

Immigration Tsunami: Understanding the Tidal Wave of Compliance When Hiring Foreign Nationals

Wendy Padilla-Madden

wmadden@bakerdonelson.com

Immigration Status of Employees

- USC and LPR
 - Includes Conditional Permanent Residents
- Unrestricted but Time Limited Employment Authorization
 - Usually present EAD to verify employment authorization
 - Pending Adjustment Applicants
 - Asylees and Refugees
 - Spouses of some visa holders (L and E)
 - Students (OPT or CPT)
 - DACA/DAPA
- Restricted and Time Limited Employment Authorization
 - Most Non-Immigrant Visa holders (H, L, E-3, TN, O, P....)

What can you ask during the interview?

- It is helpful to know if sponsorship is required for the candidate during the interview process
- Employers may **lawfully ask** following two questions regarding immigration status in an interview (recruitment) setting:
 1. Are you legally authorized to work in the U.S.? Yes or No.
 2. Do you now or will you in the future require sponsorship for employment visa status (e.g. H-1B visa status)? Yes or No.
- Employers may **NOT** ask the following:
 1. Are you a US Citizen (very limited exceptions)
 2. What country are you from?

I-9 and E-Verify Compliance

The Employment Authorization Verification Process

- In 1986 Congress passed the Immigration Reform and Control Act IRCA
- Under IRCA Employers have three primary responsibilities:
 1. Employers must verify the identity and employment eligibility of every new employee by completing the I-9 employment verification form
 2. Employers must not **knowingly hire, or continue to employ**, any person not authorized to work in the United States
 3. The employer must retain the I-9 form as required
- Employers who hire or continue to employ individuals *knowing* that they are not authorized to be employed in the United States may face civil and criminal penalties.

Personal Liability

- INA defines “employer” as “individual or entity, including an *agent or anyone* acting directly or indirectly in the interest thereof....”
- Officers, directors, employees and agents of a corporation can be held criminally and civilly liable for their acts although they were performed in their official capacity.
 - Individual must have a minimum level of knowledge of, or participation in the illegal activity.

Deadlines for Timely Completion of I-9 Form

- Must wait for employee to accept offer of employment
- Employee completes Section 1 **NO LATER than first day of work for pay**, or before if employee has accepted job offer
- Employer completes Section 2 **within three business days** of the date of hire of their employee (the hire date means the first day of work for pay).
- If you hire a person for fewer than three business days, Sections 1 and 2 of Form I-9 must be fully completed by the employee's first day of work for pay

I-9 Basics

- All U.S. employers must complete and retain a Form I-9 for each individual they hire for employment in the U.S.
 - This includes citizens and noncitizens.
 - The I-9 forms may be created and stored on paper or electronically.
- Employees must present unexpired original documentation
 - No Copies
- Employees must present: One selection from List A or One selection from List B in combination with one selection from List C.
 - Employees choose what documents to present
- Employer Rep who reviews documents must be the one that completes and signs Section 2 of Form I-9

Section 1: Employee Information and Verification

- Must be completed by **EMPLOYEE** on or before the day of hire (when employee begins work)
 - Attest, sign and date
- Employer is responsible for proper completion of Section 1
- Preparer and/or Translator Certification
 - Must be completed by whomever assisted employee in the completion of Section 1

Section 1



Employment Eligibility Verification

Department of Homeland Security
U.S. Citizenship and Immigration Services

USCIS
Form I-9
OMB No. 1615-0047
Expires 03/31/2016

► **START HERE.** Read instructions carefully before completing this form. The instructions must be available during completion of this form.
ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate against work-authorized individuals. Employers **CANNOT** specify which document(s) they will accept from an employee. The refusal to hire an individual because the documentation presented has a future expiration date may also constitute illegal discrimination.

