

I-9 Forms: A Guide to Employment Verification

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Take heed: There's more to an I-9 than just filling in every line

The Immigration Reform and Control Act prohibits employers from knowingly hiring, recruiting, referring, or continuing the employment of aliens who are not authorized to work in the United States because they have entered the country illegally or their immigration status does not permit employment.

The I-9 form created under IRCA is required to be completed by employers to keep them from knowingly breaking the law. Employers must make a reasonable effort to verify documentation used in completing the I-9 form to prove an individual's identity, as well as his/her eligibility to be employed in the United States.

When it comes to completing Form I-9s, employers can face serious charges for “document abuse,” such as demanding that new hires produce more or different identity documents than the I-9 requires. But that’s not all employers need to worry about now. Discrimination charges are also a concern.

The U.S. Department of Justice recently issued proposed regulations that make clear I-9 discrimination means treating people differently based on national origin, regardless of the explanation or whether it’s due to personal animus.

“Now more than ever,” says immigration attorney John Fay of LawLogix, “HR and hiring managers need to take stock of their I-9 and E-Verify policies and procedures, with a particular focus on avoiding discriminatory practices. Too often, employers spend all of their time trying to be better ‘I-9 enforcers’ without taking into account the other side of the coin—ensuring that employees are not treated differently based on their citizenship status, national origin, or immigration status.”

Download Form I-9 now

The new I-9 is a “smart” PDF—available online and featuring dropdown menus, hover text with instructions and error messages. Despite the hover text feature, a complete set of printed instructions are available.

The form is “fillable and savable,” according to U.S. Citizenship and Immigration Services (USCIS). That means it can be completed on a computer, printed and filed. It’s also fine to simply print it out to be completed by hand and then filed.

Caution: If you choose to print out I-9s to be completed by hand, take care. That bypasses all the “smart” features, such as dropdown fields that must be completed. Employers will be liable for forms that are incomplete.

As smart as the new I-9 is, it’s not a fully electronic form. For example, both the employer’s representative and employee must physically sign a printed out, paper document. Once completed, employers may scan the forms for electronic storage.

As always, employers are responsible for retaining completed I-9s; they are not to be submitted to USCIS or Immigration and Customs Enforcement.

Download the new I-9, read detailed instructions on how to complete it and learn more at www.uscis.gov/i-9.

The E-Verify system

The government’s attempt to combat illegal immigration at the workplace door has met with stiff resistance. The Bush administration attempted to use “no match” letters sent out by the Social Security Administration when names and Social Security numbers on I-9 forms failed to match W-2s and other tax information. But a court order suspended the program, and in 2009 the Obama administration rescinded the “no-match” letter program.

The DHS now advocates use of the E-Verify system, which allows employers to file I-9 information online. Currently, federal law requires only the federal government and employers with federal contracts worth more than \$100,000 to use E-Verify to check the work eligibility status of newly hired employees, as well as current employees who work directly on a contract. The requirement applies to federal contracts and subcontracts let on or after Sept. 8, 2009. Also, several states, such as Arizona, Georgia, Mississippi, South Carolina and Utah, require some employers to use the system.

Any employer may voluntarily use the E-Verify system. The USCIS offers compliance detail on E-Verify, including who must comply and how, at www.uscis.gov/everify.

Coverage

- All public-sector and private-sector employers, regardless of size or number of employees, must verify the citizenship or employment status of new hires.
- Employers with three or fewer employees are exempt from IRCA's anti-discrimination provisions.
- Employers with more than three but fewer than 15 employees may not discriminate according to citizenship status or national origin.
- Employers with 15 or more employees are prohibited from engaging in national origin discrimination under Title VII and bias based on citizenship status under IRCA.

- Almost all full-time, part-time, and temporary workers must be verified.
- Protected individuals include U.S. citizens or nationals, permanent resident aliens, persons granted the status of aliens lawfully admitted for temporary residence, aliens admitted as refugees, and aliens granted asylum.
- Individuals not protected include aliens who fail to apply for naturalization within six months of the date they first become eligible to apply for naturalization and those aliens who have made a timely application but have not been naturalized within two years after the date of application.

