

NAVIGATE THE I-9 RULES LIKE A VIKING TO AVOID SINKING YOUR BUSINESS IN LAWSUITS AND PENALTIES

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Introduction

- * The Immigration Reform and Control Act of 1986 (IRCA) requires all US employers to verify the identity and employment eligibility of all new employees hired after November 6, 1986.
- * This requirement is satisfied by having new employees complete Form I-9 with the employer.
- * This presentation discusses:
 - * IRCA's requirements.
 - * How to complete Form I-9 (Sections I, II, and III).
 - * E-Verify.
 - * Storing and retaining Form I-9.

Overview of IRCA

- * Enacted by Congress to eliminate employment as an incentive for illegal aliens coming to the US.
- * Employers cannot hire, or recruit or refer for a fee, individuals who are not authorized to work in the US.
- * Employers must confirm the identity and employment eligibility of all new employees hired **after November 6, 1986**.

Overview of IRCA (cont'd)

IRCA bars employers from hiring or continuing to employ unauthorized workers.

IRCA contains three major requirements for employers:

- * Complete the I-9 Form.
- * Retain documents.
- * Do not discriminate.

Penalties for Hiring or Employing Unauthorized Workers

An employer that knowingly hires or continues to employ an unauthorized worker is subject to a \$548 to \$21,916 civil penalty for each unauthorized worker.

An employer that is found to engage in a pattern or practice of employing unauthorized workers is subject to additional penalties, including:

- * A fine of up to \$3,000 for each unauthorized worker.
- * Up to six months in prison.
- * An injunction barring the practice.

Verification Requirements

Form I-9 consists of three sections:

- * Section I: Employee information and verification.
- * Section II: Employer review and verification.
- * Section III: Updating and reverification.

Verification Requirements

Employers must:

- * Ensure each new employee completes and signs Section I of the I-9 by her first day of work.
- * Review acceptable original documents showing identity and employment authorization and:
 - * Confirm the documents "appear" to be genuine and relate to the employee.
 - * Complete and sign Section II of the I-9 form within three days of hire (for employees whose employment will last fewer than three days, this must be done on the first day).
- * Reverify employment authorization for employees with expiring documents by the expiration date.

Penalties for Violating Verification Requirements

An employer that fails to complete and maintain I-9s correctly is subject to a civil penalty for each error, including:

- * Failing to complete a form.
- * Improperly completing a form.
- * Failing to produce forms within three days of a Notice of Inspection.
- * Destroying forms early.
- * Completing an outdated version of the form.

Civil penalties for an employer that violates the verification requirements are between \$220 and \$2,191 for each violation.

Anti-Discrimination Requirements

IRCA's anti-discrimination provisions prohibit employers from:

- * **Discriminating** based on the citizenship or national origin of a protected individual.
- * **Retaliating** against, intimidating, threatening, or coercing anyone for exercising their right to be free from discrimination, making a charge of discrimination, or participating in the discrimination.
- * **Over documenting** employment eligibility verification (document abuse).

Penalties for Violating Anti-Discrimination Requirements

An employer that violates anti-discrimination provisions may be subject to the following civil penalties and fines:

- * Order to cease and desist the discriminatory practice.
- * Lost wages.
- * Back pay.
- * Attorneys' fees.
- * For citizenship or national origin discrimination, civil monetary penalties between \$452 and \$18,107 for each person discriminated against.
- * For document abuse, penalties between \$181 and \$1,811 for each person discriminated against.

Completing Section I: The Employee's Responsibility

Section I Requirements

Employees must complete Section I by the **first day of work**.
Section I requires that each employee:

- * Provide her complete legal name.
- * Indicate whether she is a US citizen, lawful permanent resident (LPR) or foreign national authorized for employment.
- * Provide an alien registration number ("A" number) if the employee indicates she is an LPR.
- * Provide an "A" number or admission number if the employee indicates she is a foreign national authorized for employment.
- * Sign and date the Form I-9 Section I.

Section I Requirements (cont'd)

The employee should also include:

- * The date employment is authorized until (if the employee is a foreign national with work authorization).
- * Her maiden name (if applicable).
- * Her address.
- * Her date of birth.
- * Her social security number, if the employer is enrolled in E-Verify.

Completing Section II: The Employer's Responsibility

Section II Requirements

- * Employers must, **by the third day after an employee begins work:**
 - * Review original documents evidencing identity and employment authorization.
 - * Complete and sign Form I-9 Section II.
- * Employers may, but are not required to, retain photocopies of presented documents. They should apply the same policy for all employees.
- * Regardless of their policy, employers enrolled in E-Verify **must** photocopy the following documents if presented by the employee:
 - * US passport or passport card.
 - * Green card.
 - * Employment authorization document (EAD).

