

EMPLOYMENT,
LABOR &
WORKERS'
COMPENSATION

ADVICE
SOLUTIONS
LITIGATION

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A L A W C O R P O R A T I O N

I-9 PROCEDURES

AND

AUDITS

Employment Law Workshop

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The attached material must not be considered legal advice. The sample forms and policies are for educational purposes only. We strongly recommend that you consult with legal counsel before adopting or implementing any of the attached sample forms and policies to avoid potential liability.

TABLE OF CONTENTS

I-9 Procedures	1
I-9 Audits.....	4
Letter to Employee Sample	8
Form I-9 with instructions.....	9
CBS Article “They’re Baaaaaack! ‘No-Match’ Letters Resume After Three- Year Hiatus	14
Social Security Administration / Retirement, Survivors, and Disability Insurance / Request for Employer Information.....	16
Frequently Asked Questions About Name/Social Security Number “No- Matches”	18
Know Your Workforce: The Key to Immigration Compliance	20
Ventura County Star Article “Chuy’s restaurants target of federal investigation”	24
Homeland Security Notice of Inspection Sample	26

I-9 PROCEDURES

1. Have Employee Complete Section 1 of Form I-9.
 - a) If a translator/preparer is required, they must complete certification.
 - b) Employer has the burden to ensure that employee completes and signs Section 1.
2. Must be completed within 3 business days of start of employment.
3. Documents from List A establish both identity and employment eligibility.
4. If no documents under List A, need one each from List B and List C.
5. Must have good faith belief that the documents are facially valid upon examination.
6. Photocopies:
 - a) Employers may, but are not required to photocopy document.
 - b) If photocopies, must be maintained with I-9.
7. Anti-Discrimination.
8. Employers are prohibited from requiring an employee to provide more or different employment authorization documents than what is required by law and/or reject documents facially valid.
9. An employer cannot refuse to hire an individual because of a future expiration date.
10. Maintaining I-9s:
 - a) Must be maintained for three (3) years after the date of hire or one (1) year after the date employment ends, whichever is later.
 - b) Copy maybe maintained in personnel file.
 - c) For audit purposes, a copy of I-9s should be maintained in a separate file.
11. Updating and Re-verification:
 - a) Create "Tickler" system to advise of expiring documents.
 - b) Unless questions arise, do not reject an individual who wants to update their personal information with a changed name or social security number.

12. Electronic Storage of I-9s:

- a) Employers have been clamoring for many years for the flexibility to employ current technology to administer their I-9 records. As the immigration enforcement division of DHS (Bureau of Immigration and Customs Enforcement, informally called "ICE") has acknowledged itself, there are many advantages to electronic administration. First, electronic administration may be less costly. Second, electronic form-filling options may produce records with fewer omissions and deficiencies. Third, electronically retained I-9s are more easily searchable for audit purposes and identifiable for re-verification purposes. This is particularly important to multi-site and/or multi-state employers with interest in uniformity and quality control over diverse worksites.
- b) On October 30, 2004, President Bush signed legislation authorizing employers to accept an electronic signature on I-9s and retain those forms in electronic format. The implementing regulations were not dispersed on the effective of April 28, 2005, but ICE has did issue some guidance for use of electronic forms.
- c) Under this law, employers can continue to complete Form I-9 on paper but also store them electronically. Employers may also choose to complete and retain the Form I-9 electronically without a paper copy.
- d) There is no government-wide electronic signature or record keeping standard. Until there are final regulations providing detailed standards on obtaining and retaining electronic signatures and record keeping, ICE recommends standards used by the Internal Revenue Service (IRS) as a helpful reference for employers. An example of following the IRS standards: If a Form I-9 is completed electronically, the electronic signature should be entered and include an acknowledgement that the document has been read and understood. ICE observed that currently electronic signatures are accomplished using various technologies such as electronic signature pads, Personal Identification Numbers, biometrics and "click to accept" dialog boxes.
- e) A quality assurance program for electronic storage systems includes periodic checks of electronically stored data and methods to prevent and detect unauthorized access to the data. The electronic storage system should include an indexing system and ability to reproduce hardcopies of electronically stored Form I-9 to facilitate access by government inspectors.

13. Revisions to I-9:

- a) Recently the US Customs and Immigration Service (USCIS) announced a change in the acceptable "List A" documents that an employer may accept to establish identity and eligibility.
- b) An employer may no longer accept the following documents under List A:
 - (1) Certificate of US Citizenship - Form N-560 or N-561;
 - (2) Certificate of Naturalization - Form N-550 or N-570;
 - (3) Form I-151;
 - (4) Unexpired Reentry Permit - Form I-327; or
 - (5) Unexpired Refugee Travel Document - Form I-571.
- c) One document not listed has been added to List A - Form I-766 - Employment Authorization Document.
- d) The revised form was issued May 31, 2005 and should be used immediately since the employer is required to know of the changes. Older forms could only be used until December 31, 2005. Regardless of the form, employers are required to know that not all of the documents listed on the older versions should be accepted.

I-9 AUDITS

1. Generate a list of employees hired since November 6, 1986. It will be easier later if the list matches the order in which your I-9 forms are filed. The list should show last name, first name, date of hire, date of termination, and some distinguishing fact, e.g., SSN or DOB, in case two employees have the same name. Ideally, individuals with more than one hire date will appear on the list once for each date of hire, and each prior hire would also show a termination date, so you can determine which forms you don't need to keep.
2. Calculate the retention dates for persons on the list by comparing date of hire, date of termination, and date of your self-audit. The easiest way to do this is to write down the date that is one calendar year prior to the audit date. That becomes the target termination date. Then subtract two years to get the target hire date. (Forms can be discarded for persons hired before the target hire date whose employment ended before the target termination date.) Highlight or cross off the names of the employees on the list whose I-9 forms need no longer be retained.
3. Pull forms for highlighted names from the I-9 file. Do not throw them away until someone else has confirmed that you need no longer retain the form by confirming that the two retention tests (three (3) years from date of hire and one year from date of termination) have been met. In addition, you may find information on a form that need not be kept which may be useful in completing a form which was completed later (perhaps because of re-hire) for the same person.
4. Begin checking I-9 forms, working in the same order as the names on the list. As each form is reviewed, put a check mark on the list next to the appropriate name. Set aside forms for whom there is no name on the list as you go through it, as these are probably forms for people whose names changed.
5. Use "stick-on" notes to show problems with the forms. Be aware that forms may have multiple problems.
6. Begin correcting forms that have been reviewed. If you have retained photocopies of documents, many form deficiencies may be cured. In addition, information from employee personnel files may be helpful. If anything is added to Section 1 of the form, remember to complete the Preparer/Translator portion of the form. If using the new form, use the audit date as the date to insert in the Preparer/Translator portion of the form, since it is better to have a "late completion" problem than missing information on the form. If information is added to the form, try to use the same color ink. Do not use "White Out" to cover up incorrect information or for any other purpose; instead simply cross out the incorrect information. If you are adding information to Section 2 of the form, it is optional to include the words "Self-Audit" and the date of the audit.
7. If necessary, ask employees to sign or date Section 1 of the form or present correct documents.

8. As forms are corrected, cross out deficiencies on the “stick-on” notes. When all items are crossed out, remove the “stick-on” note. When the form is correct, re-file it. If you need to know more about your overall compliance level, annotate or highlight the employee list to show forms which have been corrected. This may help identify recurring problems for purposes of future staff training.
9. There may be some forms which simply cannot be cured. For example, you may have terminated employees from whom you accepted invalid documents, but the form cannot yet be discarded. Annotate the list to show a “major” problem, remove the “stick-on” note, and re-file the form. Note that you may wish to create a “tickler” file or some other system for reminding you to discard defective forms when you no longer need them.
10. When you have reviewed all forms and corrected all deficiencies, review the annotated list to see what forms you are missing. See if any of the forms you set aside for lack of a name on the list should be filed under a different name. Consider checking the personnel file to see if a name change has occurred. Any current employees for whom no form can be found should be called in immediately to complete a form.
11. If a significant number of forms are missing or defective for terminated employees, consider keeping separate I-9 files for current and terminated employees. This may be helpful during the process of discarding forms periodically, and there is less likelihood that ICE will ask to see forms for terminated employees if the forms for current employees are in good shape.
12. Add up the number of missing forms and major problems to calculate your exposure. Missing forms are generally penalized at around \$800 per form for the record-keeping violation plus around \$1500 per form for a knowing employment violation. (ICE assumes that persons without forms are illegal.) Major problems usually result in fines of between \$600 and \$800 per form. If your exposure is significant, consider a training seminar for staff completing I-9 forms.
13. Discard forms that you are certain you need not keep.
14. Plan your next I-9 audit.
15. I-9s must be retained for the duration of an employee's employment, plus one (1) year, or for a minimum of three (3) years from the date of hire, whichever is longer. Employers must keep a record of employees whose work authorizations will expire and re-verify the authorization to work of such employees prior to expiration.
16. It is desirable to review every I-9 form the employer has prepared. To accomplish this is goal, INS recommends that the party conducting the audit start by identifying every employee hired (or rehired) after November 6, 1986, using payroll records or other records.