| Section 1. Employee Information and Attestation <i>(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.)</i> | | | | | | |
|--|---|-------------------------|----------------|----------------|-------------------------------|----------|
| Last Name (Family Name) | | First Name (Given Name) | | Middle Initial | Other Names Used (if any) | |
| Address (Street Number and Name) | | Apt. Number | City or Town | | State <input type="text"/> | Zip Code |
| Date of Birth (mm/dd/yyyy) | U.S. Social Security Number <input type="text"/> - <input type="text"/> - <input type="text"/> | | E-mail Address | | Telephone Number | |

- **New: Maiden Name field is now “Other Names Used”**
- **SSN is optional unless enrolled in E-Verify**
- **Email address and telephone number are optional**

Section 1 Attestation

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):

- A citizen of the United States
- A noncitizen national of the United States *(See instructions)*
- A lawful permanent resident (Alien Registration Number/USCIS Number): _____
- An alien authorized to work until (expiration date, if applicable, mm/dd/yyyy) _____. Some aliens may write "N/A" in this field. *(See instructions)*

For aliens authorized to work, provide your Alien Registration Number/USCIS Number **OR** Form I-94 Admission Number:

1. Alien Registration Number/USCIS Number: _____

OR

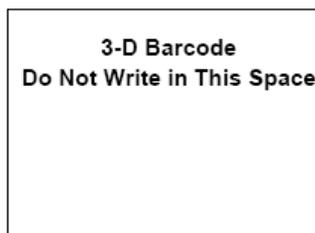
2. Form I-94 Admission Number: _____

If you obtained your admission number from CBP in connection with your arrival in the United States, include the following:

Foreign Passport Number: _____

Country of Issuance: _____

Some aliens may write "N/A" on the Foreign Passport Number and Country of Issuance fields. *(See instructions)*



| | |
|------------------------------|--------------------------|
| Signature of Employee: _____ | Date (mm/dd/yyyy): _____ |
|------------------------------|--------------------------|

- “Alien Registration Number” vs. “USCIS Number”
- Foreign Passport Information

Section 1: Preparer/Translator Certification

Preparer and/or Translator Certification *(To be completed and signed if Section 1 is prepared by a person other than the employee.)*

I attest, under penalty of perjury, that I have assisted in the completion of this form and that to the best of my knowledge the information is true and correct.

| | | | |
|--------------------------------------|--------------|-------------------------|----------|
| Signature of Preparer or Translator: | | Date (mm/dd/yyyy): | |
| Last Name (Family Name) | | First Name (Given Name) | |
| Address (Street Number and Name) | City or Town | State ▼ | Zip Code |



Employer Completes Next Page



- **Must be completed if employee receives assistance**

Section 2: Employer Review and Verification

- EMPLOYER must complete within three business days of the first day of work
 - Must review **UNEXPIRED** original documents
 - Employee should choose which documents to present
 - Do not “over-document”
 - Employer who reviews documents must sign certification

Section 2: Don't forget Employee's Name

Section 2. Employer or Authorized Representative Review and Verification

(Employers or their authorized representative must complete and sign Section 2 within 3 business days of the employee's first day of employment. You must physically examine one document from List A OR examine a combination of one document from List B and one document from List C as listed on the "Lists of Acceptable Documents" on the next page of this form. For each document you review, record the following information: document title, issuing authority, document number, and expiration date, if any.)

Employee Last Name, First Name and Middle Initial from Section 1:

- Section 2 completed by employer or employer's representative
 - New section for employee's name on page 2
 - Must examine original documents



