

Employee Documentation: How to Avoid an ICE Audit

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Employers may hire only those immigrants who are authorized to work in the United States

I. The New I-9 Form

The Immigration Reform and Control Act made all United States employers responsible for verifying the employment eligibility and identification of any employee hired to work in the United States after November 6, 1986. From this requirement, the Form I-9 was born. All employers are required to complete a Form I-9 for each employee hired to work in the United States.

On November 15, 2007, the United States Citizenship and Immigration Services (USCIS) announced that a revised Employment Eligibility Verification Form (I-9) is now available. The revised form, an example of which can be found at www.uscis.gov, will become required by law once notice is published in the Federal Register. USCIS is strongly encouraging employers to make the new I-9 Form part of their employment practices as soon as possible.

The revised form seeks to comply with the document requirements of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) which reduced the number of documents an employer may accept from a newly-hired employee during the employment eligibility verification period.

A. Unacceptable Documents

The main difference between the former I-9 and the new I-9 is the removal of five documents eligible to be offered as proof of identity and employment eligibility. The following documents no longer constitute sufficient proof for these purposes:

- 1) Certificate of U.S. Citizenship (Form N-560 or N-570);
- 2) Certificate of Naturalization (Form N-550 or N-570);
- 3) Alien Registration Receipt Card (Form I-151);
- 4) Unexpired Reentry Permit (Form I-327); and
- 5) Unexpired Refugee Travel Document (Form I-571).

These forms of identification and employment eligibility have been eliminated because they lack features that would prevent them from being counterfeited.

B. Acceptable Documents

USCIS has revised the List A of Acceptable documents to include the following:

- 1) U.S. Passport (expired or unexpired);

- 2) Permanent Resident Card (Form I-551);
- 3) Unexpired foreign passport with a temporary I-551 stamp;
- 4) Unexpired Employment Authorization Document that contains a photograph (Form I-766*, I-688, I-688A or I-688B) for immigrants authorized to work in the United States; and
- 5) Unexpired foreign passport with an unexpired Arrival-Departure Record (Form I-94) for non-immigrant aliens authorized to work for a specific employer.

*This document is new to the Form I-9 list of acceptable documents.

C. Practical Considerations

Employers only need to complete the 2007 Form I-9 for new employees.

Procedurally, no change has been made to the way the new Form I-9 is to be completed. Employers should follow standard I-9 protocol and be certain to examine all documentation received for authenticity and compliance with the form.

The 2007 Form I-9 is available in English and Spanish but only employers in Puerto Rico may have employees complete the Spanish version for their records. Employers in the United States may utilize the Spanish version for translation purposes but must complete and retain the English version for their records.

Employers may not accept those documents removed from the List of Acceptable Documents as discussed above. Once the rule is published in the Federal Register, employers may no longer use the previous version of the Form I-9. Employers who continue to use the outdated editions of the Form I-9 are subject to fines and penalties.

II. Discovering an Unauthorized Employee....before ICE does

Occasionally, an employer learns that an employee whose documentation appeared to be legitimate and in order for Form I-9 purposes is not authorized to work. In that case, the employer should request from the Employee documentation to satisfy the I-9 requirements. If the employee is unable to provide satisfactory documentation, the employer must consider whether termination is required under the circumstances.

A. No-Match Letters

In the event that an employer submits employee information to the Social Security Administration that does not match the information in the Administration's files, the Administration will send a letter directly to the employer indicating that the name and social security number do not

match their records. Too many of these letters can trigger an Immigration and Customs Enforcement (ICE) audit.

1. Prevention

Before submitting an employee's information to any government agency, check to make sure that no clerical errors have been made.

2. Remedy

If your company receives a no-match letter, first determine whether you have made a clerical error. If no error was made by the employer, the employer should ask the employee to check his social security card to verify that the information initially given to the employer was correct. If the numbers still do not match, the employer must then notify the employee that the employee is responsible for rectifying the "mismatch" situation by providing a document other than the form of document originally provided to verify the employee's eligibility to work in the United States. If the employee has provided new and acceptable documentation, this must be reported to the Social Security Administration.

If the employee is unable to provide a document identifying the employee's eligibility to work in the United States, USCIS recommends discontinuing employment. However, the employer must determine whether it is in its best interest to retain the person, considering potential discrimination claims.

B. Discovering False Documentation

False documentation includes documents that have been counterfeited, fabricated or belong to someone other than the employee who presented them. Occasionally, the employee who originally presented the documents gains legal authorization to work in the United States. In such case, the employer must determine whether providing false documentation is a violation of its policies. If providing false documentation is a violation of the employer's policies, termination may be appropriate. No law exists to require an employer to terminate an employee who initially provided false documentation and sometime thereafter presented legitimate documentation. For document retention purposes, the Form I-9 should be corrected and retained in the employee's employment eligibility file.

III. Maintaining Employer Files

Employers must maintain I-9 records in its own files for three years after the date of hire or one year after the date the employee's employment is terminated, whichever is later. A retention date can only be determined at the time the employee leaves the employ of the employer.

The I-9 Forms may be stored at the worksite or in some other remote location but they must be able to be transmitted to the worksite within three days.

IV. What if my Company is audited by ICE?

Upon request, ICE may conduct an audit of an employer's I-9 Forms.

A. Don't panic.....you have three days to prepare

The request must arrive in written form and be presented at least three days prior to the inspection. The request may require original documents as opposed to microfiche or copies.

B. Call your attorney!