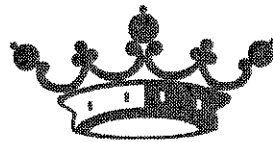


Learning the Employment Verification Processes

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The February 2009 Revised I-9 Form

It is the government's intention to eventually require all federal contractors and subcontractors to use E-Verify. Initially, the mandate was to take effect on January 19, 2009, but former President Bush agreed to push the effective date back to February 20, 2009. At the end of January, the Obama Administration delayed the effective date for a second time to May 21, 2009. By order dated April 17, 2009, the delay has been extended another six weeks to June 30, 2009.

Common complaints about E-Verify are: (1) there is a high error rate, which leads to eligible employees losing their employment; and (2) that the system cannot handle the volume of inquiries. These complaints are likely to increase if every federal contractor and subcontractor is required to use E-Verify.

Furthermore, employers must keep in mind that E-Verify only protects them from allegations by DHS that the employer had actual knowledge that it was hiring an unauthorized alien. This protection only extends if the Social Security and E-Verify documents match for that employee. There is also no protection against employee claims that the employer engaged in immigration-related discrimination. Database inaccuracies and limitations can put employers at risk for immigration discrimination claims. For example, if an E-Verify error results in a tentative nonconfirmation and the employer terminates the employment of the subject employee based upon that result, the employee may sue the employer for national origin discrimination. A tentative nonconfirmation is not a legitimate ground for termination. Instead, the employee must be promptly notified of the determination, referred to the Social Security Administration and given adequate time (at least eight business days) to resolve the issue. An employer will have a difficult time disproving a claim of national origin discrimination if it terminates employment by acting to hastily based upon an erroneous E-Verify determination.

While the E-Verify database is constantly being updated and improved, the Department of Homeland Security disputes the legitimacy of these common complaints. It claims the error rate is at least ten times less than

critics allege, and that the system is well equipped to handle the volume of inquiries.

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208. The IIRIRA mandated a reduction in the number of documents employers are permitted to accept from newly hired or re-hired employees during the employment eligibility verification process. In 1997, what was then the Immigration and Naturalization Service (INS) published an interim final rule in the Federal Register, doing away with the documents IIRIRA identified for removal. At that time, however, the Form I-9 was not updated to reflect the revised List of Acceptable Documents. USCIS revised the Form I-9 to bring it into compliance with the 1997 regulation.

The interim final rule, "Interim Designation of Acceptable Documents for Employment Verification," provided an updated list of appropriate verification documents in accord with IIRIRA. The INS, however, failed to revise the I-9 form to reflect the updated list, instead waiting for a more comprehensive final rule. Unfortunately, a more comprehensive final rule was never published, so the Form I-9 was not updated. Instead, the I-9 Form remained incorrect for approximately ten years. The lack of a final rule and an updated and accurate I-9 Form prevented the immigration authorities from enforcing the 1997 interim Rule. Finally, on November 26, 2007, USCIS mandated the use of a new I-9 form because "allowing an outdated Form I-9 to remain in use has become untenable." With a new form in place, USCIS indicated that immigration authorities will begin enforcing the current list of acceptable verification documents.

The Homeland Security Act of 2002 combined several federal agencies, all with a common mission devoted to homeland security. On March 1, 2003, the authorities of the former Immigration and Naturalization Service (INS) were transferred to three new agencies in the U.S. Department of Homeland Security (DHS): U.S. Citizenship and Immigration Services (USCIS), U.S. Customs and Border Protection (CBP), and U.S. Immigration and Customs Enforcement (ICE). USCIS is responsible for the documentation of alien employment authorization, for Form I-9 itself, and for the E-Verify employment eligibility verification program.

The primary mission of DHS is homeland security. To achieve this mission, DHS must work to ensure that individuals living and working in this country are doing so legally, and with proper legal documentation. To assist in reaching this goal, DHS must take necessary steps to ensure employers are only hiring individuals legally authorized to work in the U.S.

The primary reason for the new I-9 form is to further improve the employment verification process to provide more certainty that unauthorized individuals are not allowed to work in the United States.

USCIS recognizes that employment is often the main attraction for illegal immigrants. The changes to the Form I-9 are intended to deter illegal immigration. An added benefit is more protection for those individuals who are authorized to work in this country maintaining their employment status during this difficult time when individuals are losing their jobs.

DHS plays no role in the routine processing of I-9 forms. Employers are required to complete the forms and keep them on file for the specified period of time (three years after date of hire or one year after termination, whichever is longer). ICE, however, is responsible for enforcement of the penalty provisions for immigration enforcement, including violations of the I-9 form requirements.

