

## New Form I-9 and Increased Penalties Raise the Stakes for Immigration Noncompliance

In November 2016, the U.S. Citizenship and Immigration Services (USCIS) released an updated “smart” version of the **Employment Eligibility Verification Form I-9** (commonly known as the “I-9 form” or “I-9”). As of January 22, 2017, all employers are required to use the updated form in the [paper version](#) or the [fillable PDF version](#).<sup>1</sup>

Along with the new form, the USCIS issued 15 pages of [revised instructions](#) for completing the new I-9 form (nearly double the number of pages from the former version!) and a [new handbook for employers](#).

With *increased immigration enforcement* on the horizon and *significantly higher fines* for unlawful employment of immigrant workers, it is imperative to ensure compliance with immigration-related laws and regulations. Employers that hire one or more employees are required to comply with USCIS regulations pertaining to completion of I-9 forms.

This article highlights key changes to the new I-9 form and provides tips for properly completing the form. In addition, you’ll find specific guidelines for correcting common errors and omissions on I-9s, information about increased fines and penalties, advice for minimizing risk if you discover that a worker falsified his or her identity or work authorization, a list of invalid Social Security numbers, and a summary of the most important compliance requirements that every employer MUST abide by. **This article is packed with practical advice for ensuring compliance with USCIS regulations related to the I-9 form!** If you delegate completion of the I-9 form and/or immigration compliance to an internal employee or to any managers, we strongly recommend that you share this information with them.

### New “Smart” I-9 Form

The new I-9 form is referred to as a “smart” form because it is available in a **fillable PDF format** that includes real-time error checking notifications, validations for specific fields, drop down lists and calendars, and hover text instructions. These changes were designed to minimize common technical errors that often occur when completing the form.

Although the new I-9 form can be completed and retained electronically, ironically, it does not meet the technical definition of an “*electronic I-9*” under **Department of Homeland Security (DHS)** regulations. (Go figure!) Because DHS still considers the fillable I-9 form to be a paper form, electronic signatures are not permitted. For this reason, if you elect to complete the PDF version of the I-9, **a hard copy must be printed and signed by both the employee and the authorized employer representative who verifies the original identifying documents**.

### I-9 Compliance Refresher

Before outlining specific changes to the new I-9 form, let’s review some important requirements related to completion and retention of the I-9. These requirements are unchanged; however, the USCIS has provided additional guidance and clarification for employers.

1. Section 1 of the I-9 form must be completed by the employee at “the time of hire.” The phrase “time of hire” is defined by USCIS as **the period of time after the job offer has been accepted and before the end of the employee’s first day of active employment**. Ensure that your new hires complete Section 1 of the form during this time period. *(Note: To ensure compliance with this requirement, I-9 forms should not be attached to paper or online employment applications.)*

<sup>1</sup> The fillable PDF version of the I-9 form that was posted on the USCIS website between November 14 and 17, 2016, had a glitch in the Social Security number field in Section 1 that caused the middle two numbers to transpose. If you downloaded the fillable I-9 during that time period and have been using that version, we recommend that you verify the Social Security number on all I-9s for employees hired from the point you downloaded the form to the present. Correct any transposed numbers according to the process outlined in this document (see the section entitled “Correcting I-9 Errors,” then “Section 1 Errors and Omissions”). You will need to download and begin using the corrected version of the fillable I-9 form.



