

I-9 Compliance: What's new, what's next

The Trump administration has kept immigration issues at the forefront since taking office in 2017. Immigration-related investigations have highlighted the administration's employment law enforcement efforts. Given this emphasis, I-9 compliance is more important than ever.

For most employers, the I-9 form represents the key interface with immigration. The I-9 form lists the appropriate documents employees must present to prove their legal work status.

The 2017 I-9 form

The United States Citizenship and Immigration Services (USCIS) issued a new I-9 form in July of 2017. It is available online at <https://www.uscis.gov/i-9>. Employers may fill in the form online or download and print out the paper form. The online I-9 is considered a smart form because it incorporated many web-like features. The form responds when the employee chooses either citizen, lawful permanent resident, or alien authorized to work by altering the remaining questions to fit the chosen option. In cases where more than one translator or preparer assists the employee, the form will ask how many, and provide the necessary number of forms. No field may be left blank, the employee must write or choose n/a who. Employers who print out forms must bear this in mind.

Even with these advances, the form does not meet the government's definition of an electronic form. That means both the employer's representative and the employee must physically sign the printed document. Some companies who specialize in handling I-9 forms may have the proper electronic signature capability, but most employers do not. Once printed out and submitted, employers may scan the forms for electronic storage.

Employers using printed forms should check to ensure they are completing the most recent version. Current I-9 forms should read "7/17/17N".

I-9 Form recordkeeping requirements

I-9 forms are not filed with the federal government. However, employers must produce them along with I-9 document copies should immigration officials request them. Employers must retain either a paper or electronic copy of the form for at least three years. In cases where employees work for the company for longer than two years, the employer must keep the I-9 on file for a full year after the employee's tenure ended.

While the federal government does offer an I-9 in Spanish, it may only be used by employers in Puerto Rico.

Documents for I-9 compliance

The I-9 forms contain three lists of documents referred to as List A, List B, and List C. To establish worker eligibility, employees must present either one document from List A, or one each from List B and List C. The lists as they appear on the 2017 form are:

List A - Documents that Establish Both Identity and Employment Authorization

1. U.S. Passport or U.S. Passport Card

2. Permanent Resident Card or Alien Registration Receipt Card (Form I-551)
3. Foreign Passport that contains a temporary I-551 stamp or temporary I-551 printed notation on a machine-readable immigrant visa.
4. Employment Authorization Document that contains a photograph (Form I-766)
5. For a nonimmigrant alien authorized to work for a specific employer because of his or her status:
 - a. Foreign passport; and
 - b. Form I-94 or Form I-94 A that has the following:
 - (1) The same name as the passport; and
 - (2) An endorsement of the alien's nonimmigrant status as long as that period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the form.
6. Passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI

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, gender, 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, gender, height, eye color, and address.
3. School ID card with 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 document listed above:

10. School record or report card
11. Clinic, doctor, or hospital record
12. Day-care or nursery school record

List C- Documents that Establish Employment Authorization

1. A Social Security Account Number card, unless the card includes one of the following restrictions:
 - (1) NOT VALID FOR EMPLOYMENT
 - (2) VALID FOR WORK ONLY WITH INS AUTHORIZATION
 - (3) VALID FOR WORK ONLY WITH DHS AUTHORIZATION
2. Certification of report of birth issued by the Department of State (Forms DS-1350, FS 545, FS-240)
3. Original or certified copy of birth certificate issued by a State, county, municipal authority, or territory of the United States bearing an official seal.
4. Native American tribal document.
5. U.S. Citizen ID Card (Form I-197)
6. Identification Card for Use of Resident Citizen in the United States (Form-I-179)
- &. Employment authorization document issued by the Department of Homeland Security (DHS).

The E-Verify system

A key component of I-9 compliance is the E-Verify system. Currently, federal law requires only the federal government and employers with federal contracts worth more than \$100,000 to use E-Verify to check the work eligibility status of newly hired employees, as well as current employees who work directly on a contract. The requirement applies to federal contracts and subcontracts let on or after Sept. 8, 2009. Also, at least twenty states (Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Carolina, Oklahoma, Pennsylvania, South Carolina, Tennessee, Utah, Virginia, and West Virginia) require some employers to use the system.

Any employer may voluntarily use the E-Verify system. The USCIS offers I-9 compliance assistance for E-Verify at www.uscis.gov/everify.

I-9 Audits

I-9 compliance efforts should be geared toward preventing an I-9 audit, but that is increasingly difficult. The U.S. Immigration and Customs Enforcement (ICE) performed 5,981 I-9 audits in FFY2018 compared to just 1,360 in 2017. Audits begin when ICE sends an employer a Notice of Inspection (NOI).

As soon as an employer receives an NOI it should contact an attorney familiar with I-9 audits. The attorney may be able to negotiate an extension for the employer or may be able to reduce the number of documents required. Before an NOI arrives, employers should have already run an internal I-9 audit.

The same attorney the employer would call when it receives the NOI should oversee the internal audit. Ideally, an attorney who specializes in immigration worksite investigations should look over the I-9 forms. Attorneys that handle immigration issues such as visas may or may not have the expertise needed to handle an I-9 audit. Specifically, the attorney handling the audit should know exactly what ICE will want to see on the I-9 documents and what the conventions are for a full blown I-9 audit.

Reverification and DACA

The Deferred Action on Childhood Arrivals (DACA) issued under the Obama administration allowed immigrants

who arrived as children to avoid deportation temporarily. President Trump rescinded that policy on September 5, 2017. The move sparked a spate of lawsuits that ultimately led to injunctions in federal court. The Supreme Court will weigh in on the issue during the 2019-2020 term.

In the meantime, those who had received grants of deferred action under DACA may have the deferment renewed. These workers are eligible to work, but employers should reverify worker eligibility. DACA details are available at <https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction>.

Section 3 of the I-9 deals with reverification. Reverification is necessary for employees on certain visas. Details are available at <https://www.uscis.gov/i-9-central/complete-correct-form-i-9/completing-section-3-reverification-and-rehires>.