The benefits of the new I-9 form and verification process are that they work to ensure that only those who are legally allowed to work in this country are filling U.S. jobs, particularly in this time of economic crises. The new form also limits the documents that can be used to verify employment eligibility, making the process easier for employers.

The form and process are still not perfect. For example, the employer is responsible for ensuring that the employee fully completes Section 1 of Form I-9. The employee's failure to provide complete information can result in fines against the employer.

Implementing Changes to I-9 and E-Verify

First of all, to verify the documents, employers must be familiar with what forms of documentation can be used for employment verification. Second,

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employers should not accept copies of documents. Employees must present original documents. The only exception is that the employee may present a certified copy of a birth certificate.

Third, employers must accept any I-9 document, provided it reasonably appears on its face (1) to be genuine and (2) to relate to the individual who presents it. By signing Section 2 of the Form I-9, the employer attests to the fact that it has reviewed the original document and that the original document reasonably appears, upon reasonable inspection, to be genuine and relate to the employee who presented it. The employer is not, however, attesting to the legitimacy of the status of the person who presents the document.

If a document does not meet this standard, the employer should reject it for employment eligibility verification purposes and ask the individual to produce other acceptable I-9 documentation. If the employee does not produce acceptable documentation that appears to be genuine and to relate to the individual presenting it, the employer should not continue the individual's employment. If the document appears to be genuine and relate to the employee who presented it, the employer cannot demand further documentation.

The entire new Form I-9 Handbook is very informative. Parts Two, Three, Four and Eight are critical for employers to read, because those sections lay out specific directions for completing Form I-9, retention of documents and avoiding discrimination claims. If employers follow the detailed directions set forth in Parts Two, Three, Four and Eight, they will drastically reduce their chances of committing unnecessary errors in completing the Form I-9. Recruiters and referrers for a fee should also read Part Five, which relates directly to their services. Meanwhile employers enrolled in the E-Verify program should also read Part Six. Part Six provides direction on how to use the E-Verify system.

Among all the changes and updates, the procedure for completing Form I-9 remains the same. The handbook provides a summary of what documents can and cannot be accepted, as well as a discussion of the other minor changes to the Form I-9. It also includes some revisions and clarifications

on electronic retention of I-9 forms, the E-Verify program, various immigration classifications, Social Security Numbers, and penalties. Specifically, it provides:

- Information regarding Form I-9 completion for individuals who take advantage of AC-21 H-1B portability and students whose employment authorization is automatically extended based on the H-1B cap-gap provision or until a STEM Optional Practical Training extension is resolved.
- Updated information and photographs regarding acceptable documents.
- Updated civil money penalties for hiring or continuing to employ unauthorized aliens, unlawful discrimination, and civil document fraud.
- An expanded Question and Answer section.

Handbooks can be obtained at www.uscis.gov. Employers without computer access can order USCIS forms by calling 1-800-870-3676. Individuals can also request USCIS forms and information on immigration laws, regulations, and procedures by calling the National Customer Service Center toll-free at 1-800-375-5283.

Generally, it is very difficult to get an actual individual on the phone to handle questions about the revised form and the actual process. When you do get a live person, they will often direct you to the Handbook or the website for answers to your questions. While USCIS does not offer Form I-9 auditing or training, most immigration attorneys will provide these services for a fee.

Expired documents are no longer valid forms of identification for the I-9 form. Additionally, the following have been removed as available documents for proof of both identity and employment eligibility:

- Certificate of U.S. Citizenship (Form N-560 or N-570);
- Certificate of Naturalization (Form N-550 or N-570);
- Alien Registration Receipt Card (Form I-151);
- The un-expired Reentry Permit (Form I-327);
- The un-expired Refugee Travel Document (Form I-571).

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forms were removed because they lack features to help deter terfeiting, tampering, and fraud.

tionally, the most recent version of the Employment Authorization ment (Form I-766) was added to List A of the List of Acceptable ments on the revised form. The revised list now includes: a U.S. ort (un-expired or expired); a Permanent Resident Card (Form I- an un-expired foreign passport with a temporary I-551 stamp; an un- ed Employment Authorization Document that contains a ograph (Form I-766, I-688, I-688A, or I-688B); and an un-expired gn passport with an un-expired Arrival-Departure Record (Form I- or nonimmigrant aliens authorized to work for a specific employer.

andle this issue, employers can simply tell new hires that the de-listed ments are no longer acceptable. Instead, employees must be asked to uce documents from the lists attached to the Form I-9. Employers ot specify which documents an employee must present. Also, unless are an employer participating in the USCIS E-Verify Program, you ot require an employee to provide a Social Security Number or ask any document with the employee's Social Security Number on it. oyers should provide the list of available documents to the new hire e new hire knows what documents are acceptable.

