

EMPLOYMENT ELIGIBILITY VERIFICATION: I-9 AND IMMIGRATION COMPLIANCE

Farm Credit East

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The New Enforcement Mentality

Enforcement emphasis running through all aspects of immigration:

- OLD approach: I-9 raids and round-ups
FOCUS: hospitality, agriculture, construction, manufacturing
- NOW: Worksite enforcement across all industries, states and company sizes
FOCUS: EMPLOYER LIABILITY

Enforcement initiatives expanding rapidly

- Worksite enforcement units embedded in Service Centers
- New ICE initiatives – Notices of Inspection (NOI) to broad range of employers
- New centralized unit to conduct I-9 inspections

Immigration Reform & Control Act of 1986

CHANGE IN APPROACH TO UNAUTHORIZED EMPLOYMENT

- Amnesty for illegal aliens who were long-term residents of the U.S., Allowed many to become legal residents

- **Trade-off:** Limit immigration by future removing the “employment magnet” through sanctions for US employers who hired unauthorized workers

TWO COMPETING MANDATES

Employment verification requirement on employers for new hires

- Sanctions for failure to complete or incorrectly complete verification form
- Sanctions for hiring or continuing to employ illegal aliens

Penalties for employment discrimination based on citizenship or national origin

- Sanctions might cause discrimination against foreign-appearing workers
- Can't discriminate in the employment verification process

Employment Eligibility Sanctions



Significant and increasing penalties: see Handbook for Employers p. 37.

- Civil Penalties: Unlawful Employment:
 - Hiring/continuing to employ unauthorized aliens \$ 375 – \$16,000 per violation
 - Failing to comply with I-9 requirements: \$110 - \$1100
- Criminal penalties: - Pattern or practice of violations
 - Up to \$3,000 per employee and/or 6 months' imprisonment
- Document Fraud: Fraud or false statements or misuse of visas, immigration & identity documents
 - Civil fraud: \$375 - \$6500 per document
 - Criminal fraud: fines, imprisonment up to 5 years, forfeiture of assets
- Unlawful Discrimination: \$375 - \$16,000 per individual & other remedies
 - Recent IBM case: \$44,140 for citizenship preferences In ads

Fine calculation: six-figure assessments common, \$11 million Walmart fine

- Aggravating / mitigating factors: business size, good faith, seriousness of offense; if unauthorized aliens were employed, history of employer



Non-Discrimination Requirements

Office of Special Counsel for Immigration-Related Unfair Employment Practices, U.S.
Department of Justice

- Enforces the prohibitions on citizenship and nationality discrimination
- Policies on discrimination prevent employers from asking simple questions about work authorization

Beware of over-documentation!

- Can I ask to see the employee's green card if they say they have one?
- **** THE EMPLOYER MAY NEVER ASK TO SEE SPECIFIC DOCUMENTS ****
- Employer must accept documents if they appear to reasonably relate to the person and appear to be valid
- Exception: if a document presented does not appear to be valid or is expired
- Form M-396, *A Guide to Selected U.S. Travel and Identity Documents* (2008)

CONSISTENT PROCESS IS THE EMPLOYER'S PROTECTION



Discrimination

The prejudicial treatment or consideration of a person, racial group, minority, etc. based on category rather than individual characteristics of members of

The Hiring Process: The Problem

“U.S. Workers” are protected from employment discrimination based on national origin and citizenship, as well as other Title VII grounds.

Employers need to determine an applicant’s immigration status during the hiring process without potential liability for discrimination

*** *“Look at the Facts, Not at the Faces!”* ***

What you CANNOT Ask:

- Are you a U.S. Citizen?
- What country are you from?
- Do you have a “green card”?
- Do you have a social security card?
- If you’re not a USC, what visa do you hold?



The Hiring Process: Suggestions

DOJ Office of Special Counsel for Immigration-Related Unfair Employment Practices guidance disconnected from the reality of the actual hiring process

Official Version: Very Confusing:

“Do you have unrestricted work authorization for the U.S., i.e. are you a USC or national, a U.S. permanent resident, an asylee, a refugee, or a temporary resident of the US?”