17. Create two (2) master lists of: (i) all active employees, with their dates of hire noted; and (ii) all terminated employees for whom an I-9 form is required, with dates of hire and termination noted. Create an "I-9 audit tracking form" for every listed employee, filling in each employee's name, date of hire, and date of termination (if applicable).
18. The appropriate action for employers to take concerning Forms I-9 that are lost, destroyed, or not maintained as required by the retention requirements of the INA is to come into compliance with the law as quickly as possible. However, past violations of this nature cannot be retroactively corrected.
19. For small employers, INS recommends a "binder system" for maintaining I-9 forms. In the binder system, the employer keeps two large three-ring binders, one for current employee I-9 forms and one for terminated employee I-9 forms. Organize the employer's I-9 forms alphabetically by employee within the binders. When a new employee is hired, her or his I-9 form is to be placed in the current employee binder. At the time an employee is terminated, her or his I-9 form is transferred to the terminated employee binder, and the date of termination is noted in the margin of the I-9 form. Periodically review the terminated employee binder to determine which I-9 forms may be discarded and which must be retained pursuant to the requirements of 8 CFR 274a.2 (b)(2)(i)(A).
20. Finally, maintaining photocopies of documentation that the employer has examined in the course of completing I-9 forms makes it easier for the employer to conduct the periodic audits of its IRCA compliance effort. The OCAHO has found photocopying documents and attaching those copies to the I-9 form to be a mitigating factor in the imposition of a fine.
21. Practice indicates that the I-9 forms should be kept separate from employee personnel files to avoid charges of discrimination based on the information contained on the forms concerning an employee's age and national origin. In addition, keeping I-9 forms separate from personnel files facilitates their production at the time of an INS audit. It also eliminates the necessity of separating the I-9 forms from the personnel files at the time of an INS audit or producing personnel files for the INS that may contain sensitive or business information to which the INS would not otherwise be privy. Evaluate and Meet Employer's Education and Training Requirements.

22. The best way for an employer to avoid IRCA problems is to establish a meaningful I-9 audit system. Such a program should include at least the following elements:
 - a. Education of all personnel officials on the purpose of IRCA and how to comply with its requirements;
 - b. Establishment of a scheduling system to automatically remind an employer when re-verification of employment authorization is necessary; and
 - c. Conduct of a thorough, periodic review of all employee I-9 Forms or, for large companies, a review of a random sampling of I-9s.
23. I-9 audits should review and evaluate the employer's current IRCA compliance procedures with respect to obtaining, completing and retaining I-9 Forms. If all I-9s are being reviewed, the I-9s should be compared to a tracking form listing all present and past employees to ensure that the verification process was never forgotten. Deficiencies in specific forms should be corrected and procedures enacted to ensure future compliance.
24. Finally, employers should pay special attention to I-9 issues in the settings of mergers and acquisitions. In cases where an acquiring company assumes successor liability, there is no requirement to complete new I-9s for employees of either company if the records of the acquired employer are maintained. But liability for the acquired company's errors is assumed and the prudent acquiring firm should re-verify each employee with a new I-9. Furthermore, the acquiring company should consider requesting indemnification from the acquired company for inherited IRCA-violations and should conduct an I-9 review as part of its normal due diligence. In cases where the acquiring company does not assume any of the acquired company's liabilities, the acquiring company must get new I-9s. It should also review I-9s during due diligence and negotiate indemnification language as a precautionary measure in case successor liability is imposed by a Court.

To: Employee
From: [HR DEPARTMENT]
Subject: Employee's Request to Change I-9 Form
Date:

You have requested that we accept new identity documents and new information for the company's I-9 Form. You have advised us that the prior information was inaccurate.

As you know, our company policy is that providing false or misleading information on employment applications or any other company document is grounds for immediate termination.

You represented to us that the new information that you have given us concerning your identity and social security number are accurate. The company will verify your social security number and if it is found to be inaccurate, you will be requested to explain the inaccuracy. You should be advised that the company's policy regarding furnishing false information will be enforced, and that if the information that you have provided is false or misleading, you are subject to immediate termination.

**Form I-9, Employment
Eligibility Verification**

Instructions

Read all instructions carefully before completing this form.

Anti-Discrimination Notice. It is illegal to discriminate against any individual (other than an alien not authorized to work in the United States) in hiring, discharging, or recruiting or referring for a fee because of that individual's national origin or citizenship status. It is illegal to discriminate against work-authorized individuals. Employers **CANNOT** specify which document(s) they will accept from an employee. The refusal to hire an individual because the documents presented have a future expiration date may also constitute illegal discrimination. For more information, call the Office of Special Counsel for Immigration Related Unfair Employment Practices at 1-800-255-8155.

What Is the Purpose of This Form?

The purpose of this form is to document that each new employee (both citizen and noncitizen) hired after November 6, 1986, is authorized to work in the United States.

When Should Form I-9 Be Used?

All employees (citizens and noncitizens) hired after November 6, 1986, and working in the United States must complete Form I-9.

Filling Out Form I-9

Section 1, Employee

This part of the form must be completed no later than the time of hire, which is the actual beginning of employment. Providing the Social Security Number is voluntary, except for employees hired by employers participating in the USCIS Electronic Employment Eligibility Verification Program (E-Verify). **The employer is responsible for ensuring that Section 1 is timely and properly completed.**

Noncitizen nationals of the United States are persons born in American Samoa, certain former citizens of the former Trust Territory of the Pacific Islands, and certain children of noncitizen nationals born abroad.

Employers should note the work authorization expiration date (if any) shown in **Section 1**. For employees who indicate an employment authorization expiration date in **Section 1**, employers are required to reverify employment authorization for employment on or before the date shown. Note that some employees may leave the expiration date blank if they are aliens whose work authorization does not expire (e.g., asylees, refugees, certain citizens of the Federated States of Micronesia or the Republic of the Marshall Islands). For such employees, reverification does not apply unless they choose to present

in **Section 2** evidence of employment authorization that contains an expiration date (e.g., Employment Authorization Document (Form I-766)).

Preparer/Translator Certification

The Preparer/Translator Certification must be completed if **Section 1** is prepared by a person other than the employee. A preparer/translator may be used only when the employee is unable to complete **Section 1** on his or her own. However, the employee must still sign **Section 1** personally.

Section 2, Employer

For the purpose of completing this form, the term "employer" means all employers including those recruiters and referrers for a fee who are agricultural associations, agricultural employers, or farm labor contractors. Employers must complete **Section 2** by examining evidence of identity and employment authorization within three business days of the date employment begins. However, if an employer hires an individual for less than three business days, **Section 2** must be completed at the time employment begins. Employers cannot specify which document(s) listed on the last page of Form I-9 employees present to establish identity and employment authorization. Employees may present any List A document **OR** a combination of a List B and a List C document.

If an employee is unable to present a required document (or documents), the employee must present an acceptable receipt in lieu of a document listed on the last page of this form. Receipts showing that a person has applied for an initial grant of employment authorization, or for renewal of employment authorization, are not acceptable. Employees must present receipts within three business days of the date employment begins and must present valid replacement documents within 90 days or other specified time.

Employers must record in Section 2:

1. Document title;
2. Issuing authority;
3. Document number;
4. Expiration date, if any; and
5. The date employment begins.

Employers must sign and date the certification in **Section 2**. Employees must present original documents. Employers may, but are not required to, photocopy the document(s) presented. If photocopies are made, they must be made for all new hires. Photocopies may only be used for the verification process and must be retained with Form I-9. **Employers are still responsible for completing and retaining Form I-9.**

For more detailed information, you may refer to the *USCIS Handbook for Employers* (Form M-274). You may obtain the handbook using the contact information found under the header "USCIS Forms and Information."

Section 3, Updating and Reverification

Employers must complete **Section 3** when updating and/or reverifying Form I-9. Employers must reverify employment authorization of their employees on or before the work authorization expiration date recorded in **Section 1** (if any). Employers **CANNOT** specify which document(s) they will accept from an employee.

