The NEW Form I-9 and NEW Rules on Unfair Immigration Practices
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The Basics

• Form I-9 requirements were established in November 1986 when Congress passed the Immigration Reform and Control Act (IRCA).

• IRCA prohibits employers from hiring people, including U.S. citizens, for employment in the United States without verifying their identity and employment authorization on Form I-9.
Purpose of the Form I-9

• Form I-9 is used for verifying the identity and employment authorization of individuals hired for employment in the United States.

• All U.S. employers must ensure proper completion of Form I-9 for each individual (citizens and non-citizens) they hire for employment in the United States.
Employer and Employee Responsibilities

• **Employees** must attest to their employment authorization and present their employers with acceptable documents (indicated on the Form I-9) evidencing identity and employment authorization.
  – **Employers may not ask for specific documents!**

• **Employers** must examine the document(s) presented to determine whether the document(s) *reasonably appear to be genuine and relate to the employee* and record the document(s) information on the Form I-9.
Form I-9 Process and Timeline

Section 1

No later than the first day of employment for pay but not before accepting a job offer: employee must complete Section 1 – Employee Information and Attestation.

Tip: Employers must give employees the form, the instructions and the list of acceptable documents.
Form I-9 Timeline

Section 2

No later than the third business day after employee starts work for pay: employer must complete Section 2 – Employer or Authorized Representative Review and Verification.
Form I-9 Timeline (continued)

Section 3

If employee’s work authorization expires or the employee is rehired, employers must complete Section 3 – Reverification and Rehires.
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.
Form I-9 Retention

Form I-9 must be retained and stored by employers either for three years after the date of hire or for one year after employment is terminated, whichever is later.

Maintain Form I-9s and copies of supporting documents, if copied, in separate file – not in the employee’s personnel file.
Form I-9 Retention (continued)

Example: To calculate how long to keep an employee’s Form I-9, enter the following:

1. **Date the employee began work for pay**
   
   A. Add 3 years to the date on line 1.
   
   1. January 10, 2017
   
   A. January 10, 2020

2. **The date employment was terminated**
   
   B. Add 1 year to the date on line 2.
   
   2. September 15, 2017
   
   B. September 15, 2018

3. **Which date is later; A or B?**
   
   C. Enter the later date.
   
   3. Date on line A.
   
   C. January 10, 2020

Employer must retain Form I-9 until the date on Line C, January 10, 2020.

Employers are required to retain the pages of the form on which the employer and the employee entered data. If copies of documents were made, they should be kept with the corresponding Form I-9.

Form I-9 Spanish Version

• The Spanish version of Form I-9 may be filled out by employers and employees in Puerto Rico ONLY.
  – Spanish-speaking employers and employees in the 50 states and other U.S. territories may print the Spanish version for their reference, but may only complete the form in English to meet employment eligibility verification requirements.
Costs of Not Getting It Right

Penalties
Criminal Prosecutions
- Felony and misdemeanor
- Imprisonment, fines, forfeitures

Debarment
- Loss of federal contracts

Administrative Sanctions
- Fines for hiring violations
- Fines for paperwork violations
# Fines – Civil Violations

<table>
<thead>
<tr>
<th>Civil Violations</th>
<th>First Offense</th>
<th>Second Offense</th>
<th>Third or Subsequent Offense</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Minimum</td>
<td>Maximum</td>
<td>Minimum</td>
</tr>
<tr>
<td>Knowingly hired, or to have knowingly recruited or referred for a fee, an</td>
<td>$539 for each unauthorized alien</td>
<td>$4,313 for each unauthorized alien</td>
<td>$10,781 for each unauthorized alien</td>
</tr>
<tr>
<td>unauthorized alien for employment in the United States or to have knowingly</td>
<td></td>
<td></td>
<td>$6,469 for each unauthorized alien</td>
</tr>
<tr>
<td>continued to employ an unauthorized alien in the United States</td>
<td></td>
<td></td>
<td>$21,563 for each unauthorized alien</td>
</tr>
<tr>
<td>Failing to comply with Form I-9 employment verification requirements</td>
<td>$216 for each form</td>
<td>$2,156 for each form</td>
<td>$216 for each form</td>
</tr>
<tr>
<td>Committing or participating in document fraud for satisfying a requirement or</td>
<td>$445 for each document</td>
<td>$3,563 for each document</td>
<td>$3,563 for each document</td>
</tr>
<tr>
<td>benefit of the employment verification process or the INA</td>
<td></td>
<td></td>
<td>$8,908 for each document</td>
</tr>
<tr>
<td>Committing document abuse</td>
<td>$178 per violation</td>
<td>$1,782 per violation</td>
<td>$178 per violation</td>
</tr>
<tr>
<td>Unlawful discrimination against an employment-authorized individual in hiring,</td>
<td>$445 per violation</td>
<td>$3,563 per violation</td>
<td>$3,563 per violation</td>
</tr>
<tr>
<td>firing, or recruitment or referral for a fee</td>
<td></td>
<td></td>
<td>$8,908 per violation</td>
</tr>
<tr>
<td>$2,156 for each bond the employee paid to the employer.</td>
<td></td>
<td></td>
<td>$17,816 per violation</td>
</tr>
<tr>
<td>Failing to notify DHS of a Final Nonconfirmation (FNC) of an employee’s</td>
<td>$751 per violation</td>
<td>$1,502 per violation</td>
<td>$751 per violation</td>
</tr>
<tr>
<td>employment eligibility</td>
<td></td>
<td></td>
<td>$1,502 per violation</td>
</tr>
<tr>
<td>Requiring an individual to post a bond or security or to pay an amount or</td>
<td>$2,156 for each bond the employee</td>
<td></td>
<td></td>
</tr>
<tr>
<td>otherwise to provide financial guarantee or indemnity against any potential</td>
<td>paid to the employer.</td>
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<tr>
<td>liability arising under the employment verification requirements</td>
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<tr>
<td>Refund the employee the full amount of the bond. If the employee cannot be</td>
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<tr>
<td>found, this refund will go to the U.S. Department of Treasury.</td>
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</tr>
</tbody>
</table>
# Criminal Violations

