

I-9 COMPLIANCE BEST PRACTICES

In most cases, when employers make mistakes on the I-9 form it is due to confusion about the law/requirements or poor follow-through – not intentional disregard of the law.

Tips on completing Form I-9

- › **Be consistent** - Establish uniform company policies regarding I-9s. Treat all people the same when announcing a job, accepting applications, interviewing, offering a job, verifying eligibility to work, and in hiring and firing.
- › Complete I-9 for ALL employees, including U.S. citizens.
- › **Do not commit document abuse**
 - Do not request more documentation than is required to show identity and employment authorization
 - Do not ask for a particular document to show identity or employment eligibility
 - Do not reject documents that appear to be genuine and belong to the employee
 - Do not treat groups of applicants differently (e.g., based on looking or sounding foreign – “look at the facts, not at the faces”) when completing the Form I-9
- › Do not ignore facts if documents appear not to be genuine or are inconsistent with statements on Form I-9 -> If employee states on I-9 that she is a USC but presents you with a green card, follow up on discrepancy
- › Do not complete the I-9 process too early -> If you complete I-9 before the hiring decision is made and you do not hire the worker, you could be subjected to charges of employment discrimination
- › Make sure employee signs Part 1, Employer signs Part 2

› **Promptly re-verify employment authorization**

Many work authorization documents (I-9 Form lists A and C) must be renewed. On the expiration date, you must re-verify employment authorization and record the new evidence of continued work authorization on the I-9 Form.

This is also a good time to be sure that the visa status of your employees is properly extended

You must accept any valid document your employee chooses to present, whether or not it is the same document provided initially. Individuals may present an unrestricted Social Security card to establish continuing employment eligibility.

- Permanent resident cards should not be re-verified
- Identity documents should not be re-verified

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Procedural Tips

› Keep I-9s on file for at least 3 years from the date of employment or for 1 year after the employee leaves the job, whichever is later. This means that you must keep I-9s on file for all current employees. You must also make the forms available to government inspectors upon request.

› Conduct preventative internal audits of the I-9 files to see if there is a pattern of violations requiring remediation.

When? → change-over in HR, anticipated sale/merger, if evidence of incorrect practices come to light

› Establish a regular training program for HR professionals regarding I-9 compliance rules.

› Establish a re-verification tickler system to ensure I-9s are checked in a timely manner.

› Centralize the I-9 Form recordkeeping process.

› Establish a backup system to ensure timely compliance with I-9 rules when a human resource professional is out of the office.

› Do not delegate I-9 responsibilities to the most junior person in the office or to the department making the hire.

› Promptly destroy records not required to be maintained.

› **Do not keep Form I-9 records with the personnel records – create a separate file**

Keeping records together could compromise the privacy of employees by allowing government inspectors to review items that are completely unrelated to the Form I-9.

Employers that want to prevent this would have to manually go through the personnel records and pull the Form I-9 paperwork, something that could cost valuable time as the employer prepares for the government inspection.

Keeping the Forms I-9 separate will also make it easier to conduct internal audits to ensure compliance with IRCA and to re-verify forms as needed.

› **Keep copies of the documents presented by the employee?**

Retaining copies of the supporting documents is voluntary unless you are an E-Verify participant. Employers can retain copies of documents and must keep the copies with the specific Form I-9. Be consistent.

Pros: Maintaining documentation could provide a good faith defense for an employer in showing that it had reason to believe a worker was authorized even if the paperwork was not properly completed.

It is easier for an employer to conduct internal audits to ensure compliance when they can see what documents were actually provided to the HR representative responsible for completion of the Form I-9.

Cons: Maintaining copies of documents leaves an unnecessary paper trail for government inspectors.

Adds to paperwork in I-9 file

› Do not refuse to hire someone just because they have work authorization with an end date

› Avoid “citizen-only” or “permanent resident-only” hiring policies unless required by law, regulation or government contract. In most cases, it is illegal to require job applicants to be U.S. citizens or have a particular immigration status.

› Be aware that U.S. citizenship is not limited to persons born in the United States – individuals born to a U.S. citizen, and those born in Puerto Rico, Guam, the Virgin Islands, the Commonwealth of Northern Mariana Islands, American Samoa, and Swains Island. Citizenship is granted to legal immigrants after they complete the naturalization process.

