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Form I-9: An Updated Form, a Primer on Use and COVID-19 Accommodations

When it comes to hiring new employees, stacks of paper usually come to mind. One of the documents in that stack is Form I-9, or the Employment Eligibility Verification form. Beginning May 1, employers must use a new version of the Form I-9 dated 10/21/19 in the lower left-hand corner. Further, due to the COVID-19 pandemic, the Department of Homeland Security (DHS) has announced temporary policies and that it will use discretion in requiring the physical presence of documents to be inspected for documentation on the Form I-9.

Form I-9: Section by Section

The Form I-9 and its instructions are available online here. U.S. Citizenship and Immigration Services (USCIS) provides instructions and a "Handbook for Employers M-274," available online here. Even with all this guidance, employers frequently fill out I-9 forms incorrectly and find themselves subject to civil penalties for simple violations like having incomplete information, placing information in the wrong place on the form, failing to sign and date the form, failing to use the proper documentation to verify the identity and work authorization of employees, over-documenting the identity and work authorization of employees, or failing to reverify those employees' whose work authorization has expired.

Section 1

At the time of hire, usually on his or her first day, the employee completes Section 1 of Form I-9. The employee must fill out Section 1 legibly and completely. If an employee uses a preparer or translator, the preparer or translator must complete the bottom part of Section 1. Before the employer begins to complete its portions, it must ensure that the employee (or his or her translator or preparer) has filled out Section 1 properly or it will be liable for any violations of missing or incomplete information. DHS has not changed this process due to COVID-19.

Section 2

Once Section 1 is correctly completed, the employer is responsible for completing Section 2. Within three business days of beginning employment, an employee must provide to the employer for review the appropriate documentation that demonstrates his or her identity and authorization to work in the United States. Employees may provide any unexpired documents as set forth in the List of Acceptable Documents attached to Form I-9 to establish their identity and employment authorization. The full list of documents that satisfy the requirements for establishing identity and/or work authorization is on page 3 of the Form I-9. As the list explains, some documents can be used to establish both identity and work authorization and others can be used only to establish identity or work authorization. Employers cannot request employees to provide certain documents over others. Further, employers must accept any documents that reasonably appear on their face to be genuine. Nonetheless, employers should question if documents appear inauthentic (such as looking like they were typed on a typewriter or having a different name or alien number on the front or the back of the document).

While it is not required, employers should make copies of the documents presented by all employees. These copies could prove useful in that they allow the employer to self-audit its records and update them before any formal audit from U.S.

Immigration and Customs Enforcement (ICE). Copying the documents presented for some but not all employees could lead to additional penalties and potential claims of discrimination.

Designated or authorized representatives should carry out all of the Form I-9 responsibilities – one person cannot review the employee's documents and another person fill out Section 2. Finally, employers must follow these requirements if employees are physically present at their work location.

Recognizing that some employers are operating remotely due to COVID-19, DHS has provided some flexibility to employers in complying with the requirements of Section 2 of the Form I-9. For instance, instead of reviewing the employee's identity and employment authorization documents in the employee's physical presence, employers with remote operations may inspect the documents remotely through video, fax, or e-mail and must obtain and retain copies within three business days for purposes of completing Section 2.

Employers should use the "Additional Information" box in Section 2 to annotate the process. For example, the employer's authorized representative should date when the remote inspection was completed. Once normal operations resume, the employer's authorized representative must conduct an in-person inspection of the documents. In the "Additional Information" box, the employer's authorized representative should enter "COVID-19" and the date the physical inspection was completed. If the same person who conducted the remote inspection conducts the physical inspection, then the person needs to add their initials in the "Additional Information" box. If a different authorized representative performs the physical inspection, then the authorized representative should include his or her full name and title in the "Additional Information" box. For examples of how to include this additional information, see here.

Section 3

Employers use Section 3 of Form I-9 for reverification of rehired employees within three years of the date of the employee's previous Form I-9. As state and local governments lift restrictions and employers recall employees following stay-at-home orders, employers need to assess whether reverification of these employees is required. To answer this question, employers should consider whether the employee continued in their employment and had "a reasonable expectation of employment at all times." According to USCIS, an employee may be continuing in their employment, and thus not necessitate reverification when they return to work, when the employee is on approved paid or unpaid leave because of illness of a family member or temporarily laid off for lack of work. USCIS provided factors employers should consider when analyzing whether an employee had a reasonable expectation of employment at all times. Factors include availability of the individual's job when she or he returns; the company's financial condition, indicating its ability to permit the individual to resume employment; and the company's communication to the individual that he or she will resume employment within a reasonable time.

Employers must also use Section 3 of Form I-9 to reverify employees whose employment authorization expired. Employers should ensure that they reverify employees no later than the date the employment authorization document expires. Employers cannot allow employees whose employment authorization has expired to continue working. If employees are physically present at a work location, employers should continue to comply with the requirements. If employers are operating remotely, then they should follow the guidance for remotely inspecting documents as set forth for Section 2.

Employers should monitor DHS's and ICE's websites for updates. As of July 18, DHS's temporary guidance on accommodations for employers operating 100% remotely currently expires August 19, but may be extended.

Penalties

While compliance with Form I-9 on its face is easily attainable, many employers incur monetary penalties due to lack of training or carelessness. Monetary penalties can quickly add up. Penalties range from $230 to $22,927 *per violation*. A single form could have multiple violations if, for instance, it is not dated, is missing information, or has information in the incorrect spot on the form. Factors such as the size of the business, good faith, seriousness of the violation, whether or not the individual was unauthorized to work, and history of prior violations of the employer may affect the size of the penalty. An employer may be subject to criminal penalties if it is convicted of having engaged in a pattern or practice of "knowingly" hiring unauthorized workers.

USCIS regularly conducts workplace audits based on geography or type of business. It only provides employers three days in which to turn over their employees' I-9 forms when conducting audits. Therefore, it is recommended that employers routinely self-audit their employees' I-9 forms and correct any deficiencies. Corrections should be dated and initialed to note that they were not part of the original record.

Conclusion

In summary, employers should confirm they are using the right form and entering the proper information. Training employees who will act as the employer's authorized representatives is also key. Finally, employers should consider performing an internal audit, with the assistance of outside counsel, of the I-9 forms as a way to identify patterns of errors, correct the errors, and provide custom training to designated authorized representatives to prevent ongoing patterns of errors.

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