Clearer Version:

“Do you currently have unrestricted work authorization for the US, or would you require sponsorship for a working visa?”

☐ I have unrestricted work authorization now and would NOT require sponsorship

☐ I have work authorization now but would need sponsorship in the future

☐ I would require sponsorship for a working visa



Employment Eligibility Verification Basics – The Form from Hell

NEW Form I-9 version: 7/17/2017

- Same information as before – but improved graphics and organization

No single document available to establish identity and work authorization

- Some visas include work authorization, others do not
- Some foreign employees need EADs, others do not
- Asylee / refugee paperwork may substitute for visa or EAD

Form I-9 must be completed within three days of hire

- Employee completes Part I on Day 1
- Employer completes Part II by end of Day 3 (the “Thursday rule”)
- For Part II, employee chooses and presents to employer documents from authorized list that establish
 - Identity
 - Employment eligibility

FORM I-9:

Section 1 - Employee Verification

Section 1. Employee Information and Attestation *(Employees must complete and sign Section 1 of Form I-9 no later than the **first day of employment**, but not before accepting a job offer.)*

Last Name (Family Name) ?		First Name (Given Name) ?		Middle Initial ?	Other Last Names Used (if any) ?	
Address (Street Number and Name) ?			Apt. Number ?	City or Town ?		State ? <div style="border: 1px solid black; width: 20px; height: 20px; margin: 0 auto; text-align: center;">▼</div>
Date of Birth (mm/dd/yyyy) ?	U.S. Social Security Number ?		Employee's E-mail Address ?		Employee's Telephone Number ?	

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.

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

<input type="checkbox"/> 1. A citizen of the United States ?			
<input type="checkbox"/> 2. A noncitizen national of the United States <i>(See instructions)</i> ?			
<input type="checkbox"/> 3. A lawful permanent resident ? (Alien Registration Number/USCIS Number): ? _____			
<input type="checkbox"/> 4. An alien authorized to work ? until (expiration date, if applicable, mm/dd/yyyy): ? _____ Some aliens may write "N/A" in the expiration date field. <i>(See instructions)</i>			
<p><i>Aliens authorized to work must provide only one of the following document numbers to complete Form I-9: An Alien Registration Number/USCIS Number OR Form I-94 Admission Number OR Foreign Passport Number.</i></p> <p>1. Alien Registration Number/USCIS Number: ? _____ OR 2. Form I-94 Admission Number: ? _____ OR 3. Foreign Passport Number: ? _____ Country of Issuance: ? _____</p>			
<div style="border: 1px solid black; padding: 10px; width: fit-content; margin: 0 auto;"> QR Code - Section 1 Do Not Write In This Space </div>			
<table border="1" style="width: 100%;"> <tr> <td>Signature of Employee ?</td> <td>Today's Date (mm/dd/yyyy) ?</td> </tr> </table>		Signature of Employee ?	Today's Date (mm/dd/yyyy) ?
Signature of Employee ?	Today's Date (mm/dd/yyyy) ?		

- Must be completely filled out / MUST GIVE EMPLOYEE I-9 INSTRUCTIONS
- SSN box is OPTIONAL unless employer using E-Verify
- Employee attestation boxes CRITICAL: → re-verification date

FORM I-9:

Section 1 - Employee Verification

Significantly improved graphics over previous form

- Expanded room for all required fields
- No more controversy over where the employee is to sign
- Clearer alternatives for employee's immigration status
- Notes box to clarify information
- Help Button (?) on most fields with clarifications
- Drop Down Menu



Still challenges to correct completion

- Must be completely filled out / **MUST GIVE EMPLOYEE I-9 INSTRUCTIONS**
- SSN box is **OPTIONAL** unless employer is using E-Verify
- Employee attestation boxes **CRITICAL** → reverification date
- Employer's obligation to make sure Employee completely fills out Section I

