I-9 and Immigration Rules for HR Managers

forework™

Where everything checks out.

VERIFICATION OF EMPLOYMENT AUTHORIZATION

The Immigration Reform and Control Act of 1986 (IRCA) requires all US employers to complete the Form I-9 for each new employee hired after November 6, 1986. Employers are subject to the same laws regardless of which state they operate in and whether they are using paper or electronic I-9 forms.

IRCA prohibits discrimination by employers in the Form I-9 completion process. Employers may not discriminate by:

- improperly making hiring decisions based on national origin, if the employer has between 4 and 14 employees (instead of IRCA, employers with 15 or more employees are covered by Title VII of the Civil Rights Act of 1964 (Title VII) regarding national origin discrimination);
- improperly making hiring decisions based on citizenship; or
- requiring new employees to present specific or additional documents of identity or employment eligibility.

Further, employers must not retaliate against an employee based on the employee's complaint or participation in an investigation regarding IRCA discrimination.

I-9 FORM

Every new employee must complete the Form I-9. Section 1 of Form I-9 must be completed before or on the first day of employment, while Section 2 must be completed within three days of hire. Employers should ensure that they are using the most up-to-date version of the Form I-9, which may be found on the United States Citizenship and Immigration Services' (USCIS) website.

Employers cannot specify which document(s) the new employee should present from the list of acceptable documents. Employees can present any List A document, which are sufficient to establish both identity and employment eligibility. Alternatively, a new employee may submit a combination of List B and List C documents. List B documents establish identity and List C documents are sufficient to establish employment eligibility. If the employee cannot present a required document, the employee must present an acceptable receipt. Receipts showing that a person has applied for an initial grant of employment authorization or for renewal of

employment authorization, are not acceptable. Acceptable receipts must be presented within the three-day period and valid replacement documents within 90 days.

Employees must present original, unexpired documents. Employers may, but are not required to, photocopy the documents presented. However, if photocopies are made, they must be made for all new hires and they should be attached to the completed I-9 form. There must be a uniform system in place. I-9 forms must be kept for at least three years from the date of hire and for one year from the date employment terminates. Under present regulations, the retention rules do not apply to photocopies of the presented documents.

Employers must accept the documents that are presented if they reasonably appear to be genuine on their face and relate to the person presenting them. The employer is not expected to be an expert at authenticating documents. However, if the documents do not appear genuine, do not accept them and ask for alternative documents without specifying which ones. If the employee presents a work authorization document with an expiration date, the employer must reverify employment eligibility before that document expires.

Reverification is accomplished by examining a new document and completing Section 3 of the I-9 form. Thus, it is important to have a calendar system in place. Employers do not need to reverify US passports and 1-551 (Permanent Resident or Resident Immigrant) cards. Section 3 is used for updating and reverification; employers also have the option of completing a new I-9 instead of Section 3.

If an employer does not complete and retain the form properly, it may face civil money penalties and possibly criminal penalties as well. If the employer is a federal contractor, it may face debarment for substantial noncompliance.

The government must give three-days' notice in writing before inspecting an employer's I-9 forms. Employers should use this time wisely to ensure that their forms are correctly completed and that the employer has all the required forms. As a general rule, employers should politely insist upon their right to advance notice of an audit and employers should not waive their rights by agreeing to a more limited inspection immediately.

We recommend that all I-9 forms be kept separately in binders, alphabetically, and when inspected, the binders be placed in a conference room for review. All terminated I-9s within the retention period should be kept in a separate binder from active employee forms. The goal is to comply but segregate the documents and the inspector from the rest of the files and employees to minimize the flow of information.

THE E-VERIFY SYSTEM

E-Verify is a free, internet-based system that allows employers to determine whether their employees are eligible to work in the United States. The E-Verify system compares information from an employee's I-9 form to data from the US Department of Homeland Security and Social Security records to confirm eligibility. Use of the E-Verify system is voluntary on the part of most employers; however federal contractors are required to use E-Verify for all new and existing employees assigned to their federal contracts.

New York does not require private sector employers to verify their employees through the E-Verify system.

NO-MATCH LETTERS

US Immigration and Customs Enforcement (ICE) has published regulations relating to the unlawful hiring or continued employment of unauthorized workers which apply to the employment verification process and impose obligations on employers when an employer either:

- receives a "no-match" letter from the Social Security Administration (SSA) or
- receives a letter regarding employment verification forms from the Department of Homeland Security (DHS).

Under the regulations, employers have a heightened duty to follow up on no-match letters and other employment verification discrepancies. DHS takes the position that a no-match letter is an indication that the subject employee is not authorized to work in the United States. The regulations create an expansive definition of the term "constructive knowledge" as applied to an employer's information about an individual's authorization to work in the United States under the Immigration and Nationality Act.

An employer may violate federal regulations if it has knowledge that an employee is an unauthorized worker. An employer is deemed to have knowledge if a reasonable person would infer from the facts that the employee is not authorized to work in the United States. Constructive knowledge can be found where at least one of the following criteria is met:

1. the I-9 form employment eligibility form has not been properly completed (including support documentation);

2. the employer has learned that the worker is not authorized to work within the United States; or

3. the employer acts with reckless disregard for the legal consequences of permitting another individual to introduce an unauthorized worker into the workforce.

