

The New I-9 Form - What You Need to Know

Legal Alert
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Sequestration didn't stop the Department of Homeland Security from introducing a new Employment Eligibility Verification Form I-9 on Friday, March 8, 2013. The new Form I-9 went into effect immediately, but employers can continue to use the prior versions (Rev. 08/07/09) Y and (Rev. 02/02/09) N through the close of business on Monday, May 6, 2013. Only the new version can be used beginning on and after May 7, 2013.

The new Form I-9 is longer, split into two pages – one side for the employee and the other for the employer – and has more detailed instructions – six pages attached to the Form I-9, and a revised 70-page M-274 Handbook for Employers. Anyone who has any responsibility for Form I-9 compliance should be sure to read and understand them all to reduce potential liability. This article highlights some of the most significant aspects of these new documents and issues worthy of your consideration. It focuses exclusively on the printed format, not the electronic format that many private vendors may have available.

Where to Obtain the Form I-9

The best place to get your Form I-9 is directly from the [government's web site](#). The Form I-9 has been updated on a sporadic and unannounced basis. By accessing the Form I-9 directly from the government, you know that you will be using the current version. Use of an outdated, no longer in use Form I-9 can cause problems in a government inspection. You should also bookmark the [M-274 Handbook for Employers](#). It should be required reading and is easily searchable key words, providing quick and easy guidance. Another helpful resource is [I-9 Central](#). It provides many answers and useful links and updates, warranting regular visits.

Key Elements Have Not Changed

The Form I-9 must be completed and retained by employers for each new employee hired to work in the U.S. after November 6, 1986. The Form I-9 should not be completed before an individual is offered and has accepted a job offer. Newly hired employees must complete and sign Section 1 no later than the first day of employment. The employer must see original documents, with the exception of a birth certificate, and must complete Section 2 within 3 days of the employee's first day of employment. Section 3 of the Form I-9 is for situations involving reverification of employment authorization and rehires of former employees.

So why does this formerly one-page form require expansion to two pages, with six pages of instructions and a seventy-page handbook? You might be surprised that the revisions to the form and its instructions have actually helped make it easier to complete properly and to reduce the possibility of an error that can cost your business money. But they also raise questions as to potential liability for mistakes or failure to comply with the government's new requirements.

Section 1

It can be very helpful to provide the full nine-page Form I-9, with its Instructions, Form I-9 and Lists of Acceptable Documents with a job offer or upon a person's acceptance of an offer. The instructions for Section 1 take up more than one page, but offer helpful comments and explanations. For instance, the instructions explain that people with "two last names or a hyphenated last name" should include both names in the last name field. This explanation has never before been part of the instructions to the employee, and its absence often resulted in incomplete or inaccurate information and complications during inspections.

"Other Names Used (if any)" has replaced the former version's "Maiden Name" box. The instructions now make it mandatory to write either other "legal names," such as a maiden name, or "N/A."

The instructions make it clear that it is not acceptable to provide a post office box (P.O. Box) as an address. And, for border commuters from Canada or Mexico, it is now clear that they can indicate their foreign address.

For the very first time, the instructions clearly indicate that providing a Social Security number (SSN) in Section 1 is voluntary, unless the employer participates in the government's E-Verify program, in which case it is mandatory to provide the number in that location.

New to the updated Form I-9 are two additional optional boxes for "E-mail address" and "Telephone Number." The instructions state that a person "may" write "N/A" if choosing not to provide that information.

Perhaps the best change to Section 1 is the expansion of the four-box attestation, now making it almost impossible for an employee to fail to understand that only one of the four boxes can be checked, and that for only certain boxes must additional, specific information be provided. However, the instructions for those with time-limited authorization to work in the U.S. are quite detailed, with four paragraphs of instructions and three of four lines requiring notations (with exceptions).

TIPS FOR SECTION 1

The instructions provide that “Employers must ensure that Section 1 is completed properly...” and an accurately completed Section 1 can make it easier to respond in an inspection.

According to DHS, every box in the first two rows must have information in it except “Apt. Number.” An employer should consider adopting a practice of considering Section 1 of a Form I-9 as incomplete and unacceptable if any of the mandatory boxes are blank.

Only one of the four attestation boxes may be checked and, for the bottom two, additional information must be included. For the bottom attestation, four of the five lines must have information.

