

# Labor & Employment Law UPDATE

*Practical and preventive information for managing  
your workplace*

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## *New Form I-9 and Regulations Effective February 2, 2009*

On December 17, 2008, the U.S. Department of Homeland Security (DHS) published newly revised employment verification regulations and a proposed new Form I-9, which becomes effective on February 2, 2009. DHS states that the purposes of the revisions are to “improve the integrity of the employment verification process so that individuals who are unauthorized to work are prevented from obtaining employment in the United States” and to “strengthen the effectiveness of the Form I-9 process.” Accordingly, DHS has amended the regulations governing acceptable employment authorization documents and identification that employees may present for the new Form I-9 as well as a number of technical and Form changes.

Following are the most significant items that employers need to know about the new Form and regulations:

### **Effective Date**

- Employers must begin using the new Form I-9 on February 2, 2009. The form can be accessed on the U.S. Citizenship and Immigration Services (USCIS) Web site, but a new *Handbook for Employers* is not yet available.

### **Changes to Acceptable Documents and Receipts**

- **Employers may no longer accept expired documents of any type.** In the past, some expired documents were acceptable, such as expired driver’s licenses or expired passports. That will no longer be the case.
- DHS has expanded acceptable List A documents to now include a U.S. Passport Card and passports from the Federated States of Micronesia and the Republic of the Marshall Islands.
- DHS has modified the reference on List A to temporary I-551 stamps contained in foreign passports to include temporary I-551 notations on machine-readable immigrant visas, which are issued by U.S. Consulates.
- DHS has removed:
  - 1) Form I-688, Temporary Resident Card,
  - 2) Form I-688A, Employment Authorization Card, and

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- 3) Form I-688B, Employment Authorization Card from the valid List A documents. Form I-766 (the current Employment Authorization Document card) remains a valid List A document.
- The list of acceptable documents now includes Form I-94A in addition to Form I-94.
- The List C reference to “Social Security number card” was replaced with the correct statutory term, “Social Security account number card.”

### Technical Changes

- List C has been updated to correctly identify Form FS-5450, Certification of Birth, and Form DS-1350, Certification of Report of Birth.

### Form I-9 Changes

- U.S. non-citizen nationals and U.S. citizens will now be separated into two different categories and have two different status boxes in Section 1 of the new Form I-9. Only a very small group of individuals are considered nationals of the U.S., but not citizens. These include individuals born in American Samoa, certain children of noncitizens who are born abroad, and some former citizens of the former Trust Territory of the Pacific Islands who relinquished their U.S. citizenship.

These revisions represent the key changes to the Form I-9 process for employers. The USCIS has indicated that a new *Handbook for Employers* reflecting these changes will also be prepared and published. However, no timeline has been given on when such guidance will be available.

As of February 2, 2009, employers may not use the current Form I-9, published in November 2007, for any purpose. Although employers are not required to have existing

employees re-verify their employment eligibility on a new Form I-9, **the new Form is the only acceptable Form for new hires and for any re-verifications of the employment eligibility of existing employees on or after February 2, 2009.** Failure to use the new Form could not only result in administrative fines, but also call into question the employer’s good faith compliance with the employment verification requirements. With agency audits of employers and ICE raids on workplaces on the rise and more employers becoming subject to the mandatory use of the E-Verify electronic verification system, it is imperative that an employer carefully comply with employment verification rules.

**Heidi A. Guttan-Fox  
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## *Pay Equity Bills Likely to Pass in Congress*

In May 2007, the United States Supreme Court, in a case entitled *Ledbetter v. Goodyear Tire & Rubber Co.*, reversed a \$360,000 award granted to Lilly Ledbetter by a jury who found that she had been discriminated against because of her sex in how she was paid. Ledbetter, who had worked for Goodyear for 19 years and was a supervisor, had been making \$45,000 a year, which was \$6,500 less than the lowest-paid male supervisor. The Supreme Court, in a 5-4 ruling, found that Ledbetter had waited too long to bring her claim, stating that she should have filed charges with the U.S. Equal Employment Opportunity Commission within 180 days after the allegedly discriminatory pay decision was

made. Ledbetter did not sue until 1998 but alleged wage discrimination stretches back to the early 1980s. The Court rejected Ledbetter's arguments that each paycheck she received was a new discriminatory act for purposes of determining whether she had brought a timely charge. The Court also rejected what they called "policy arguments" that pay discrimination is harder to detect than other types of employment discrimination.