Examples of an employer's constructive knowledge that an employee may be unauthorized to work include all of the following:

- written notice from the SSA that the combination of the name and Social Security number submitted for an employee do not match agency records;
- written notice from DHS that the immigration status document or employment authorization document presented or referenced by the employee in completing Form I-9 was assigned to another person or the agency has no record that the document has been assigned; and
- a request by a worker (who already claimed to be a permanent resident, US citizen or US national) that the employer file an immigrant labor certification or employment-based immigration visa petition.

The amended regulations also describe "safe harbor" procedures that the employer can follow in response to such a letter and thereby be certain that DHS will not use the letter as part of an allegation that the employer had constructive knowledge that the referenced employee is a person not authorized to work in the United States. The "safe harbor" procedures include attempting to resolve the no-match issue and, if it cannot be resolved within a certain period of time, independently verifying the employee's identity and employment authorization through a specialized process. ICE considers employers to have acted reasonably if the employer resolves the discrepancy with the relevant agency within 30 days of receiving a no-match letter by doing all of the following:

- checking its records for a clerical error,
- informing the agency of its error, and
- verifying that the name and number, as corrected, match the agency's records.

If the employer cannot resolve the discrepancy as described previously, it must contact the employee and request confirmation that the employee's information is correct. If the original

information was correct, the employer must: correct the employee's information in its records, inform the relevant agency of the correction and match the corrected information with the agency's records.

If the employee who is the subject of a no-match letter maintains that the information he or she provided to the employer is correct, the employer must ask the employee to pursue the matter with the agency. Employers who take these corrective steps within 30 days of receiving a no-match letter are regarded as having acted reasonably and fall within the safe harbor.

Employers should also maintain a paper record, for example in a memorandum to the worker's personnel file, of the steps it has taken, including meetings with the employee, to resolve the problem.

A first-time violation under the amended law can result in the suspension of the employer's business license pending the satisfactory resolution of the worker's status. Should an employer commit another violation within three years of the first violation, his or her business license can be suspended for one full year.

FORM I-9 CHECKLIST

A. Completing Section 1 of Form I-9

Employers must ensure that each employee completes Section 1 of Form I-9 by the employee's first day of work. In particular, each employee must:

- provide her complete legal name;
- indicate whether she is a US citizen, lawful permanent resident ("LPR"), or foreign national authorized for employment;
- provide an alien registration number if the employee indicates she is an LPR;
- provide an "A" number or admission number if the employee indicates she is a foreign national authorized for employment; and
- sign and date the Form I-9, Section 1.

In addition, the employee should include:

- the date employment is authorized until, if the employee indicates she is a foreign national authorized to work;
- her maiden name (if applicable);
- her address; and
- her date of birth.

An employee must provide her Social Security number if the employer is enrolled in E-Verify.

An employee may (but does not have to) include a telephone number or email address, or both. If the employee includes contact information, the employee may be contacted directly by USCIS if the employer is enrolled in E-Verify and one of the following situations arise:

- the employee is the subject of a tentative non-confirmation (TNC); or
- the employee naturalizes as a US citizen and fails to update her Social Security Administration (SSA) records.

An employee may use a third party to complete or translate Section 1 if the employee is incapacitated; not fluent in the English language; or under the age of 18.

If the employee uses a third-party preparer or translator, the third party should provide the following personal information: name, address, signature and date of service in completing or translating the Form I-9 Section 1.

B. Completing Section 2 of Form I-9

By the third day after an employee begins work, employers must review original documents evidencing identity and employment authorization and complete and sign Form I-9 Section 2. Employers may, but are not required to, retain photocopies of presented documents. They should apply the same policy for all employees. Regardless of their policy, employers enrolled in E-Verify must photocopy the following documents if presented by the employee: US passport, US passport card, green card, or employment authorization document (EAD).

USCIS publishes a list of documents that are acceptable for proving identity and employment authorization. When reviewing documents, employers should ensure they are valid and not fraudulent, ensure the documents relate to the person offering them by comparing the name and any photograph to the employee, not request specific documents, and accept any documents that the employee presents that satisfy the Form I-9 list of acceptable documents. As a best practice, if the employee presents too many documents, the employer should give the employee

a copy of the Form I-9 list of acceptable documents (listed on the Form I-9 in Lists A, B, and C) and ask the employee to pick the documents to be used for the Form I-9.

If the employee will be employed for three days or less, the employer must complete this step by the employee's first day of work.

Further, employers must include any document title, the document-issuing authority, identification number, and expiration date of required List A, List B, or List C documents, and sign and date Form I-9 Section 2.

Employers should include the employer's name and address and the representative's title, not use a post office box for their address, enter the employee's date of hire where indicated, and have a system to track employee documents with limited duration employment authorization. Employers enrolled in E-Verify may only accept List B documents from an employee if the List B document contains a photograph.

