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Preparing for a Form I-9 audit

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With enhanced enforcement of immigration laws, there are more audits of employers' compliance with the Form I-9 Employment Eligibility Verification (Form I-9). Employer failure to comply with the Form I-9 process is a separate violation of law, and a violation can occur even if all employees are in fact legally authorized to work.

By law, every employer is required to complete a Form I-9, Employment Eligibility Verification, on each employee (immigrant or citizen) within three days of hire. The employer must maintain those records; they are not filed with the government. The Department of Homeland Security, Immigration Control and Enforcement can demand that you deliver completed Form I-9s for review within three business days. The employer must make Forms I-9 available upon request at that time.

Failure to timely obtain, maintain, and deliver Forms I-9 timely has its consequences. Employers who fail to obtain the appropriate documentation from new employees can be fined up to \$200,000 per I-9 employment verification they fail to fill out and maintain! Additionally, the protection which compliance with I-9 process affords you as a defense against hiring unauthorized aliens could be weakened or lost altogether. Being able to deliver the documents within three business days is one of the fundamental requirements of that law and its regulations.

Form I-9s are not an employment record; they are immigration law compliance forms. They can also be used for no other purpose. They should be kept in a single binder readily obtained to show compliance. The law requires that those forms, and only those forms, be presented upon demand

within three days.

Because so much is at stake in such an audit, the time to prepare is now.

There are many issues regarding employment and immigration law. This article addresses only one of them. Obtaining ongoing legal counsel on all of those issues is important. In addition, this article is a general presentation and is not legal advice regarding your own specific situation. You, of course, should obtain individual and confidential counseling from your own attorney on questions regarding your operation.

Phase 1: Preparation for the audit.

1. You need two 3-ring notebooks – "I-9 Originals" and "I-9 Follow-up". I-9 Originals is the notebook that you would take to an audit. In the second notebook have tabs for each month plus a tab, up front, labeled

Prepare a list of all employees. If you are paying yourself or family members, then all of you are employees who should be on the list.

"NOW". Place copies of I-9s with expiration dates in the proper month of expiration.

2. Prepare a list of all employees. The easiest way is to combine the list of employees who received a W-2 from your company in any of the last four years with those who would receive one for this year. Remove duplicates. If you are paying yourself or family members, then all of you are employees who should be on the list.

3. To this list add the date of hire to each of the names, and the date of termination if they have been terminated.

4. Print the list out in alphabetical order.

5. All Form I-9s for all employees should

be in one place. No Form I-9s or copies belong in individual employee files.

6. Organize the I-9s in alphabetical order in the I-9 Originals notebook.

Phase 2: Inventory the I-9s.

One by one match the employee list with an I-9. If there is no I-9, immediately complete the employment eligibility process for current employees. It is too late for former employees. The forms are required at the time of employment.

Phase 3: Visual Review of I-9s.

1. Is the form complete? Regulations allow you to photocopy the form, but both sides must be copied. This means the List of Acceptable Documents must be attached either on the back of the form or stapled as two page single-sided form.

2. Are there any portions of the form which are illegible due to stains, markings or fading so that any required information from you or your employee is incomplete or missing? Correct and initial or complete a new form and attach it the old one.

3. Does the form have any white-out, obvious erasures, or modifications? As a rule, all entered information should be typed or printed in black or dark ink. In the future make needed corrections by drawing a line through the wrong entry and above it enter the correct one. The employee will need to initial any changes to Section 1. The person who signed for the Employer can initial changes to Section 2.

4. Is the correct form being used? **The form must be current as of the time of hiring.** The form date is at the bottom right of the page. List the form date under the column "Form Used"; it becomes important later.

if hired on or after this date	use this form
July 5, 2007	6/05/07
April 3, 2009	2/02/09
Sept. 8, 2009	8/09/09

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5. The law does not require that copies of documents presented be kept with the Form I-9. If you do it, then make sure it is done for every employee.

Phase 4: Step-by-step review of Section 1.

1. Compare the name on the I-9 with your records. The names should agree with the forms which were submitted. Nicknames and shortened names should be avoided. A common error is the misspelling of names. The employee who filled this out should have it correct, so it is a matter of conforming your records to that name. Employees changing names should have a new Form I-9 with the current information. Attach the earlier one.

2. Maiden name is used only if it applies.

3. The address is the address at the time of filling out the form. It may disagree with a current address or the one used to the mail W-2. What is critical here is it must be a complete physical location address, not a post office address. The zip code can, but need not be, the 9 digit zip code. You are not required to verify the address.

4. The date of birth is also a common place for errors. Common mistakes are using the current date or the current year. You are not required to verify the date of birth.

