

I-9 Forms, Legislation, and eSolutions

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Introduction

The Federation for American Immigration Reform (FAIR), a Washington, D.C. based group that promotes stricter immigration policies, along with other reports, advise that the United States has somewhere between 11 and 20 million illegal aliens residing within our borders. In addition, 1.1 million undocumented workers enter the U.S. each year.

The financial cost to illegal immigration is enormous. Reports indicate that over \$30 billion leaves the U.S. economy annually as workers ship home to their country money and goods.

To pick just the state of California, it's nearly 3 million illegal immigrants cost taxpayers nearly \$9 billion each year according to a report by FAIR. Topping the cost is education for children, medical care and incarceration for crimes.

Sources estimate that the net annual cost of illegal immigration in the U.S. is estimated to be between \$67 and \$87 billion a year.

- Illegal immigrants accounted for nearly 5% of the U.S. labor force
 - Illegal immigrants represented nearly one-quarter of all farm works
 - Illegal immigrants represented approximately 20% of construction workers
 - Illegal immigrants represented approximately 17% of leisure and hospitality employees
- Source: Pew Hispanic Center – 2005 study

The Law

The Immigration Reform and Control Act of 1986 (IRCA) legally mandates that U.S. employers verify the employment eligibility status of newly-hired employees. IRCA made it unlawful for employers to knowingly hire or continue to employ unauthorized workers. In response to the law, the Immigration and Naturalization Service (INS), now an integrated component of the Department of Homeland Security (DHS) created Form I-9 and mandated its accurate and timely completion by all U.S. employers and their employees.

Within the first three (3) days of hire, new employees must complete a Form I-9.

Risks of Non-Compliance

While most employers attempt to fully comply with IRCA, many routinely and unknowingly accept I-9 Forms with fraudulent supporting documents. Employers that fail to fully comply with IRCA face significant legal, financial and public relations risks.

Non-compliance, whether intentional or simply caused by oversight, has severe consequences imposed by the DHS, and the potential of a corporate image tarnished by negative publicity.

Employers are usually unaware that they have a problem with Form I-9 employment verification requirements, until they are audited by governmental authorities. By that time, it is generally too late to undo the damage.

Employer Sanctions

- The following is a partial list of federally mandated fines resulting from non compliance:
 - For employers who fail to properly complete, retain or make Form I-9 available for inspection, fines range from \$100 to \$1,100 per individual I-9 Form.
 - For employers who knowingly hire or knowingly continue to employ unauthorized workers, “civil penalties” range from \$250 to \$11,000.
 - For employers engaging in a pattern or practice of knowingly hiring or continuing to employ unauthorized workers, “criminal penalties” can be as much as \$3,000 per unauthorized employee and/or 6 months imprisonment.

Note: If an employer can demonstrate compliance with Form I-9 requirements, a good faith defense with the respect to a charge of knowingly hiring an unauthorized alien will have been established unless the government can prove otherwise.

Note: The fines referenced in the first two bullet points above, are higher than the fines listed in the “Employer Handbook”, M-274. Fines were increased 10% as of September 29, 1999.

Form I-9

- The law requires that the employee complete **Section 1** at the time of hire or when the employee begins work. **Section 1** may also be completed at the application stage as long as the practice does not discriminate.
- The employer must complete **Section 2** within three business days of hire and certify that the employee’s documents of identity and work authorization appear genuine and belong to the employee.
- **Section 3** is completed by the employer when it is necessary to update or re-verify and employee’s work authorization document(s).

List of Acceptable Documents

Effective September 30, 1997, the following documents were removed from the List of Acceptable documents:

- Certificate of U.S. Citizenship (List A #2)
- Certificate of Naturalization (List A #3)
- Alien Registration Card I-151 (List A #5) Form I-551 is still acceptable.
- Unexpired Reentry Permit (List A #8)
- Unexpired Refugee Travel Document (List A #9)

- Added to the List of Acceptable documents is Form I-766, Employment Authorization Card revised 1/3/96 (List A).

Revised Form I-9

In May 31, 2005 New Form I-9 was revised and Re-branded with updated agency name

Common Errors

Charles Kuck, Vice President of the American Immigration Lawyers Association indicated: “No employer in America has I-9’s that are 100 percent correct”.