Verification requirements and acceptable documents

When an applicant is hired, the employer must sign a Form I-9 attesting that it has examined appropriate documents, provided by the applicant, which verify the applicant's identity and authorization to work in the United States. The applicant must also attest on the form that he/she qualifies for employment.

Section 1 — Employee Information and Verification must be completed by employees on their first day of work.

Employers must complete *Section 2* — Employer Review and Verification within three business days of the date employment begins. Although verification must be done within three days of hire, it could be extended to 90 days if the employee presents a receipt proving that an application for replacement of the authorization document has been filed.

If employees are hired for fewer than three days, Sections 1 and 2 of the I-9 form must be completed at the time of hire.

Verification is determined by reviewing one document from List "A" or one original document from each of Lists "B" and "C."

You are not permitted to accept any expired documents for proof of identification or work authorization. Finally, you must use the new I-9 form for any reverifications of existing employees.

List "A" documents show identity and authorization to work.

- U.S. Passport or U.S. Passport Card
- Permanent Resident Card or Alien Registration Receipt Card (Form I-551)
- Foreign passport that contains a temporary I-551 stamp or temporary I-551 printed notation on a machine-readable immigrant visa
- Employment Authorization Document that contains a photograph (Form I-766)

- In the case of a nonimmigrant alien authorized to work for a specific employer incident to status, a foreign passport with Form I-94 or Form I-94A bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, as long as the period of endorsement has not yet expired and the proposed employment is not in conflict with any restriction or limitations identified on the form
- Passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI

List "B" documents establish identity.

- Driver's license or ID card issued by a State or outlying possession of the United States, provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address
- ID card issued by federal, state, or local government agencies or entities, provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address
- School ID card with a photograph
- Voter's registration card
- U.S. Military card or draft record
- Military dependent's ID card
- U.S. Coast Guard Merchant Mariner Card
- Native American tribal document
- Driver's license issued by a Canadian government authority

The following documents may be used by persons under age 18 who are unable to present a document listed above.

- School record or report card
- Clinic, doctor, or hospital record
- Day-care or nursery school record

List "C" documents establish employment eligibility.

- Social Security Account Number card other than one that specifies on the face that the issuance of the card does not authorize employment in the United States

- Certification of Birth Abroad issued by the Department of State (Form FS-545)
- Certification of Report of Birth issued by the Department of State (Form DS-1350)
- Original or certified copy of birth certificate issued by a State, county, municipal authority, or territory of the United States bearing an official seal
- Native American tribal document
- U.S. Citizen ID card (Form I-197)
- Identification card for use of Resident Citizen in the United States (Form I-179)
- Employment authorization document issued by the Department of Homeland Security

Verification exemptions

Employers do not need to complete a Form I-9 for persons who are:

- hired before November 7, 1986, who are continuing in their employment, and have a reasonable expectation of employment at all times;
- employed for casual domestic work in a private home on a sporadic, irregular, or intermittent basis;
- independent contractors; or
- providing labor to you who are employed by a contractor providing contract services (e.g., employee leasing or temporary agencies).

Reverification requirements

When a current employee's work authorization expires, you must reverify his/her employment eligibility. You may use Section 3 of the Form I-9, or, if Section 3 has already been used for a previous reverification or update, use a new Form I-9. The employee must present a document that shows either an extension of the employee's initial employment authorization or new work authorization. If the employee cannot provide you with proof of current work authorization (e.g., any document from List A or List C), you cannot continue to employ that person. (Note: List B identity documents, such as a driver's license, should not be reverified when they expire.)

You must reverify an employee's employment eligibility no later than the date the employee's work authorization expires.

When you rehire a former employee, you must ensure that he/she is still authorized to work. You may do this by completing a new Form I-9 or you may reverify or update the original form by completing Section 3.

If you rehire an employee within three years of the initial date of hire, and the employee is still eligible to work on the same basis as when the original Form I-9 was completed, you may update on the employee's original Form I-9 or on a new Form I-9.

To update, you must:

1. Record the date of rehire;
2. Sign and date Section 3; and
3. If you are updating on a new Form I-9, write the employee's name in Section 1.