Section 2: Employer Review

New header area

Expanded document area

Section 2 Certification

Section 3

| Section 2. Employer or Authorized Representative Review and Verification | | | | |
|--|--|--------------------------------------|--|--|
| <small>(Employers or their authorized representative must complete and sign Section 2 within 3 business days of the employee's first day of employment. You must physically examine one document from List A OR examine a combination of one document from List B and one document from List C as listed on the "Lists of Acceptable Documents" on the next page of this form. For each document you review, record the following information: document title, issuing authority, document number, and expiration date, if any.)</small> | | | | |
| Employee Last Name, First Name and Middle Initial from Section 1: | | | | |
| List A Identity and Employment Authorization | | OR | List B Identity | AND List C 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: | <div style="border: 1px solid black; padding: 5px; text-align: center;"> 3-D Barcode Do Not Write in This Space </div> | | | |
| Issuing Authority: | | | | |
| Document Number: | | | | |
| Expiration Date (if any)(mm/dd/yyyy): | | | | |
| Expiration Date (if any)(mm/dd/yyyy): | | | | |
| Document Title: | | | | |
| Issuing Authority: | | | | |
| Document Number: | | | | |
| Expiration Date (if any)(mm/dd/yyyy): | | | | |
| Expiration Date (if any)(mm/dd/yyyy): | | | | |
| 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 | | Date (mm/dd/yyyy) | Title of Employer or Authorized Representative | |
| Last Name (Family Name) | | First Name (Given Name) | Employer's Business or Organization Name | |
| Employer's Business or Organization Address (Street Number and Name) | | | City or Town | State ▼ |
| | | | | Zip Code |
| Section 3. Reverification and Rehires (To be completed and signed by employer or authorized representative.) | | | | |
| A. New Name (if applicable) Last Name (Family Name) | | First Name (Given Name) | Middle Initial | B. Date of Rehire (if applicable) (mm/dd/yyyy) |
| C. If employee's previous grant of employment authorization has expired, provide the information for the document from List A or List C the employee presented that establishes current employment authorization in the space provided below. | | | | |
| Document Title: | Document Number: | Expiration Date (if any)(mm/dd/yyyy) | | |
| 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: | | Date (mm/dd/yyyy): | Print Name of Employer or Authorized Representative: | |
| | | | | |

| List A Identity and Employment Authorization | OR | List B Identity | AND | List C Employment Authorization |
|---|----|---|-----|---|
| Document Title: | | Document Title: | | Document Title: |
| Issuing Authority: | | Issuing Authority: | | Issuing Authority: |
| Document Number: | | Document Number: | | Document Number: |
| Expiration Date <i>(if any)</i> (mm/dd/yyyy): | | Expiration Date <i>(if any)</i> (mm/dd/yyyy): | | Expiration Date <i>(if any)</i> (mm/dd/yyyy): |
| Document Title: | | <div style="border: 1px solid black; padding: 10px; width: fit-content; margin: auto;"> <p style="text-align: center;">3-D Barcode Do Not Write in This Space</p> </div> | | |
| Issuing Authority: | | | | |
| Document Number: | | | | |
| Expiration Date <i>(if any)</i> (mm/dd/yyyy): | | | | |
| Document Title: | | | | |
| Issuing Authority: | | | | |
| Document Number: | | | | |
| Expiration Date <i>(if any)</i> (mm/dd/yyyy): | | | | |

- Employer must physically examine one document from List A
OR
a **combination** of one document from List B and one from List
C

Section 2: Employer Certification

- **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, (3) to the best of my knowledge the employee is authorized to work in the United States.*
- Signature and Date of person certifying under oath

Section 2: Employer Certification

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 | | Date (mm/dd/yyyy) | Title of Employer or Authorized Representative | |
| Last Name (Family Name) | | First Name (Given Name) | Employer's Business or Organization Name | |
| Employer's Business or Organization Address (Street Number and Name) | | City or Town | State | Zip Code |

- **Section 2 must be completed no later than 3 business days after the employee begins work for pay (the “Thursday Rule”)**

Avoid Immigration-Related Employment Discrimination

- Employee should choose which documents to present for I-9 process
 - Have a laminated copy of the current I-9 list of acceptable documents and provide it to employees who ask: “What document do you want?”
- Accept documents that appear to be genuine and to relate to the employee named
 - Have clearly defined standard document review guidelines and follow them for all employees
- Treat all prospective hires consistently

List of Acceptable Documents

- All documents must be unexpired, with a few exceptions
- Employee must be given the choice of which documents to present
- New form contains examples of restricted SS cards which are not acceptable