2. Section 2 of the I-9 form must be completed by the employer **within three business days of the date of hire** (The term "hire" means the beginning of employment in exchange for wages or other remuneration. Based on this definition, the "date of hire" means the first day of work for pay).
3. Employees who are rehired within 3 years of the date of their previous I-9 form do not need to complete a new I-9 form; however, Section 3 of the previous I-9 form must be completed. (See **Completing the New I-9 Form** below for more information.)
4. Reverification of List A and List C documents is never required for U.S. citizens, noncitizen nationals, or lawful permanent residents who presented a Permanent Resident Card (Form I-551). Reverification does not apply to List B documents.
5. I-9 forms should not be completed by independent contractors.
6. Employers who have acquired or merged with another company can either (1) treat all acquired employees as new hires and complete a new I-9 form for every individual, using the effective date of the acquisition or merger as the first day of employment in Section 2 of the form, **OR** (2) treat all acquired individuals as employees who are continuing in their uninterrupted employment status and retain the previous owner's I-9 form for each acquired employee. (*Note: If you select option 2, you are liable for any errors or omissions on the previously completed I-9 form.*)
7. The 15-page instruction document and List of Acceptable Documents (page 3 of the I-9 form) must be made available to employees (in print or electronically) at the time they complete Section 1 of the I-9 form. We recommend that whoever is responsible for completing the I-9 form at your company read and follow the requirements outlined in the new instruction document.
8. The I-9 is available in Spanish; however, only employers in Puerto Rico may use the Spanish version. Employers in the United States and other U.S. territories may use the Spanish version as a translation guide for Spanish-speaking employees, but the English version must still be completed and retained.
9. Employees are free to choose which documents they submit to establish their identity and eligibility to work in the U.S. Documents that reasonably appear to be genuine must be accepted. **Employers may not ask employees to provide specific documents (such as a Social Security card) for I-9 purposes.** To do so may constitute unlawful discrimination. (*Note: This means that if an employee presents acceptable documentation from List A, you cannot ask them to provide List B and/or List C documentation.*)
10. Employees must present original, unexpired documents in the physical presence of the company representative completing Section 2 of the I-9. The documents must include either one document from List A **OR** one document from List B AND one from List C. If you participate in the E-Verify program and an employee elects to present one document from List B and one from List C, the List B document must contain a photograph.

*Note: There is one exception to the requirement for submitting original documents: A certified copy of the birth certificate can be submitted in place of the original. Also, certain employees may present an expired employment authorization document if the employee's employment authorization has been extended by regulation or a Federal Register Notice. This includes Employment Authorization Documents [Forms I-766] and Permanent Resident Cards [Forms I-551] that appear to be expired on their face, but that have been extended by USCIS.*
11. Employer representatives who physically examine List A, B, and C documents in the employee's presence must complete Section 2 in its entirety, including the full name of the document (or the common abbreviation), the issuing authority, the document number, and the expiration date. The employer representative must sign the Certification in Section 2, which is **an official government affidavit attesting under penalty of perjury** that (a) he or she examined the documents presented by the employee, (b) they appear to be genuine and to relate to the employee named, and (c) to the best of his or her knowledge, the employee is authorized to work in the U.S.
12. Receipts for List A, B, and C documents are acceptable only under certain circumstances. Follow the rules on page 6 of the new instruction document.
13. If your company is not required to participate in the E-Verify program, photocopying the original documents presented by employees is **voluntary**. If you elect to photocopy the documents presented by employees, to minimize the risk of a discrimination complaint based on citizenship status, immigration status, or national origin, we recommend that you apply this practice consistently for all individuals who complete an I-9 form upon hire and who present documents for a reverification.

**Remember, even if you photocopy original documents presented by an employee, you must still complete Section 2 of the I-9 form.** Many employers mistakenly believe that if they simply make a copy of the documents, there is no need to write the document information in Section 2 of the form. This is false and can subject an employer to paperwork violations and fines. (Note: As of August 2016, civil fines for mistakes or omissions on the I-9 form have increased 96%, from a maximum of \$1,100 to \$2,156. The minimum penalty per violation increased from \$110 to \$216.)

14. I-9 forms should be stored in a secure location separate from personnel files. We recommend that I-9 forms be filed in binders with A-Z tabs—one binder with I-9s for current employees and one for separated employees. If you copy the documents presented by employees, the photocopies must be retained with the I-9s and presented during an investigation or audit by an authorized agency.

**Completed I-9s must be retained for as long as an individual works for the employer. I-9s for employees who have separated must be retained for 3 years after the date of hire (first day of work for pay) or 1 year after the date employment ends, whichever is later.**

As an alternative to storing I-9s in a paper format, you may store scanned I-9s electronically provided you comply with USCIS standards for electronic retention and retrieval of I-9s (8 CFR Part 274a.2).