If you rehire the employee within three years of the initial date of hire, and the employee's previous grant of work authorization has expired, but he/she is currently eligible to work on a different basis or under a new grant of work authorization than when the original Form I-9 was completed, you may reverify on the employee's original Form I-9 (or on a new Form I-9 if Section 3 of the original has already been used).

To reverify, you must:

1. Record the date of rehire;
2. Record the document title, number, and expiration date (if any) of any document(s) presented;
3. Sign and date Section 3; and
4. If you are reverifying on a new Form I-9, write the employee's name in Section 1.

Employers always have the option of completing Sections 1 and 2 of a new Form I-9 instead of completing Section 3 when rehiring employees.

Non-discrimination provisions

IRCA prohibits employment discrimination based on national origin and citizenship status. An employer cannot request more or different documents than required to verify status, nor can it refuse to accept documents that "reasonably appear to be genuine."

Other signs of discrimination include: asking employees with a foreign accent to prove U.S. citizenship but sometimes waiving this procedure for white employees; and photocopying documents from some applicants and not from others. It is also discriminatory to threaten, intimidate, or retaliate against a person who has filed or plans to file a discrimination charge.

Record-keeping requirements

I-9 forms must be kept for three years from the date of hire or one year from the date of termination, whichever is longer. If the employee has been with the company for more than three years, you must retain the I-9 form for one year after termination. If the employee has been with your company for less than three years, determine which date is later—three years after the date of hire or one year after the employee left.

When a person who was previously employed is rehired and the original Form I-9 was updated, it must be kept for three years from the initial date it was completed or one year after the employee is terminated, whichever is later. If a new I-9 form is completed, retain the document according to the new date listed in the Certification section of Section 2.

Employers who use a state employment agency must retain the agency's statement that certifies the applicant's eligibility for the same time periods as above.

Completed I-9 forms should be kept in a locked cabinet separate from all other documents. Only those with a "need to know" should have access to these files.

In 2010, the U.S. Department of Homeland Security (DHS) issued final regulations that give employers greater flexibility to electronically sign and store their Form I-9s. The rules say you can use a paper I-9 system, electronic system or a combination of both. Plus, the rules clarify you must complete I-9s within three business days (not calendar days) of an employee's hire date.

The final rule provides additional flexibility for employers—including more options for data compression, fewer storage requirements and greater electronic storage flexibility.

Penalties

Employers that violate immigration law face large civil monetary penalties, which are sometimes raised by the Department of Homeland Security and the Department of Justice to account for inflation. There are several categories of violations:

- Penalties for failing to comply with the employment eligibility verification process
- Penalties for document fraud (e.g., forging or altering documents for I-9 purposes)
- Penalties for document fraud related to preparing, filing, or assisting others in preparing or filing falsely made or fraudulent documents
- Penalties for unfair immigration-related practices (e.g., discriminating against applicants or employees based on nationality or citizenship status; refusing to accept permissible documents presented by an employee in compliance with Form I-9 requirements)
- Penalties for participants in the government's electronic employment eligibility program who fail to notify the DHS of the inability to confirm an employee's employment eligibility.

Frequently Asked Questions

1. What are the employment verification requirements of IRCA?

IRCA requires that when an applicant is hired, an employer must sign a Form I-9 attesting that it has examined appropriate documents, provided by the applicant, which verify the applicant's identity and authorization to work in the United States. The applicant must also

attest on the form that he/she qualifies for employment. Verification must be done within three days of hire, but could be extended to 90 days if the employee presents a receipt proving that an application for replacement of the authorization document has been filed.

2. Must employers complete an I-9 form for everyone who applies for a job?

No. Employers need to complete I-9 form only for people they actually hire. For purposes of the I-9 rules, a person is "hired" when he/she begins work for wages or other compensation.

3. How long must I-9s be kept for terminated employees?

Verification forms must be kept for three years from the date of hire, or one year from the date of termination, whichever is longer.

4. Is an employer responsible for knowing whether the documents shown for the I-9 are falsified?

The general rule of thumb is that employers must make reasonable efforts to ascertain the legitimacy of such forms. But if later events turn up fraud on the part of the employee, the employer is not automatically liable.