LISTS OF ACCEPTABLE DOCUMENTS All documents must be UNEXPIRED

Employees may present one selection from List A or a combination of one selection from List B and one selection from List C.

| LIST A Documents that Establish Both Identity and Employment Authorization | OR | LIST B Documents that Establish Identity | AND | LIST C Documents that Establish Employment Authorization |
|--|----|--|-----|--|
| 1. U.S. Passport or U.S. Passport | OR | 8. Native American tribal document | AND | 1. A Social Security Account Number card, unless the card includes one of the following restrictions: (1) NOT VALID FOR EMPLOYMENT (2) VALID FOR WORK ONLY WITH INS AUTHORIZATION (3) VALID FOR WORK ONLY WITH DHS AUTHORIZATION |
| 2. Permanent Resident Card or Registration Receipt Card (Form I-551) | | | | |
| 3. Foreign passport that contains temporary I-551 stamp or temporary I-551 printed notation on a machine-readable immigrant visa | | | | |
| 4. Employment Authorization Document that contains a photograph (Form I-786) | | | | |
| 5. For a nonimmigrant alien authorized to work for a specific employer because of his or her status: a. Foreign passport; and b. Form I-94 or Form I-94A that contains the following: (1) The same name as the alien and (2) An endorsement of the alien's nonimmigrant status as long as that period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the form. | | | | |
| 6. 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 | | | | |
| | | 9. Driver's license issued by a Canadian government authority | | 5. Native American tribal document |
| | | For persons under age 18 who are unable to present a document listed above: | | 6. U.S. Citizen ID Card (Form I-197) |
| | | 10. School record or report card | | 7. Identification Card for Use of Resident Citizen in the United States (Form I-179) |
| | | 11. Clinic, doctor, or hospital record | | 8. Employment authorization document issued by the Department of Homeland Security |
| | | 12. Day-care or nursery school record | | |

Illustrations of many of these documents appear in Part 8 of the Handbook for Employers (M-274).

Refer to Section 2 of the instructions, titled "Employer or Authorized Representative Review and Verification," for more information about acceptable receipts.

Section 3: Updating and Re-Verification

- Must update when previous grant of work authorization expires
 - Do not re-verify expired Column B documents
 - Do not re-verify Permanent Resident Cards or US Passports
- Can also be used for re-hires
 - Only if re-hired within 3 years of original hire date

Section 3 Reverification & Rehires

| | | |
|---|--|--|
| Section 3. Reverification and Rehires <i>(To be completed and signed by employer or authorized representative.)</i> | | |
| A. New Name <i>(if applicable)</i> Last Name <i>(Family Name)</i> First Name <i>(Given Name)</i> Middle Initial | B. Date of Rehire <i>(if applicable)</i> (mm/dd/yyyy): | |
| C. If employee's previous grant of employment authorization has expired, provide the information for the document from List A or List C the employee presented that establishes current employment authorization in the space provided below. | | |
| Document Title: | Document Number: | Expiration Date <i>(if any)</i> (mm/dd/yyyy): |
| 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: | Date (mm/dd/yyyy): | Print Name of Employer or Authorized Representative: |

- **Can be used for rehires within 3 years of previous I-9**
- **Can be used for re-verification only if the form is still valid**

I-9 Retention

- Employers are required to retain the page of the form on which the employer and the employee enter data.
- If copies of documents presented by employees are made, those too should be kept with the I-9 forms.
 - E-Verify Case Number must be written in top of I-9 form or E-Verify confirmation should be kept with I-9 records
 - E-Verify requires employers keep copies of certain documents
- Form I-9 must be kept by the employer either for three years after the date of hire or for one year after employment is terminated, *whichever is later*.
- 3 Day Inspection Notice – NOI

I-9 Retention

| | |
|---|----------|
| 1. Date the employee began work for pay | 1. _____ |
| A. Add three years to the date on line 1. | A. _____ |
| 2. The date employment was terminated | 2. _____ |
| B. Add one year to the date on line 2. | B. _____ |
| 3. Which date is later; A or B? | 3. _____ |
| C. Enter the later date. | C. _____ |