15. I-9 forms must be made available for inspection (usually within 3 business days) upon request by officers from the following agencies: **U.S. Immigration and Customs Enforcement (ICE), the Department of Justice (DOJ), and the Department of Labor (DOL).**
16. If your company participates in the E-Verify program, new employees must still complete the I-9 form as part of the E-Verify process.

### **Invalid Social Security Numbers**

If an employee provides a Social Security number (SSN) with **000, 666, or 900-999** in the first three places (referred to as the “Area Number” because at one time it had geographical significance), it may be fraudulent. These series of initial numbers are not used by the Social Security Administration (SSA) when issuing SSNs.

In addition, in the past, SSNs that began with an **“8”** were invalid; however, as of June 25, 2011, as part of an effort to “randomize” SSNs, the SSA reversed course and began issuing SSNs beginning with the number 8. Based on the first date of issue, only those individuals born in the last six years, those who received work authorizations within the past six years, and those who were issued a new SSN due to identity theft (or some other official reason) should have an SSN that begins with an “8.”

If an employee provides an SSN with one of the above invalid numbers and you use this number when submitting quarterly tax reports or annual returns, you could receive a letter from the SSA notifying you that the number is invalid. In the past, these were referred to as **“mismatch letters.”** The SSN has no jurisdiction or authority over employment decisions, so they cannot require employers to terminate an employee on this basis. However, if you receive an SSN with one of the invalid numbers, it could raise questions about the person’s identity.

Under the immigration laws, if an employer has **actual or constructive** knowledge that an individual is not authorized to work in the U.S. and the employer hires or retains the person in spite of this, the employer is in violation of the law. In the context of immigration regulations, according to the INS, “constructive knowledge” is “knowledge that can be fairly inferred through a notice of certain facts and circumstances that would lead a person, through the exercise of reasonable care, to know about an individual’s unlawful employment status.”

Receiving an SSN mismatch letter from the SSA or accepting for I-9 purposes a Social Security card with a number that is invalid could constitute constructive knowledge that an individual is not authorized to work in the U.S. and could, in turn, subject an employer to significant liabilities.

To minimize this risk, employers should not accept invalid SSNs (those beginning with 000, 666, or 900-999 and those that begin with an 8 for individuals other than those noted above) for I-9 or tax purposes.

If you discover that such a number was inadvertently used or accepted, address the concern with the employee and, depending on the circumstances, provide him or her with a reasonable opportunity to visit an SSA office and request a correction of any errors. (As an example of a reasonable amount of time to correct an SSN number error, employers enrolled in the E-Verify program must provide employees with 8 federal government workdays to visit an SSA field office to request an update or correction of the records).

If an employee submits a Social Security card with an invalid number as a List C document to satisfy the I-9 document requirement and, in lieu of the Social Security card, the employee cannot provide a different valid List C document, continuing to employ the individual is in violation of immigration laws and could subject the employer to sanctions.

### **Completing the New I-9 Form**

#### **Section 1: Employee Requirements and Changes**

- Any fields that the employee would have previously left blank because the information did not apply (e.g., no middle initial) must now have “N/A” written or electronically added to the field. Since e-mail addresses and phone numbers are optional, employees should write or electronically select “N/A” if they choose not to provide this information.
- The “Other Names Used” field has been replaced with “Other Last Names Used” to help avoid potential discrimination issues and to provide privacy protection to transgender individuals and others who have changed their first names.
- Providing a Social Security number in Section 1 of the I-9 form is **voluntary** unless the employer participates in the E-Verify program. Employees must provide E-Verify employers with their Social Security numbers in Section 1.
- Employees who provide an Alien Registration Number/USCIS Number must now indicate if the number provided is an A-number or a USCIS number. Foreign nationals must enter their foreign passport information OR their Form I-94 information (not both, as required on the previous I-9).
- The employee must check a box indicating he or she did or did not use a translator or preparer.
- If the employee used a translator or preparer, the fillable PDF version of the form includes space for up to 5 different signatures of translators and/or preparers who may have assisted the employee.