Section 2 - Employer Verification

Employee Info from Section 1 ?		Last Name (Family Name) ?		First Name (Given Name) ?		M.I. ?		Citizenship/Immigration Status ? <input type="button" value="v"/>	
List A		OR		List B		AND		List C	
Identity and Employment Authorization				Identity				Employment Authorization	
Document Title ?				Document Title ?				Document Title ?	
Issuing Authority ?				Issuing Authority ?				Issuing Authority ?	
Document Number ?				Document Number ?				Document Number ?	
Expiration Date (if any)(mm/dd/yyyy) ?				Expiration Date (if any)(mm/dd/yyyy) ?				Expiration Date (if any)(mm/dd/yyyy) ?	
Document Title ? <input type="button" value="v"/>				Additional Information ? 				QR Code - Sections 2 & 3 Do Not Write In This Space	
Issuing Authority ? <input type="button" value="v"/>									
Document Number ?									
Expiration Date (if any)(mm/dd/yyyy) ?									
Document Title ? <input type="button" value="v"/>									
Issuing Authority ? <input type="button" value="v"/>									
Document Number ?									
Expiration Date (if any)(mm/dd/yyyy) ?									

- Some document expiration dates require re-verification; others do not
- Employer may have to complete AFTER start date if employee completes early
- Places for two documents do not mean two documents are required: sometimes need two documents working together to establish work authorization

FORM I-9:

Section 2 - Employer Verification

Certification: I attest, under penalty of perjury, that (1) I have examined the document(s) presented by the above-named employee, (2) the above-listed document(s) appear to be genuine and to relate to the employee named, and (3) to the best of my knowledge the employee is authorized to work in the United States.

The employee's first day of employment (mm/dd/yyyy): (See instructions for exemptions)

Signature of Employer or Authorized Representative <input type="text"/>		Today's Date(mm/dd/yyyy) <input type="text"/>	Title of Employer or Authorized Representative <input type="text"/>	
Last Name of Employer or Authorized Representative <input type="text"/>		First Name of Employer or Authorized Representative <input type="text"/>		Employer's Business or Organization Name <input type="text"/>
Employer's Business or Organization Address (Street Number and Name) <input type="text"/>			City or Town <input type="text"/>	State <input type="text"/> <input type="button" value="v"/>
			ZIP Code <input type="text"/>	

FORM I-9:

Section 2 - Employer Verification

Still challenges to correct completion

- List B: Virtually no acceptable identity documents if no drivers' license
- E-Verify employers must remember to get List B document with photo

Employer **MUST** accept a document if:

- It appears to be genuine and
- It relates to the individual presenting it.





FORM I-9: Section 3 - Reverification

Section 3. Reverification and Rehires *(To be completed and signed by employer or authorized representative.)*

A. New Name (if applicable) ?			B. Date of Rehire (if applicable)
Last Name (Family Name) ?	First Name (Given Name) ?	Middle Initial ?	Date (mm/dd/yyyy) ?

C. If the employee's previous grant of employment authorization has expired, provide the information for the document or receipt that establishes continuing employment authorization in the space provided below.

Document Title ? <div>▼</div>	Document Number ?	Expiration Date (if any) (mm/dd/yyyy) ?
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I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.

Signature of Employer or Authorized Representative ?	Today's Date (mm/dd/yyyy) ?	Name of Employer or Authorized Representative ?
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- Re-verification pertains to work authorization ONLY
- May present a different work authorization document than originally presented
- Do not re-verify early, even if green card arrives or status changes
- Keep re-verification I-9s separate from others, in date order for re-verification
- Do not re-verify on expired Form I-9; must fill out NEW I-9

FORM I-9: General FAQ'S

CAN I COMPLETE AN I-9 EARLIER THAN DAY 1?

- Yes, but may NOT complete before a hiring decision is made
- May complete earlier if nondiscriminatory business purpose consistently applied

Example:

After hiring decision but before mandatory physical & drug test

FORM I-9: General FAQ'S

MAY I ACCEPT RECEIPTS?