Electronic I-9 Forms

- Minimum Requirements
 - Resulting form is legible with no change to name, content, or sequence to data elements and instructions.
 - Reasonable controls to ensure integrity, accuracy and reliability of system
 - Reasonable controls to prevent and detect unauthorized use: creation, deletion, alteration or deterioration of records
 - Inspection and QA program
 - Retrieval System with proper indexing to allow viewing and reproduction of selected records
- Regulations: 8 CFR §274a.2

Electronic I-9 Forms

- Minimum Performance Standards:
 - Secure database;
 - Password-protected, unique user profiles;
 - Indexing;
 - Audit trails;
 - Electronic summary files/spreadsheet;
 - Backup redundancy; and
 - Confirmation of electronic signature at the time of the transaction.

Electronic I-9 Notable Cases

- Abercrombie & Fitch
 - Home-grown system
 - \$1 Million Negotiated Settlement
- Rose Acre Farms Inc.,
 - Discrimination suit by DOJ due to NowHIRE's system capabilities
- Lexis Nexis vs. USVerify
 - 2011 non-renewal of reseller agreement
 - Clients were left without access to I-9 and E-Verify data

Civil Penalties for Hiring Undocumented Aliens

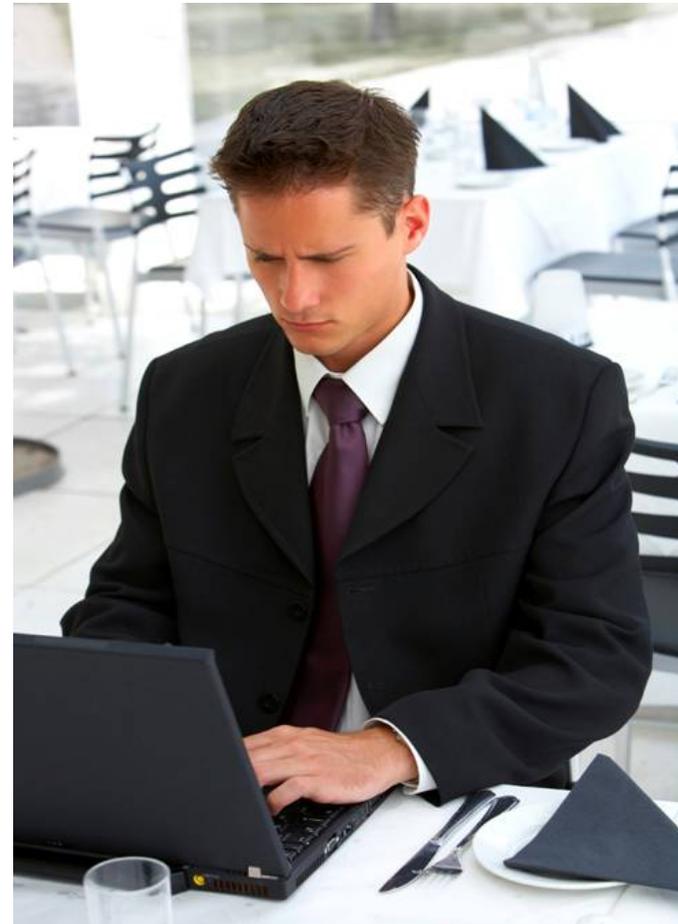
- Immigration and Nationality Act (INA)
 - 1-9 Violations
 - **Paperwork Violations**: penalties range from \$110 to no more than \$1,100 per employee
 - **Knowing Hire Violations**: penalties range from \$375 to \$16,000 for each unauthorized workers for repeated offenses
- IRCA
 - Knowingly “accept” or “provide” forged or false documents to satisfy DHS hiring or employment verification requirements
 - Penalties range from \$250 to \$2,000 for each forged document violation