#### **Sections 2 and 3: Employer Requirements and Changes**

- The top of Section 2 includes a new field to note the citizenship/immigration status of the employee. When using the paper version, you must complete this section by entering the number of the citizenship or immigration status checkbox that the employee selected in Section 1. When using the fillable PDF version, this field populates automatically.
- The fillable PDF version contains drop-down menus in many fields, including the document choices for Lists A, B, and C. Although the fillable PDF version contains features to help reduce inadvertent errors, using it is not a safe harbor for employers that have forms with errors or omissions.
- It is not permissible to use a **webcam** or **Skype** to verify documents from List A, B, or C. If a new employee is hired to work at a remote location, you may designate another employee, an outside agent, or a notary public to act as the authorized representative to inspect the original documents in person and to sign the official government affidavit in Section 2. In this situation, the employer remains the responsible party for the verification and is accountable for any violations the designee may commit.
- A blank box was added to Section 2 for employers to input or note additional information such as the E-Verify case verification number, employee termination date, information from additional documents that F-1 or J-1 nonimmigrant employees may present, notations that describe special circumstances such as employment authorization extensions for employees with certain visas, and other such information. Use of this box is optional.
- If it becomes necessary to **reverify a current employee's document(s)**, you must use the **new I-9 form** and you must (1) complete the “Employee Info from Section 1” fields at the top of Section 2, leaving the Citizenship/Immigration Status” field blank, (2) complete Section 3 of the new form, and (3) attach the new I-9 to the original I-9 form. In this situation, it is not necessary to complete any other sections of the new I-9 form.

- If you learn of a legal name change at a time other than during a rehire or reverification, USCIS recommends that you update the I-9 with the new name in the space provided in Section 3 so that you maintain correct information on the form.
- If you **rehire** an employee within three years of the date the last I-9 form was executed, you can choose to complete Section 3 of the original I-9 form **OR** you may complete Section 3 on a new I-9 form and attach it to the previously executed form. For other rehire scenarios, refer to page 13 of the new instruction document.

### Correcting I-9 Errors

Failure to comply with regulations pertaining to employment verification and proper completion and use of the updated I-9 form can result in serious consequences. As of August 1, 2016, employers face increased penalties and fines for unlawfully employing immigrant workers and mistakes or omissions on the I-9 form. Fines associated with mistakes and/or omissions on an I-9 and failure to make I-9s available for inspection as required by law have increased **96%** from a minimum of **\$110 to \$216** to a maximum of **\$1,100 to \$2,156** per violation. (The amount of the penalty is based on the size of the business, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations of the employer.) Penalties for discriminating against immigrant workers and violating visa-related requirements have also increased. And, of course, if an authorized agency discovers immigration violations, additional audits and/or closer scrutiny by the agency is more likely.

**To minimize liability, we recommend that your I-9s be completed and periodically audited by an individual who is knowledgeable about immigration requirements, including, but not limited to, how to properly complete the new I-9 form and how to correct errors or omissions on I-9s.**

If you have not reviewed or audited your I-9 forms recently, now is the time to do so. USCIS has prescribed the methods for correcting errors and omissions discovered on I-9s. Here is a list of common errors and omissions and how to properly correct them:

- **Section 1 Errors and Omissions:** If you discover an error or omission in Section 1 of an I-9, to bring the I-9 into compliance, you must ask the employee to correct the error. Employers may not correct errors or omissions found in Section 1 of the I-9. Ask the employee to draw a line through any incorrect information, enter the correct information nearby, and initial and date the correction. Any missing information must be added by the employee and the newly added information must be initialed and dated by the employee. When an employee corrects Section 1 of an I-9 form, USCIS recommends that employers attach a written explanation of what occurred with the I-9 form.

If a Section 1 error or omission is discovered after the employee's employment has ended, the employer should attach a written explanation to the I-9 form explaining the error and place it in the employee's file.

- **Section 2 or 3 Errors and Omissions:** If you discover an error or omission in Section 2 or 3 of an I-9, you or your authorized representative should enter any omitted information and initial and date the newly added information. If it is necessary to correct an error, draw a line through the incorrect information, enter the correct information nearby, and initial and date the correction. Once again, USCIS recommends that employers attach a written explanation of what occurred with the I-9 form.

If you discover that the individual completing Section 2 or 3 did not include the date the section was completed, do not back date the form. Enter the current date and initial the newly added information.

