

# I-9 Employment Verification Process

## Frequently Asked Questions



Courtesy of the Greenberg Traurig Business Immigration and Compliance Group

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I.

### WHAT IS THE I-9 FORM REQUIREMENT?

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 employment of illegal immigrants and thereby discourage illegal immigration into the United States.

Specifically, 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. Employers must comply with the I-9 requirements every time they hire an employee (defined as “any person who performs labor or services in return for wages or other remuneration”). Failure to comply with the I-9 requirements can subject employers to a variety of different civil penalties (such as monetary fines), and in some cases, criminal penalties.

II.

### WHAT OFFENSES CAN AN EMPLOYER BE LIABLE FOR?

- Failure to properly complete an I-9
- 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

III.

### WHAT MONETARY AND CRIMINAL SANCTIONS CAN AN EMPLOYER BE SUBJECT TO?

- Failure to properly comply with immigration employment laws can result in fines and criminal penalties.
- **Paperwork Violations** may result in fines between \$100 and \$1,100 for each individual for which a mistake was 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 \$2000-\$5,000, and for every offense thereafter; offenders can be fined between \$3,000 to \$10,000. For violations which 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 alien 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 hires ten or more aliens whom he knows were illegally brought into the U.S. in violation of the alien smuggling/criminal harboring provision.

### Related Offenses

- Demanding excessive documentation 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.
- Refusal to hire someone because of temporary work authorization.
- Not accepting other valid documents that can be used in lieu of certain United States Citizen and Immigration Services (USCIS) documents. For example, employers who do not accept an I-551 stamp or a letter from the

## IV.

### WHEN WILL AN EMPLOYER BE REQUIRED TO USE THE I-9 FORM?

Whenever an employer hires an individual (citizen or non-citizen) as an employee, the employer is required to complete the I-9 Form.

#### **Certain individuals, however, are generally exempted from the I-9 requirement:**

- Employees hired before 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 does not have the authority to hire and fire.
- In light of recent high profile enforcement actions, it is important to determine if you are a "dual employer."

*Employers are required to complete the I-9 Form whenever an individual is hired*

## V.

### HOW DOES AN EMPLOYER COMPLY WITH AND COMPLETE THE I-9

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/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:

- Present one document from List A on the I-9 form, establishing both identity and employment eligibility, OR

- Present one document from List B (establishing identity) and List C (establishing employment eligibility) on the I-9 form.

An 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 documentation presented by the employee if the documents reasonably appear to be genuine on their face. If an employee is hired for less than three business days, both Sections 1 and 2 must be completed at the time of hire.

**Section 3:** Updating and Reverification 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 relevant expiration 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/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 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 with the original I-9. The employee must present documentation showing an extension of his/her employment authorization or new work authorization.

#### **Reverifying or Updating Work Authorization for Rehired Employees:**

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 by using Section 3.

**Update:** 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 rehiring date, and sign/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.

**Reverify:** 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 from List A or C originally presented, and

*Employers must present original documents that establish identity and employment eligibility*

*Employers must ensure that the employees maintain employment eligibility by renewing expiring status*

*Early notice of expiration will give employees adequate time to renew authorization.*

- Sign and date Section 3.

We have found that it is very useful to create a system that will remind the employer 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 ninety days before the expiration date.

### VI.

#### WHAT IF AN EMPLOYEE IS UNABLE TO PROVIDE THE DOCUMENTATION WITHIN THREE DAYS OF HIS/HER EMPLOYMENT START DATE?

If an employee does not have the proper documentation within three days of his/her start date, you must terminate the employee.

### VII.

#### WHAT I-9 RECORDS SHOULD AN EMPLOYER KEEP ON FILE AND FOR HOW LONG?

Employers must retain the I-9 form for every current 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 later in time. 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.

### VIII.

#### SHOULD WE COPY THE DOCUMENTS THAT ARE PROVIDED FOR VERIFICATION?

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 such a copy is made, it must be retained with the I-9 form. Copies of documents may assist an employer and its counsel in preparing for an USCIS audit and in defending against claims that appropriate documentation was not demanded or presented. Moreover, maintaining copies of documents may aid an employer in defending against assertions that it accepted fraudulent documents that it should have known were not genuine. Finally, maintaining photocopies of documentation that the employer has examined in the course of completing I-9 forms makes it easier for the employer to conduct the periodic audits of its IRCA compliance effort. The Office of the Chief Administrative Hearing Officer (OCAHO) has found photocopying documents and attaching those copies to the I-9 form to be a mitigating documents, copies must be made for all employees to avoid discrimination claims. Further, 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.