Criminal Penalties for Hiring Undocumented Aliens

- Immigration and Nationality Act (INA) & Immigration and Reform Control Act (IRCA)
 - Misdemeanor pattern or practice violations 8 USC § 1324a(f)
 - \$3,000 per undocumented alien & 6 months jail for entire pattern or practice
 - Felony Hiring 8 USC § 1324(a)(3)
 - 5 years and fine is greater of \$250,000 or 2x financial gain (employed at least 10 aliens during any 12 month period)
 - Felony Harboring 8 USC § 1324(a)(1)(A)(iii)
 - 5 or 10 years if for commercial advantage
 - Felony Money Laundering 18 USC § 1957
 - 10 years
 - Use of proceeds from a specified unlawful activity: includes most INA violations (excluding misdemeanor violation)
 - Derived from your own unlawful activity like hiring undocumented aliens
 - Paying an unauthorized alien off the books
 - Aiding and Abetting Aggravated Identity Theft 18 USC § 1028A
 - Conspiracy

What is E-Verify?

- Internet-based system
- Operated by Department of Homeland Security (DHS) and the Social Security Administration (SSA)
- Allows participating employers to electronically verify employment eligibility of newly hired employees



How E-Verify Works



How to run an E-Verify case

Form I-9



What E-Verify is NOT



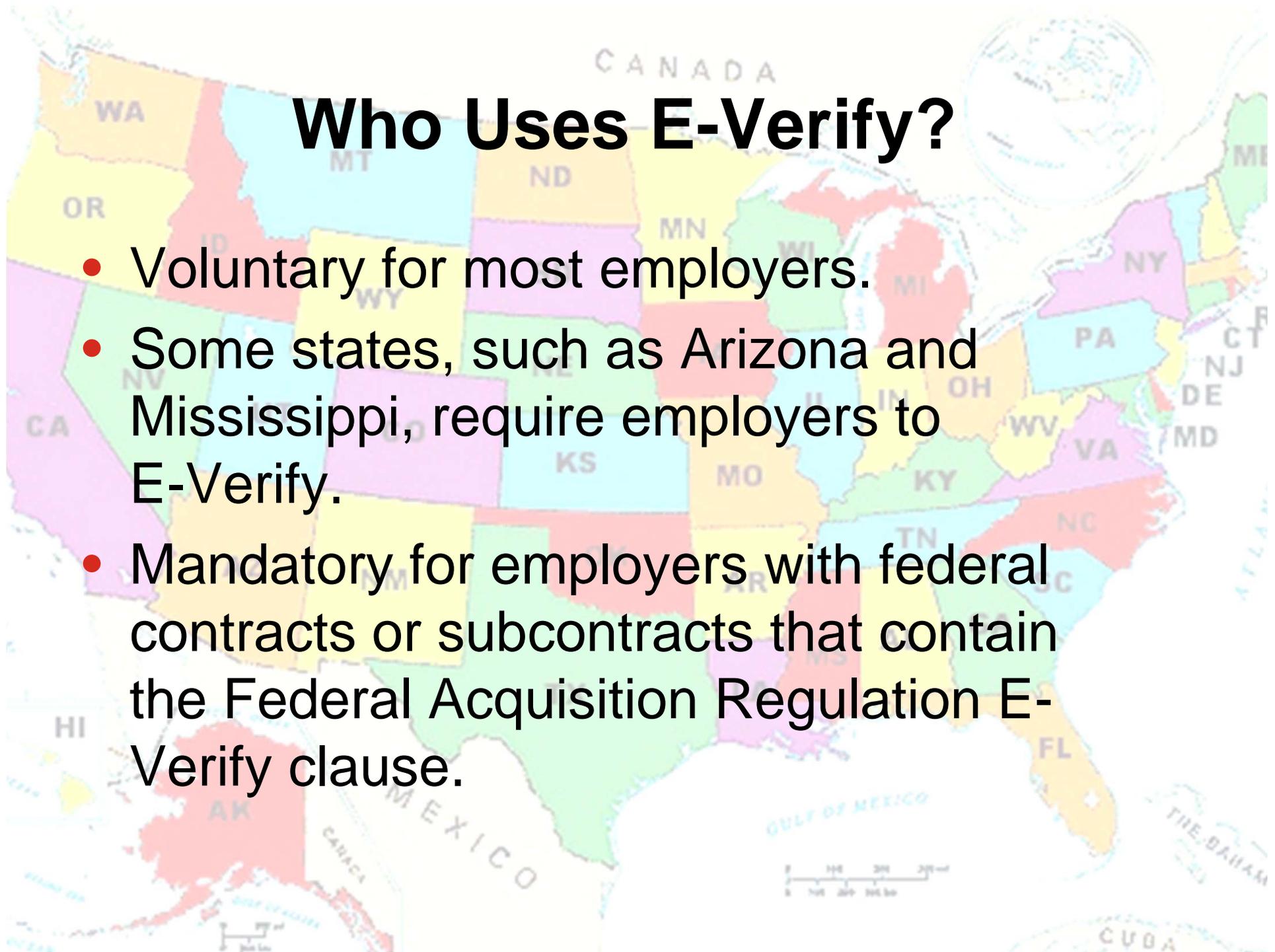
What is E-Verify?