- MAY ACCEPT A RECEIPT FOR AN IDENTITY DOCUMENT
- MAY NOT ACCEPT A RECEIPT FOR AN INITIAL WORK DOCUMENT
- MAY ACCEPT A RECEIPT FOR A LOST, STOLEN OR DESTROYED WORK DOCUMENT
- MAY ACCEPT RECEIPT FOR REWNAL OF CERTAIN EMPLOYMENT AUTHORIZATION DOCUMENTS (NOVEMBER 2016) FOR 180 DAYS.
- EXCEPTIONS FOR TPS, ASYLEES, REFUGEES
- MAY ACCEPT A RECEIPT FOR A OPT STEM EXTENSION

EXTENSIVE DISCUSSION IN HANDBOOK, P.7-8

FORM I-9: General FAQ'S

SHOULD I KEEP COPIES OF THE DOCUMENTS I LOOK AT?

Current View:
YES (IN MOST CASES)

- CURRENT USCIS GUIDANCE: MAKE COPIES
- REQUIRED IF AN E-VERIFY EMPLOYER AND EMPLOYEE PRESENTS A GC

Previously two schools of thought: avoiding documentation of errors vs. confirming correct process

FORM I-9: Common Pitfalls for the Employer



Most common mistakes by employers during the I-9 process:

- ✓ Employer specifies which document the employee is to produce (BUT sometimes this is unavoidable, e.g., H-1B transfers!)
- ✓ Employer requests or records too many documents (Eager new hires may volunteer too many documents: do not record!)
- ✓ Employer fills out the I-9 form too early, before hiring decision is documented
- ✓ Employer fills out Part I for the employee / lack of employee signature
- ✓ Employer fails to record expiration dates of work authorization documents to permit proper reverification

Documentation errors alone will not give rise to a claim of employment discrimination unless there is proof of an employer's intent to discriminate.

- Employer still at risk for unauthorized employment due to documentation errors
- Does not excuse failure to complete I-9 at all

FORM I-9: Common Problems



“Jose” completed his I-9 and presented documents which appear to be valid. I think he’s illegal, though. What should I do?

- **NOTHING!** You have complied with your obligations under the law
- **Exception:** if you have “constructive knowledge” from a reliable source that Jose is not work authorized, i.e., he asks for visa sponsorship

Maria told me Jose is illegal and that his GC was a fake. What should I do?

- Do you have “constructive knowledge” based on what Maria said? Is she reliable? Does she have reason to know? Do any other facts support her statement?
- If the documents appear valid, and no other indicators exist: do nothing.

FORM I-9: More Common Problems



I'm hiring independent contractors. Do I have to do their I-9s?

- No, but the company providing the IC's should do so. Company should provide assurances that I-9s have been correctly completed

Can I outsource completion of my I-9's?

- Yes, but employer assumes all liability (Employee must be physically present with examiner of documents)

I am employing a worker to perform work outside the U.S., do I need to complete an I-9?

- No, I-9 requirements only apply to work performed within the U.S.

A graphic on the left side of the slide. It features a photograph of two men in light blue shirts, one pointing at a computer screen. Overlaid on the image is the text 'IMMIGRATION COMPLIANCE' in large, bold, blue capital letters.

IMMIGRATION COMPLIANCE

Basic I-9 Compliance: Best Practices

- The formal ICE Raid usually stems from initial I-9 Audit
- Require every new employee to complete Section I on first day of employment
- Employee must provide verification documents by end of 3rd work day or be terminated
- Employee may present any acceptable document(s) listed: do not request a specific document
- Make copies of both sides of all documents
- If employee not a USC, note the visa expiration date and calendar (90 days)
- Keep I-9's separate from other personnel/payroll records
- Train hiring managers on I-9 procedures regularly and document training

FORM I-9: Finding Answers



Handbook for Employers

Guidance for Completing Form I-9
(Employment Eligibility Verification Form)