5. The social security number is voluntary and, as a matter of course, should not be used unless the employer is participating in E-verify.

6. One of the four boxes on the right side of the form must be checked. A non citizen national of the United States is a person who was born in American Samoa, certain former citizens of the former Trust Territory of the Pacific Islands, and certain children of such born abroad. For the remaining two choices the person must put in the Alien # or Admission #. In the case of an alien authorized to work, the expiration date must be entered.

If none of the boxes are marked, the employee must mark them, initial the change, and date. If the expiration date has passed, the employee needs to re-verify eligibility for employment.

7. The employee must sign. If the person is under the age of eighteen or placed by a nonprofit group for a rehabilitation program, then on the signature line print or type "individual under the age of 18" or "special placement" as the case is, and the parent or guardian or representative of the nonprofit group should sign as a "Preparer/Translator".

8. The form should be dated as of the date of signature.

9. If anyone prepares Section 1 other than the employee, such as an underage child or a special placement, or someone who is illiterate or not able to understand English, then the person filling it out must sign, print the name and physical location address, and state the date.

10. Section 1 is to be filled out and

signed by the employee. By signing, the employee verifies that the statements are true subject to the penalty of perjury. Any corrections or additions must only be done and initialed by the employee.

Step-by-step review of Section 2, Employer review and verification

This is the single most important part of the process. The rule is simple: either there is evidence of a document from List A (on the reverse or next page of the form) or there is **both** one document from List B and one from List C. Put another way, if there is a document from List A, there should be nothing from either Lists B or C.

1. For the first column, if it is used, make sure there is a document listed, such as a U.S. Passport or other List A document; the document number; and the expiration date.

For employment after April 3, 2009 all documents must be valid and not expired as of the date the employment was verification process was done.

2. If List A is not used, then one document each found in List B and List C should be noted. Expiration dates for any

Step-by-step review of Section 2, employer review and verification, is the single most important part of the process.

document used in list C should be entered. The information required is identified in the column to the right, but must be entered in the space under the appropriate list. In the case of expiration dates, the same applies. The second expiration date applies to certain documents in List A only.

3. If a foreign passport with Form I-551 or Forms I-766 or I-94 are used under List A, list the expiration date. The same goes for the expiration dates of any employment authorization issued by the Department of Homeland Security.

4. Any Form I-9 without a document fully identified from either List A, or one each from List B and List C, is invalid and the I-9 process redone immediately. I-9s with expiration dates should be copied and placed in the Follow-up binder.

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5. If the date of employment is blank, enter the correct date and initial the change.

6. Make sure there is a signature. If it is not, it must be signed by the person who actually saw the documents. Merely adding a signature of someone else will not do. The law is very clear: The person who actually held and viewed the documents and filled out Section 2, and no one else, must sign on behalf of the employer. It is not compliance to have one employee, such as a clerical employee, fill out Section 2, look at and note the documents, but then submits the form to someone else to sign who has done neither. That is not compliance with the law. From here on only the employee who sees the documents is to sign. If it has already happened, review it with an immigration law attorney.

Reverification of I-9s

As a general rule, once the Form I-9 is properly completed it does not need to be redone unless some of the documents, such as authorization to work, expire and the employment needs to be reverified.

1. Reverification is necessary in two situations: When a previously employed individual is rehired, or when documents expire. If documents associated with either immigration/citizenship status as listed in Section 1, or documents showing the person is authorized to work under List A, or documents showing that the employee has current employment authorization under List C have expired, reverification is necessary.

2. The need for this can be seen by comparing the expiration dates of the documents with the current date.

Final notes:

The final I-9 Current binder should have only the completed Forms I-9 and a list of all employees during the last three years with hire and termination dates. Other employment information such as address, wages, etc., should not be on the list. Notes from this audit should not be there.

Routinely refer to and use the Follow-up Binder to insure that you are current and correct on all Form I-9s.

Do not mix individual Form I-9s or copies of them with other employment records. It is illegal to use the form and documents used for its compliance for any other purpose.

Form I-9 can only be viewed by Department of Homeland Security and may be shown to any other person – even a governmental official – without a proper order. Check with your lawyer if anyone else asks.

Some states have their own, additional, requirements to verify eligibility for employment. Those states include Arizona and Oklahoma. The law is constantly changing, so check with your lawyer for your state.

This is an ongoing process. Continue to learn, continue to train, continue to audit, and continue to be vigilant. Your liberty and property are at risk if you do not.

Other information can be found at: <http://www.cvmbs.colostate.edu/ilm/proinfo/wdnnewsletter.htm>.