PREPARING FOR THE I-9 INSPECTION

ICE (Immigration Customs & Enforcement) may inspect your I-9 forms upon three days notice. Neither your consent nor a search warrant is required, but ICE must serve you with the required three day notice. Often, the notice takes the form of a written “Notice of Inspection.” In addition, ICE may ask you to waive the three day period. Usually, the three day notice period is very important to you as an employer. You may need the time to review and make copies of your I-9 forms.

In addition, before or during the I-9 inspection, ICE officials will ask you for a list of employees. Rather than providing ICE officials with copies of payroll or other records (which include information not relevant to the I-9 inspection), a list of employees (which includes the information requested by the Inspection Notice) is usually sufficient to comply with this request.

Tips for Navigating Through the I-9 Inspection Process:

- › Do not waive the three day notice period
- › Do not give consent to ICE to speak with employees
- › It's best to not have employees present during the inspection, otherwise, ICE may ask them questions about status
- › ICE may ask to use your office to review the I-9 forms. You have the discretion to grant or deny them permission to do so
- › You may insist upon a subpoena before granting ICE access to other personal information aside from I-9's (you can blame the attorney for this - “my attorney instructed me to only provide access to I-9 forms”)
- › Review and evaluate your present I-9 compliance to eliminate any major flaws. Ensure that:
 - Section 1 is completed at time of hire;
 - Verification documents are provided no later than the 3rd business day from date of hire;
 - Receipts which evidence current work authorization are being accepted and placed in the re-verification docket system;
 - Employer completed Section 2 within 3 business days of date of hire;
 - Employees are not required to produce specific documents or more documents than the law requires;
 - The I-9 forms are retained for the entire requisite period of time (1 year after employees period of employment has ended, or 3 years from date of hire, whichever is later); and
 - An adequate docketing/ tracking system is in place to ensure that employees whose work authorization will expire are re-verified.
- › Prepare a computer print-out or other simple list of all employees who worked during the period covered in the Notice of Inspection, including date of hire and termination
- › Separate those I-9 records which are requested by ICE
- › Separate out the remaining I-9 records from other personnel records and review them for completeness and technical mistakes

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Keep your I-9 records separate from other records if they have not been maintained separately, and they can be prepared for the inspection procedure. ICE should not be offered access to full personnel files of employees (unless they are served a search warrant for those records), since those files contain private data that should not be made available to the government.

Failure to complete I-9 forms for inadvertently omitted employees can be corrected at this point. ICE may view the employer's action a good faith attempt to comply.

If you discover errors in completing Section 1 of the I-9 form, you should have the employee correct the failure on the form, and initial/date the correction. With regard to errors in completing Sections 2 or 3, you should make the appropriate corrections, then initial and date each correction. While you cannot be fined for technical or procedural errors on I-9 forms unless ICE grants you an opportunity to cure the defect, you can still be fined for substantive errors without the benefit of prior notice.

After the completion of the employer's internal I-9 audit, the following steps should be taken to prepare for the ICE inspection:

- › Go through the physical premises of the employer to look for situations that might raise further questions (i.e. if there appears to be more workers onsite than I-9 forms completed).
- › Review personnel records and recordkeeping system to get a rationale for why records are maintained in certain ways, why different types of workers are classified in particular ways (e.g. independent contractors v. employees)

ICE is particularly looking for different payroll systems designed by employers for certain employees, such as cash payments as these are an indication of the employment of unauthorized workers.

- › Suspend workers for whom proper verification cannot be completed prior to the inspection

You must be sensitive to the labor law, union contracts, and discrimination in terminating an employee, even when unauthorized employment violations are suspected. If it is clear that an employee has not properly completed the verification procedure or has not produced acceptable employment verification documentation, the employer should call in the employee to him or her that it appears that the employee has not properly documented their right to work in the U.S. The employee should be asked to produce proper employment authorization documentation by a date prior to the inspection or be suspended from employment on that date. The employee's case can then be raised with ICE. Following this procedure probably meets the employer's duty to inquire about suspicious employment authorization cases, while protecting the employer under labor and discrimination laws and union contracts.

- › Decide on a response to ICE Requests for Other Personnel Records

Because most employers will comply with an inspection request for I-9 forms without the need for a subpoena or warrant, the real issue that needs to be resolved by the employer is an ICE request for further documents. Most employers should be reluctant to needlessly expose personnel records to ICE. The expense of complying with such a broad request and the possibility that other types of violations might be exposed that have nothing to do with the I-9 compliance should be considered before consenting to a broad ICE request for personnel records.