- A. If an employee's name has changed at the time this form is being updated/reverified, complete Block A.
- B. If an employee is rehired within three years of the date this form was originally completed and the employee is still authorized to be employed on the same basis as previously indicated on this form (updating), complete Block B and the signature block.
- C. If an employee is rehired within three years of the date this form was originally completed and the employee's work authorization has expired or if a current employee's work authorization is about to expire (reverification), complete Block B; and:
 - 1. Examine any document that reflects the employee is authorized to work in the United States (see List A or C);
 - 2. Record the document title, document number, and expiration date (if any) in Block C; and
 - 3. Complete the signature block.

Note that for reverification purposes, employers have the option of completing a new Form I-9 instead of completing **Section 3**.

What Is the Filing Fee?

There is no associated filing fee for completing Form I-9. This form is not filed with USCIS or any government agency. Form I-9 must be retained by the employer and made available for inspection by U.S. Government officials as specified in the Privacy Act Notice below.

USCIS Forms and Information

To order USCIS forms, you can download them from our website at www.uscis.gov/forms or call our toll-free number at 1-800-870-3676. You can obtain information about Form I-9 from our website at www.uscis.gov or by calling 1-888-464-4218.

Information about E-Verify, a free and voluntary program that allows participating employers to electronically verify the employment eligibility of their newly hired employees, can be obtained from our website at www.uscis.gov/e-verify or by calling 1-888-464-4218.

General information on immigration laws, regulations, and procedures can be obtained by telephoning our National Customer Service Center at 1-800-375-5283 or visiting our Internet website at www.uscis.gov.

Photocopying and Retaining Form I-9

A blank Form I-9 may be reproduced, provided both sides are copied. The Instructions must be available to all employees completing this form. Employers must retain completed Form I-9s for three years after the date of hire or one year after the date employment ends, whichever is later.

Form I-9 may be signed and retained electronically, as authorized in Department of Homeland Security regulations at 8 CFR 274a.2.

Privacy Act Notice

The authority for collecting this information is the Immigration Reform and Control Act of 1986, Pub. L. 99-603 (8 USC 1324a).

This information is for employers to verify the eligibility of individuals for employment to preclude the unlawful hiring, or recruiting or referring for a fee, of aliens who are not authorized to work in the United States.

This information will be used by employers as a record of their basis for determining eligibility of an employee to work in the United States. The form will be kept by the employer and made available for inspection by authorized officials of the Department of Homeland Security, Department of Labor, and Office of Special Counsel for Immigration-Related Unfair Employment Practices.

Submission of the information required in this form is voluntary. However, an individual may not begin employment unless this form is completed, since employers are subject to civil or criminal penalties if they do not comply with the Immigration Reform and Control Act of 1986.

Paperwork Reduction Act

An agency may not conduct or sponsor an information collection and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The public reporting burden for this collection of information is estimated at 12 minutes per response, including the time for reviewing instructions and completing and submitting the form. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: U.S. Citizenship and Immigration Services, Regulatory Management Division, 111 Massachusetts Avenue, N.W., 3rd Floor, Suite 3008, Washington, DC 20529-2210. OMB No. 1615-0047. **Do not mail your completed Form I-9 to this address.**

Department of Homeland Security
U.S. Citizenship and Immigration Services

Form I-9, Employment Eligibility Verification

Read instructions carefully before completing this form. The instructions must be available during completion of this form.

ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate against work-authorized individuals. Employers CANNOT specify which document(s) they will accept from an employee. The refusal to hire an individual because the documents have a future expiration date may also constitute illegal discrimination.

Section 1. Employee Information and Verification (To be completed and signed by employee at the time employment begins.)

Print Name: Last	First	Middle Initial	Maiden Name
Address (Street Name and Number)		Apt. #	Date of Birth (month/day/year)
City	State	Zip Code	Social Security #

I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.

I attest, under penalty of perjury, that I am (check one of the following):

- ☐ A citizen of the United States
- ☐ A noncitizen national of the United States (see instructions)
- ☐ A lawful permanent resident (Alien #) _____
- ☐ An alien authorized to work (Alien # or Admission #) _____ until (expiration date, if applicable - month/day/year)

Employee's Signature

Date (month/day/year)

Preparer and/or Translator Certification (To be completed and signed if Section 1 is prepared by a person other than the employee.) I attest, under penalty of perjury, that I have assisted in the completion of this form and that to the best of my knowledge the information is true and correct.

Preparer's/Translator's Signature

Print Name

Address (Street Name and Number, City, State, Zip Code)

Date (month/day/year)

Section 2. Employer Review and Verification (To be completed and signed by employer. Examine one document from List A OR examine one document from List B and one from List C, as listed on the reverse of this form, and record the title, number, and expiration date, if any, of the document(s).)

List A	OR	List B	AND	List C
Document title: _____		_____		_____
Issuing authority: _____		_____		_____
Document #: _____		_____		_____
Expiration Date (if any): _____		_____		_____
Document #: _____		_____		_____
Expiration Date (if any): _____				

CERTIFICATION: I attest, under penalty of perjury, that I have examined the document(s) presented by the above-named employee, that the above-listed document(s) appear to be genuine and to relate to the employee named, that the employee began employment on (month/day/year) _____ and that to the best of my knowledge the employee is authorized to work in the United States. (State employment agencies may omit the date the employee began employment.)

Signature of Employer or Authorized Representative	Print Name	Title
Business or Organization Name and Address (Street Name and Number, City, State, Zip Code)		Date (month/day/year)

Section 3. Updating and Reverification (To be completed and signed by employer.)

A. New Name (if applicable)	B. Date of Rehire (month/day/year) (if applicable)
C. If employee's previous grant of work authorization has expired, provide the information below for the document that establishes current employment authorization.	
Document Title: _____	Document #: _____
Expiration Date (if any): _____	
I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.	
Signature of Employer or Authorized Representative	Date (month/day/year)

LISTS OF ACCEPTABLE DOCUMENTS

All documents must be unexpired

LIST A

**Documents that Establish Both
Identity and Employment
Authorization**

LIST B

**Documents that Establish
Identity**

LIST C

**Documents that Establish
Employment Authorization**

OR

AND

1. U.S. Passport or U.S. Passport Card	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	1. Social Security Account Number card other than one that specifies on the face that the issuance of the card does not authorize employment in the United States
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	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	2. Certification of Birth Abroad issued by the Department of State (Form FS-545)
4. Employment Authorization Document that contains a photograph (Form I-766)	3. School ID card with a photograph	3. Certification of Report of Birth issued by the Department of State (Form DS-1350)
5. In the case of a nonimmigrant alien authorized to work for a specific employer incident to status, a foreign passport with Form I-94 or Form I-94A bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, as long as the period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the form	4. Voter's registration card	4. Original or certified copy of birth certificate issued by a State, county, municipal authority, or territory of the United States bearing an official seal
	5. U.S. Military card or draft record	
	6. Military dependent's ID card	
	7. U.S. Coast Guard Merchant Mariner Card	5. Native American tribal document
	8. Native American tribal document	
	9. Driver's license issued by a Canadian government authority	6. U.S. Citizen ID Card (Form I-197)
	For persons under age 18 who are unable to present a document listed above:	7. Identification Card for Use of Resident Citizen in the United States (Form I-179)
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	10. School record or report card	8. Employment authorization document issued by the Department of Homeland Security
	11. Clinic, doctor, or hospital record	
	12. Day-care or nursery school record	

Illustrations of many of these documents appear in Part 8 of the Handbook for Employers (M-274)

Atlanta

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Asheville

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Austin

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Birmingham

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Boston

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Chicago

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Columbia

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Dallas

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Fairfax

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Greenville

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Jacksonville

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Kansas City

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Lakeland

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Los Angeles County

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Macon

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Nashville

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Port St. Lucie

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Princeton

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St. Louis

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Tampa

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Ventura County

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Winston-Salem

CHAIR, IMMIGRATION
PRACTICE GROUP
Penni Bradshaw
Winston-Salem, NC

EDITOR IN CHIEF
Robin Shea
Winston-Salem, NC

CHIEF MARKETING
OFFICER
Victoria Whitaker
Atlanta, GA

They're Baaaaaack! "No-Match" Letters Resume After Three-Year Hiatus

April 21, 2011

By Penni Bradshaw
Winston-Salem Office

The Social Security Administration recently announced that it would once again be sending "No Match" letters to employers. "No Match" letters are intended to advise employers that there is some discrepancy in the SSA records between the name of an employee and the Social Security number listed for that employee as of the time that the employer submitted payroll taxes.