Source: HR Magazine October 2006

- Most errors are made by employers
 - Most errors are made in Sections 2 & 3
 - Errors are the result of lack of staff training and inexperience with the I-9 process
1. Fail to record the date of hire in the Certification Box of Section 2
 2. Failure of employee to complete Section 1 by the end of the first day of employment
 3. Employer’s fail to complete Section 2 by the end of the third day of employment
 4. Section 1 and Section 2 identifiers are mismatched
 5. Employer’s accept receipts for application of a new document (only should accept receipt for replacement of document)
 6. Employee’s do not present documents of identity and work authorization within the first 3 days of employment (Section 2 is often blank)
 7. Pattern of employer’s forgetting to date and sign the document

The U.S. Citizenship and Immigration Services system “Basic Pilot Program”

The original verification program was established to allow employers to make a “good faith” determination of the validity of documents presented. DHS introduced the Basic Pilot Program

providing employers the ability to verify right to work status using a modem. Passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Verification became the joint responsibility of DHS and SSA. March 1992, the Telephone Verification System (TVS) was Congress's first attempt to verify the work authorization of non-citizens. Phase II "Pilot" introduced in September 1995 named EVP was the first computer based program.

In December 2004, the Basic Pilot became fully operational in all 50 states. July 1, 2005, DHS and SSA converted to a "web based" verification system using the Basic Pilot Program and named Form I-9 Compliance as the first "Designated Agent" to roll out the program nationally.

As of October 2005, there were 4,587 participants. As of April 24, 2006, only 6,200 companies nationwide were participating in the Basic Pilot Program. As of July 2006, a reported 10,000 companies signed on to the Program. Today there are just more than 11,000 companies on the program.

Electronic I-9 & Signature

On October 30, 2004, the President signed legislation into law (Public Law 108-390) authorizing employers to retain the Form I-9 in electronic format. The legislation also authorizes attestations on the form I-9 to be manifested by an electronic signature. The effective date was to be the earlier of April 28, 2005 or the issuance of impending regulations. Such regulations were issued by the Department of Homeland Security (DHS) on June 6, 2006.

Enforcement

On April 20, 2006 Homeland Security Secretary Michael Chertoff said in a statement: "We intend to find employers who knowingly or recklessly hire unauthorized workers and we will use every authority within our power to shut down businesses that exploit an illegal workforce to turn a profit."

[Read at: <http://www.ice.gov/pi/news/newsreleases/articles/060420washington.htm>]

By simply taking a moment in time between April and May 2006, the office of Immigration Control Enforcement (ICE) made several raids and arrests at employers who hired illegal aliens.

ICE is significantly enhancing its worksite enforcement efforts as part of its interior enforcement strategy. The Administration is seeking \$41.7 million in new funding in its fiscal year 2007 budget request. The budget increase would support the hiring of an additional 171 special agents and 35 support personnel to enhance existing worksite enforcement investigations.

2005 Proposed Legislation

In 2005 there were in excess of 50 bills in Congress that in one way or another, address immigration.

Legislation – House of Representatives

H.R. 4437: Sensenbrenner (Amends the Immigration and Nationality Act)

Passed by the House of Representatives December 16, 2005. The overall bill, HR 4437, was sent to conference with Senate immigration reform legislation, and if the two Houses agree to a final bill, the CLEAR Act (Clear Law Enforcement for Criminal Alien Removal Act) provisions could become law sometime in 2006. A similar bill has been already introduced in the Senate.

H.R. 4437 tightens regulations on employers regarding illegal immigrants and strengthens border security. It authorizes sections of fencing (totaling 698 miles) along the southwest border. It creates a new electronic employment verification system modeled on the Basic Pilot Program. It repeals the “visa lottery”. It reaffirms state and local law enforcement’s inherent authority to assist in the enforcement of immigration laws. It adds new penalties for certain immigration-related crimes, including alien smuggling and passport fraud

In addition, it requires employers to screen new hires for employment eligibility. The following phase in would occur: all new hires immediately upon passage, all current employees (government & safety sensitive employers) within 3 years, all current employees within 6 years.

Finally, it would Increase fines for violations. TITLE 8--ALIENS AND NATIONALITY
CHAPTER 12--IMMIGRATION AND NATIONALITY SUBCHAPTER II--IMMIGRATION
specifically indicates:

“It is unlawful for a person or other entity- (A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment.”