Section II Requirements (cont'd)

When reviewing documents, employers should:

- * Review the documents and accept documents that appear to be valid.
- * Ensure the documents relate to the person offering them by comparing the name and any photograph to the employee.
- * **Not** request specific documents.
- * Accept any documents that the employee presents that satisfy the I-9 Form list of acceptable documents.

List "A" Acceptable Documents

List A consists of documents that establish both **identity** and **employment authorization**:

- * US passport or US passport card.
- * Permanent Resident Card or Alien Registration Receipt Card (Form I-551; also known as "green" card).
- * Foreign passport containing temporary evidence of permanent resident status, including either:
 - * Temporary I-551 stamp.
 - * Temporary I-551 printed notation on a machine-readable immigrant visa.
- * Employment authorization document that contains a photograph (Form I-766).

List "A" Acceptable Documents (cont'd)

- * For a non-immigrant authorized to work for a specific employer because of her status:
 - * A foreign passport.
 - * Unexpired Form I-94 or I-94A with an endorsement of the worker's non-immigrant status. The document is acceptable only if the proposed employment does not conflict with any restrictions or limitations identified on the form.
- * Passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with a Form I-94 or I-94A authorizing admission under the Compact of Free Association Between the US and the FSM or RMI.

List "B" Acceptable Documents

List B consists of documents that establish **identity**:

- * Driver's license or ID card issued by a state or outlying possession of the US (must contain either a photograph or identifying information such as name, date of birth, gender, height, eye color, and address).
- * School ID card with a photograph.
- * Voter's registration card.
- * US military card or draft record.
- * Military dependent's ID card.
- * US Coast Guard Merchant Mariner Card.
- * Native American tribal document.
- * Driver's license issued by a Canadian government authority.

List "B" Acceptable Documents (cont'd)

For persons **under the age of 18** who cannot present a document listed above:

- * School record or report card.
- * Clinic, doctor, or hospital record.
- * Daycare or nursery school record.

List "C" Acceptable Documents

List C consists of documents that establish **employment authorization**:

- * Social security number card without limiting endorsement stating that the card does not authorize employment in the US.
- * Certification of Birth Abroad issued by the US Department of State.
- * Original or certified copy of a birth certificate bearing an official seal, and issued by a state, county, municipality, or US territory.
- * Native American tribal document.
- * US Citizen ID Card (Form I-197).
- * ID Card for Use of Resident Citizen in the US (Form I-179).
- * Employment authorization document issued by the Department of Homeland Security.

Completing Section III: Reverification

Reverification

Employers:

- * **Must** reverify expiring or expired employment authorization documents for a current employee.
- * **May** reverify expiring or expired employment authorization for a terminated employee who is rehired within three years of the employee's original hire date.

Reverification (cont'd)

When reverifying, employers must:

- * Notify an employee before her work authorization expires to present documents from List A or List C evidencing extended or new employment authorization.
- * Include any document title, the document issuing authority, identification number, and expiration date of required List A or List C documents.
- * Sign and date Form I-9 Section III.

Reverification (cont'd)

Employers should also:

- * Indicate the date of rehire, if reverification is completed for an employee rehire.
- * Review the documents and accept documents that appear to be valid.
- * Have a system to track employee documents with limited duration employment authorization.

Storing and Retaining Form I-9

Storing and Retaining I-9 Forms

- * **Retain**: Employers must retain I-9 Forms (and any photocopies of presented documents) for each employee hired after November 6, 1986.
- * **Store**: Employers should store I-9 Forms and any photocopies of presented documents separately from employee personnel files.
- * **Organize**: Employers should retain I-9 Forms and any photocopies in an organized manner that allows employers to easily access, sort, and present them to US Immigration and Customs Enforcement (ICE) within 72 hours if they are requested.

Storing and Retaining I-9 Forms (cont'd)

If an employee's employment ends, the employer must retain the I-9 Forms (and photocopies) for the longer of:

- * **Three years** from the employee's hire.
- * **One year** from the employee's termination.

E-Verify

E-Verify

E-Verify is a free electronic employment eligibility system co-managed by the Department of Homeland Security (DHS) and Social Security Administration (SSA).

E-Verify enrollment is:

- * **Mandatory** for certain federal contractors and subcontractors.
- * **Mandatory** for employees in certain states.
- * **Voluntary** for all other employers.

E-Verify Authorization Process

Within **three days after the employee begins work:**

- * Complete the Form I-9 process.
- * Obtain the employee's social security number (SSN).
- * Create and submit an E-Verify case using the I-9 form information, including the SSN, in the E-Verify system.
- * Track the results of the E-Verify case and retain with the Form I-9.

E-Verify System Response

The employer will receive an immediate online response indicating one of the following:

- * The employee is authorized to work.
- * The DHS needs additional time to review its records.
- * A tentative nonconfirmation (TNC) that the SSA or DHS records cannot confirm the employee's SSN or employment authorization.

