



August 1, 2006

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Department of Homeland Security Publishes Interim Regulations Relating to Electronic Signature and Storage of Form I-9: *What Employers Need to Know*

Comprehensive Immigration Reform and worksite enforcement are hot topics in the newspapers, on Capitol Hill, and by employers around the country. What used to be a function reserved for Human Resources departments has now made its way onto the radar screens of general counsels, top management and business owners. Criminal indictments, large fines and continuing investigations by Immigration and Customs Enforcement (ICE) have been fueling the fire. Assistant Secretary Julie Myers of ICE has said that small employers, are just as likely to be targets of ICE as large companies if they are “bad faith actors.” ICE has finally published its long awaited interim regulations making it easier for some employers to comply with their I-9 recordkeeping responsibilities by allowing for electronic storage. Interestingly enough, this e-storage will also make government access during an investigation easier.

Background and Current I-9 Obligations

The Immigration Reform and Control Act (“IRCA”) of 1986 requires all employers in the U.S. to verify that all employees hired after November 6, 1986 are authorized for employment in the United States. In addition, employers must retain Form I-9 on which they confirm the identity and employment authorization of each employee.

By law, employers are required to have newly hired employees complete Section 1 of the Form I-9 on their initial date of hire. Employers must also review documents from employees, verifying their identity and employment authorization, and complete Section 2 within the first three days of employment. Employers are also obligated to re-verify the employment eligibility of their employees upon the expiration of certain employment authorization documents presented as evidence of employment eligibility in the original Form I-9.¹ Employers are required to retain Form I-9s for three years after the date of hire or one year after the date of termination of employment, whichever is later.

Worksite Enforcement Initiatives

As GT has continued to report, ICE is actively conducting worksite enforcement operations as part of the Secure Border Initiative (SBI), which seeks to secure America’s borders and reduce illegal migration. An integral part of this program is increased Department of Homeland Security (DHS) attention to employer compliance and enforcement making it imperative for employers to understand how to properly comply with I-9 requirements. Employers who fail to complete and retain Form I-9s, according to specified regulations, are subject to civil penalties for each violation.

¹ Permanent Resident Alien cards do not need to be reverified upon expiration



OMB No. 1615-0047; Expires 03/31/07

Employment Eligibility Verification

1. The instructions must be available during completion iscriminate against work eligible individuals. Employers employee. The refusal to hire an individual because of tion.

ad and signed by employee at the time employment begins.

| | |
|----------------|--------------------------------|
| Middle Initial | Maiden Name |
| Apt. # | Date of Birth (month/day/year) |
| Zip Code | Social Security # |

under penalty of perjury, that I am (check one of the following):

citizen or national of the United States

Lawful Permanent Resident (Alien #) A _____

an alien authorized to work until _____

Alien # or Admission #) _____

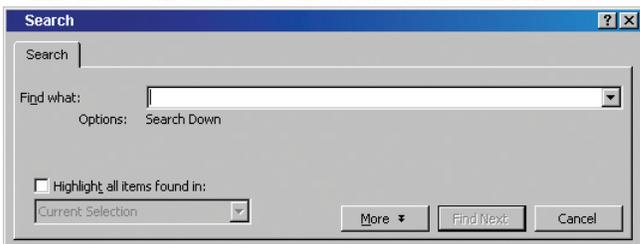
_____ Date (month/day/year)

ad and signed if Section 1 is prepared by a person assisted in the completion of this form and that to the best

Print Name _____

_____ Date (month/day/year)

signed by employer. Examine one document from List A OR use of this form, and record the title, number and expiration date, if



ied the document(s) presented by the above-named id to relate to the employee named, that the nd that to the best of my knowledge the employee may omit the date the employee began employment.)

| | |
|-----------------------|-----------------------|
| _____ | Title |
| City, State, Zip Code | Date (month/day/year) |

by employer.

B. Date of Rehire (month/day/year) (if applicable) _____

information below for the document that establishes current employment

Expiration Date (if any): _____

oyee is eligible to work in the United States, and if the employee ne and to relate to the individual.

_____ Date (month/day/year)

Paper, Paper, Paper

Many employers have expressed frustration with the sheer volume of physical files containing Form I-9s that they are required to maintain. These requirements are especially burdensome for larger employers or those with high employee turn-over rates. In 2004, to facilitate the employment verification process, Congress passed legislation giving employers the option of completing and storing Form I-9s electronically rather than in paper, microfilm or microfiche format, as previously required. DHS believes there are a number of potential advantages to employers who implement an electronic I-9 system. These include a reduction in the cost of physically storing paper copies or transferring a company's I-9s to microfilm or microfiche. At an estimated employer total labor cost of \$20 per hour, DHS calculates that employers expend an estimated \$13,000,000 annually on the completion and retention of paper Form I-9s. According to DHS, the electronic Form I-9 will not only save employers' money, but it will save a minimum of one minute of burden time per form.