C. Reverification

Employers **must** reverify expiring or expired employment authorization documents for a current employee. Employers **may** reverify expiring or expired employment authorization for a terminated employee who is rehired within three years of the employee's original hire date. Employers may instead complete a new Form I-9 when a former employee is rehired and **may** use the Form I-9 reverification section to indicate an employee's name change. Using Section 3 for this purpose does not require the employer's verification or signature.

Employers should not specify what documents the employee must present as part of reverification.

Employers should not request or require documents verifying identity during reverification, because the employee's identity was verified when they initially completed the Form I-9 and identity does not change or expire. Requiring an employee to present documents from, for example, List B, in addition to documents showing extended or new employment authorization may constitute discrimination.

When reverifying, employers must notify an employee before her work authorization expires to present documents from List A or List C evidencing extended or new employment authorization, include any document title, the document-issuing authority, identification number, and expiration date of required List A or List C documents, and sign and date Form I-9 Section 3.

Employers should indicate the date of rehire if reverification is completed for an employee rehire, review the documents to ensure they are valid and not fraudulent, and have a system to track employee documents with limited-duration employment authorization.

COMPLETING I-9 FORMS FOR REMOTE WORKERS

An employer may need an alternative method for completing the I-9 Form if the employer hires an employee who is located far from any of the employer's worksites, such as a sales employee who will work from her home. In such cases, an employer may designate an agent to complete the Form I-9. The employer must select an agent wisely, as it is liable for IRCA violations flowing from the agent's errors and omissions.

Under the IRCA, an employer must, within three days of the employee's hire date:

- review the employee's original documents proving identity and employment authorization,
- attest to the review and that the documents appear genuine and related to the person presenting them, and
- complete and sign the Form I-9 Section 2.

In addition, an employer may use an agent to reverify the employee's employment authorization by reviewing renewed or new employment authorization documents when the employee's original employment authorization documents are expiring in the Form I-9 Section 3.

When an employer designates an agent to fulfill its I-9 responsibilities, the agent stands in the shoes of the employer, but the employer retains all of the liability for the agent's missteps. An employer must identify an agent who is reliable and trustworthy. The Immigration and Customs Enforcement agency continues to conduct worksite enforcement, particularly through I-9 audits and investigations. Furthermore, an employer that participates in E-Verify must rely on the agent's performance to timely complete their E-Verify case initiation.

In addition to the other steps an employer may take to ensure the integrity of its Form I-9 policies and procedures, an employer hiring remote employees should ensure the agent it deputizes for the I-9 process understands his or her responsibilities in completing Section 2 of the Form I-9. For example, the agent must know which documents the employee may present and what the document review entails, and properly enter the document information on Form I-9.

WHAT TO DO IF ICE VISITS

Representatives of US Immigration and Customs Enforcement (ICE) may visit workplaces to conduct routine audits of I-9 forms. Evidence of noncompliance can result in civil and criminal penalties to the employer and the potential loss of undocumented workers who may face deportation proceedings. Employers are advised to consult with an experienced immigration attorney well in advance and prepare a plan for either eventuality.

Employers should routinely audit their own I-9 records to be sure they have been prepared for all employees and have been completed properly. Employers have the right to insist on three working days' advance written notice before being required to produce their I-9 forms for inspection. If ICE finds that some employees are not authorized to work, the employer will be given 10 days to provide a valid work authorization for the employees. If the documents cannot be produced in that time, the employer will need to terminate the individual's employment.

ICE agents can go to a workplace without warning and seek entry to the premises. In the process they may seek to question or detain employees. There is little that an employer can do to prevent ICE agents from entering the public areas of a business such as a parking lot, lobby or publicly accessible restaurant. However, an employer does not have to allow immigration agents to enter private areas of the business without a judicial warrant. An administrative warrant on the letterhead of the Department of Homeland Security is not the same thing; so, an employer may lawfully restrict access to private areas of the business unless the warrant has been issued by a US District Court or a state court judge.

In the absence of a warrant, ICE agents need permission to enter private areas. Therefore, an employer should establish a policy and train its supervisors in advance to identify what are the private areas and what should be said to immigration agents. Supervisors and employees should be told not to panic or attempt to run away. Such behavior may provide ICE agents with a legal reason to arrest them. Employers have no obligation to answer questions of the ICE agents.

Even if an agent shows an administrative warrant with an employee's name on it, the employer does not have to say if the employee is working that day. Nor does the employer have to take the agent to the employee. Employers also have the right to videotape the ICE agents.

Employees have no obligation to show any identification to an ICE agent or to answer any questions. They may remain silent and ask for an attorney. In addition, an employer may remind the employees of these rights. However, ICE agents do have the right to arrest employees and an employer should not take any action to impede them from doing so.

We anticipate, handle and solve businesses employment obligations and personnel challenges, all of them.

From recruitment to termination, and everything in between, we handle every aspect of businesses' labor and employment needs.

Learn more at www.forework.com

forework™

Where everything checks out.