Resolving a TNC

If the employer receives a TNC response, it must:

- * Promptly notify the employee.
- * Print and review the TNC with the employee.
- * Confirm the accuracy of the employee's information in the E-Verify system.
- * Ask the employee if she will contest the TNC, indicate the employee's choice on the further action notice, and, with the employee, sign and date the notice.
- * Provide a copy of the further action notice to the employee while retaining the original.

Resolving a TNC (cont'd)

The SSA and DHS have up to ten federal workdays to resolve the issue and update E-Verify.

Updated results may include:

- * Employment authorized.
- * SSA or DHS final nonconfirmation.
- * SSA or DHS case in continuance.
- * Review and update employee data.
- * DHS no show.

Closing the E-Verify Case

After receiving a final response from E-Verify, the employer must:

- * Indicate what action the employer will take regarding an employee.
- * Close the E-Verify case.

California Immigrant Worker Protection Act

- * The Immigrant Worker Protection Act (A.B. 450) imposes various prohibitions and requirements on employers.
 - * Entrance into employer's place of business
 - * Request for employee records
 - * Notice requirements
 - * Prohibits re-verification of employment eligibility
 - * Enforced by California Attorney General and Labor Commissioner

California Immigrant Worker Protection Act

- * Prohibits employers from providing “voluntary consent” to an immigration enforcement agent to “any nonpublic area of a place of labor.”
- * Prohibits “voluntary consent” to “access, review, or obtain the employer’s employee records.”
- * Civil penalties of \$2,000 to \$5,000 for 1st violation, and \$5,000 to \$10,000 for each subsequent violation.

California Immigration (cont.)

- * A.B. 450 also imposes several new notification requirements on employers, as follows:
- * Within 72 hours of receiving a Notice of Inspection to inspect I-9 forms or other employment records, the employer must provide notice to each current employee and provide written notice to a collective bargaining representative, if any.

California Immigration (cont.)

- * Within 72 hours of receiving an immigration agency notice that provides results of the I-9 or records inspection, an employer must provide to each current affected employee and the collective bargaining representative a copy of the notice.
- * Also the employer must provide to each “affected employee” and their representative written notice of the employer and employee’s obligations arising from the inspection results.
- * An “affected employee” is one identified by the inspection results as lacking work authorization or whose work authorization documents have been identified by the agency inspection to have deficiencies.
- * The notice must relate to the affected employee only and must be delivered by hand at the workplace if possible, or by mail and email if hand delivery is not possible.

Effective January 1, 2018, except as otherwise required by federal law, section 90.2(a)(1) of the California Labor Code requires employers to provide notice to current employees of any inspection of I-9 Employment Eligibility Verification forms or other employment records conducted by an immigration agency by posting a Notice, in the language the employer normally uses to communicate employment-related information to the employee, within 72 hours of receiving notice of the inspection.

Name of the Immigration Agency Conducting the Inspection (more than one box may be checked, as appropriate):

- ICE (Immigration and Customs Enforcement)
- DHS (Department of Homeland Security)
- USCIS (United States Citizenship and Immigration Services)
- Other:

Date the Employer Received the Notice of Inspection: _____

Date the Inspection will be Conducted: _____

Location of the Inspection:

- At the employer's place of business or worksite, located at the following address: _____
- At a location other than the employer's place of business or worksite

Subject of the Inspection (to the extent known, check all that apply):

- I-9 forms
- Supporting documents for I-9 forms (such as passports, driver licenses, social security cards, permanent resident cards)
- Payroll records and data (including employee names, social security numbers, hire dates)
- California Quarterly Contribution Return and Report of Wages (form DE9 or DE6)
- Quarterly Wage and Hour Report
- Any list of employees (including names, social security numbers, birth dates, hire dates, etc.)
- Any correspondence from the Social Security Administration regarding mismatched or no-matched social security numbers
- Documentation or correspondence identifying participation in E-Verify or the Social Security Number Verification Service
- Other information or documents listing or identifying employees or their personal information (please briefly list and describe): _____

A copy of the Notice of Inspection of I-9 Employment Eligibility Verification forms, and any accompanying documents, must be posted or given to employees with this notice.

California Immigration (cont.)

- * Violations of any of the above provisions carry hefty civil penalties of \$2,000 to \$5,000 for a first violation, and \$5,000 to \$10,000 for each subsequent violation.
- * Finally, A.B. 450 prohibits employers from re-verifying employment eligibility of a current employee **at a time or in a manner not required** by federal law. Violations carry a civil penalty of up to \$10,000.

California Immigration (cont.)

- * Steps to Take:
 - * Train management regarding the new prohibition on granting voluntary access and understanding of proper procedures when faced with a visit or inspection request.
 - * Prepare to promptly comply with the new posting and notice requirements when a Notice of Inspection or inspection results are received.
 - * Review I-9 forms and processes to ensure full compliance.



Thank You!

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Questions & Answers

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