

Form I-9 Frequently Asked Questions

FOR INFORMATIONAL PURPOSES ONLY

The Immigration Reform and Control Act (IRCA) requires, among other things, that an employee's eligibility to work be verified by use of the Employment Eligibility Verification Form I-9. Below are some frequently asked questions about this fundamental legal cornerstone of the employment process.

1. Must I keep on file a Form I-9 for every current employee?

Yes. The Form I-9 was developed for the purpose of verifying that individuals are legally eligible to work in the United States. Employers are required to complete a Form I-9 for every individual hired after November 6, 1986. (See Question #8 for rules regarding rehired employees.)

Reference: Handbook for Employers, Instructions for Completing Form I-9, (page 1) and Title 8, Code of Federal Regulations, Section 274a2(b) Employment Verification Requirements.

2. How long must I keep I-9 Forms on file?

An employer must retain the original Form I-9 for each employee either for three (3) years after the date of hire, or one (1) year after employment is terminated, whichever is later. All current employees hired after November 6, 1986 must have I-9 Forms on file with the employer for the full term of their employment, plus the applicable retention period cited above.

Examples

Determining Retention Calculation dates for:

1. Employee hired on 11/01/93 and terminated on 07/05/94
2. Employee hired on 03/27/99 and terminated on 05/19/03

Step 1:

Identify hire date and add 3 years = [timeframe A]

1. 11/01/93 + 3 years = 11/01/96
2. 03/27/99 + 3 years = 03/27/02

Step 2:

Identify termination date and add 1 year = [timeframe B]

1. 07/05/94 + 1 year = 07/05/95
2. 05/19/03 + 1 year = 05/19/04

Step 3:

Compare date [A] and [B]

1. Compare 11/01/96 and 07/05/95
2. Compare 03/27/02 and 05/19/04

Step 4:

Determine the later timeframe [A] or [B] in each case.

The later of the two timeframes becomes the retention date for the corresponding Form I-9.

Results:

1. 11/01/96 is later than 07/05/95, so 11/01/96 is the retention date for this terminated employee's Form I-9.
2. 05/19/04 is later than 03/27/02, so 01/19/04 is the retention date for this terminated employee's Form I-9.

Reference: Handbook for Employers, Instruction for Completing Form I-9, M-274 (page 2) and Title 8, Code of Federal Regulations, Section 274a. 2(b)(2) Retention and Inspection of Form I-9.

3. Should I make photocopies of documents the employee presents?

Generally, it is not recommended that you make photocopies of Form I-9 supporting documents. An employer may do so if they so choose. If such a copy is made, it must be retained with the Form I-9. The copying of any such supporting documentation and retention of the copies does not relieve the employer from the requirement to fully complete Section 2 of the Form I-9. If employers choose to keep copies of Form I-9 documentation, then such retention must apply to all employees, and the copies should be attached to the related I-9 Forms. If an employer implements a policy of copying I-9 related employee documents, it must ensure that it follows this practice for all employees and not solely for individuals of certain national origin or citizenship status. To do so may constitute unlawful discrimination under Section 274B of the Immigration and Nationality Act.

Reference: Employer Information Bulletin 102, (page 7), dated 3/16/05 entitled: The I-9 Process in a Nutshell, Copying of Documentation, Office of Business Liaison, U.S. Department of Homeland Security, Citizenship and Immigration Services <http://www.uscis.gov>.

4. What is the current version of the Form I-9?

The current version of Form I-9 bears a revision date of 05/31/05Y in the lower right hand corner of each page of the I-9 Form.

Reference: Handbook for Employers, Instructions for Completing Form I-9, M-274.

5. Should I keep I-9 Forms in personnel files?

There is no rule or regulation mandating where I-9 Forms must be retained. Generally, it is considered a "best practice" to keep I-9 Forms separate from other personnel/HR records for several reasons. First, if you receive notice of an I-9 audit, you will not want to waste time searching for I-9 Forms in your personnel files. Secondly, keeping your I-9 Forms separated from other records makes it easier to conduct periodic self-audits of your compliance status. Finally, since The Department of Homeland Security (DHS), the Department of Labor (DOL) and Office of Special Counsel (OSC) can review the forms, it makes it easier for these audits to be conducted without undue intrusion into your personnel/HR records.

6. What are my obligations in determining whether a document is genuine?

The law does not require you to be an expert regarding the authenticity of documents of identity and work authorization offered as part of the Form I-9 process. Instead, the law states that you must apply a "reasonably prudent person" test and determine whether the document presented "reasonably" appears to be genuine, relates to the individual, and authorizes employment.

Reference: Title 8, Code of Federal Regulations, Section 274a 2(b)(ii)(A) and Handbook for Employers, Instructions for Completing Form I-9, M-274, (page 7) Part Three- How to Complete Form I-9.

