

# Recent Changes to the Form I-9

By Amy Erlbacher-Anderson, Attorney

On March 8, 2013, the Department of Homeland Security issued a new version of the Form I-9, Employment Eligibility Verification ("Form I-9"). As background, federal law has prohibited employers from employing foreign workers since the early 1950s unless they hold a status which authorizes them to work in the United States. However, it was not until the Immigration Reform and Control Act of 1986 that employers were provided a mechanism to control such hiring by requiring all employers to complete a Form I-9 to verify the identity and work authorization of every employee hired, *regardless of citizenship*.

At the most basic level, federal immigration law forbids three things:

1. an employer knowingly hiring an unauthorized alien;
2. an employer continuing to employ a person if the employer becomes aware that the employee is, or has become, unauthorized; and
3. an employer hiring any individual without complying with the employment verification process.

With immigration reform at the forefront in Congress, immigration and employment authorization of workers have become vital issues.

Here are the basics...

**The Form** - An employer's duty to verify employment authorization is met

by completing a Form I-9 for each person hired on or after November 6, 1986. There is, unfortunately, little written law on the Form I-9 and employment verification requirements. Proposed regulations were issued in 1997 addressing these topics, but have never been finalized.

**The Legalities** - The Form generally must be completed within three days of the first day of employment. The employee should complete Section 1 on the first day of employment; the employer must complete Section 2 by the third day. "Day" means any day on which the employer is open for business, even if the HR department is not open or otherwise available. It is recommended to complete the entire form on the first day; but, Form I-9s may be completed at any point after the person accepts a job offer. An applicant should never be asked to complete a Form I-9.

Only the employee can complete Section 1; only the employer can complete Section 2 or 3. The employee must present original documents proving their identity and employment authorization and attest, under penalty of perjury, as to their knowledge of the penalties for false statements and false documents and their authorization to work. The employee may present either a single document establishing both employment authorization and identity (a "List A" document) or two documents – one establishing employment authorization

(a "List C" document) and one establishing identity (a "List B" document).

A translator or other "preparer" may assist an employee in completing a Form I-9; however, this individual must complete, sign, and date the Preparer/Translator section at the bottom of page 1. Form I-9s cannot be auto-completed by an HRIS program.

***Because the employer is liable for all information provided on a Form I-9, the employer should review Section 1 immediately after the employee completes it, to ensure that it is properly completed and that any corrections are made by the employee at that time.***

The employer records which documents were presented in Section 2, after examining the original documents the individual provides, and attests that the documents appear to be genuine and relate to the individual who presents them. The employer also attests, under penalty of perjury, that he/she has examined the employee's documentation and has verified the individual's ability to work in the U.S. The person who signs this section must be the person who examined the original documents.

The employer may not specify which document(s) an individual may present, but may request additional documents or refuse the offered documents if they do not appear genuine, unless such request is

made for the purpose or with the intent of discriminating against the employee. The employer should compare the information provided in Section 1 with the documents the employee provides. If there is a discrepancy, the employee must be given an opportunity to explain and correct Section 1, if necessary.

If the employee's work authorization expires at some future date, the employer must re-verify such authorization on or before the expiration date of the original document. Re-verification is also required if the employee's basis for work authorization has changed or if the employee is re-hired within three years of the original date on the Form I-9. Generally, the employer can either use Section 3 of the original Form I-9 or complete a new Form. Since a new version of the Form has been issued, it may be necessary to use a new Form if the original Form is an older version.

Each Form I-9 must be kept for the later of three years after the employee's hire date or one year after the employee's termination date. Form I-9s should be kept apart from other personnel files, not only for convenience in the event of an audit (ICE is only required to give three days' notice) but also to avoid the appearance that employment decisions were made using such information and a claim of discrimination.

**Recent Changes** - The Form, its Instructions, and the *Handbook* were most recently revised and reissued in March of 2013, with additional changes made to the *Handbook* in May. The new Form can be identified by the revision information printed at the bottom right corner of each page – Form I-9 (Rev. 03/08/13)N. The new *Handbook* can be identified by the revision information printed at the bottom right corner of the title page – M-274 (Rev. 04/30/2013)N. The Form, Instructions, and *Handbook* are freely available from the USCIS website, [www.uscis.gov](http://www.uscis.gov), in the Form I-9 Central webpage. This webpage is a valuable source of information for employers.



All employers *must* have begun using the new Form I-9 on May 7, 2013. If an employer has used the prior version of the Form for post May 6 hires, the employer's representative must complete the Form I-9 again on the correct version and maintain both Forms in the employer's records. *There is also a new Spanish version of the Form, but it may only be used by employers*

*located in Puerto Rico.*

The most significant changes to the new Form include:

1. Expanded format/layout of the Form;
2. New data fields requesting information not requested in prior versions; and
3. Expanded instructions for the Form.

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The new Form is two pages, instead of the traditional single page. The first page consists solely of Section 1, which is for the employee, and the Preparer/Translator section. The second page includes Section 2 and Section 3, but pertains solely to the employer.

Section 1 has been completely reformatted. The Form more clearly requests full last names and specifies that all "other" names should be listed, not just maiden names. In addition, the Form requests the employee's email address and telephone number. However, the Form does not make it clear that these are optional. The Form also does not indicate that the social security number is optional when the employer does not use E-Verify.

The "status box" now encompasses nearly a quarter of the page and requests more detailed information, especially from those employees who are "aliens authorized to work." There are specific rules on when such information must be provided that should be carefully reviewed if this box is checked.

Employers must now include the employee's full name at the beginning of Section 2, at the top of the second page. The section for recording information on documentation presented by the employee now covers nearly one-third of the page and allows employers to more easily record a List A "document" that consist of multiple documents. Further, the line for recording an employee's start date has been separated from the attestation clause and makes it clear that the first day of employment is requested.

Section 3 gives employers more room to record information on documentation and a box to print the name of the person completing the Section.

The new Instructions have expanded to six pages and clearly instruct the employer to provide a copy of the Instructions to the employee with the Form. DHS also makes it clear that no box in Section 1 should be

left blank by the employee and recommends using "N/A" if not otherwise completed.

The new *Handbook* contains up-to-date information and examples of how to complete the new Form and the appearance of the documents that are considered acceptable for verification purposes. Of particular interest, however, is the new guidance provided on how to handle employees who present "new" identities and how the three-day rule for completing the Form is based on employer operations.

This article provides basic information on the new Form, but only scratches the surface of the employment authorization law and the process of completing a Form I-9. Any person tasked with completing the Form or assisting an employer with the Form should first thoroughly review the Form, the Instructions, and the *Handbook* as well as take a tour of the I-9 Central webpage.

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