ICE may be agreeable to limit its initial request for records, which will have been framed in extremely broad terms. For example, providing ICE with federal or state withholding records listing the names of employees for whom payroll taxes were withheld might satisfy ICE in cases in which it has no cause to suspect that the employer may be paying employees off the books. ICE can compare this list to the available I-9 forms to determine whether there appear to be sufficient I-9 forms for the numbers of employees. This compromise serves to keep ICE inspectors out of individual employee personnel files while providing them with a basis to evaluate the completeness of I-9 forms.

- › Arrange for the ICE Inspector to be Accompanied at All Times When on the Employer's Premises

If an employer gives ICE permission to enter its premises to inspect the verification records, that permission is limited strictly to the inspection of such records. ICE agents should not take the permission to enter for this limited purpose to constitute permission to approach and canvas employees on the premises about their right to be in the U.S. or to constitute permission to examine other employer payroll or personnel records.

DOCUMENT RETENTION IN THE IMMIGRATION CONTEXT

Immigration Document	How Long Should the Document be Kept	Where Should the Document be Stored	Notes
I-9 Employment Eligibility Verification	Once employment has ended, keep I-9 for 3 years after date of hire, or 1 year after the date employment is terminated. For example, if an employee retires after 15 years, his or her Form I-9 will be stored for a total of 16 years. Keep I-9 on file for all current employees.	I-9s can be retained in paper, microfilm, microfiche, or electronic formats. You may retain completed paper forms onsite, or at an off-site storage facility, as long as you are able to present the Forms I-9 within 3 days of an inspection request. You may also use any electronic record-keeping, attestation, and retention system that complies with Dept. of Homeland Security standards.	We recommend that employers keep their I-9s in a separate location from personnel records. Several government agencies have the authority to inspect your I-9 files, and by keeping them separate you are limiting the government's access to your unrelated field.
Labor Condition Application (LCA)/ Public Access File¹	An employer must retain copies of the LCA and the public inspection file for 1 year beyond the end of the period of employment specified on the LCA or 1 year from the date the LCA is withdrawn, except in the case of Department of Labor (DOL) enforcement action.	The inspection file should be kept at either the employer's principal place of business or the location where the employee works.	We recommend that this documentation be kept separate from the employee's personnel records. An employer must also retain payroll records for a period of three years from the date the records were created. Payroll records for each employee must include the following: employee full name; employee home address; employee's occupation; employee's rate of pay; hours worked by the employee each day and each week, if paid on other than a salary basis; total additions to or deductions from pay each pay period by employee; and total wages paid each pay period, date of pay and pay period covered by the payment by employee.

¹As of October, 1991, all employers using the H-1B category (as well as H-1B1 and E-3 categories) must first file a Labor Condition Application (LCA) with the U.S. Department of Labor. An employer should have a public inspection file for each LCA submitted. The inspection file should contain the following: a copy of the LCA (Form ETA 9035); documentation that states the wage rate to be paid to the H-1B employee; a clear explanation of the system that was used to set the "actual wage" for the occupation in which the H-1B employee will be engaged; documentation that the employer relied on to determine the "prevailing wage" for the occupation; and documents establishing how the employer complied with the notice requirement

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Immigration Document	How Long Should the Document be Kept	Where Should the Document be Stored	Notes
Employment-Based Nonimmigrant Visa Petition	The petitions should remain on file for as long as the petition is valid. In addition, while there is no legal requirement to do so, employers should consider retaining petitions until the employee has attained permanent resident status or is no longer employed.	We recommend that petitions be stored on-site in the event of a worksite inspection. They may be stored either electronically or in paper format.	
PERM Labor Certification and PERM Audit File	The employer is required to retain the labor certification application and all supporting documentation for 5 years from the date of filing the ETA Form 9089.	It is not necessary for an employer to keep its PERM files onsite. They can be retained by the employer's lawyers. The employer should be able to access the files if needed.	The DOL can begin the process of revoking labor certification beyond 5 years. Thus, the employer may wish to consider retention beyond the 5 year period, in the event that it may need to defend against a revocation proceeding.
I-140 Immigrant Petition for Alien Worker	While there is no retention requirement, employers should consider retaining petitions until the employee has attained permanent resident status.	We recommend that petitions be stored on-site in the event of a worksite inspection. They may be stored either electronically or in paper format.	