7. What is document abuse discrimination?

1. Requiring employees to present any specific document(s);
2. Requiring employees to present more documents than are minimally necessary to establish identity and employment eligibility;
3. Refusing to accept a document that reasonably appears to be genuine on its face.

Collectively, these prohibitions are referred to as the "document abuse discrimination provisions." Enforcement of this section of the law lies with the Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices. The penalties for document abuse discrimination are similar to the penalties for improper Form I-9 completion.

The best way to avoid document abuse discrimination is to:

1. Let the employee choose what document(s) to present;
2. Never require more documents than minimally necessary to establish identity and employment authorization;
3. Never reject a document that reasonably appears to be genuine and to relate to the individual.

Reference: Handbook for Employers, Instructions for Completing Form I-9, M-274 (page 2)
New Anti-Discrimination Provision.

8. What should I do about the Form I-9 when I re-hire an individual?

Re-hires are an exception to the general rule related to completing an I-9 Form for every person you hire. In the case of re-hires, if the original I-9 Form is less than three years old, you can simply ask the re-hire to confirm that the information on the I-9 Form is still accurate. If so, you should put the re-hire date in Section 3 of the I-9 Form and sign and date that portion of the form. If the original I-9 Form is more than three years old, or if no form was obtained or retained previously, then you must complete a new I-9 Form.

Reference: Handbook for Employers, Instructions for Completing Form I-9, M-274 (page 4) Re-verifying or Updating Employment Authorization for Rehired Employees.

9. What should I do if an individual presents a document with an expiration date?

First, you should not refuse to employ someone merely because his/her employment authorization expires at some point in the future. Secondly, you should record the expiration date correctly in Section 2 of the I-9 Form. If the employee's employment authorization document (List A or List C) bears an expiration date, then you should have a methodology in place to notify the employee prior to the expiration of said document(s). You should then record the new document information in Section 3 of the I-9 Form. There are two exceptions to the re-verification rule.

Do not undertake re-verification of U.S. passports or permanent alien registration cards, even though each has an expiration date.

Reference: Handbook for Employers, Instructions for Completing Form I-9, M-274 (page 4) Future Expiration Dates and Employer Information Bulletin 102, page 5, Receipt Rule, dated 3/16/05 entitled: The I-9 Process in a Nutshell, Office of Business Liaison, U.S. Department of Homeland Security, Citizenship and Immigration Services at <http://www.uscis.gov>.

10. What do I do if an individual doesn't have the required document(s)?

You will find that most eligible candidates have a valid List B identity document, or can obtain one relatively quickly. This is not always the case for employment authorizing documents in Lists A and C. The law permits you to accept a receipt for an application to replace an employment authorization document. The receipt authorizes employment for 90

calendar days, at which point the employee must produce the original document. You should record the receipt number in Section 2 and show an expiration date 90 days from the date the receipt is presented to you. Remember to re-verify employment eligibility and complete Section 3 of the form at the end of the 90-day grace period.

Reference: Handbook for Employers, Instructions for Completing Form I-9, M-274 (page 4) Re-verifying Employment Authorization for Current Employees and Employer Information Bulletin 102, page 2, Receipt Rule, dated 3/16/05 entitled: The I-9 Process in a Nutshell, Office of Business Liaison, U.S. Department of Homeland Security, Citizenship and Immigration Services at <http://www.uscis.gov>.

11. What are the penalties for Form I-9 deficiencies?

Employers who fail to properly complete, retain, and/or present I-9 Forms for inspection as required by law may be subject to a civil penalty for violations occurring on or after September 29, 1999 from \$110-\$1,100 per employee whose Form I-9 is not properly completed, retained, and/or presented. For Form I-9 violations occurring before September 29, 1999, civil penalties range from \$100-\$1,000.

Unlike the substantive violations of "knowingly hiring" or "knowingly continuing to employ", paperwork violations do not increase for repeat offenses. On the other hand, an employer that entirely ignores the Form I-9 process could be subject to pattern or practice liability, which might result in a fine of up to \$10,000 and/or a six-month prison sentence.

Although the Department of Homeland Security (DHS) proposes a penalty by issuing a Notice of Intent to Fine, the employer has the right to a hearing before an Administrative Law Judge (ALJ), who ultimately sets the penalty. The ALJ may ignore the fine proposed by the DHS and make a separate determination of what fine is appropriate. In doing so, the ALJ will consider the following factors: (1) size of the employer's business; (2) "good faith" demonstrated by the employer; (3) seriousness of the violation; (4) whether the employer should have known that the employment was unauthorized; and (5) past history of IRCA violations.

Reference: Employer Information Bulletin 111, (page 2), Failure to Comply with Form I-9 Requirements, dated 3/16/05 entitled: Employer Sanctions, Office of Business Liaison, U.S. Department of Homeland Security, Citizenship and Immigration Services at <http://www.uscis.gov>.