E-Verify is not...

- ...a system that provides immigration status.**
- ...used for prescreening.**
- ...a safe harbor from worksite enforcement.**

Who Uses E-Verify?

- Voluntary for most employers.
- Some states, such as Arizona and Mississippi, require employers to E-Verify.
- Mandatory for employers with federal contracts or subcontracts that contain the Federal Acquisition Regulation E-Verify clause.



Some E-Verify No-No's

- Don't use E-Verify to prescreen applicants.
- Don't take adverse action based on a case result unless E-Verify is a Final Non-confirmation.
- Don't selectively verify work authorization for newly hired employees.



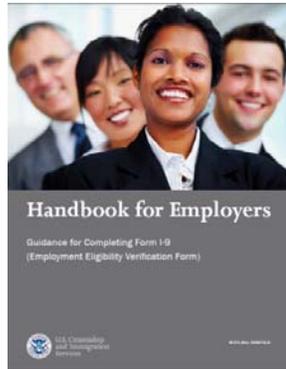
Employer Responsibilities



Employer responsibilities

- Unless you are a *federal contractor whose contract contains the FAR E-Verify Clause* you can only use E-Verify to verify new hires.
- Once you begin using E-Verify, you must verify new employees **no later than the third business day** after the employee begins working for pay.
- You must apply E-Verify procedures to **ALL new hires**, regardless of citizenship status.

USCIS Form I-9 and E-Verify Resources



The I-9 Handbook for Employers (M-274)
Latest edition: March 8, 2013

<http://www.uscis.gov/files/form/m-274.pdf>



I-9 Central
Frequently updated resource for I-9 news and
guidance

<http://www.uscis.gov/I-9Central>



<http://www.uscis.gov/e-verify>

New Proposed Major Changes to E-Verify

- Re-verification of continuing work authorization
 - Including print and retain along with I-9 Form
 - Different time-frame than required by Section 3

- Employee driven review of Final Non-confirmation results
 - Confusing process
 - Employee may still be terminated upon receipt of FNC
 - Proposed notice tells Employees FNC result may be triggered by Employer error

Hiring Foreign Nationals

- Hiring a foreign national employee **differs significantly** from hiring a U.S. citizen or Lawful Permanent Resident.
- Sponsorship involves time, money, and also additional employment responsibilities
- Foreign nationals are not allowed to work for a U.S. employer until proper work authorization is issued by the U.S. government.
- Holding a **Visa** does not always mean that the person is authorized to work.

Sponsorship Considerations

- Eligibility Issue:
 - whether any of the work-authorizing nonimmigrant visa categories will fit the job you have open and the candidate you have in mind
 - Required wages. Can I afford them?
 - Tax Obligations of employer
- Time Limits:
 - When can employee start to work?
 - How long can they work for employer?
- Other Issues and Restrictions

QUESTIONS?