<table>
<thead>
<tr>
<th>Criminal Violations</th>
<th>First Offense</th>
<th>Second Offense</th>
<th>Third Offense</th>
</tr>
</thead>
<tbody>
<tr>
<td>Engaging in a pattern or practice of hiring, recruiting or referring for a fee</td>
<td>Up to $3,000 for each unauthorized alien</td>
<td></td>
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<td>unauthorized aliens</td>
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<td></td>
<td>Up to 6 months in prison for the entire pattern or practice</td>
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<td></td>
</tr>
</tbody>
</table>
Background Information – The New Form

- Current Form I-9, which became effective in March 2013 and expired on March 31, 2016.

- November 24, 2015, U.S. Citizenship and Immigration Services (USCIS) announced they were seeking public comment on a newly revised “smart” version of the Form I-9.

- March 28, 2016, USCIS published an updated notice in the Federal Register to allow an additional 30 days for public comments.
Background Information – The New Form (continued)

• November 14, 2016, USCIS released revised Form I-9.

• January 22, 2017, Revised Form I-9 is effective.

• Employers may continue using Form I-9 dated March 8, 2013 through January 21, 2017.
The New Form I-9

• New Form: https://www.uscis.gov/i-9.

• Revised instructions are now 15 pages and no longer part of the Form I-9.

• List of acceptable documents has not changed.
The New Form I-9 – Smart Form

• Designed to help employers and employees complete the form with greater accuracy:
  – Fillable form designed to be completed on a computer.
  – Allows the user to click question marks next to every field of information that must be completed – gives user specific guidance about parameters for the information requested.
  – Requires user to complete all fields in a section in order to finish, print and physically sign the form.
  – Enforces restrictions on the types of information that can be entered.
  – Relies on answers in certain fields to automatically enter answers in other fields.
The New Form I-9 – Paper Version

• Paper version of the new Form I-9 is also available.
• **Tip: Do not use the Smart Form to fill out the I-9 by hand:**
  – Printing the uncompleted Smart Form generates errors.
  – USCIS has posted a “Form I-9 Paper Version” for completing by hand.
  – The paper version does not provide the user with any guidance for completing the form, but user may refer to the 15 pages of instructions.
Employees and employers can use different methods (by hand or Smart Form) to complete the new Form I-9.
Best Practice: N/A

• Some fields are optional or may not be applicable
  – e.g.:
    ▪ Middle initial
    ▪ Other last names used
    ▪ Employment Auth. Exp. Date
    ▪ Alien Reg/USCIS #
    ▪ I-94 number
    ▪ Foreign Passport Number
    ▪ Country of Issuance
    ▪ Email address
    ▪ Telephone number

• No blank spaces allowed.

**TIP:** Ensure that N/A is used in all fields in Sections 1 and 2 where no applicable information is entered.
Electronic Form I-9 Software

• The Smart Form is NOT an electronic I-9 because it does not allow or offer electronic signature, storage and retention.

• Employers may continue to use software to electronically generate, sign and retain Form I-9s as long as the software adheres to regulatory requirements.