Make sure that the employee has used the proper date format of month/day/year. (This can be easily determined upon seeing documentation of the employee’s birth date presented for Section 2.) It is all too common to see the alternate day/month/year which, again, causes problems with inspections.

Section 2

The best change to Section 2 is the expansion of space for List A documentation and the related lack of additional space for List B or List C documents, which should never need more than one document.

What is the Required Date of Completion for Section 2? (When can Three mean Four?)

Generally, an employer’s representative must examine the required documentation and complete Section 2 “within 3 business days of the employee’s first day of employment.” For many years, many people thought that meant that if a person started work on a Monday, Section 2 had to be completed by the close of business on Wednesday. But DHS guidance now clearly advises that the three day period begins after the employee’s first day of employment. Thus, as the instructions now provide, “the employer must complete Section 2 by Thursday of that week.”

As always, if someone is hired for a job that is expected to be for less than 3 business days, Section 2 must be completed by no later than the first day of employment. And DHS now makes it clear that it is completely acceptable to complete Section 2 on, or even before the first day of employment, if there has been both an offer and acceptance of employment.

First, Write the Last Name

Because the Form I-9 is now two pages, DHS requires employers to write the last name, first name, and middle initial of the employee at the top of Section 2, “to identify the pages of the form should they get separated.” While this makes some sense, is it really necessary for those employers who choose to use a double-sided Form I-9, and what penalty is there if an employer fails to do so at all, or not until the date the form is turned over to the government?

To Photocopy or Not to Photocopy

That is still the question that each employer must ask and answer uniformly. But another question remains open – what to do with the photocopied documents? The new instructions state that the “photocopies must be retained and presented with Form I-9 in case of an inspection by DHS or other federal government agency.” But where? The new M-274 Handbook provides, on page 29, that they “must either be retained with Form I-9 or stored with the employee’s records.” This appears to be one of the first times that DHS has confirmed that they can be separated. But separating them can present a logistical nightmare if they have to be re-united within a matter of days when an employer is presented with a three-day inspection notice.

Section 3

Section 3 is where an employer should indicate the re-hiring date of employees, unless you want to complete another Form I-9, retaining all previously completed forms. Documentation for a rehire can be in Section 3 of an existing Form I-9, even if that particular version is no longer authorized for use.

Reverification, which is an action associated with ongoing employment of an employee whose employment authorization is about to expire, must be on a Form I-9 that is authorized for use on the date of reverification. The M-274 Handbook provides a helpful, expanded explanation of the List A documents that never need reverification, despite having an expiration date.

OVERALL TIPS

An employer is only required to retain pages 7 and 8 of the Form I-9 and any documents photocopied (if photocopying is the standard practice). It can help to print pages 7 and 8 on one, double-sided document so as to reduce the possibility of losing or misplacing a page.

Is Absolute Compliance with the Instructions Important?

Let’s face it – it now seems more likely that the new Form I-9 will not be completed as instructed by DHS than on the old form, especially in Section 1. Does DHS truly expect every new employee to read and understand the distinctions between boxes that “must” be completed and those in which they “may write ‘N/A’ if you choose not to provide this information.” And what is the penalty for an employer who fails to “ensure that Section 1 is completed properly,” especially when it comes to the distinctions between the mandatory and voluntary sections? We can expect to see how these issues get sorted out as the enforcement arm, Immigration and Customs Enforcement (ICE), conducts its audits in the coming months.

It is clear that failure to comply with Form I-9 requirements presents a very expensive proposition. DHS clearly has the authority to assess fines of substantial, sometimes debilitating amounts. But it is becoming equally clear that, as the Form I-9 has expanded over its more

than 25-year existence, so too has the government's position that it can fine for issues not fully intended by Congress. Recent administrative decisions have confirmed that the government does not have the authority to impose a fine for every issue it had contended.

Any business that has been the subject of an ICE Notice of Inspection of its Forms I-9 knows the disruption that such an inspection causes. ICE and other authorized entities can require an employer to turn over its Forms I-9 and related documentation with just three business days' notice. And it can fine an employer for failure to properly prepare, complete and retain them. But ICE has taken the position that it can assess fines for many issues that many question as within its authority. And failure to fully comply with some of these new Form I-9 requirements is likely to be equally challenged. These are issues to be sorted out in other forums.

An employer may be best served by establishing specific protocols for Form I-9 compliance and then training those assigned the responsibility of preparing and retaining these important forms. A well-crafted protocol that is adhered takes time and effort, but can result in reduced liability in the long run.