For years, the SSA routinely sent out "No Match" letters to employers. However, for tax years 2007 through 2009, the agency suspended sending out the letters because of **litigation surrounding a proposed Department of Homeland Security regulation** (later withdrawn) that would have provided a "safe harbor" for employers if they followed certain procedures in responding to "No Match" letters.

The **current version** of the "No Match" letter lists a single employee. In years past, the letters provided the employer with a list of employees who had match problems.

There has long been confusion about how the government expects employers to respond to "No Match" letters.

The usual letter states as follows: "The letter does not imply that you or your employee intentionally provided incorrect information about the employee's name or SSN. It is not a basis, in and of itself, for you to take any adverse action against the employee, such as laying off, suspending, firing or discriminating against the individual."

That's what the SSA says. However, the Department of Homeland Security, **in guidance that it issued in 2008**, advised employers that they should take a more active approach:

Respond to Social Security "Employer Correction Requests" or no-match letters. Check your records to ensure you have recorded the information correctly. Check with your employee to verify the information given to you is correct. Verify any corrections with SSA. Encourage the employee to resolve the issue with SSA and ensure any corrections are valid by checking again with SSA.

And there's yet another county heard from: The Office of Special Counsel of the Civil Rights Division of the U.S. Department of Justice, in its own **recently-issued guidance**, cautioned employers not to *terminate* a worker based solely on receiving information on a no-match, but to *follow up*, giving the employee a "reasonable period of time" to resolve the issue. Interestingly, that same OSC Guidance suggests that employers similarly follow up if they receive information from a *third party* (such as a commercial business that conducts employee

April 21, 2011

background checks, a third-party identity theft inquiry, or a health care provider) indicating that there may be issues with an employee's Social Security number or work authorization.

The challenge for employers is that receipt of a "No Match" letter arguably gives the employer "constructive knowledge" that there may be an issue with a particular worker's authorization to work in the United States. Immigration and Customs Enforcement, the enforcement arm of the Department of Homeland Security, routinely requests copies of "No Match" letters during the course of I-9 audits.

So what should employers do when they receive a "No Match" letter?

*Promptly follow up with the employee, as recommended by the DHS and the DOJ.

*Advise the employee that there is an issue with his or her documentation or work authorization, and give the employee a "reasonable" amount of time in which to provide additional documentation. How much time is "reasonable"? Unfortunately, we have conflicting answers. The E-Verify system gives employees eight business days to provide additional documentation. The withdrawn DHS regulations would have given employees 90 days. Although any time frame within this large range might be legally "reasonable," many employers give their employees two weeks.

*Once you receive the additional documentation from the employee, follow up further (either with the SSA or the DHS) to verify any new information or documentation furnished by that worker.

If you need assistance with any immigration law issues, please contact any member of Constangy's **Immigration Law Practice Group**, or the Constangy attorney of your choice.

About Constangy, Brooks & Smith, LLP

Constangy, Brooks & Smith, LLP has counseled employers on labor and employment law matters, exclusively, since 1946. A "Go To" Law Firm in Corporate Counsel and Fortune Magazine, it represents Fortune 500 corporations and small companies across the country. Its attorneys are consistently rated as top lawyers in their practice areas by sources such as Chambers USA, Martindale-Hubbell, and Top One Hundred Labor Attorneys in the United States, and the firm is top-ranked by the U.S. News & World Report/Best Lawyers Best Law Firms survey. More than 130 lawyers partner with clients to provide cost-effective legal services and sound preventive advice to enhance the employer-employee relationship. Offices are located in Alabama, California, Florida, Georgia, Illinois, Massachusetts, Missouri, New Jersey, North Carolina, South Carolina, Tennessee, Texas, and Virginia. For more information, visit www.constangy.com.

**Social Security Administration
Retirement, Survivors, and Disability Insurance
Request for Employer Information**

Social Security Administration
Data Operations Center
P.O. Box 39
Wilkes-Barre, PA 18767-0039



700000000



Date:

11

Sequence Number:

Employer Number:

We are writing to you about your Wage and Tax Statement (W-2) or Corrected Wage and Tax Statement (W-2c) for the employee shown below. Please complete the information on the back of this letter and return it to us promptly. We cannot put these earnings on the employee's Social Security record until the name and Social Security number you reported agree with our records.

Employee's Name:

Social Security Number:

Reported Earnings:

Tax Year:

2010

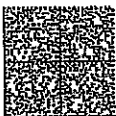
The reasons the reported information does not agree with our records may include, but are not limited to:

- Typographical errors
- Incomplete or blank name reported
- Incomplete or blank Social Security number (SSN) reported
- Name changes

This letter does not imply that you or your employee intentionally provided incorrect information about the employee's name or SSN. It is not a basis, in and of itself, for you to take any adverse action against the employee, such as laying off, suspending, firing, or discriminating against the individual. Any employer that uses the information in this letter to justify taking adverse action against an employee may violate state or Federal law and be subject to legal consequences. Moreover, this letter makes no statement about your employee's immigration status.

For Spanish-speaking individuals: Esta carta no implica que usted ni su empleado intencionalmente proveyeron información incorrecta sobre el nombre o número de Seguro Social del empleado. El hecho de que haya recibido esta carta no constituye una razón, de por sí, para que tome alguna acción adversa contra el empleado, tal como suspenderlo, despedirlo o discriminar contra el individuo. Cualquier empleador que use la información en esta carta para justificar una acción adversa contra un empleado puede encontrarse en violación de la ley estatal o federal, y estar sujeto a enfrentar consecuencias legales. Además, esta carta no hace ninguna declaración sobre el estado migratorio de su empleado. Esta carta pide información sobre las ganancias que usted informó para su empleado. Si usted necesita una traducción de esta carta, por favor llámenos gratis al, 1-800-772-1213, de lunes a viernes, desde las 7 a.m. hasta las 7 p.m.

Please See Reverse



Form SSA-L4002-C1 (01/2011)

THIS IS WHAT YOU NEED TO DO

1. Compare the information shown on the front of this letter to your employment records.
2. If the records match, ask the employee to give you the name and Social Security number exactly as it appears on the employee's Social Security card. (While the employee must furnish the SSN to you, the employee is not required to show you the Social Security card. But, seeing the card will help ensure that all records are correct.)
3. If the employee's Social Security card does not show the employee's correct name or Social Security number, or if the employee needs to report a name change or replace a lost Social Security card, have the employee contact any Social Security office.
4. If you or the employee has been using an incorrect name or Social Security number, you must correct it.
5. Fill in the requested information below and return this letter in the enclosed envelope. (Do not attach a Form W-2c to this letter.)

REQUEST FOR EMPLOYER INFORMATION (Please Print-Use Black Ink or #2 Pencil)

1. Name shown on the employee's Social Security card:

First	ML	Last
-------	----	------

2. Social Security number on the employee's card

3. Do the earnings reported belong to this employee? ☐ Yes ☐ No (Explain)

4. Has the employee ever used another name? ☐ No ☐ Yes (Give other names used)

First	ML	Last
-------	----	------

5. Does the employee still work for you? ☐ Yes ☐ No (Give full last known address)

ADDRESS	
CITY	STATE ZIP

6. Daytime phone number where you can be reached

If you have any questions, you may call us toll-free at 1-800-772-6270 from 7 a.m. to 7 p.m., Monday through Friday, Eastern time. If you call an office, please have this letter with you. It will help us to answer your questions.

Enclosure:
Envelope



Terry Stradtman
Terry Stradtman
Associate Commissioner for
Central Operations

See Next Page

FREQUENTLY ASKED QUESTIONS ABOUT NAME/SOCIAL SECURITY NUMBER "NO-MATCHES"

What is an SSA No-Match Letter? It is a written notice issued by the Social Security Administration (SSA) to an employer, usually in response to an employee wage report, advising that the name or Social Security number (SSN) reported by the employer for one or more employees does not "match" a name or SSN combination reflected in SSA's records. The letter cautions employers against taking any adverse employment action against a referenced employee based solely on receipt of the letter, and explicitly states that the letter makes no statement about the referenced employee's immigration status. Rather, the letter simply reports an apparent error in either the employer's records or SSA's records, and seeks the employer's and, if necessary, the employee's assistance in conforming those records. For more information on the SSA's No-Match letter program, see <http://www.socialsecurity.gov/employer/noMatchNotices.htm>.

If an employee's name and SSN don't match SSA's records, doesn't that mean the employee is not authorized to work? No. There are many possible reasons for a no-match letter, many of which have nothing to do with an individual's immigration status or work authorization. Because of this, an employer should not assume that an employee referenced in a no-match letter is not work-authorized, and should not take adverse action against the referenced employee based on that assumption. Such action could subject the employer to liability under the anti-discrimination provision of the Immigration and Nationality Act (INA), codified at 8 U.S.C. § 1324b.

