

# FAQ: What Employers should know about the Form I-9

## Background

Employers are required to use Form I-9 to verify their workers' identity and eligibility to be employed in the United States as soon as he or she accepts the job offer. The latest edition of the Form I-9 became mandatory on May 1st, 2020.

Immigration worksite enforcement has increased dramatically in the last decade and is expected to continue. Employers face a difficult task balancing the requirements of immigration and anti-discrimination laws. Additionally, there is a patchwork of state laws regarding employment verification and employers' compliance.

This document is intended to help you comply with the Form I-9 and process requirements.

## 1. What are some of the key features of the Form I-9?

The form I-9 is a two-page form that employers and employees complete as part of the employment verification process.

The two substantive pages contain three sections.

- Page One contains Section 1 which is completed by the employee. It also contains a section for preparers and/or translators, if applicable.
- Page Two contains Section 2 and Section 3 which are completed by the employer. Section 2 contains an "additional information" field, where employers can record relevant notes such as employment authorization document (EAD) extensions for F-1 OPT STEM students, CAP-GAP, H-1B extensions, E-Verify case number, employee termination date, and others. Section 3 is used for rehires or reverification.

The instructions have grown from six to 15 pages, including four pages of explanations.

The form can be completed on paper, electronically through private software, or through the government's website as a fillable form.

## 2. What are the benefits of using the on-line fillable Form I-9?

Its most significant features are field-level data validation and help text. The program checks for errors and provides guidance as the information is entered. The users fill out the form online and might need to print the form to obtain handwritten signatures. The completed form should be stored in a safe place.

\*This material is not intended to substitute as legal advice.

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### **3. When and how must the employer and the employee complete Form I-9?**

The employee must fully complete section 1 of the form no later than the first date of hire.

The employer must complete Section 2 within three business day of the date of hire. For example, if an employee begins work on a Monday, the employer has until Thursday of that week to complete the form I-9 (Monday - Thursday rule).

The employer must review the documents provided by the employee as evidence of work authorization. The employer is verifying that the documents appear genuine and apply to the person presenting. The employer must retain the Form and supporting documents (if applicable) for the required retention period.

The employer must complete section 3 on the date of rehire and, in the case of re-verification, before the work authorization expires.

### **4. Can an employer with remote hires delegate the responsibility of examining the employee's original documents to one person (or agent/authorized representative) and have another person complete the attestation based on photocopies of the documents or via webcam?**

In general, the person who signs the attestation must be the same person who physically examines each original acceptable document to determine if it reasonably appears to be genuine and relate to the employee.

An employer with remote hires can delegate the verification to a person who serves as an agent / authorized representative of the employer for the purpose of completing the I-9. That agent must physically examine the documents and complete section 2 of Form I-9 (unless virtual flexibility is applicable).

Technically, anyone can act as the employer's agent for this purpose but the employer should develop a policy for this process and ensure the agent is educated in the process as the employer retains the liability for the actions of the agent/authorized representative.

The Handbook for Employers (M-754) (updated 4/2020) provides that an employer might "designate, hire, or contract with any person" they choose to complete, update or make corrections to Section 2 or 3 on their behalf.

The authorized representative must perform all the employer duties described in the Handbook, and complete, sign and date Section 2 or 3 on behalf of the employer. Employees cannot act as authorized representatives for their own Form I-9.

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## 5. Is pre-population permitted for Form I-9?

USCIS' guidance provides that Section 1 *cannot be pre-populated* using onboarding electronic I-9 systems, even if the employee reviews the entries and signs the section in affirmation of the entries. Employers choosing an I-9 software solution should ensure the system does not pre-populate Section 1.

An employer can pre-populate certain fields in Section 2 such as: employer's name and address.

Sources confirming the prohibition of pre-population include:

A [Technical Assistance Letter](#) dated August 20, 2013 from the Office of the Special Counsel (OSC) that discourages section 1 pre-population and USCIS' [E-Verify Connection Newsletter](#) (issue 33) noting the prohibition of Section 1 pre-population by an electronic system that collects information during the on-boarding process for a new hire.

## 6. What should an employer do when it discovers during an internal audit that a Form I-9 for an employee was not completed or is missing, or a section of the Form I-9 was left blank?

If a Form I-9 was not completed or is missing, the current version of the Form I-9 should be completed as soon as possible. If the original Form I-9 exists but Section 1 or Section 2 was not completed or is missing, the employee (for Section 1) or the employer (for Section 2) should complete the section as soon as possible.

When making corrections to the Form I-9, the employer should not backdate the form and should make a signed and dated note explaining the correction. When correcting section 2, the employer should clearly state the actual date employment began in the certification portion of Section 2.

## 7. What kinds of fines are involved?

*Civil money penalties are assessed when an employer fails to properly prepare, retain, or produce upon request the Form I-9.*

Immigration and Customs Enforcement (ICE) has been consistently collecting millions of dollars per year from employers in I-9 penalty cases.

Failure to prepare or present a Form I-9 during an audit is considered one of the most serious substantive violations. Other examples of substantive violations include failure to review and verify a proper List A, B or C document and failure to sign the attestation in section 2.

Penalties for these violations range from \$230 to \$2,292 per violation. The penalty can be aggravated or mitigated by certain factors.

*Proactive internal audits, training and education under the guidance of an immigration compliance attorney are considered good faith mitigating factors and provide attorney client privilege.*

Employers can also be found to have knowingly hired or continued to employ unauthorized workers. These employers may be fined, criminally prosecuted, and barred from government contracts.

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The failure to complete Form I-9 can be the basis for a finding of knowingly hiring or continuing to employ an unauthorized worker.

#### **8. How are penalties for verification violations determined?**

Penalties are assessed and/or mitigated based on a variety of factors, including but not limited to:

- A party's control or lack of control over the Form I-9 process,
- The size of the business,
- Good faith compliance
- The seriousness of the violation,
- Whether or not the employee was determined to be authorized to work,
- The history of the employers past violations.

#### **9. What are the retention requirements for Form I-9?**

An employer is required to retain a Form I-9 for one year from the date of the employee's termination or three years from the date of hire, whichever is later.

#### **10. What proactive steps can employers take to lessen the likelihood of an investigation or fines?**

An investigation typically happens because of a complaint from a disgruntled employee, a referral from the E-Verify unit, or can be random.

Employers should evaluate and update their Form I-9 process; work with an experienced immigration compliance attorney to develop policies, institute training, and resolve I-9 concerns; and take steps to train the staff for a good faith compliance use of the Form I-9.

**NOTE: An employer's participation in E-Verify does not replace Form I-9 requirements or the need to comply.**

**For additional information or to learn about how the Marks Gray Immigration Team may assist your business, please contact us via email: [immigrationteam@marksgray.com](mailto:immigrationteam@marksgray.com)**

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