Now, the Democratic Congress is renewing efforts to push through two pieces of legislation on pay discrimination, one of which, named the Lilly Ledbetter Fair Pay Act, is specifically designed to reverse the Supreme Court's decision. Both bills were passed in the House two weeks ago, and the Senate voted 72-23 last Thursday to consider the Ledbetter Act. However, Senate Republicans are pushing for more time to consider the proposed law.

The current version of the Lilly Ledbetter bill would redefine the statute of limitations as 180 days after *either* the alleged discriminatory decision regarding pay is made *or* after issuance of the last discriminatory paycheck. The bill would then allow liability for back pay up to two years preceding the date the charge was filed *if* the discriminatory practices during those two years were similar or related to the discriminatory practices that occurred within the 180-day statute of limitations period. The legislation would amend not only Title VII with respect to equal pay issues, but also the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Rehabilitation Act of 1973. Republicans are expected to offer an amendment that would start the 180-day statute of limitations period from the date on which the person learned of, or should have learned of, the act of discrimination.

The second bill, the Paycheck Fairness Act,

which has been passed by the House but has not yet been taken up by the Senate, would place the burden on employers to prove that wage disparities are job-related and not sex-based. The bill also allows for punitive damages awards and creates a retaliation claim for employees who have questioned pay structures or shared information about their own wages with other employees.

The Senate is expected to vote on some version of these bills some time this week, and President-Elect Obama will likely sign the legislation once in office. In the event that these bills pass, employers can expect to see increased litigation on the issue of equality in pay. In many cases, employers will find it more difficult to defend against pay discrimination lawsuits brought under the Lilly Ledbetter Act because the alleged discriminatory decision may have occurred years before the lawsuit was filed. In such cases, the decision makers may be long gone, as well as any documents relied on in making the decision. Finding evidence to use in defending against these claims will thus prove difficult. Additionally, if the Paycheck Fairness Act passes, the risks for employers in pay discrimination cases will also increase.

**Allison D. Balus**

## *Just a Reminder of Other Key Changes for Employers in 2009*

The first of 2009 brings a host of modifications to labor and employment law. HR will be busy bringing in the new year with one compliance issue after another. In

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addition to the issues discussed above, some of the key changes are listed below, along with a listing of which *Baird Holm Labor & Employment Law Update* or *Alert* to revisit for a full explanation:

- January 1 - Americans with Disabilities Act Amendments take effect demanding changes to hiring, documentation, and accommodation processes (See [September 2008 Legal Alert](#))
- January 15 - E-verify must be implemented for federal contractors ([December 2008 Newsletter](#))
- January 16 - New FMLA regulations take effect requiring a change in posters, policies, and documents (See our [November 17, 2008 Legal Alert](#))

## *Is Your Company One of the Best Places to Work in Omaha?*

Find out if your company or organization is one of the 'Best Places to Work' by registering now to participate in the Best Places to Work Omaha 2009.

This event is an annual opportunity for Omaha area employers to learn more about the engagement and satisfaction of their employees through a confidential, online employee survey. Research has clearly shown that more engaged employees tend to stay longer, serve customers more effectively, and help drive a more profitable company. For companies who have more

than fifty employees there is an opportunity to be recognized as one of the 'Best Places to Work in Omaha 2009' at a special luncheon held in conjunction with the Annual Baird Holm Labor Law Forum on May 7, 2009. This competition will recognize the top five employers in both a 50-250 employee category and a more than 250 employee category.

The Best Places To Work is an annual initiative of Baird Holm LLP, in joint sponsorship with the Greater Omaha Chamber of Commerce, created in 2005 with several goals in mind: recognizing and honoring those companies that have created positive work environments, identifying and sharing best practices, promoting Omaha and Omaha-area employers, and providing to participating companies valuable feedback and data that will assist them in measuring levels of employee satisfaction and engagement.

### **Key dates to remember**

- Survey Registration: November, 2008 to February 4, 2009
- Online Survey Conducted: February 9 - 21, 2009
- Survey Results Available: First week of March, 2009
- Best Places to Work Luncheon at the Baird Holm Labor Law Forum: May 7, 2009

### **Register your company**

To register your company for the Best Places to Work Omaha 2009, visit <http://www.qmrrinc.com/bestplaces09/omaha>

For more information on the Best Places to Work 2009, please visit:

<http://www.bairdholm.com/news-events-11.html>

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