What is the anti-discrimination provision of the INA? The anti-discrimination provision of the INA prohibits discrimination on the basis of national origin, citizenship status or immigration status, document abuse during the employment eligibility verification process and retaliation.

How does SSA determine when a no-match letter should be issued? After SSA processes wage reports submitted by employers, the agency tries to resolve name/SSN discrepancies by sending no-match letters to employees, employers and self-employed individuals to inform them when a reported name or SSN does not match SSA's records.

Are there sources of information other than SSA no-match letters suggesting possible name/SSN no-matches? Yes. Other organizations issue notices or provide alerts similar to SSA no-match letters. They include:

- commercial businesses that conduct employee background checks;
- third-party identity theft inquiries; and
- health providers providing services to an employee under an employer-provided health plan.

Information from these sources can be received by employers and employees by mail, email, other electronic format or by telephone. Such reports or alerts, however, should be treated cautiously, and should not be used as conclusive evidence of employment authorization, as these third party reporting entities have no legal authority to determine an individual's work authority and may not have access to current information contained in SSA's databases. However, as in the case of responding to no-match letters originating directly from SSA, an employer should at a minimum follow the same policies, procedures and timelines as it does for SSA no-match letters.

What might cause a no-match? There are many reasons for a no-match notice, including but not limited to: (1) an unreported name change due to marriage, divorce or naturalization; (2) input errors by SSA staff; (3) reporting errors by an employer or employee; (4) identity theft; (5) errors in reporting proper culturally based hyphenated or multiple surnames; and (6) fraud.

What action should an employer take upon receipt of an SSA no-match letter or other notice of a no-match? To confirm that a reporting or input error is not the cause of a no-match, an employer, with the assistance of the referenced employee, should confirm that the name and SSN reported accurately reflects the referenced employee's name and SSN. If no error is discovered, the employer should then advise the referenced employee to contact the local SSA office to address the reported no-match. An employer should not use the no-match letter or other no-

match notice by itself as the reason for taking any adverse employment action against the referenced employee. In addition, employers should not use the receipt of a no-match letter or other no-match notice (or the fact that an employee raises any objection to the employer's no-match response procedures) as a basis to either retaliate against the employee or otherwise subject the employee to heightened scrutiny. Doing so may violate the anti-discrimination provision of the INA, or other state or Federal equal employment opportunity or labor laws. While not required to do so, an employer may schedule (and document) periodic meetings or other communications with the employee during the resolution period to keep abreast of the employee's efforts to resolve the no-match, and to determine whether the employee needs more time to resolve the no-match than initially contemplated.

Do no-match letters or other no-match notices create "constructive knowledge" that an employee is not authorized to work? The mere receipt of a no-match letter or other no-match notice does not, standing alone, constitute "constructive knowledge" on the part of an employer that the referenced employee is not work authorized. Only the Department of Homeland Security (DHS) is legally authorized to conclusively determine an individual's authorization to work. It is recommended that an employer give a referenced employee a reasonable period of time to address and correct information contained in a no-match letter or other no-match notice.

What is a "reasonable period of time"? There are no Federal statutes or regulations in effect that define a "reasonable period of time" in connection with the resolution of a no-match notice. As a practical matter, a "reasonable period of time" depends on the totality of the circumstances. Of note, in the E-Verify context SSA has the ability to put a tentative nonconfirmation into continuance for up to 120 days. This recognizes that it can sometimes take that long to resolve a discrepancy in SSA's database.

What is the relationship between E-Verify Notices of Tentative Nonconfirmation (TNC) and SSA No-Match Letters? Both rely upon SSA databases. However, DHS's E-Verify program is specifically designed to verify an employee's work authorization and provides workers with an opportunity to correct the SSA databases before making that determination. For more information on the E-Verify program, see http://www.dhs.gov/files/programs/gc_1185221678150.shtm. In contrast reports simply indicating that an employee's name and SSN do not match SSA's records do not make any statement about an employee's work authorization.

How can employers minimize the receipt of SSA No-match Letters? Employers can use the Social Security Number Verification Service (SSNVS). SSA offers this free online service that allows registered users (employers and authorized third-party submitters) to verify the names and SSNs of employees against SSA records. Telephone Number Employer Verification (TNEV) is very similar to SSNVS, but it is an automated telephone service that allows registered users to verify names and SSNs over the telephone without speaking to an agent. Verifying SSNs through SSNVS and TNEV allows SSA to properly credit the correct earnings to the correct individual's earnings record. These services can only be used for wage reporting purposes. An employer's use of SSNVS or TNEV for any other reason (e.g., to verify work authorization) is improper and may violate the anti-discrimination provision of the INA. For more information, go to www.socialsecurity.gov/employer, or contact OSC at the telephone numbers indicated below.

For more information on the anti-discrimination provision of the Immigration and Nationality Act, call OSC through its employer telephone hotline at (800) 255-8155 or visit OSC's Website:
<http://www.justice.gov/crt/osc>

Worksite Enforcement

Advisory



U.S. Immigration
and Customs
Enforcement

Know Your Workforce: The Key to Immigration Compliance

A recurrent issue encountered in ICE worksite enforcement investigations today is the abuse of the Social Security card by individuals seeking to satisfy the work authorization requirements mandated by federal law. The Social Security card has long been a favorite of fraudulent document vendors. In fact, immigration fraud investigators have coined the term "three pack" to refer to the frequently encountered fraudulent document combination of the Social Security card, the state driver's license or identity card, and a work authorization document.

A common Social Security card fraud theme is for individuals without work authorization to assume the identity of persons with valid identity and work authorization documents to establish employment eligibility during the I-9 process.

ICE is issuing this worksite enforcement advisory to make employers aware of significant fraud trends encountered by the law enforcement community so that employers do not inadvertently facilitate acts of identity theft within their own workforce. ICE, in cooperation with other federal agency partners, such as the Social Security Administration, USCIS and the Federal Trade Commission are working together to enhance efforts to protect and promote the integrity of the Social Security number.

Case Study: Know Your Work Force

ICE investigators have found that many aliens who are not authorized to work in the United States claim to be U.S. citizens when completing the Form I-9 and use authentic Social Security numbers that belong to U.S. citizens. In one investigation, ICE conducted an I-9 audit of an employer and discovered that most of the workforce claimed U.S. citizenship even though the industry historically employs a large percentage of non-U.S. citizens.

Keying in on this anomaly, ICE determined that many of the workers had supplied the employer with Social Security numbers issued from one particular non-local jurisdiction—in this particular case, Puerto Rico. This fact is

Continued on next page

February 2008

Contact IMAGE at
image@dhs.gov
or
IMAGE Coordinator
425 I Street NW
Washington, DC 20536

U.S. Immigration and
Customs Enforcement

ICE

Report Suspicious Activity
to the ICE toll-free tip line:

1-866-DHS-2-ICE

1-866-347-2423

significant because prior immigration investigations have determined that “document mills” frequently use Social Security numbers that seemingly originate in one jurisdiction and that unauthorized aliens frequently use “breeder documents” such as the Social Security card and birth certificate as a stepping stone to obtain valid state identity documents as a means to escape detection by law enforcement and employers.

Things to Look for

Notable changes in the claimed citizenship or immigration status of your workforce

No one knows your work force better than you. When you customarily hire aliens with authorization to work in the U.S. and you notice your employees claiming to be U.S. citizens in numbers that strike you as abnormally high or atypical for your region and/or industry, you should consider contacting your local ICE office.

As noted above, investigations by ICE have uncovered schemes by local document vendors who traffic in legitimate identification documents belonging to U.S. citizens, typically from one particular state, possession or territory. If you notice that your new hires are suddenly presenting identical documentation (birth certificates, or driver's licenses, for example), from one particular state, possession or territory (or locality), this may warrant further inquiry by discussing with the employee his or her connection with the particular issuing entity, or by contacting ICE for further information.

Employers are reminded that it is unlawful to discriminate against employees based upon their national origin, including “foreign” appearance or accent, with respect to hiring, firing, and the terms and conditions of employment. See Title VII of the Civil Rights Act of 1964. In addition, it is unlawful to discriminate based upon citizenship or immigration status against U.S. citizens or nationals, refugees, asylees, or lawful permanent residents, with respect to hiring, firing, or employment verification. See the Immigration and Nationality Act's anti-discrimination provision, 8 U.S.C. § 1324b. Additionally, the employer should not request more or different documents or refuse to honor documents that appear genuine and relate to the individual.