The introduction of electronic forms should also allow employers to ensure that each I-9 is properly completed and retained. An electronic system will automatically detect information that is missing in fields or improperly entered. Electronically retained Form I-9s will also be easier to search. This is important for re-verification, quality assurance and inspection purposes. Maintaining Form I-9s electronically may also streamline the process for companies with numerous offices. Issues that plague certain companies, including the use of fraudulent and/or duplicative social security cards and names by unauthorized workers, will be easier to spot. Moreover, companies that choose electronic storage will be able to comply quickly with government agency requests for Form I-9s. By creating this more efficient employment verification process, DHS hopes to lower the number of unauthorized workers in the United States. Rather than invest DHS investigator time in data entry, DHS investigators will be able to conduct more thorough investigations of a companies' I-9s. Now that is food for thought.

So what are the specifics?

On June 15, 2006, ICE published in the Federal Register interim regulations specifying the standards for electronic storage and signature. The regulations are extremely general and companies should consult with counsel to determine what type of storage method is right for them. If electronic storage is chosen, counsel can assist in implementing and



Department of Homeland Security
U.S. Citizenship and Immigration Services

Please read instructions carefully before completing this form. ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate on the basis of race, color, sex, religion, or national origin. CANNOT specify which document(s) they will accept for a future expiration date may also constitute illegal discrimination.

Section 1. Employee Information and Verification. To be completed by the employee.

Print Name: Last _____ First _____

Address (Street Name and Number) _____

City _____ State _____



I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.

Employee's Signature _____

Preparer and/or Translator Certification. (To be completed by the preparer or translator, other than the employee.) I attest, under penalty of perjury, that of my knowledge the information is true and correct.

Preparer's/Translator's Signature _____

Address (Street Name and Number, City, State, Zip Code) _____

Section 2. Employer Review and Verification. To be completed by the employer. The employer must examine one document from List B and one from List C, as listed on the back of this form, of the document(s).

| List A | OR | List B |
|---------------------------------|----|--------|
| Document title: _____ | | _____ |
| Issuing authority: _____ | | _____ |
| Document #: _____ | | _____ |
| Expiration Date (if any): _____ | | _____ |
| Document #: _____ | | _____ |
| Expiration Date (if any): _____ | | _____ |

CERTIFICATION - I attest, under penalty of perjury, that I have examined the above-listed document(s) and they appear to be genuine. The employee began employment on (month/day/year) _____ and is eligible to work in the United States. (State employment age)

Signature of Employer or Authorized Representative _____ Print Name _____

Business or Organization Name _____ Address (Street Name and Number) _____

Section 3. Updating and Reverification. To be completed and signed by the employer.

A. New Name (if applicable) _____

C. If employee's previous grant of work authorization has expired, provide the following information: Document Title: _____ Document #: _____

I attest, under penalty of perjury, that to the best of my knowledge, the information presented on this form is true and correct. I have examined the document(s) I have examined appear to be genuine.

Employee One
Digitally signed by Employee One
DN: CN = Employee One, C = US
Date: 2006.07.21 14:35:36 -07'00'

selecting the right program for each business. The following is an overview of what employers should know regarding the electronic storage of Form I-9s.

Format of the Electronic I-9 Form and Electronic Recordkeeping Standards

Employers will be able to access an upgraded Form I-9 from the USCIS website. This form will enable employers and employees to electronically sign and save completed information in the form. The regulation further permits employers and employees to manifest the requisite attestations using electronic signature technology. Employers are now permitted to complete, sign, scan and retain the electronic Form I-9s, as long as they comply with electronic retention standards which are described below.

DHS has given employers the flexibility of choosing a method of I-9 retention most economically advantageous to their specific businesses. Nevertheless, any method chosen for electronic recordkeeping must be consistent with IRS electronic recordkeeping standards. DHS is working with the IRS to develop audit protocols to streamline the process for producing information and documentation when ICE or DHS (and presumably DOL and Office of Special Counsel) determine that an audit and review of a company's I-9s is necessary.

Standards for Electronic Retention

Employers who choose to use the electronic I-9 storage system will be required to employ a system that includes:

- Reasonable controls to ensure the integrity, accuracy and reliability of the electronic storage generation or storage system;
- Reasonable controls to prevent and detect unauthorized use or the accidental deletion or alteration of completed and electronically stored Form I-9s;
- Program to train employees in the minimization of unauthorized or accidental alteration or erasure of records;
- Timestamp entry to appear every time a Form I-9 is accessed and a particular action taken;
- Backup and recovery of records to protect against information loss, such as power interruptions;
- 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 signatures;



Employee Presents:

List A:

List B:
 New Jersey Driver's License

List C:
 U.S. Social Security Card

Presented to HR Manager

LISTS OF ACCEPTABLE DOCUMENTS

| LIST A | OR | LIST B | AND | LIST C |
|--|----|--|-----|--|
| Documents that Establish Both Identity and Employment Eligibility | | Documents that Establish Identity | | Documents that Establish Employment Eligibility |
| <ol style="list-style-type: none"> 1. U.S. Passport (unexpired or expired) 2. Certificate of U.S. Citizenship (<i>Form N-560 or N-561</i>) 3. Certificate of Naturalization (<i>Form N-550 or N-570</i>) 4. Unexpired foreign passport, with <i>I-551 stamp</i> or attached <i>Form I-94</i> indicating unexpired employment authorization 5. Permanent Resident Card or Alien Registration Receipt Card with photograph (<i>Form I-151 or I-551</i>) | | <ol style="list-style-type: none"> 1. Driver's license or ID card issued by a state or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, gender, height, eye color and address 2. ID card issued by federal, state or local government agencies or entities, provided it contains a photograph or information such as name, date of birth, gender, height, eye color and address 3. School ID card with a photograph 4. Voter's registration card 5. U.S. Military card or draft record 6. Military dependent's ID card | | <ol style="list-style-type: none"> 1. U.S. social security card issued by the Social Security Administration (<i>other than a card stating it is not valid for employment</i>) 2. Certification of Birth Abroad issued by the Department of State (<i>Form FS-545 or Form DS-1350</i>) 3. Original or certified copy of a birth certificate issued by a state, county, municipal authority or outlying possession of the United States bearing an official seal 4. Native American tribal document |

- Retrieval system that includes an index permitting searches and filtering by any data element. Also, the employer's storage system must not limit or restrict access in any way to an agency of the United States; and
- The ability to reproduce legible and easily readable paper copies.²

Employers should note that any action resulting in the alteration or loss of any electronic records will be considered a violation and may subject the employer to sanctions. Therefore, GT urges employers to take all necessary precautions to ensure the programs they implement meet regulatory requirements.

The electronic I-9 storage system the employer uses must also contain a method to acknowledge that the signatory has read the attestation prior to capture. The electronic signature must then be attached by the program to the completed Form I-9. There are a number of ways employers

will be able to comply with this requirement. For example, employers may introduce electronic signature pads, biometrics, identification numbers or "click to accept" dialog boxes. Employers will also have to determine by what method their representatives will want to complete the Form I-9s. Smaller employers may prefer to have the signature of each individual Human Resources representative included in the system. Larger employers may find it more convenient to introduce electronic signature pads at various locations. Regardless of the method chosen, every employer's electronic I-9 storage program must:

- Attach the electronic signature at the time of creation of the records;
- Create and preserve a record certifying the identity of the person producing the signature; and
- Provide a printed confirmation upon completion of the I-9 to the signatory.

² 8 C.F.R. § 274a.2 (e)



What should we do now?

Now is the time for companies to review their records and ensure compliance with the immigration regulations regarding recordkeeping and retention of Form I-9s. Many businesses will choose to continue to maintain paper records; however those that choose to change to an electronic system will need to sit down with counsel to discuss what type(s) of electronic systems will meet the IRS standards and be most appropriate and useful in practice. Employers who now employ electronic recordkeeping systems as part of their accounting and tax functions may choose to expand their systems to include the employment verification process. There are many I-9 products being introduced to the market and making the correct selection is essential. Pending further guidance, as long as the electronic system is considered IRS compliant, it will be ICE compliant. Interestingly, the regulations also permit employers to use a combination of paper and electronic storage of their employees' I-9s.

Because the legislation became effective on April 29, 2005, many employers have already implemented an electronic Form I-9 retention system. DHS will not require that Form I-9s created between that date and June 15, 2006 comply with the new regulatory standards described above.

Going Paperless is Not Without Responsibility

The regulations require employers who retain electronic Form I-9s to demonstrate that their electronic storage system is properly maintained and protected against tampering, and that any electronic signature (employee or employer) can be authenticated. Furthermore, employers will be required upon request to provide the DHS with documentation of the business process that 1) Created and stored the I-9s; 2) Modified and maintained the retained I-9s; and 3) Established the authenticity and integrity of the I-9, such as

audit trails. Companies will still be given three days notice prior to an inspection of the Form I-9. At the time of inspection, employers will be required to present either original paper, microfilm, microfiche or electronic versions of the I-9s.

To Paper or Not to Paper?

This rule does not require that employers use an electronic I-9 storage system, but only provides guidance for those who choose to implement an electronic I-9 storage system. The publication of this regulation does not make any changes to the current paper Form I-9 process. GT welcomes the Federal Register's publication of the long-awaited interim regulations relating to the electronic signature and storage of Form I-9. However, while we believe that large-scale businesses, as well as small companies, may benefit from the convenience of using an electronic employment verification system certain considerations will need to be made prior to implementing any change. GT will continue to provide updates on any clarifications made to the interim regulations relating to the electronic storage of Form I-9s.

“Any comprehensive strategy to stem the flow of illegal immigration must address the thousands of employers that hire illegal aliens both wittingly and unwittingly,” said DHS Secretary Michael Chertoff. “We have been bringing a growing number of criminal prosecutions against unscrupulous employers; however prosecutions are only part of the solution. If the government is going to fully address the problem of illegal alien employment, it must partner with employers, educate them and provide them with the tools they need to develop a stable, legal workforce.”

Greenberg Traurig's business immigration and compliance group has experience in advising multinational corporations on a variety of employment-related issues, particularly I-9 employment eligibility verification matters and minimization of exposure and liabilities. GT develops immigration related compliance strategies and programs, as well as performs internal I-9 compliance reviews. GT has defended businesses involving large-scale government raids and audits. GT attorneys provide counsel on a variety of 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.



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