- **Multiple Errors or Omissions:** If you discover multiple errors on the same form, you may redo the specific section on a new I-9 and attach it to the old form. A new I-9 form can be completed when it is necessary to correct *major errors*, such as an entire section left blank or discovery of unacceptable documents under Section 2. In these situations, USCIS recommends that employers attach a written explanation to the I-9 outlining the reasons for the changes or completion of a new I-9.
- **Concealing Changes:** Employers should never conceal changes made to the I-9 form, since this may lead to increased liability. If correction fluid was inadvertently used, after correcting any errors or omissions on the form, USCIS recommends that you attach a signed and dated note to the form explaining what happened.
- **Employees Working Under a False Identity:** If an employee informs you (or you have reason to believe) that he or she has an identity that is different from that which was previously used to complete the I-9 form, you should complete a

new I-9 using the correct and true identity information. Write the original hire date in Section 2 and attach the new I-9 to the original I-9, along with a written explanation of what occurred. When a false identity is discovered, the I-9 rules do not require you to terminate the employee; however, other company policies or practices may call for some type of disciplinary action. You can take disciplinary action (up to and including termination) for falsifying a company document as long as you consistently apply this practice without regard to an employee's national origin or citizenship or immigration status.

- **Employees Who Are Not Authorized to Work and Who Cannot Provide Documentation to Establish They Are Authorized to Work:** It is unlawful for an employer to continue to employ an alien when the employer has actual or constructive knowledge that the individual is not authorized to work. To avoid the potential for sanctions under the Immigration and Nationality Act (INA), if you learn that an employee is unauthorized to work, the employee should be terminated.
- **Employees Who Were Not Authorized to Work in the Past, but Who Are Currently Authorized to Work:** The same provisions noted under "Employees Working Under a False Identity" apply in this situation.
- **Wrong Version of the I-9 was Used:** As long as the I-9 documentation that was originally presented was acceptable at the time of hire, correct the error by stapling the outdated I-9 form to a blank, updated version of the I-9. Sign the updated version and attach a written note explaining that the wrong version was used at the time of hire. As an alternative, you can forego signing a blank, updated version of the I-9 and simply attach a written explanation of the error to the original I-9 form.
- **I-9 Form Never Completed or Missing for a Current Employee:** Complete a current version of the I-9 as soon as possible. Do not backdate the form. Clearly state the actual date employment began in the certification portion of Section 2 and attach a signed and dated explanation of the corrective action taken.
- **Entire Section of I-9 Form Left Blank:** If Section 1 was left blank, require the employee to complete it as soon as possible. If Section 2 was left blank, complete it as soon as possible, keeping in mind that the person who completes it must physically see the documents provided by the employee. Do not backdate the form. Clearly state the actual date employment began in the certification portion of Section 2 and attach a signed and dated explanation of the corrective action taken.
- **I-9 Form Does Not Include Sufficient Documentation to Meet Eligibility Verification Requirements:** Complete a new I-9 form and ask the employee to present documentation sufficient to meet the requirements related to the current version of the I-9. (Remember, the employee has the choice of which documents to present in order to bring the I-9 into compliance.) Staple the completed and signed Section 2 (or 3) of the current version of the I-9 to the previous I-9, and include a signed and dated explanation of the corrective action taken. Do not backdate the new I-9.

***Note:** Keep in mind that documents under Lists A, B, and C have changed over time. When auditing I-9s to ensure that documentation is sufficient to meet the requirements, use the list of acceptable documents that was in effect at the time the I-9 was completed.*

- **Photocopies of Documents Do Not Appear to be Genuine:** Employers are required to accept original I-9 documentation that *reasonably appears to be genuine and to relate to the individual presenting the documentation*. Examining photocopies of documents may not definitively confirm or deny the genuineness of the document; however, if you conclude that a photocopied document does not appear to be genuine or does not relate to the person who presented it, address the concern with the employee and provide him or her with the opportunity to choose a different document to present from the list of acceptable documents. Keep in mind that from a photograph you may not conclude **without foundation** that an employee's I-9 documents are not genuine or do not relate to the individual. For this reason, when auditing I-9s, you should not request documentation from employees solely because photocopies are unclear.