*Employers must retain the I-9 form for every current employee for the full duration of that individual's employment*

**IX.**

*Maintaining copies of documents aids an employer in defending against assertions*

**WHAT DOES IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE) RECOMMEND REGARDING I-9 AUDIT AND REVIEW?**

Every I-9 form that the employer has prepared should be reviewed. When our office conducts an audit we start by identifying every employee hired (or rehired) after November 6, 1986, using payroll records or other records. It is important that you have these items available.

Using a spreadsheet, we create two main lists:

- All active employees, with their dates of hire noted; and
- All terminated employees for whom an I-9 form is required, with date of hire and termination noted.

We also create an “I-9 audit tracking form” for every listed employee, and fill in each employee’s name, date of hire, and date of termination (if applicable). ICE recognizes that it may not be practical, with larger employers, to inspect every I-9 form. In our experience, a review of a random sample may be sufficient to reveal common errors. These problems can be corrected on the spot, and prevented in the future. To perform a random sample audit, choose employees from personnel records in some random manner (for example, select all employees whose first name begins with “S” or every employee whose date of birth is in September). Once this is done, complete an I-9 audit tracking form for each randomly selected employee with the name, date of hire, and date of termination, if applicable, for each selected employee. Then:

- Collect all I-9 Forms.
- Match each I-9 Form to its corresponding I-9 Audit Tracking Form.
- Reconcile all differences.

If there is an audit tracking form without a matching I-9 form, conduct another search for the I-9 form. If the form cannot be located, have the employee and employer complete an I-9 form. The form should not be backdated.

**X.**

*The employer should allow the employee to present any document or combination of documents sufficient to satisfy the requirements of IRCA*

**WHAT CAN WE DO IF FORMS I-9 ARE LOST, DESTROYED, OR NOT MAINTAINED TO BEGIN WITH?**

Attempt to comply immediately. However, past violations of this nature cannot be retroactively corrected. Remember, the employer has an ongoing responsibility to be in compliance. Missing information should be conspicuously inserted, initialed, and dated contemporaneously with its insertion. The employee should provide any missing information in Section 1 of the I-9 Form; the employer should complete Sections 2 and 3 of the form. In cases where it is necessary to go back to the employee for additional information, be sure that the employer makes 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 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.

## XI.

### WHAT SYSTEM SHOULD SMALL EMPLOYERS USE?

For small employers, UCIS and ICE representatives recommend a “binder system” for maintaining I-9 forms. In the binder 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 current regulations.

## XII.

### SHOULD WE MAINTAIN A SEPARATE FILE FOR I-9 FORMS?

Practice indicates 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 their production at the time of a government 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 USCIS that may contain sensitive information to which you would not want them to be privy to otherwise. 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.

*Greenberg Traurig, LLP provides comprehensive legal advice in order to make the I-9 process easier and more efficient for Human Resource Managers*

### About

Dawn Lurie serves as Shareholder in the Business Immigration and Compliance Group of Greenberg Traurig's Tysons Corner office. Dawn Lurie advises multinational corporations on a variety of employment related issues particularly I-9 alien employment verification matters and minimization of exposure and liabilities. She develops immigration related compliance strategies and programs as well. Dawn has performed internal I-9 compliance reviews and defended businesses involved in government audits. Dawn has also published and frequently lectures on I-9 issues including penalties for failure to act in accordance with government regulations, anti-discrimination laws and employers' responsibilities upon receiving social security "no-match" number letters

Dawn also focuses her practice on business immigration matters and provides strategic immigration planning to address the visa and work authorization needs of U.S. and global personnel including professionals, managers and executives, treaty investors/ traders, essential workers, persons of extraordinary ability, corporate trainees and students. Dawn specifically advises and assists multinational corporations in the industrial, retail, service industry, real estate, healthcare, pharmaceutical and technology sectors in all aspects of U.S. immigration law.

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