With respect to a violation of subsection (a) (1) (A) or (a) (2) of this section, the order under this subsection--

(A) shall require the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of--

(i) not less than \$250-\$5,000 and not more than \$2,000-\$7,500 for each unauthorized alien with respect to whom a violation of either such subsection occurred,

(ii) not less than \$2,000-\$10,000 and not more than \$5,000-\$15,000 for each such alien in the case of a person or entity previously subject to one order under this paragraph, or

(iii) not less than \$3,000-\$25,000 and not more than \$10,000-\$40,000 for each such alien in the case of a person or entity previously subject to more than one order under this paragraph.

With respect to a violation of subsection (a)(1)(B) of this section (**Proper Completion of the Form I-9**), the order under this subsection shall require the person or entity to pay a civil penalty in an amount of not less than \$100 \$1,000 and not more than \$1,000 \$25,000 for each individual with respect to whom such violation occurred.

Legislation – Senate

The Senate passed sweeping immigration reform titled the “Comprehensive Immigration Reform Act of 2006” (S. 2611) on May 25, 2006.

The bill may amend the current I-9 employment verification forms capturing name, DOB, SSN, alien I.D or authorization number that the Secretary shall require that the Employer shall “attest” that employer has verified the identity & eligibility for employment

- Signatures may be handwritten or electronic
- Document examination based on reasonableness
- Documents establishing both Employment Eligibility and Identity:
 - U.S. passport
 - Permanent resident card or other document designated by the Secretary which (1) contains a photograph, (2) is evidence of employment eligibility, and (3) contains security features
- Documents evidencing Employment Eligibility:
 - Social Security Card (with no legend)
- Documents establishing Identity:
 - Drivers’ License or identity card issued by a State, Commonwealth of the Northern Mariana islands, or an outlying possession of the U.S. that complies with the Real ID Act of 2005
 - Employee ID issued by a Federal agency or department
 - Name, DOB, Gender, eye color, address, & photo
 - Security features
 - Employee ID determined reliable by Secretary
 - Name, DOB, Gender, eye color, address, & photo
 - Security features

The Employee shall “attest” that they are a:

- National of the U.S.
- An alien lawfully admitted for permanent residence
- An alien authorized to be hired, recruited or referred for a fee in the U.S.

The Employee’s Signature: handwritten or electronic

The law changed the retention requirement listing that the documents may be Retained as paper, microfiche, microfilm, or electronic version and available for inspection beginning on the date of hiring and ending:

- Referral for a fee (without hiring) 7 years after the date of recruiting or referral
- Hiring...the later of:
 - 7 years from the date of hire
 - 1 year after the date employment is terminated
 - Subject to reduction by Secretary

Further, Retention of supporting documents would change whereby the Employer shall copy all documents presented and retain such as paper, microfiche, microfilm, or electronic means and copies shall be designated as copied documents and reflect the signature of the employer and individual and the date of receipt of such documents.

Employers would be required to use an electronic platform to submit identity and work eligibility documentation of all new hires to the Department of Homeland Security (DHS) within 72 hours of employment. The department would verify the information and respond to the employer within 10 days. If the new hire's documentation could not be confirmed after 10 days, the DHS would then have 30 days to conduct a secondary verification process.

In addition, Employers shall participate in the Electronic Employment Verification System. The phase in period is different than the House version allowing the Secretary discretion for "critical employers" (critical infrastructure, national security, or homeland security needs) 180 days after enactment. Notwithstanding, the EEVS program would be mandatory on all employers 18 months after Congress raises funds

The Electronic Employment Verification System would verify identity and eligibility for employment and provide a response not later than 3 days with a Confirmation, Tentative Non-Confirmation, or a Final Non-Confirmation. Further there are other requirements including a 10 Day requirement, Termination, Recording of Conclusion, and Consequences of Non-confirmation.