, if the employee cannot understand the list without assistance or if eeds the Form I-9 translated, someone may assist the employee. in, the employer may not tell the employee which documents he or must present to satisfy Form I-9 requirements.

forms presented by non-U.S. citizens are likely to be different than citizens. For example, they may present Employment Authorization uments (EADs) or Green Cards. These documents may have an ration date, some of which require future re-verification. This makes situation unique because U.S. citizens usually do not have to be e-fired (absent being re-hired), because their authorization to work does expire. It is recommended that employers get training regarding the ous acceptable documents that may be unique to non-citizens. ning can be obtained through a qualified immigration attorney or by

many of the immigration organizations, including the American Immigration Lawyers Association (AILA).

To assist employers in completing the Form I-9, as well as other immigration-related questions, U.S. Citizenship and Immigration Services (USCIS) has structured a wide range of information to inform employers on employment, business, investment, training, and related immigration subjects—a function previously provided by the USCIS Office of Business Liaison. A number of fact sheets, brochures, and other guidance materials are available at www.uscis.gov. In addition, telephone assistance is available at the following numbers:

- For general employer information: 1-800-357-2099
- For E-Verify information: 1-888-464-4218
- For student employment information: (202) 353-3046

(Administered by U.S. Immigration and Customs Enforcement)

With regard to questions regarding potential discrimination, OSC has a toll-free automated telephone hotline for employers: 1-800-255-8155 (1-800-362-2735 (TDD)). Information is available 24 hours a day and features easy-to-follow prompts to receive prerecorded answers to common questions asked by employers.

The hotline offers callers taped information on four key subjects:

- Tips on avoiding immigration-related discrimination when completing the I-9 Form;
- Information on how to avoid immigration-related discrimination in hiring practices;
- The penalties for employment discrimination; and
- The acceptable documents that establish identity and work eligibility.

Callers who need additional information will be able to speak with an OSC representative from 9 a.m. to 5 p.m., Eastern Standard Time/Eastern Daylight Time. The hotline's Fax-Back option provides callers with helpful written information. Callers can key in their fax machine number, and

thin minutes will receive by fax a copy of the list of documents acceptable for establishing identity and work eligibility and information on INA's anti-discrimination provisions. OSC updates the telephone system's recorded and fax-back information to reflect changes to the list of acceptable documents.

General Information: 1-800-255-7688. 1-800-237-2515 (TDD for hearing impaired)

Automated Employer Hotline: 1-800-255-8155 1-800-362-2735 (TDD for hearing impaired)

USCIS's Handbook for E-Verify can be found at:
http://www.uscis.gov/files/nativedocuments/E-Verify_Manual.pdf.

Employers must be prepared to handle situations when DHS or SSA informs them that E-Verify does not find a match for their new hire. The process begins when an employer completes the onscreen form for E-Verify. If the employee matches the records, the employer will be notified of a match within three to five seconds. If the information does not match the government's database, the employer will be asked to check the information provided and to correct any errors. If there are no errors, or once errors are corrected, the employer must press "Continue Verification."

After selecting "Continue Verification," the employer will be notified either: (a) employment is authorized; (b) SSA tentative non-confirmation (TNC); (c) DHS verification in process.

If employment is authorized, employment eligibility is verified and the case may be resolved. If the employer receives an SSA tentative non-confirmation response, the employee's Social Security information could not be verified. A TNC does not necessarily mean that the employee is not authorized to work in the United States.

It is the employer's responsibility to contact the employee as soon as practical to provide him/her an opportunity to contest the TNC and resolve the discrepancy in their record. The employee must be allowed to continue working while resolution of a TNC is pending. The employer

must be notified of the TNC response and referred to SSA if he or she contests the SSA TNC. See Section 3.2.6 for how to refer the new hire to SSA to resolve a TNC.

If the employer receives a DHS Verification in Process response, the employee's information matches information contained in SSA records, but does not match DHS's records. The case is then automatically referred to DHS for further verification. Employers do not need to take any action once the case is referred to DHS. DHS will respond to most of these cases within twenty-four hours, although some responses may take up to three federal government workdays. Employers should check the system daily for a response.

