

WHITEPAPER

Employers: Answers to Your Top 10 FAQ about the New “Smart” Form I-9

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The Top 10 FAQs about the New Smart I-9 Form

On November 22, 2016, after less than one year working on a suitable form, USCIS released the newest edition of the Form I-9. The hope is that this revised form and its instructions will reduce I-9 errors and violations that lead to employers' penalties.

Immigration and Customs Enforcement (ICE) has been consistently collecting about \$16 million per year from employers in I-9 penalty cases. This update is intended to help you get ready for this new form, avoid being an ICE's casualty and answers the most common questions relating to this new form and the employment verification process.

1. Why a new Form I-9 now?

The simple answer is that the prior form had expired and needed to be revised. Additionally, this new form is designed to facilitate the ongoing emphasis on employers' compliance with the employment verification process and assessment of fines.

2. 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. Employers may receive monetary fines for all substantive violations. Uncorrected technical and procedural failures become substantive violations after 10 business days. Failure to prepare or present a Form I-9 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 almost doubled on August 1, 2016, from \$110-\$1,100 per violation to \$216-\$2,156 per violation. The penalty can be aggravated or mitigated by five factors: the size of the business, good faith effort to comply, seriousness of violation, whether the violation involved unauthorized workers, and history of previous violations.

Proactive properly conducted internal audits, as well as training and education under the direction of an immigration compliance attorney, are considered good faith mitigating factors.

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. Monetary penalties for knowingly hiring and continuing to employ violations also increased in August 2016 from \$375-\$16,000 per violation to \$539-\$21,563 per violation. The failure to complete Form I-9 can be the basis for a finding of knowingly hiring or continuing to employ an unauthorized worker.

3. When do I have to start using the new Form I-9?

There is a 2-month grace period for the transition. Employers must take this limited time to learn about the new form and instructions, update company policies and practices, and provide training to those responsible and engaged in the process. Employers must begin using the new form by **no later than Jan. 22, 2017**.

4. What are the main changes to the Form I-9?

- **New Supplements** – The form is still two pages, but it contains several new fields, requirements and a supplement for preparers and/or translators.
- **Expanded Instructions** – This section has grown from six pages to 15 pages, including four pages of document explanations and abbreviations.
- **“Smart” Form** – The form can still be completed on paper or electronically through software, but now there is a new third option: through the USCIS fillable “smart” form.
- **Section 1 Changes** – The "Other Names Used" field has been changed to "Other *Last* Names Used". This is to prevent discrimination and for the privacy of certain individuals. Fields not completed because they are not applicable require you to enter N/A. These fields include: Middle Initial, Other Last Names Used, e-mail address and others. A foreigner authorized to work has now three options to attest to the basis for their work authorization. The smart version of the I-9 will display a QR code which will be used for auditing purposes. The preparer and/or translator certification has expanded options.
- **Section 2 Changes** – There are two new fields worth noting: the “Citizenship/Immigration Status Field” field at the top of the page, where employers should enter the number which corresponds to the employee’s citizenship or immigration status (US citizen = 1; noncitizen national = 2; lawful permanent resident = 3; alien authorized to work = 4); and the “Additional Information” field, where employers can record other relevant data, such as employment authorization extensions for Temporary Protected Status beneficiaries, F-1 OPT STEM students, CAP-GAP, H-1B and H-2A extensions, E-Verify case number, employee termination date, or the Form I-9 retention date.

5. What is “smart” about the new Form I-9?

This new I-9 form offers a new third option for completion: a USCIS fillable “smart” form.

The most significant features it offers are field-level data validation and help text; it checks for errors and provides guidance as you enter information. It also includes the ability to add multiple preparer/translator sections and new section 2 document titles.

While you do fill out the form on a computer, it is not an electronic I-9. Employers still need to print the form, get handwritten signatures, store the completed form in a safe place, monitor reverifications, and retype the information into the E-Verify system (if required).

6. When should the employer and the employee complete the Form I-9?

The new employee can complete the form *after acceptance of the job offer and no later than the first date of hire*. The employer has *three business days* to complete the form. For example, if an employee begins work on a Monday, the employer has until Thursday of that week to complete Section 2 of Form I-9.

Section 3 must be completed on the date of rehire and, in the case of re-verification, before the work authorization expires.

7. Is I-9 pre-population permitted?

It depends. On November 4, 2016, USCIS issued a new warning stating that section 1 cannot be pre-populated using onboarding electronic I-9 systems. This is true even if the employee reviews the entries and signs the section in affirmation of the entries.

However, an employer can pre-populate certain fields in Section 2 such as: employer's business or organization name, employer's business or organization address (street number and name), city or town, state, and zip code.

Employers must engage in due diligence when selecting and using electronic I-9 vendors. If you choose to use a software solution, it is best to use specialized compliance programs that do not pre-populate section 1.

8. Can an employer with remote hires delegate the responsibility of examining the employee's original documents to one representative and have another representative complete the attestation based on photocopies of the documents or via webcam?

No. The government's position is that the representative who signs the attestation must be the same person that physically examines each original 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. Technically,

anyone can act as the employer's agent for this purpose such as a human resource professional at another company, a staff member at your bank or financial institutions, a librarian, an attorney, accountant, or notary public.

The DHS does not require the authorized representative to have specific agreements with the employer, 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.

9. When is an employer required to complete a Form I-9 for a re-hired employee?

If an employee is re-hired and *more than three years have passed* since the employee initially completed the I-9, *a new Form I-9 must be completed*. Otherwise, the employer has the option to re-verify by completing Section 3 (of the currently valid form) or complete a new Form I-9.

If the employee's prior work authorization is still valid, the employer representative may rely on the previously completed I-9 and just update section 3, block B (date employee begins employment) and sign, date, and print his or her name at the bottom of this section.

If the employee's work authorization has expired, the employer must verify the current work authorization and complete section 3, blocks B and C (information relating to the work authorization document), or complete a new I-9 to perform the re-verification. The employer must also sign, date, and print his or her name in this section. We recommend that employers remind employees of the upcoming expiration of their work authorization at least 120 days prior to their expiration.

10. What proactive steps can employers take to lessen the likelihood of an investigation (which typically happens from: disgruntled employee complaint, referral from the E-Verify unit or randomly) and/or the potential for fines when using this new I-9?

Employers should: evaluate and update their I-9 process; work with an experienced immigration attorney to develop policies, institute training and resolve I-9 concerns; and take steps to train the staff for a smooth roll-out and ongoing use of the new form.

Now more than ever, HR professionals and managers must ensure that they are in compliance with the I-9 and E-Verify requirements. We look forward to assist you.

How to Contact Us

For additional information or to learn about how our Immigration team may assist your business, please contact us via email: immigrationteam@marksgray.com.

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