites and different Employment Identification Numbers?
- Does the vendor serve as an E-Verify Web Services provider or Designated Agent or both?
- Does the vendor currently use the photo tool?
- Does the vendor offer Single Sign On integration? For example, will the user have to sign-on once or twice to use the software to transmit information to E-Verify?
- What are your E-verify batch processing capabilities?
- Does the application allow for automatic submission to E-Verify for initial verification?
- How does the system handle the issuance of a delayed social security number?
- How does the system resolve a Tentative Non-Confirmations (TNC)? Do you automatically capture electronically signed TNC Notification and Referral letters in the employee's record and follow up with the employer for TNC resolution?

### **Integration with state I-9 rules:**

- Does the system link to any forms mandated by state I-9 laws (e.g. Colorado, Georgia)?

### **Customer Service and Support**

Any electronic I-9 system application will require on-going technical support from the vendor. Here are some suggested questions regarding customer service and support:

- Do you have a customer support hotline? Does it service all time zones?
- How many employees are in your customer service department?
- Is there a guaranteed response time for customer service requests?
- In the past how quickly has your company integrated changes to the Form I-9 and/or E-Verify?

### **Cost Structure**

The various electronic I-9 vendors on the market offer a range of fee structures. The following questions should help understand the ultimate cost to the client of a particular vendor:

- Is the cost structured as a subscription fee, a fee per I-9 record, or a combination?
- Is there a fee for I-9 completion and subsequent reverifications? For subsequent I-9 storage? Do fees vary by volume of I-9s completed?
- Is there an initial set-up fee?
- Is there a fee for each HR user of the system, or is there unlimited access by the company's HR staff?
- How are data migration and roll-over fees charged?
- Are there fees related to notification and reporting?
- Are there additional costs for integration with E-Verify or existing company systems?
- Are there system maintenance or update fees?
- Is there an additional cost for customer service requests? For fixing bugs?
- What are the fees for building customer-specific functionality?

### **Federal Contractor Transition**

The federal contractor E-Verify regulation has been an incredible boon to the software vendors in the I-9 market. For employers subject to the federal contractor E-Verify rule, there are critical issues to consider when selecting an I-9 vendor. While the government has been slow to begin enforcement in the area of subcontractor flowdown, the inevitable increase in future enforcement could eventually affect many of our clients, regardless of whether they do any direct business with the US government. The urgency created by the federal contractor E-Verify timelines have pushed many companies into making quick decisions on I-9 issues based on the ease of implementation and the price tag rather than on long-term needs, overall cost and a full evaluation involving key players from different areas of a company. It is critical that a company making the transition to federal contractor status consult with experienced counsel and not rely solely upon quasi-legal advice of an electronic I-9 vendor. Questions to ask include:

- Federal contractors subject to the E-Verify rule may, in some situations, choose to not prepare new I-9 forms. In this situation, how are existing paper Forms I-9 integrated into the system in an effort to run the employee through the E-Verify system?

- Is a record created that connects the paper Form I-9 copy and supporting documents to the E-Verify query?
- Does a “data dump” need to be manually completed to enter such employees into the system? Can the company users do this themselves or must the data entry need to be done by the vendor, and if so at what cost?
- What assistance is offered, if any, by the vendor to compare existing paper Forms I-9 to newly created ones to ensure consistency and alert the customer to potential problems?

## **Conclusion**

Companies that are considering transitioning from paper Forms I-9 to an electronic I-9 system need to be aware that the decision involves significant potential issues relating to legal liability, security, functionality and cost. Therefore, the corporate decision-makers, whether they are human resource executives or general counsels, should consider the advantages of obtaining advice from seasoned immigration counsel in evaluating which of the various electronic employment verification software applications in the marketplace are the best fit for their company. Our knowledge of the regulatory electronic I-9 requirements (8 C.F.R. §§ 274a.2(e)-(g)) and our experience navigating the maze of I-9 regulations make immigration attorneys uniquely qualified to provide expert advice to our clients.