M-274 (Rev. 06/30/13) N

USCIS Handbook for Employers (M-274): excellent current resource

- ✓ Examples of many types of documents used in I-9 process
- ✓ Answers questions not on I-9 instructions
- H-1B visas
 - Transfers/portability: original I-94 from previous H employment and proof of filing of I-129 for new employer, AC-21 annotation on the I-9
 - Extensions: timely filing extends work authorization 240 days, annotate extension in I-9 margin
- F-1 and J-1 issues
 - Documentation of CPT, OPT
 - Documentation of “cap gap” status for pending H-1B visas for F-1 students
- Employment “incident to status”
 - Some visas include work authorization, some don't: which is which??
 - Asylee may use I-94 or I-94A with asylee approval stamp as List C document

FORM I-9: Finding Answers



Handbook for Employers

Guidance for Completing Form I-9
(Employment Eligibility Verification Form)



U.S. Citizenship
and Immigration
Services

M-274 (Rev. 01/02/17)

- Green cards: Do not revalidate any GC with an expiration date
 - The CARD expires, but the STATUS does not
 - Should NOT revalidate Conditional GC's received through marriage
 - Must revalidate if presented with temporary GC stamp in passport

Check regularly for updates to the Handbook:
they are NOT announced

www.uscis.gov/files/form/m-274.pdf

FORM I-9: Maintaining Records



Maintain I-9 copies for statutory required period – Electronic or Hard Copies

- ✓ At least 3 years from the date of employment or for 1 year after the employee leaves the job, whichever is later
- ✓ Employer should promptly delete I-9s when possible

Maintain I-9 forms separately from individual personnel records

- ✓ Keeping I-9s in personnel files compromises privacy of employees: allows government inspectors to review items unrelated to Form I-9
- ✓ Saves valuable time in case Forms I-9 are requested for audit (3 days' notice)
- ✓ Easier to conduct internal audits to ensure compliance with IRCA
- ✓ Easier to organize for re-verification as needed

Create tickler system for timely I-9 reverification & record purging

Amendments: Never backdate, never ever hide a change

- ✓ Draw line through incorrect information - Initial and date all changes - note reason if possible
- ✓ If need to complete new I-9, attached old one to updated version



I-9 AUDITS: When the Government Knocks...

Employer's I-9s must be produced within three days of service of the Notice of Inspection

- Mail inspection; I-9s are to be sent to a local ICE office
Other documents may be requested, such as payroll list
- On-site inspection: when ICE hopes to gather other evidence, e.g., proof of presence of undocumented workers,
- Neither consent nor a warrant are required for the I-9 inspection
 - Consent/warrant IS required for other information-gathering:
 - Do not give consent without warrant

What immediate defenses does an employer have?

- ICE agents may make unannounced visits and request I-9s or information:
Do not consent to visit; notify attorney, insist on 3 days' notice
- Insist on the statutory 3 days' notice for production of I-9s, even by mail:
- Review all I-9s; correct if necessary; sign & date corrections;
- Limit geographic scope of agent on-site: agent does not have right to roam premises or talk to other employees