Employers can fall into several other traps where I-9 documents are concerned. You've got to check the applicable documents for proof within three days of employment, or obtain receipts showing the applicants have applied for the proper documents.

You must also accept any document or combination of documents that the INS has deemed acceptable. That is, you can't demand more than the law demands. You also must demand original documents. If, however, a birth certificate is used as List C documentation, a certified copy bearing an official seal is allowable.

The employer is responsible for making sure the I-9 form itself is completely filled out, including the employees' section. And you should keep track of any expiration dates on any documents so you're not caught with your guard down at a later date.

5. What must a company do when rehiring an employee?

If an employee who is eligible to work in the United States leaves and is rehired within three years, the company may still rely on a previously completed Form I-9. But if the period exceeds three years, a new Form I-9 must be completed.

6. Can we fire an employee who fails to produce a required document within three business days?

Yes. Employers can terminate an employee who fails to produce required documents, or a receipt for a replacement document (in the case of lost, stolen, or destroyed documents), within three business days of the date of hire. However, employers must apply these

practices uniformly to all employees. If an employee presents a receipt for a replacement document, he/she must produce the actual document within 90 days of the date of hire.

7. What happens if an employer properly completes its portion of an I-9 form, but the federal government later discovers that an employee isn't eligible to work in the U.S.?

Employers can't be charged with a verification violation; however, employers can't knowingly continue to employ this employee. Employers will have a good-faith defense for knowingly hiring an unauthorized alien, unless the government can prove they had actual knowledge that the employee wasn't eligible to work in the U.S.

8. May employees present a photocopy of a document?

No. Employees must present original documents. The only exception is that an employee may present a certified copy of a birth certificate.

9. We have employees who work in satellite offices. Can they fax me copies of the documents, or do I need to see the originals?

Faxes aren't allowed, but you may use an agent, such as a notary public or attorney, at the satellite office to inspect employees' documents. Whether someone is an agent is controlled by state agency law.

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www.businessmanagementdaily.com/BackgroundCheckGuidelines

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One of the biggest employer complaints about the Family and Medical Leave Act (FMLA) is the productivity problems caused by employees' use—and abuse—of FMLA intermittent leave. The problem: Employees with chronic health problems often take FMLA leave in short increments of an hour or less. The Department of Labor took steps to help minimize workplace disruptions due to unscheduled FMLA absences by saying that, in most cases, employees who take FMLA intermittent leave must follow their employers' call-in procedures for reporting an absence. Amend your organization's policies, update your employee handbook and revisit how you track FMLA intermittent leave with these 5 guidelines.

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Overtime Labor Law: 6 compliance tips to avoid overtime lawsuits, wage-and-hour Labor audits and FLSA exemption mistakes

Employers, beware: The Department of Labor's Wage and Hour Division reports that wage-and-hour labor litigation continues to increase exponentially. Federal class actions brought under the Fair Labor Standards Act (FLSA) outnumber all other types of private class actions in employment-related cases. Use this special report, Overtime Labor Law: 6 compliance tips to avoid overtime lawsuits, wage-and-hour Labor audits and FLSA exemption mistakes, to review your overtime pay policy and double-check your FLSA exempt employees' status. Expecting a visit from a DOL auditor? Get prepared by taking the self-audit at the end of this report.

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Office Communication Toolkit: 10 tips for managers on active listening skills, motivating employees, workplace productivity, employee retention strategies and change management techniques

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Workplace Violence Prevention Toolkit: HR advice, guidelines and policies to keep your workplace safe

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12 Ways to Optimize Your Employee Benefits Program: Low-cost employee incentives, recognition programs and employee rewards

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Microsoft Email: Outlook Tips & Training: How to improve productivity by effectively employing under-used features already at your fingertips

We all use Outlook. It's easy. You can answer email, keep your appointments and your calendar, and save your files in various folders. But are you using it to manage your entire workflow? You can. Melissa P. Esquibel combines her 25+ years of experience in information technology with a background in training, technical writing and business risk analysis to move beyond email and help you understand Outlook's amazing workflow benefits. You'll discover how to get more out of Outlook than you ever dreamed possible with this hands-on road map to Outlook that can send your productivity skyrocketing.

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