Case Study:

Middle management isn't immune from prosecution

During another ICE investigation, an employee of a company noticed co-workers tearing up IRS W-2 records. When the employee approached a supervisor about what he saw, the supervisor stated that it did “not matter since those employees were illegal anyway.”

The employee informed ICE investigators of what he had seen and heard. The investigation ultimately led to the arrest of several managers as well as a large portion of the work force.

Don't ignore relevant information.

Indifference to the law by supervisors and employees is never a good business practice and may result in criminal charges against you, your company and your employees. 8 CFR, Part 274a.1 codifies the concept of “constructive knowledge” for employers to include instances that the employer “...has information available to it that would indicate that the alien is not authorized to work... .”

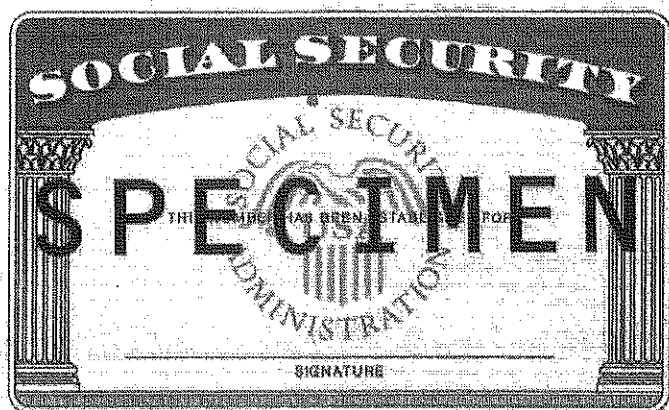
Things to Look for

Social Security “Employer Correction Requests” or no-match letters

Respond to Social Security “Employer Correction Requests” or no-match letters. Check your records to ensure you have recorded the information correctly. Check with your employee to verify the information given to you is correct. Verify any corrections with SSA. Encourage the employee to resolve the issue with SSA and ensure any corrections are valid by checking again with SSA.

Any other discrepancies identified by SSNVS (Social Security Number Verification System)

If a company finds inconsistencies after submitting a Social Security number to the Social Security Administration (SSA), employers should immediately check their records for errors and discuss/address the issue with the employee and the SSA if the error cannot be identified. See www.socialsecurity.gov for instructions on proper use of the SSNVS system.



Depiction of the SSA 1995 revision.

Social Security cards

Although this advisory deals primarily with the fraudulent use of valid SSN cards, the Social Security card remains susceptible to fraudulent reproduction.

Social Security cards are not immigration documents but are used to establish employment authorization. Social Security cards have been issued since 1936 and have been revised more than 20 times. Originally, the seal on the Social Security card read Social Security Board. In May of 1980, it was changed to the Department of Health and Human Services.

In April 1995 it was changed to read Social Security Administration. Some counterfeiters have failed to notice these changes.

Additionally, there are Social Security cards that have been issued since 1982 with the annotation "NOT VALID FOR EMPLOYMENT," and beginning in 1992 with the annotation "VALID FOR WORK WITH INS AUTHORIZATION" which has now changed to DHS.

In October 1983, security features were added to the card. All Social Security cards issued since October 1983 have been printed with raised (intaglio) printing and the signature line consists of microline printing of the words "SOCIAL SECURITY ADMINISTRATION" in a repeating pattern.

Additional Resources and Issues

- Enroll in the online E-Verify program sponsored by USCIS and supported by the Social Security Administration to verify employment eligibility for all of your new employees. Updates to this system such as the use of a "photo tool" and the implementation of fraud detection procedures will help to reduce instances of impostor related fraud.
- Be vigilant to abnormal trends such as an unexplained surge in identity documents issued from a particular state, locality, etc., particularly if the surge does not correspond to information on record regarding your employee's prior employment or prior residences.
- Employers may utilize commercially available database software or credit checks to compare the reported use of the Social Security card number with the reported work history and residences of the employee. This information may indicate either that your employee is the victim of identity or other fraud, or it may indicate that your employee is using a stolen number. You should contact ICE for further information.
- Do not ignore information that you learn as an employer that indicates an employee is not authorized to work.
- A listing of local ICE offices is available at www.ice.gov.

ICE recommends that employers not take any adverse action against an employee based solely on what is contained in this advisory. ICE merely reminds employers to use diligence in the recruitment and hiring of employees and emphasizes that employers should not ignore relevant information.

IMAGE Employer Certification Requirements: Best Employment Practices

To become an IMAGE participant, your company must adhere to the following Best Employment Practices, required for certification.

1. Use the DHS employment eligibility verification program E-Verify to verify the employment eligibility of all new hires.
2. Establish an internal training program on the hiring process, with annual updates (i.e., on how to manage completion of Form I-9 [Employment Eligibility Verification Form]), and on how to detect the fraudulent use of documents in the I-9 process, and cooperate with ICE to make employees available for ICE training sessions as deemed appropriate.
3. Permit the I-9 and E-Verify process to be conducted only by individuals who have received this training, and include a secondary review as part of each employee's verification, to minimize the potential for a single individual to subvert the process.
4. Arrange for annual I-9 audits by an external auditing firm or a trained employee not otherwise involved in the I-9 process.
5. Establish a self-reporting procedure for the reporting to ICE of any violations or discovered deficiencies.
6. Ensure and document the definitive resolution of no-match letters received from the Social Security Administration (SSA), per SSA and Department of Homeland Security guidance.*
7. Establish a tip line mechanism (inbox, e-mail, etc.) for employees to report activity relating to the employment of unauthorized aliens, and a protocol for responding to employee tips.
8. Establish and maintain appropriate policies, practices and safeguards against use of the verification process for unlawful discrimination, and to ensure that U.S. citizens and authorized workers do not face discrimination with respect to hiring, firing or recruitment or referral for a fee because of citizenship status or national origin.
9. Communicate IMAGE guidelines to other companies in the hiring network (such as employment services and agencies) and contractors and subcontractors. Work toward incorporating IMAGE guidelines into relationships and agreements with these companies and establish a protocol for assessing the adherence to the Best Employment Practices guidelines by the company's contractors and subcontractors.
10. Submit an annual report to ICE to track results and assess the effect of participation in the IMAGE program. The report should include (a) identification of individuals removed from employment in accordance with participation in the IMAGE program; (b) instances and resolution of SSA no-match letters; (c) major organizational changes; and (d) identification of any vulnerabilities that are found to be exploited by unscrupulous employees and unauthorized aliens. When appropriate, ICE encourages timely disclosure in advance of the annual report. Discovery or allegations of substantive criminal violations must be **immediately** reported to ICE (in accordance with Best Employment Practice 5, above), whereas technical violations may be documented in the annual report. For more information on the IMAGE Program or to request an information packet, please visit www.ice.gov/image.

To combat unlawful employment ICE has introduced the ICE Mutual Agreement between Government and Employers (IMAGE). IMAGE is a voluntary partnership initiative to assist employers in building legal workforces. IMAGE is designed to build cooperative relationships between government and industry to reduce the unlawful employment of illegal aliens through strengthened employment practices and enhanced training of employers. By voluntarily participating in IMAGE, companies reduce unauthorized employment and the use of fraudulent identity documents. As part of IMAGE, ICE and U.S. Citizen and Immigration Services (USCIS) will provide education and training on proper hiring procedures, fraudulent document detection, use of the E-Verify employment eligibility verification program and anti-discrimination safeguards. For more information, please visit IMAGE online at www.ice.gov/image. To obtain additional information regarding IMAGE, click on IMAGE Information Packet Request.

To provide feedback regarding this ALERT, send an e-mail to IMAGE@dhs.gov.

* On October 10, 2007 the U.S. District Court for the Northern District of California issued a preliminary injunction in *AFL-CIO, et al. v. Chertoff, et al.* (N.D. Cal. Case No. 07-CV-4472 CRB). The preliminary injunction enjoins and restrains DHS and the Social Security Administration from implementing the Final Rule entitled "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter."

Chuy's restaurants target of federal investigation

By Teresa Rochester

Originally published 02:18 p.m., April 20, 2011

Updated 06:08 p.m., April 20, 2011

A federal investigation into the suspected hiring of illegal immigrants and tax evasion led to the arrests Wednesday of the owners of Chuy's Mesquite Broiler restaurants and their accountant, as well as triggered searches at the chain's eateries in Arizona and California.

Federal agents served search warrants at Chuy's locations in Thousand Oaks, Simi Valley, Moorpark and Camarillo, resulting in the arrests of eight suspected unauthorized workers, according to Immigrations and Customs Enforcement spokeswoman Virginia Kice. A fifth restaurant in Simi Valley wasn't searched.