Employers are required to keep copies of the Form I-9 for either three years after hire date or one year after termination, whichever is later. Documents can be maintained either in hard copy or electronically.

E-verify participants must retain copies of documents used as part of the Photo Screening Tool (currently the Permanent Resident Card (Form-551) and the Employment Authorization Document (Form I-766).

Great debate over the accuracy of the E-Verify system continues. With the accuracy and reliability of the database in dispute, employers risk denying employment to individuals truly qualified to work in the United States. As mentioned above, denying employment to qualified individuals can increase exposure to discrimination claims.

As also mentioned above, E-Verify only protects employers from allegations by DHS that the employer had actual knowledge it was hiring an unauthorized alien. This protection only extends if the Social Security and e-verify documents match for that employee.

The most likely risk scenario is where an employer runs an inquiry on a new hire. That new hire is authorized to work in the U.S. However, the databases used by E-Verify are either incorrect or out of date. As a result of the inaccurate information, the employer was notified either that the Social Security records or the DHS records could not be confirmed. As a result, and in accordance with USCIS requirements, the employer terminates the

employee's employment. The employee then files a discrimination claim against the employer for immigration-based discrimination. The employer will be forced into costly litigation against that employee to prove that its employment based decisions were based upon the E-Verify results and not discriminatory animus. Regardless of the outcome of the verification item, employers can protect themselves from potential claims or liabilities by keeping records of all information provided by E-Verify.

Ms. Maiolo is a member of Carr Maloney PC. She specializes in the areas of employment and labor law, civil rights law, business law and commercial litigation, and regularly manages legal matters specific to nonprofit and charitable organizations as well as religious institutions. Ms. Maiolo also has handled matters on appeal to the highest courts of several jurisdictions.

As part of her employment and labor law practice, civil rights practice and Directors and Officers liability practices, Ms. Maiolo has successfully represented clients in claims brought under federal, state and local laws governing fair employment practices, Title I, the Americans with Disabilities Act, ADEA, FMLA, employment discrimination, sexual harassment, wrongful discharge, breach of contract, negligent hiring, and defamation. She represents clients before the EEOC, state and local fair employment practices agencies and federal and state courts. She has also successfully handled race and ethnicity discrimination claims brought under Title 42 Section 1981 of United States Code, as well as all other civil rights claims.

As part of her business law and commercial litigation practice, Ms. Maiolo has drafted and negotiated all types of contracts, including employment agreements, compensation packages, separation or termination agreements, non-compete agreements, and non-solicitation agreements, to her clients' great satisfaction. When necessary, she has also successfully represented her clients in litigation arising out of such agreements. Given the nature of these claims, Ms. Maiolo is always ready to jump into a case to seek and obtain temporary restraining order and/or preliminary injunction to prevent continued breach of damages pending resolution of a matter.

Ms. Maiolo is also quite familiar with the considerations, traits, and interests unique to nonprofit and charitable organizations, as well as religious institutions. She has represented clients in multimillion dollar claims involving the Free Establishment Clause including civil courts from delving into the polity and governance of religious institutions,

church property law and the ministerial exception as it pertains to employment law claims. She has also represented several nonprofit and charitable organizations in employment related matters, civil rights law matters, and general litigation matters throughout the Mid-Atlantic region.

Ms. Maiolo serves as general counsel for corporations, associations and organizations providing daily advice and counseling on employment, business and immigration related matters. She provides risk management services to employers, including the review, revision, and development of employment policies and practices. Further, Ms. Maiolo assists and counsels clients, through individual training sessions and/or group seminars, in how to prevent employment law or civil rights violations, as well as how to minimize the damage once such violation has occurred.

She also assists employers in obtaining employment based visas for sponsored employees. As for private individuals, Ms. Maiolo assists them in obtaining various visas, permanent residency, or citizenship, depending on the individual's qualifications.

Ms. Maiolo is the editor-in-chief of the firm's e-newsletter, Legally Speaking, which is published on a quarterly basis and provides recipients with information regarding the current state of all areas of the law. She is co-author of the firm's practice manual Overview of State and Local FEP Laws of DC, MD and VA. She has also authored many articles informing readers of the most successful ways to minimize exposure to employment and civil rights related claims.

ASPATORE SPECIAL REPORT

The Impact of Revisions to the I-9 Form and E-Verify Process

An Immediate Look at the Legal, Governmental,
and Economic Ramifications of New Employment
Verification Requirements

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