I-9 AUDITS: Managing the Results

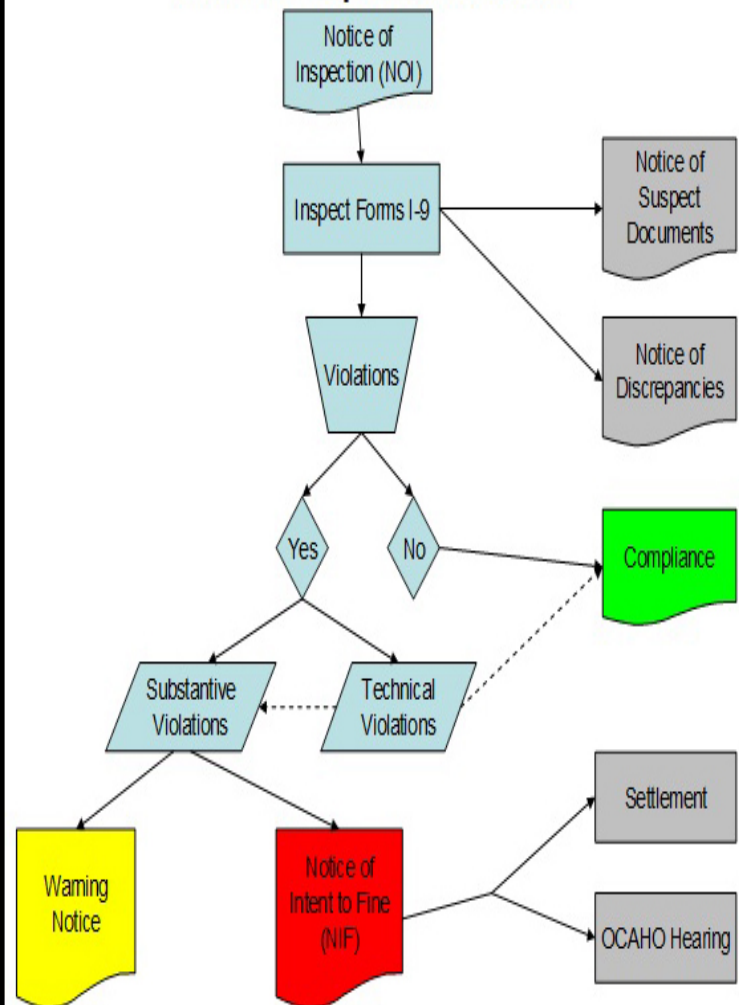
Inspections may lead to different ICE notices:

- ✓ Compliance letter: all is well with an employer's I-9 forms
- ✓ Notice of Suspect Documents: an employee may be unauthorized to work; need for additional evidence to demonstrate work authorization; penalties for continuing to employ
- ✓ Notice of Discrepancies: ICE is unable to determine work authorization for an employee; employee needs to produce additional documents
- ✓ Notice of Technical or Procedural Failures: 10 days to correct identified violations; failure to correct substantive violation
- ✓ Warning Notice: errors discovered not meriting fines; expect future compliance
- ✓ Notice of Intent to Fine (NIF): issued for substantive, uncorrected technical, "knowing hire" and "continuing to employ violations"

NIF comes with charging documents setting forth the violations

- Negotiate settlement with ICE or request OCAHO hearing within 30 days
- No action: ICE Final Order with penalties or to ALJ for adjudicative process

Form I-9 Inspection Process



I-9 AUDITS: Prevention Planning



Employers can raise in their defense the existence and utilization of a written Employer Compliance Policy

- Procedure for completion of I-9s; training of new staff, internal QA
- Procedure for corrections of errors and for authorized updates (e.g., H-1B portability case approved, H-1B extension approved, etc.)
- Clear statements of policy on
 - employee failure to deliver documents timely for verification;
 - responses to SSA “no match” letters; or
 - requests for visa services inconsistent with status listed on I-9.
- Development of a tickler system for reverification; perform reverifications
- Procedure for retention, storage and purging of I-9s
- Self-audit procedures: internal or by third party?
 - Many sources of self-audit checklists (SHRM, BLR, etc.)
 - Caution: self-audit can lead to continuation of original mistakes

USEFUL WEBSITES



**WHITEMAN
OSTERMAN
& HANNA LLP**
ATTORNEYS AT LAW

U.S. Citizenship & Immigration Services
(information for employers, forms,
I-9 Central).

www.uscis.gov

E-Verify Information through USCIS
(extensive information, FAQs, link to
sign up, manuals)

www.uscis.gov/everify

Social Security Administration

www.ssa.gov

Immigration & Customs Enforcement
(SEVIS, Guide to Documents, etc.)

www.ice.gov

**Office of Special Counsel for immigration-
Related Unfair Employment Practices**
U.S. Dept. of Justice

www.usdoj.gov/crt/osc

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The information in this presentation is intended as general background information on immigration law and employment eligibility issues. It is not to be considered as legal advice with regard to any specific immigration issue. Immigration law changes often and information becomes rapidly outdated. Please consult your immigration counsel before taking action on immigration matters.

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