12. What is the Form I-9 list of acceptable documents that establish identity and work eligibility?

The following is the list of acceptable documents for Form I-9 purposes:

List A - Documents that Establish Both Identity and Employment Eligibility

1. U.S. Passport (unexpired or expired)
2. Unexpired foreign passport, with I-551 stamp or attached INS Form I-94 indicating unexpired employment authorization
3. Alien Registration Receipt Card with photograph (INS Form I-151 or I-551)
4. Unexpired Temporary Resident Card (INS Form I-688)
5. Unexpired Employment Authorization Card (INS Form I-688A)
6. Unexpired Employment Authorization Document issued by the INS which contains a photograph (INS Form I-688B)
7. Unexpired Employment Authorization Document (INS Form I-766)

List B - Documents that Establish Identity

1. Driver's license or ID card issued by a state or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, sex, height, eye color, and address

2. ID card issued by federal, state or local government agencies or entities provided it contains a photograph or information such as name, date of birth, sex, height, eye color, and address
3. School ID card with a photograph
4. Voter's registration card
5. U.S. Military card or draft record
6. Military dependent's ID card
7. U.S. Coast Guard Merchant Mariner Card
8. Native American tribal document
9. Driver's license issued by a Canadian government authority

For persons under age 18 who are unable to present a List B document listed above:

1. School record or report card
2. Clinic, doctor, or hospital record
3. Day-care or nursery school record

List C - Documents that Establish Employment Eligibility

1. U.S. Social Security Card issued by the Social Security Administration (other than a card stating it is not valid for employment)
2. Certification of Birth Abroad issued by the Department of State (Form FS-545 or Form DS-1350)
3. Original or certified copy of a birth certificate issued by a state, county, municipal authority or outlying possession of the United States bearing an official seal
4. Native American tribal document
5. U.S. Citizen ID Card (INS Form I-197)
6. ID Card for use of Resident Citizen in the United States (INS Form I-179)
7. Unexpired employment authorization document issued by the INS (other than those listed under List A)

Reference: Employer Information Bulletin 102, (page 2), Receipt Rule, dated 3/16/05 entitled: The I-9 Process in a Nutshell, Office of Business Liaison, U.S. Department of Homeland Security, Citizenship and Immigration Services at <http://www.uscis.gov>.

13. Does an employer have to re-verify the employment eligibility of an employee whose permanent resident card has expired?

No. On August 1, 1989, Immigration and Naturalization Service (INS) began issuing a revised Resident Alien Card, Form I-551, to new permanent resident aliens. The I-551 is a List A document because it establishes both identity and employment eligibility. The card will also contain an expiration date, making the card valid for 10-years from the date of issuance. The applicant will then be required to obtain a new card. However, because employment authorization is unlimited for I-551 holders, there will be no need to update the I-9.

Reference: Employer Information Bulletin 102, page 5, Source of Confusion (#4), dated 3/16/05 entitled: The I-9 Process in a Nutshell, Office of Business Liaison, U.S. Department of Homeland Security, Citizenship and Immigration Services at <http://www.uscis.gov>.

14. If an employer believes a new hire is an alien, can he/she ask the person to produce a Green Card when filling out the I-9 Form?

No. As the Instructions attached to the I-9 Form (rev. 5-31-05) state, "Employers CANNOT specify which document(s) they will accept from an employee."

Reference: This statement is repeated in the instructions accompanying the I-9 Form (OMB No. 1115-0136) and Handbook for Employers, Instructions for Completing Form I-9, M-274 (page 3) (Part 3, Section 2).

15. When filling out the I-9 Form, can an employer accept a Social Security card from an alien as proof of work authorization?

Yes. If the Social Security card does NOT have a statement on it which says "NOT VALID FOR EMPLOYMENT," it should be accepted as proof of employment eligibility. Such an unrestricted Social Security card is clearly listed on the back of Form I-9 as a List C acceptable document under List C.

The Social Security Administration (SSA) issues the following cards:

1. The card most people possess shows only name and Social Security number and allows individuals to work without restriction. SSA issues it to U.S. citizens or people lawfully admitted to the U.S. for permanent residency.
2. A second type of card bears the legend, "NOT VALID FOR EMPLOYMENT." SSA issues this document to people from other countries lawfully admitted to the U.S. without work authorization from the INS and who need a Social Security number to obtain a benefit or service.
3. A third type of card bears the legend, "VALID FOR WORK ONLY WITH INS AUTHORIZATION." SSA issues this document to people lawfully admitted to the U.S. on a temporary basis and with Department of Homeland Security (DHS) authorization to work.

Reference: Handbook for Employers, Instructions for Completing Form I-9, M-274, List of Acceptable Documents, List C.