Warrants were served at 15 of the chain's 22 restaurants, according to authorities. About 40 suspected illegal immigrants who were working at Arizona restaurants were detained, an ICE spokesman in Phoenix told The Associated Press.

Owners Mark Evenson, 58, of Paradise Valley, Ariz., and his son, Christopher Evenson, 39, of Oro Valley, Ariz., and company accountant Diane Strehlow, 47, of Tempe, Ariz., were named in a 19-count federal indictment after a lengthy investigation by ICE's Homeland Security Investigations and the Internal Revenue Service.

It was not immediately clear who was representing the Evensons and Strehlow.

The indictment alleges the Evensons hired illegal immigrants to work in the kitchens and legal workers as servers or in other restaurant jobs.

Illegal workers were allegedly paid under the table with no taxes withheld or reported to the IRS, while authorized workers were paid using normal payroll practices, with taxes properly itemized and submitted to the IRS, according to the indictment.

At least \$400,000 in Social Security and Medicare taxes were not paid because of fraudulent tax forms filed by company officials, according to the indictment.

In July 2009, Mark Evenson continued to employ a worker he believed had been deported and had re-entered the country by jumping the border fence, the indictment

alleges.

On May 13, 2010, Mark Evenson allegedly told an employee not to "run" the employees through the government because the government "will kick it back," according to the indictment.

The following month a worker told Mark Evenson that the kitchen staff did not have files or applications and Evenson allegedly replied "he did not put them on the payroll," according to the indictment.

In August 2010, Christopher Evenson was allegedly told by an employee that the person he wanted to hire was working at another restaurant and was undocumented. Christopher Evenson allegedly replied the other restaurant did the same thing, the indictment states.

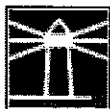
The next month, Mark Evenson received a customer complaint that the restaurant in Lake Havasu City, Ariz., was employing illegal immigrants. The indictment stated Evenson told an employee "if we throw some American people in there," maybe that would solve the problem.

He then advised the employee he believed to be undocumented that "I just need to get you off the oh, show floor. I need to hide you in the kitchen," the indictment alleges.

In a November 2010 incident described in the indictment, Mark Evenson allegedly instructed an employee involved in preparing payroll that "if those Social Security numbers get in the state, they'll come and pick them up."

If convicted of all charges, Mark Evenson faces up to 86 years in prison and a \$5.33 million fine, while Christopher Evenson faces up to 81 years in prison and a \$5.08 million fine. Strehlow would face a maximum prison term of 40 years and a \$2 million fine.

They all are scheduled to be arraigned today in federal court in Tucson.



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300 N. Los Angeles Street, Room 6676
Los Angeles, California 90012



**Homeland
Security**

NOTICE OF INSPECTION

March 21, 2011

Dear Sir/Madam:

Section 274A of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986, requires employers to hire only United States citizens and aliens who are authorized to work in the United States. Employers must verify employment eligibility of persons hired after November 6, 1986, using the Employment Eligibility Verification Form I-9.

U.S. Immigration and Customs Enforcement (ICE) regulations require the provision of three days notice prior to conducting a review of an employer's Forms I-9. This letter serves as advance notice that ICE has scheduled a review of your forms for March 25, 2011, at 10:00 a.m. You may, however, waive the three-day period, should you wish to do so, by annotating and signing the bottom of this letter and advising this office of your decision.

During the review, Special Agent Yolanda Magdaleno and Auditor Michael Tom will discuss the requirements of the law and inspect your Forms I-9. The purpose of this review is to assess your compliance with the provisions of the law. ICE will make every effort to conduct the review of records in a timely manner so as not to impede your normal business routine. Questions may be directed to the Agent at (213) 830-5548.

Sincerely,

A handwritten signature in black ink, appearing to read "MaVedinia Romero".

MaVedinia Romero
Assistant Special Agent in Charge

I wish to waive the three-day notice to which I am entitled by regulation.

(Printed Name)

(Signature)

(Date)

FORM I-9 INSPECTION

On November 6, 1986, the enactment of the Immigration Reform and Control Act required employers to verify the identity and employment eligibility of their employees and created criminal and civil sanctions for employment related violations. Section 274A (b) of the Immigration and Nationality Act (INA), codified in 8 U.S.C. § 1324a (b), requires employers to verify the identity and employment eligibility of all individuals hired in the United States after November 6, 1986. 8 C.F.R. § 274a.2 designates the Employment Eligibility Verification Form I-9 (Form I-9) as the means of documenting this verification. Employers are required by law to maintain for inspection original Forms I-9 for all current employees. In the case of former employees, retention of Forms I-9 are required for a period of at least three years from the date of hire or for one year after the employee is no longer employer, whichever is longer.

On the date of the inspection, please provide the following:

- Form I-9 and Supporting Documents: Provide the original Forms I-9 for individuals employed as of the date of the Notice of Inspection, along with any supporting documents (e.g. passports, driver license, social security card, permanent resident card, etc.) that you maintain in the normal course of business. At a later date, you may be requested to provide originals of all Form I-9 for employees who have left the company or whose employment has been terminated in the preceding 3 years. This will be determined by the inspecting Agent. Please alphabetize the Forms I-9. The Agent conducting your inspection will take the original Forms I-9 and supporting documents back to their office for further review. You should retain copies of the Forms I-9 and supporting documents for your files.
- Most Recent Payroll Report issued prior to the date of the Notice of Inspection
- Employee Listing: Please provide an alphabetized listing of all your current employees as of the last completed pay period prior to the date on the Notice of Inspection. Please include on this list, the following information regarding each employee: (1) name (last, first & middle initial) (2) social security number, (3) date of birth, (4) termination date, if applicable, and (5) identify who are managers/supervisors. If at possible, please provide this listing in an electronic format (i.e. Excel Spreadsheet). If your company already maintains a similar listing of this information, it may be possible to submit this document in place of this listing of employees.
- DE-6: Please provide a copy of DE-6, State of California, Employment Development Department, Quarterly Wage and Withholding Report, for the most recent completed quarter.



BUSINESS ENTITY QUESTIONNAIRE

PURSUANT TO AN INSPECTION OF EMPLOYMENT ELIGIBILITY FORMS (SEC. 274A OF THE INA)

1. NAME OF BUSINESS: _____
 2. TRADE NAME OF DBA: _____
 3. ADDRESS: _____
 4. TELEPHONE / FAX#: PHONE (____) _____ FAX (____) _____
 5. NATURE OF OWNERSHIP: _____ STATE IN WHICH RECORDED _____
NAMES OF OWNERS / PARTNERS: _____
 6. TYPE OF INDUSTRY OR SERVICE: _____
 7. EMPLOYER I.D. #/ SSN: _____ NUMBER OF EMPLOYEES: _____
 8. GROSS INCOME: _____ NET INCOME: _____ DATE STARTED BUSINESS: _____
 9. CHECK BOX WHICH APPLIES-IF YOU STARTED BUSINESS AFTER NOVEMBER 6, 1986, DID YOU:
☐ START WITH A WORKFORCE FROM A PREVIOUS BUSINESS WHICH WAS IN OPERATION
PRIOR TO 11/6/86; OR
☐ START BY HIRING WORKERS WITHOUT TRANSFERRING OVER THE WORKFORCE OF A
PREVIOUS/PREDECESSOR COMPANY
 10. NUMBER OF DIVISIONS OR SITES: _____ # OF SHIFTS _____
ADDRESS OF OTHER DIVISIONS OR SITES: _____
SHIFT TIMES: 1. _____ TO _____ 2. _____ TO _____ 3. _____ TO _____
 11. NAME OF PARENT COMPANY: _____
 12. IS THIS BUSINESS UNDER ANY BANKRUPTCY PROCEEDINGS AT THIS TIME? ☐ YES ☐ NO
 13. WHO HAS THE HIRE AUTHORITY FOR THE COMPANY: _____
 14. WHO DOES THE FORM I-9: _____
 15. HOW ARE THE EMPLOYEES PAID: _____
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U.S. Immigration
and Customs
Enforcement

December 1, 2009

Fact Sheet

Form I-9 Inspection Overview

On November 6, 1986, the enactment of the Immigration Reform and Control Act required employers to verify the identity and employment eligibility of their employees and created criminal and civil sanctions for employment related violations. Section 274A (b) of the Immigration and Nationality Act (INA), codified in 8 U.S.C. § 1324a (b), requires employers to verify the identity and employment eligibility of all individuals hired in the United States after November 6, 1986. 8 C.F.R. § 274a.2 designates the Employment Eligibility Verification Form I-9 (Form I-9) as the means of documenting this verification. Employers are required by law to maintain for inspection original Forms I-9 for all current employees. In the case of former employees, retention of Forms I-9 are required for a period of at least three years from the date of hire or for one year after the employee is no longer employer, whichever is longer.

