

PUBLICATION

Parsing the Revisions to the I-9 Handbook for Employers

Authors: Robert C. Divine

February 21, 2017

On January 22, 2017, two days after President Trump was inaugurated but with no connection to that event, USCIS published a new Form I-9 for verification of employment authorization required for every new hire since 1986. Last week USCIS published a revision to its Handbook for Employers for completing I-9, Form M-274. The 69-page revision not only covers implications of the new option to complete the I-9 by the new "smart" electronically fillable form. It also describes and depicts some new types of authorization documents, instructs how to correct Form I-9 errors (pages 29-30, 47), adds some details in discussing discrimination and other issues, and adds references to some web tools (especially at www.uscis.gov/i-9-central), among other changes.

We have prepared an annotation of the revised Handbook highlighting in yellow the most meaningful new language but not highlighting mere re-wording or reorganization of prior discussion. We also similarly highlighted the prior version from 2013, showing some of the most noteworthy deletions from the new Handbook, but we note that most deleted Q&As have been folded into the main text of the revision.

Mechanics

As for completing the new I-9, the manual emphasizes some field-specific parameters that the smart "electronic" form when completed on computer enforces inherently. For instance, the revision states, "When you complete Section 3 on a computer and print, Sections 2 and 3 will appear on the same page" (page 16). Almost every field should contain responsive data or "N/A" (page 47), with one exception: The revision confirms in numerous places that a Social Security number is optional except when the employer uses E-Verify, and even then if the worker has not yet been issued a SSN the field should be left blank (pages 4, 47). It explains which persons should check the different four boxes for citizen, national, permanent resident or alien authorized to work (page 4).

The revision specifies repeatedly that the top of each sheet of the I-9 must be completed with *exactly* the same information of the worker that was entered in Section 1. When completed on a computer, the I-9 form does this automatically.

A few new aspects of the form itself are explained. The new Form I-9 provides a new space for "Additional Information," and the revised Handbook describes numerous types of notations that should be written there instead of the previously instructed marginal notes (see page 7). If more than one preparer or translator is used, then a new Supplement identifying the additional assisting parties must be used (page 4).

If an employer is re-verifying or updating a previously completed I-9 whose version is not now current, the employer must complete Section 3 on the current version of the form and attach it to the previously completed form (page 27).

Mechanical policies

The revision removes some references to the policy that an employer may complete Form I-9 before an employer begins work as long as the worker has accepted a job offer, but on page 5 it makes this policy clear enough. [It does not say whether an employer in this situation can refuse employment to a worker who fails to

present sufficient documents within three days of the employer's presentation of the form to the worker but before the work was supposed to start.]

In a most helpful addition along similar lines, the revision states, "Staffing agencies may choose to use either the date an employee is assigned to their first job or the date the new employee is entered into the assignment pool as the first day of employment" (page 7).

The revised Handbook emphasizes that the same person who completes Form I-9 as the employer representative (who may be even someone who is not an employee of the company) must be the person who views in person the worker and the original documents presented to confirm they relate to the same person. This amplifies similar clarification in the Form I-9 Instructions to prevent claims that employers didn't have notice that such practice is required. The revision repeatedly requires that the employer's address be a street address, apparently not a post office box or the like.

Mechanisms are clarified for verification by successor employers of workers involved in a corporate transaction (page 28). Special rules for State Employment Agencies as referrers are clarified (page 29).

If the employer makes copies or images of the documents presented by employees in the I-9 process, the employer must make those documents available for DHS inspection with the I-9 Forms (pages 33-34).

A curious exception to the general phenomenon – that deleted Q&As have been folded into the text of the revised Handbook – concerns a Q&A in which USCIS answered that if an employer uses a professional employer organization (PEO) to manage its employee arrangements such that the employer and PEO are joint employers, then either can complete the I-9s for both of them but with both jointly responsible for non-compliance. We see nothing in the Handbook revision to renounce this position, but it is no longer articulated.

Discrimination

The revision adds lots of language about wrongful discrimination based on requiring specific documents instead of allowing the worker to choose which combination of documents to present and based on requiring more or different documents than the form technically requires (i.e., pages 16, 35-39, 49-51). The prior version referred to this as "document abuse" but the new form refers to "unfair documentary practices." We know that the OSC has been seeking penalties from employers who it believes have been requiring permanent residents to present their green cards, often having identified such employers through data mining their E-Verify queries and then interviewing workers and human resources personnel, and the revised Handbook drives home the lesson to avoid that practice. The revision clarifies that when an employer is re-verifying a worker whose temporary authorization has expired, the employer must accept any generally acceptable documents and not just an extension of the expired document (page 26). The revision also newly identifies three new types of "unfair documentary practices": (1) requesting specific documents to run an E-Verify case or based on an E-Verify tentative non-confirmation; (2) requesting a worker to run or show clearance from an E-Verify "Self Check;" and (3) re-verifying a permanent resident when the permanent resident card expires (page 36). And if an employer finds certain documents unacceptable (not genuine or related to the worker), the employer must refuse to accept them but must allow the worker to present other documents from the List of Documents (page 43).

Style

We can't help but notice that the writers of this 69-page document have chosen quite noticeably to use the "singular they," a literary practice using "they" to refer to a singular person rather than using the generic "he" or "he or she." The writers also refer to people with inanimate references, such as "that" rather than "who."

E-Verify

The revision provides quite many references to the requirements for employers who use E-Verify. It mentions that List B identity documents must contain a photograph, even for workers with disabilities and for Native Americans (page 11, 17). Participating employers should provide E-Verify Case Detail Pages when they receive a request for I-9 inspection (page 34). It mentions that E-Verify can be used not only in the 50 states but specifically in the District of Columbia, Puerto Rico, Guam, the U.S. Virgin Islands and the CNMI.

Newly Acceptable or Noted Documents

The revision contains a new section on "Automatic Extensions of Employment Authorization Documents (EAD) in Certain Circumstances" (pages 13-15, 25-26, 48). Other references in relation to EAD extensions in specific status situations appear throughout the Handbook.

For the first time the revised Handbook describes the documents that may be presented by Native Americans (page 17). The I-94 for a refugee apparently must contain an admission class of "RE" to be valid as a receipt document, and decisions by immigration judges or the Board of Immigration Appeals granting asylum are not acceptable (page 18). Specific combinations of documents are laid out for [earlier discussions], J-1 students (page 19), F-1 students for various situations (pages 20-3), and CNMI-Only Nonimmigrant Transitional Workers (pages 24-25).

The revision substitutes new versions of certain documents among those depicted at the end, including I-551 stamp (page 56), employment authorization document (EAD, I-766) (page 57), I-20 (page 58), and I-94 electronic record (page 59).