

# Employee Verification, Employer Sanctions and Anti-discrimination

## DESK REFERENCE

### I. Employee Verification Procedures

All employers in the United States have been required, since 1986, to verify at the time they hire any person (not just a foreign national) that the person is authorized to be employed in the United States. This verification is completed when the new hire completes a Form I-9 and the employer reviews documentation presented by the new hire that establishes the identity and employment authorization of the new hire:

#### A. Completion of Form I-9

Any individual hired must, at or prior to commencement of employment, sign a Form I-9 attesting that he or she is a citizen of the United States, a non-citizen national of the United States,<sup>1</sup> an alien lawfully admitted for permanent residence or an alien who is authorized to be hired for such employment. Within three business days, the employee must present to the employer the required documents; and the employer must complete its portion of the Form I-9 verifying that it has examined the required documents. The employer may copy any document presented by an individual and retain the copy with the I-9.

#### B. Document Examination

Employers must examine either (1) a specified document establishing both employment authorization and identity, or (2) both a document evidencing employment authorization and a document establishing identity of the individual. (See II, below). The employer must satisfy itself that the document “reasonably appears on its face to be genuine.”

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<sup>1</sup> The new Form I-9 Section 1, effective April 3, 2009, now separates U.S. citizens and non-citizen nationals of the United States. Non-citizen nationals of the U.S. are certain persons born in American Samoa, certain former citizens of the former Trust Territory of the Pacific Islands who relinquished their U.S. citizenship, and certain children of non-citizen nationals born abroad. For further information, see the instructions to Form I-9.

### C. Retention Requirements

Form I-9 must be retained for a period of three years after the date of hiring or one year after the date the individual's employment is terminated, whichever is later. During that time, the Form must be made available for inspection by officers of the Department of Labor or the Immigration and Naturalization Service upon three days advance notice.

### D. Updating Form I-9

If an I-9 Form reveals that an employee has temporary employment authorization, the employer has the responsibility to update the I-9 Form.

## II. Employer Document Examination Requirements

In order to comply with the Immigration Reform and Control Act's employee verification requirements, an employer must examine original documents produced by every individual who is hired for employment. The documents to be examined fall into two classes: documents evidencing that the person is authorized to work in the United States, and documents establishing the person's identity. Certain documents are considered to establish both, whereas other documents are considered to establish only one or the other. **Employers should note that, under recent changes to the law effective April 3, 2009, employees may only present valid, unexpired documents to evidence employment eligibility.** Employees may no longer present an expired U.S. passport or expired documents in List B on Form I-9. If the document does not contain expiration date, such as a Social Security card, it is considered unexpired.

### A. Documents Establishing Both Employment Authorization and Identity

(If one of these documents is presented, the employer should not check any further documentation.)

1. United States passport.
2. A U.S. passport card.
3. Alien Registration Receipt Card ("green card") or Permanent Resident Card with photograph (INS Form I-551).
4. A foreign passport that:
  - Contains an unexpired stamp that reads:  
*"Processed for I-551. Temporary evidence of lawful admission for*

*permanent residence. Valid until \_\_\_\_\_. Employment authorized.” Or*

- A temporary I-551 printed notation on a machine-readable immigrant visa. Or
  - Has attached a Form I-94 bearing the same name as the passport and containing an endorsement of the alien’s nonimmigrant status, so long as the period of endorsement has not yet expired and that status authorizes the alien to work for the employer.
5. A passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with a valid 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.
  6. Employment Authorization Document that contains a photograph (*Form I-766*). Employers should note that Forms I-688, I-688A and I-688B are older employment authorization documents that are no longer issued, and they are no longer acceptable for establishing employment authorization on Form I-9.

## **B. Documents Establishing Identity Only**

(If an individual presents a document in this category, the individual must also present a document in C, below.)

1. State driver’s license or other federal, state or local government identification
  - This type of document is only acceptable if it contains a photograph of the individual or if it contains identifying information such as: name, sex, date of birth, height, weight, color of eyes and address.
  - Driver’s license issued by a Canadian government authority is also acceptable.
2. Voter’s registration card
3. U.S. Military card or draft record or military dependent’s identification card
4. School identification card with a photograph
5. Native American tribal document

6. U.S. Coast Guard Merchant Mariner card

***NOTE: If the employer participates in the E-Verify Program, they may only accept List B identity documents that bear a photograph.***

### **C. Documents Establishing Employment Eligibility Only**

(If an individual produces a document in this category, he or she must also produce a document in B, above.)