The administrative inspection process is initiated by the service of a Notice of Inspection (NOI) upon an employer compelling the production of Forms I-9. U.S. Immigration and Customs Enforcement (ICE) typically will allow 3 business days to present the Forms I-9. Often, ICE will request the employer provide supporting documentation, which may include a copy of the payroll, list of current employees, Articles of Incorporation, and business licenses.

ICE agents or auditors then conduct an inspection of the Forms I-9 for compliance. When technical or procedural violations are found, pursuant to INA §274A(b)(6)(B) (8 U.S.C. § 1324a(b)(6)(B)), an employer is given ten business days to make corrections. An employer may receive a monetary fine for all substantive and uncorrected technical violations. Employers determined to have knowingly hired or continued to employ unauthorized workers under INA § 274A(a)(1)(a) or (a)(2) (8 U.S.C. § 1324a(a)(1)(a) or (a)(2)) will be required to cease the unlawful activity, may be fined, and in certain situations may be prosecuted criminally. Additionally, an employer found to have knowingly hired or continued to employ unauthorized workers may be subject to debarment by ICE, meaning that the employer will be prevented from participating in future federal contracts and from receiving other government benefits.

Monetary penalties for knowingly hire and continuing to employ violations range from \$375 to \$16,000 per violation, with repeat offenders receiving penalties at the higher end.

Penalties for substantive violations, which includes failing to produce a Form I-9, range from \$110 to \$1,100 per violation. In determining penalty amounts, ICE considers 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.¹

¹ See INA §274A(e)(5) (8 U.S.C. 1324a (e)(5))

ICE will notify the audited party, in writing, of the results of the inspection once completed. The following are the most common notices:

- Notice of Inspection Results – also known as a “compliance letter,” used to notify a business that they were found to be in compliance.
- Notice of Suspect Documents - advises the employer that based on a review of the Forms I-9 and documentation submitted by the employee, ICE has determined that the employee is unauthorized to work and advises the employer of the possible criminal and civil penalties for continuing to employ this individual. ICE provides the employer and employee an opportunity to present additional documentation to demonstrate work authorization if they believe the finding is in error.
- Notice of Discrepancies - advises the employer that based on a review of the Forms I-9 and documentation submitted by the employee, ICE has been unable to determine their work eligibility. The employer should provide the employee with a copy of the notice, and give the employee an opportunity to present ICE with additional documentation to establish their employment eligibility.
- Notice of Technical or Procedural Failures – identifies technical violations identified during the audit and gives the employer 10 business days to correct the forms. After 10 business days, uncorrected technical and procedural failures will become substantive violations.
- Warning Notice - issued in circumstances where substantive verification violations were identified but circumstances do not warrant a monetary penalty and there is the expectation of future compliance by the employer.
- Notice of Intent to Fine (NIF) - may be issued for substantive, uncorrected technical, knowingly hire and continuing to employ violations.

In instances where a NIF is served, charging documents will be provided specifying the violations committed by the employer. The employer has the opportunity to either negotiate a settlement with ICE or request a hearing before the Office of the Chief Administrative Hearing Officer (OCAHO) within 30 days of receipt of the NIF. If the employer takes no action after receiving a NIF, ICE will issue a Final Order. If a hearing is requested, OCAHO assigns the case to an Administrative Law Judge (ALJ), and sends all parties a copy of a Notice of Hearing and government’s complaint, thus setting the adjudicative process in motion.

The Notice of Hearing spells out the procedural requirements for answering the complaint and the potential consequences of failure to file a timely response. Many OCAHO cases never reach the evidentiary hearing stage because the parties either reach a settlement, subject to the approval of the ALJ, or the ALJ reaches a decision on the merits through dispositive prehearing rulings.

Determination of Recommended Fine

The cumulative recommended fine set forth in the Notice of Intent to Fine is determined by adding the amount derived from the **Knowing Hire / Continuing to Employ Fine Schedule** (plus enhancement or mitigation) with the amount derived from the **Substantive / Uncorrected Technical Violations Fine Schedule** (plus enhancement or mitigation). Typically, the date of the violation shall be the date ICE conducted the Form I-9 inspection and not the date the Form I-9 was completed by the employer.

Penalties for Knowing Hire / Continuing to Employ Violations

Employers determined to have knowingly hire or continuing to employ violations shall be required to cease the unlawful activity and may be fined. The agent or auditor will divide the number of knowing hire and continuing to employ violations by the number of employees for whom a Form I-9 should have been prepared to obtain a violation percentage. This percentage provides a base fine amount depending on whether this is a First Tier (1st

time violator), Second Tier (2nd time violator), or Third Tier (3rd or subsequent time violator) case. The standard fine amount listed in the table relates to each knowing hire and continuing to employ violation. The range of the three tiers of penalty amounts² are as follows:

Knowing Hire / Continuing to Employ Fine Schedule
(For violations occurring on or after 3/27/08)

Knowing Hire and Continuing to Employ Violations	Standard Fine Amount		
	First Tier \$375 - \$3,200	Second Tier \$3,200 - \$6,500	Third Tier \$4,300 - \$16,000
0% - 9%	\$375	\$3,200	\$4,300
10% - 19%	\$845	\$3,750	\$6,250
20% - 29%	\$1315	\$4,300	\$8,200
30% - 39%	\$1785	\$4,850	\$10,150
40% - 49%	\$2255	\$5,400	\$12,100
50% or more	\$2,725	\$5,950	\$14,050

² Since the passage of IRCA in 1986, federal civil monetary penalties have been increased on two occasions in 1999 and 2008 pursuant to the Federal Civil Penalties Inflation Act of 1990, as amended by the Debt Collection Improvement Act of 1996. These adjustments are designed to account for inflation in the calculation of civil monetary penalties and are determined by a non-discretionary, statutory formula. (See 73 FR 10130 (February 26, 2008))

U.S. Department of Justice
Immigration and Naturalization Service

INA-10-072

Subpoena

Office address:

U.S. Immigration and Customs Enforcement
Office of Investigations
400 N. 5th Street, 11th Floor
Phoenix, Arizona 85004

File No. PX19PR10PX0026

Date: November 19, 2009

In re:


Notice of Inspection - Form I-9, Employment Eligibility Verification

To:

You are hereby commanded to appear before an ICE Special Agent on December 1, 2009 at a location and time to be determined, to give testimony in connection with an administrative proceeding being conducted under the authority of the Immigration and Nationality Act, relating to the verification of employment eligibility, to ensure that employers hire only United States citizens and aliens authorized to work in the United States.

You are further commanded to bring with you the following books, papers, and documents viz:

SEE ATTACHMENT


Matthew C. Allen
Special Agent In Charge

Certificate of Service

I certify that on 11/19/09, I served the above subpoena on the witness named above in the following manner: in person


ICE Special Agent

Form I-138 (Rev. 11-5-70)Y

ATTACHMENT 1 SUBPOENA FORM I-138
Custodian of Records

You are commanded to bring with you the following books, papers, and documents:

1. **ORIGINAL** "Form I-9, Employment Eligibility Verification" for all current employees of Pro's Ranch Market Inc., and all former employees in accordance with mandatory retention requirements of 8 U.S.C. §1324a(b)(3) (three years after date of hire, or one year after termination of employment, whichever is later). **NOTE: ICE will take custody of the original I-9 Forms (and attached copies of identity documents). The company should make a copy of the I-9 Forms and attachments for their records. A receipt will be provided identifying the number of original I-9 Forms ICE receives. If a "by-name" receipt is desired, the company must provide a "by-name" list of all I-9 Forms in order to inventory the I-9 Forms provided.**
2. All copies made of any identification and work authorization documents verified in Section 2 of Form I-9.
3. Copies of any E-Verify screen prints generated for individual employees.
4. A list of all current and former employees (in accordance with Form I-9 retention requirements) identifying employee name, Social Security Number, hire date, and termination date. **An electronic EXCEL version of this list is preferred.**
5. Copies of quarterly wage and hour reports and/or payroll data for all employees (current and former) covering the period of the inspection (3Q2006 through 3Q2009).
6. Relevant business information: Identification of Employer Identification Number (EIN) or Taxpayer Identification Number (TIN); owner address information, telephone number, and email address; copy of Articles of Incorporation; copies of state and local business licenses.
7. Identification as to whether the business is a participant in E-Verify (previously "Basic Pilot") or the Social Security Number Verification Service (SSNVS), and if so, the date(s) when participation began.