

OVERVIEW OF THE I-9

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MELTZER HELLRUNG
IMMIGRATION SOLUTIONS

OVERVIEW OF THE I-9

TO COMPLY WITH FEDERAL LAW, EMPLOYERS MUST DO THREE THINGS:

- ⇒ Verify the identity and employment authorization of new each employee.
- ⇒ Complete and retain a Form I-9, for each employee.
- ⇒ Refrain from discriminating against individuals on the basis of national origin or citizenship.¹

USCIS provides a handbook to assist employers with the completion of form I-9. A copy of this manual is available at the following link: [M-274](#). We recommend referencing this link when completing the form.



Who Completes an I-9?

All new employees must fill out an I-9.

BELOW ARE INDIVIDUALS WHO DO NOT HAVE TO COMPLETE AN I-9:

- Employed in a private home for casual domestic work, in a sporadic, irregular, or intermittent basis (one-time housekeepers, babysitters, etc.)
- Independent contractors
- Employed by a contractor providing contract services (such as an employee from a temp agency)
- Unpaid interns
- Not physically working on U.S. soil

REMOTE WORK:

- ⇒ Remote employees still need to fill out an I-9. The employer is responsible for inspecting work authorization documents for all employees.
- ⇒ Employers may designate an authorized representative to fill out the form I-9 on the employer's behalf, such as notary publics, foremen, etc.

⇒ E-Verify Employers

- E-Verify employers are able to conduct remote inspection of employees' identity and work authorization documents.
- Remote inspection is available to E-Verify employers at any hiring site enrolled in E-Verify.
- If a qualifying E-Verify employer uses the remote inspection procedure for new employees at a hiring site, it must do so consistently for all remote employees at the site. An employer may offer remote inspection for remote hires only but continue to use inperson physical examination for onsite or hybrid onsite/remote employees, as long as the employer does not adopt this practice for a discriminatory purpose or treat employees differently based on their citizenship, immigration status, or national origin.
- If an employee is unable or unwilling to submit documents for remote inspection, the employer must permit the employee to submit documents for physical examination. Qualified employers are not required to use the alternative remote inspection process; they may opt to continue in-person physical documentation inspection. However, they must continue to comply with all standard E-Verify requirements.

- We recommend that Employers place their I-9 document inspection practices in a written policy for clarity should the employer be subject to an audit.

⇒ **Employers who do not use E-Verify**

- Employers who do not use E-Verify must still inspect all documents in person.
- This in-person inspection can be completed with the assistance of companies that send an in-person inspector. Another common option is to deputize a family member, roommate, or friend of the employee to serve as an agent of the company and perform the inspection and I-9 completion on behalf of the company. This is typically done over a video call and aided by an HR representative of the company.

Employer's Responsibility When Completing the Form I-9



- ⇒ By the first day of employment, have the employee complete Section 1 of the I-9.
 - This can be completed anytime after the offer is accepted through the first day of employment.
- ⇒ Within three (3) business days of employment, the employee presents to the employer original documents showing the employee's identity and employment authorization, an employer representative must complete Section 2 of the I-9.
 - The person reviewing the document should assess whether the photo resembles the person who is presented in front of them and that the document on its face reasonably appears to be authentic. The person reviewing the document is not expected to be the police.
- ⇒ It is often best that Section 1 and 2 are completed together, but an employee does have an additional two days to present documents.

¹For more guidance on this point, please see MH's "Avoiding National Origin and Citizenship Status Discrimination in the Hiring Process" collateral

Avoiding Discrimination



Employees can either present one document from List A located on the I-9 instructions or a document from List B and List C. It is not within the employer's discretion what documents an employee presents, and employers cannot request specific documents.

In the event that the employee provides documents that are non-compliant, you should reject the document(s) presented and refer the employee back to the list of acceptable documents included with Form I-9.

When to Reverify Employment Authorization



- ⇒ If an employee's employment authorization document will expire, an employer should complete Section 3 of the I-9 and reverify employment authorization.
- ⇒ Generally, employers do not need to reverify Green Card holders, even if the Green Card is expiring. The following are the few limited circumstances where green card holders should be reverified:
 - Reverify only if the employee presents a Form I-94 with a temporary I-551 stamp, or
 - A foreign passport with a temporary I-551 notation on a machine readable, immigrant visa (MRIV)
 - Conditional residents (i.e. individuals with green cards issued for 2 years) need to be reverified.
- ⇒ Meltzer Hellrung can help track foreign national status, even if they are not sponsored by the employer. We notify our clients of these upcoming expiration dates.

Maintaining Records



- ⇒ You must keep the I-9 on file for the duration of an employee's employment.
- ⇒ If an employee is terminated, you must keep the form on file three years after the date of employment, or one year after termination-whichever is greater.
- ⇒ Be consistent with retaining the copies of documents. There are pros and cons on whether to retain documents. To determine whether it is helpful to your company to maintain copies of documents, please speak to your Meltzer Hellrung attorney.
 - **Technical errors** are errors which occur during the completion of an I-9 but do not completely negate the purpose of the form which is to verify an employee's identity and employment authorization status. Errors in section 2 are considered to be technical if copies of the documents are retained. We recommend keeping copies of supporting documents.
 - **Substantive errors** are those that cannot be corrected because as a result of the error or omission, the verification of the new hire's employment eligibility failed at the time the form was completed. In the event of an audit, fines are issued for substantive errors which are found.
- ⇒ Employer's may use physical or digital retention programs but assumes the risk of failure in a digital program.
 - Program must have audit trail.



Audits

- ⇒ Any U.S. employer can be audited by Immigration Customs Enforcement (ICE). If you are selected for audit, a notice of inspection will be mailed to your office. The company will have at least 3 business days to present the requested documents. We recommend contacting your Meltzer Hellrung attorney immediately if you receive such a notice.
- ⇒ Fines for substantive violations range from \$234–\$2,332 per infraction. The amount of the individual fines will vary based on the percentage of I-9s which contain errors.
- ⇒ Violations for knowingly hiring individuals without work authorization can incur fines from \$583–\$4,667 per infraction.
- ⇒ We recommend that our clients conduct self-audits of I-9s. Self-audits are viewed by ICE as an employer's good faith attempt at complying with the I-9 requirement. We are available for audits at an additional fee. Please contact your Meltzer Hellrung attorney for additional guidance regarding if you are interested in conducting a self-audit.



Best Practices for I-9s

- ⇒ All I-9s should be kept in a centralized location at each company office.
- ⇒ I-9s should be audited on annual or bi-annual basis.
- ⇒ Any I-9s that can be purged, should be removed to limit the company's liability in the event of an ICE audit. Errors which are contained in I-9s which should have been purged can still result in fines if the I-9 was not properly discarded.
- ⇒ If you are considering new I-9 software, contact your Meltzer Hellrung attorney to advise on compliance. We also recommend requesting a compliance letter from an attorney from the software company you are considering.
- ⇒ Employers should be consistent in keeping or not keeping documents for all new hires.
- ⇒ Employers are required to use the correct edition of the form.



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Founded with the belief that immigration can be a strategic advantage, we understand the complexities of immigration and respond with innovative solutions to meet business and talent needs. Our unique solution - skilled immigration professionals delivering responsive service to clients through Voyager[®], our proprietary immigration management platform, delivers the best immigration experience to companies, employees and their families.