16. Can an employer accept an expired driver's license to establish a new hire's identity for Form I-9 purposes?

Yes. However, a driver's license can only be used to establish a new hire's identity for Form I-9 purposes (not authorization to work). It is one of a number of List B documents that only establishes identity for I-9 purposes.

Reference: Employer Information Bulletin 102, (page 5), Section 2: Employer Review and Verification, dated 3/16/05 entitled: The I-9 Process in a Nutshell, Office of Business Liaison, U.S. Department of Homeland Security, Citizenship and Immigration Services www.uscis.gov.

17. Can an employer accept an expired United States passport to establish a new hire's identity and authorization to work?

Yes. An expired United States passport establishes both who the holder is, i.e., his/her identity, and that he/she is a United States citizen and therefore authorized to work in the United States.

Reference: Handbook for Employers, Instructions for Completing Form I-9, (M-274), (page 14), dated 11/21/1991 wherein it states that "You may accept an expired United States Passport [for I-9 purposes]." This means that there is no reason to re-verify the I-9 Form when the passport expires.

18. Why must United States citizens fill out I-9 Forms?

It is the law. The I-9 Form is designed to determine who is authorized to work in the United States. Its purpose is not to determine who is, and is not a citizen. While all citizens are authorized to work in the United States, it is not always easy to recognize who is, and is not a citizen. We are a diverse people drawing our heritage from every country in the world. Employers cannot simply look at new hires and determine, "who needs to complete a Form I-9, and who doesn't." For this process to be effective, everyone must complete a Form I-9.

Reference: Form I-9 Instructions, Section 1-Employee, dated 11/21/91, Title 8, Immigration and Nationality Act, Section 274A1(B)(i).

19. Is an employer required to complete a Form I-9 for everyone who applies for a job?

No. An employer must complete a Form I-9 for every individual actually hired. For purpose of this law, a person is "hired" when he or she begins to work for the employer.

Reference: Employer Information Bulletin 102, (page 2), The I-9 Process: General, dated 3/16/05 entitled: The I-9 Process in a Nutshell, Office of Business Liaison, U.S. Department of Homeland Security, Citizenship and Immigration Services www.uscis.gov.

20. Does an employer need to complete a Form I-9 for an Independent Contractor or its employees?

No.

Reference: Handbook for Employers, Instructions for Completing Form I-9, M-274 (page 12) Part Seven, Question 5 and Title 8, Code of Federal Regulations, Section 274a.1(j) and 274a.5.

21. Can an employer accept as evidence of employment eligibility a Social Security card that has been laminated?

No. Lamination of such cards renders the document invalid.

Reference: Handbook for Employers, Instructions for Completing Form I-9, M-274, Document List C (page 29).

22. Are employers responsible for completing a Form I-9 for citizens and nationals of the United States?

Yes. While citizens and nationals of the United States are automatically eligible for employment, they too must present the required documents and complete Form I-9.

Reference: Form I-9 Instructions, Section 1-Employee, (Rev. 05/31/05) and Title 8, Immigration and Nationality Act, Section 274A 1(B)(i).

23. If someone accepts a job with an employer, but will not start work for a month or longer, can the employer complete a Form I-9 when the employee accepts the job?

Yes. The law requires that an employer complete Form I-9 when a person begins working. However, the employer may complete the form earlier, so long as it completes the form at the same point in the employment process for all employees.

Reference: Handbook for Employers, M-274, Instructions for Completing Form I-9 (page 3) Part Three, How to complete the Form I-9.

24. If an employee is a non-citizen and provides an Alien Number (Section 1 of Form I-9) but not a supporting immigration document, can the employer request to see the employee's immigration document(s)?

No. However, if the employee presents a Social Security card with a legend "VALID FOR WORK ONLY WITH DHS AUTHORIZATION," the employer can then ask to see the employee's immigration work authorization document.

Reference: Handbook for Employers, M-274, Part Seven (page 13) Question 10.

25. Can Form I-9 Compliance, LLC assist my organization in verifying the “right to work” status of my newly hired employees?

Yes, and the benefits are significant. Form I-9 Compliance, LLC will help take all of the guesswork out of the employment verification process. Our computerized process uses an automated error-detecting electronic Form I-9 that virtually eliminates errors, omissions and technical discrepancies. Social Security, immigration “A” and I-94 numbers are verified through the Social Security Administration (SSA) and Department of Homeland Security (DHS). The process is quick, easy to use, and most importantly, it is accurate.

26. Has the Department of Homeland Security authorized the use of an electronic Form I-9?

Yes. On September 28, 2004, President Bush authorized the use of an electronic Form I-9 and signature when he signed H.R. 4603. The Department of Homeland Security (DHS) issued guidance and interim guidelines for making use of these electronic applications on April 29, 2005, the date the above law became effective.

Reference: U.S. Immigration and Customs Enforcement website at
<http://uscis.gov/graphics/index.htm>