1. Social Security Account Number Card
  - Not including a Social Security Card that expressly indicates that it is not valid for employment
2. Birth Certificate issued by any state, county, municipal authority or outlying possession of the United States
  - Must be under seal
  - Certified copy is acceptable
3. Certification of Birth (*Form FS-545*) or Certification of Report of Birth (*Form DS-1350*) issued by the Department of State
4. Native American tribal document
5. U.S. Citizen ID Card (*INS Form I-197*)
6. ID Card for use of resident citizen in the U.S. (*INS Form I-179*)
7. Unexpired employment authorization document issued by the Department of Homeland Security (other than those listed under List A)

### **D. Special Rules**

1. Employees who are presently authorized to work and who present an application receipt for any of the above documents are given 90 days to present the document itself.
2. Individuals under age 18 are excused from producing a required identity document if they either:
  - Produce a school record or report card, clinic doctor or hospital record or daycare or nursery school record; or

- Have their parent or legal guardian complete and sign the employee's part of the Form I-9.
3. If an alien's employment authorization document is valid until a certain date, the employer is liable for sanctions for continuing employment of the alien after the expiration date.

### III. Dos and Don'ts to Avoid Employer Sanctions and Discrimination Penalties

It is sometimes difficult for an employer to skirt the often thin line between avoiding employer sanctions penalties and avoiding the commission of an unfair immigration-related employment practice (national origin or citizenship discrimination). For example, if a document reasonably appears on its face to be genuine and relates to the employee, the employer can be subject to a discrimination charge if the employer asks the employee for further or different documents. On the other hand, if an employer accepts a document that does not reasonably appear to be genuine or does not relate to the employee in question, the employer can be subject to employer sanctions penalties.

The following dos and don'ts will help employers avoid both employer sanctions penalties and discrimination charges:

#### A. Employers should do the following:

1. Do ask job applicants if they are authorized to work full time.
2. Do make photocopies of documents and attach the copies to the I-9 form for every employee or for no employee.
3. Do update the I-9 form if the original I-9 form reveals that the employment authorization of the employee was temporary.
4. Do notify every job applicant that he or she will be required to produce I-9 documents at the time of hire.
5. Do apply all procedures equally.

#### B. Employers should not do any of the following:

1. Do not specify which among the approved I-9 documents an employee must produce.
2. Do not ask an employee for more than the required minimum number of approved documents.

3. Do not ask that a foreign national produce immigration documents if the foreign national produces the required minimum documents, such as Social Security card and driver's license.
4. Do not include a question on an employment application that asks if a job applicant is a U.S. citizen or permanent resident alien.
5. Do not ask a job applicant if he or she is authorized to work permanently (certain of the classes protected against national origin and citizenship discrimination do not have permanent work authorization, such as refugees, asylees and conditional residents).
6. Do not review a prospective employee's documents or complete the I-9 Form before a hiring decision is made (the documents may reveal information that may lead to a discrimination charge if the person is not hired).

#### IV. Employer Guidelines for Dealing With Government Employer Sanctions Inspections

There are several general rules that an employer should follow when confronted with a request for inspection of records by the government:

- Insist on right to three days notice
- Notify counsel immediately, and do not discuss anything with the government until counsel has been notified
- Do not consent to a search of the workplace
- Do not destroy documents covered by the scope of the investigation nor falsify any information on any documents
- Determine if the inspecting agency is USCIS or the Department of Labor
- Be aware that a subpoena requires a court order to enforce and that an employer can insist upon a court order without being penalized, whereas a warrant is a court order for which an employer can be penalized for non-compliance
- Consider the advantages of having the I-9 inspection at USCIS offices rather than at the employer's offices since this might be a less disruptive alternative and may lead to fewer requests for other records that the employer may have and/or less chance of a request to search the workplace

- Consider whether to require a warrant or to consent to an inspection after the three days
- Consider whether to require a subpoena for the production of potentially confidential records relating to an employee and whether to insist upon a court order to enforce the subpoena

This Desk Reference was prepared by the Immigration Law Firm **Klasko, Rulon, Stock & Seltzer, LLP**.

If you have questions regarding the information in this document, please contact any of the attorneys listed below.

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