• Make sure your software incorporates the changes made to the new version of the Form I-9.
The New Smart Form I-9 – Page 1

1. Embedded instructions for completing each field
2. Drop down lists and calendars, (e.g., for the state code, date of birth, date of hire)
3. All fields must be completed, or use N/A
4. Alerts users of errors with pop up error windows
5. Section 1 Attestation – helpful in minimizing employee errors
6. Section 1 – Preparer/Translator Certification – employees now must affirmatively indicate whether a preparer/translator was used
The New Smart Form I-9 – Page 2

Section 2 – Employer Review/Verification

• Area to enter additional information that employers are currently required to notate in the margins of the form.
  • e.g., e-verify case number, employee termination dates, form retention dates and more
• The Smart Form pre-selects a valid list of Supporting Documents based on the Citizenship Status previously selected in the Attestation portion of Section 1.
• Certification: Drop down boxes and embedded instructions help to clarify what information is necessary for a portion of the I-9 that frequently contains errors of omission.
• As with Section 1, the Certification Section needs to be printed and signed manually after being completed with the online Form.
The New Smart Form I-9: Section 3

Instructions on Rehires or Reverifications are more detailed and contain additional information on how to complete this section.
Important Reminders…

• The revised Form I-9 is not an “electronic I-9” as defined in the DHS regulations:
  – Employers using this “Smart Form” will ultimately still need to:
    ▪ Print the form.
    ▪ Obtain signatures.
    ▪ Retain manually.
    ▪ Monitor reverifications and updates manually.
    ▪ Data-enter information into e-verify.
Use of “Old” Form = Technical Violation

• Ensure that all of your locations are using the new form.
• If the “old” form is mistakenly used:
  − Correct the error by stapling the outdated form to a blank current version, sign the blank current version and note why the current blank version is attached (e.g., wrong version used at time of hire).
  − Draft an explanation and attach it to the “old” completed form explaining that the wrong form was filled out correctly and in good faith.
Handbook for Employers

The Handbook for Employers, Form M-274 has not yet been updated to reflect the new Form I-9 and its computer-assisted features.

USCIS has indicated that the Handbook will be updated before January 22, 2017, the date on which the new Form I-9 must be used.

The current Handbook is available at: https://www.uscis.gov/i-9-central
Takeaways: Form I-9

• Use the new Form I-9 starting now or by January 22, 2017.

• Train managers at remote locations to properly complete the form and on the implications of failing to do so.

• Determine whether you will use the paper or Smart version or some combination of the two.

• Develop consistent processes and procedures for completing Form I-9s.

• Consider conducting an internal audit of your Form I-9s.
Takeaways: Form I-9 (continued)

• Ensure that:
  – You comply with Form I-9 timelines.
  – The information on the form is clear and can be read.
  – The date entered in Section 2 as the date the employee began employment matches the date in payroll records.
  – Highlighting marks, hole punches and staples do not interfere with an authorized official’s ability to read the information on the form.
  – Copies of the documentation retained with Form I-9 are legible.
  – All applicable sections of the form are completed – use N/A.
  – Form I-9s are retained in separate files – not in the employee’s personnel files.

• Treat employees in a non-discriminatory manner.
New DOJ Rule on Unfair Immigration-Related Employment Practices
Background


• Prohibits unfair immigration-related employment practices, specifically, discriminating in hiring or terminating an individual because of national origin or citizenship.

• 1986 Act resulted in regulations still in force today (example: prohibition on requesting more or different documents for I-9 purposes when requested with purpose or intent to discriminate).
The New Rule

• Good news: No major changes for employers, but:
  
  – Updated procedures related to discrimination claims.
  
  – Changes to definitions of specific statutory terms to clarify their meaning.
  
  – Updated verbiage of regulations.
Updated Procedures

DOJ’s Special Counsel can investigate on its own initiative, without an employee complaint:

• Statistical evidence based on an employer’s usage of e-verify could lead to investigations of employers.

• Example: A large percentage of LPR workers provided a green card to prove identity and work authorization, while USC workers presented driver’s licenses and Social Security cards.
Changes to Statutory Terms

• New Rule incorporates intent requirement of existing anti-discrimination law.

• Definition of “discriminate”: act of *intentionally* treating an individual differently from other individuals because of national origin or citizenship status, regardless of the explanation for such differential treatment, and regardless of whether such treatment is because of animus or hostility.

• Practices constituting unlawful discrimination can take place during hiring or in day-to-day workplace interactions.

• Hiring means recruitment, selection and onboarding.
New Rule Takeaways

• Reminder: Review I-9 employment authorization policies.
• Know what you can ask.
• Practice Pointer: Compliance vs. overcompliance.
The Immigration Horizon: What’s Ahead

- New Administration:
  - Expect rise in employment verification enforcement.
  - Repeal executive actions.
  - Restrictions on H-1B visas.
Thank you!