Civil Penalties would be increased for the following:

- Hiring or continuing to Employ Unauthorized Aliens
 - Not less than \$500 and not more than \$4,000 for each unauthorized alien with respect to each such violation
 - If previously been fined 1 time: Not less than \$4,000 and not more than \$10,000 per violation
 - If previously been fined more than 1 time: Not less than \$6,000 and not more than \$20,000 per violation
- Violating Recordkeeping or Verification Practices
 - Not less than \$200, Not more than \$2,000 for each unauthorized alien with respect to each such violation
 - If previously been fined 1 time: Not less than \$400 and not more than \$4,000 per violation
 - If previously been fined more than 1 time: \$6,000 for each such violation
- Other Penalties
- Penalties shall be adjusted for inflation every 4 years

Civil Penalties for Pattern Practice would be dramatically increased:

- Not more than \$20,000, imprisoned for not more than 6 months, or both
- Prohibition on Award of Government Contracts, Grants, or Agreements
- Repeat violators shall be debarred for 2 years for those without contracts, grants or agreements
- Employers who hold contracts, grants or agreements who are repeat violators or who have been convicted of a crime under this section shall be debarred from receipt of Federal contracts, grants, or cooperative agreements for 2 years.
- Indictments for violations could form the basis for debarment

Disclosure of Taxpayer Identity Information by SSA to DHS of "No Match" notices would be required of Employers with 100 names and tax ID's that didn't match SSA records and Employers with more than 10 names of employees with the same taxpayer identifying number including Employers with multiple persons using the same taxpayer identifying number and

Employers who file an information return where there is reason to believe employee was not entered in the EEVS.

The bill would Repeals the Basic Pilot and also repeal reporting requirements of earnings of aliens not authorized to work.

The bill Increases the number of investigators for worksite enforcement by not less than 2,000 annually and increases the number of investigators for fraud detection by not less than 1,000 annually. Finally, it creates a temporary guest worker program and more...

DHS & No Match Letters

The Social Security Administration "no-match letters" are supposed to be a simple administrative mechanism to help workers get their earnings credited to their correct Social Security account. DHS proposed regulation would clarify that if the employer fails to take "reasonable steps," and if the employee is in fact an unauthorized worker, DHS may conclude, depending on the totality of relevant circumstances, the employer had "constructive knowledge" of that fact in violation of immigration law. In the proposed regulation, DHS outlines a safe harbor for employers who take "reasonable steps," within 14 days of receipt of a no-match letter, to attempt to resolve the discrepancy.

STATES Proposed Legislation in 2006

Eleven states, including California, Ohio, Georgia and Virginia, would require employers to confirm workers' employment eligibility. Six would mandate that employers adopt Basic Pilot. Alabama, Kansas, and Tennessee propose making employment of illegals a criminal offense. South Carolina would penalize employers who hire illegals, then punish them again if they provide illegals with workers' compensation benefits. Kansas would make hiring an illegal immigrant a misdemeanor punishable by a fine of up to \$1,500 and up to 90 days in jail.

STATES Legislation Passed in 2006

Georgia: Requires any employer who does contracts or subcontracts with state agencies, departments, or instrumentalities to verify the employment eligibility of employees through the Basic Pilot Program.

Tennessee: Requires any employer who contracts with a state agency to attest in writing each employee's eligibility to work in the U.S.

Colorado: Requires all employers to affirm that they don't hire illegal aliens and to maintain copies of all documents relating to the Form I-9. Also requires those who do business with a state

agency to attest to the employment eligibility of employees and not do business with subcontractors who hire undocumented workers.

New Service Available

Form I-9 Compliance, LLC was the first federally-approved Designated Agent of the Department of Homeland Security (DHS) and the Social Security Administration (SSA) for electronic Form I-9 employment verifications.

InfoLink Screening Services, Inc., a national provider of background screening, drug testing and employment physicals is the first Alliance Partner of Form I-9 Compliance to offer I-9 Solutions to employers.

Error detecting, electronic Form I-9 (*patent pending*) The eForm I-9 “Smart Form” virtually eliminates processing errors and simplifies the document completion process.

- **Electronic signature** utilizing E-Sign Act compliant click-to-sign solution, which completes the paperless I-9 process.
- **Secure, paperless Form I-9 storage** providing anytime, anywhere access for updating, re-verification and governmental inspection as dictated by law.
- **Automated alerts 90, 60 and 30** days in advance of the expiration of employees’ work authorization documents.
- **Add eDocuments feature** that allows you to attach related I-9 documents and images to employees’ electronic Form I-9.
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Legal “right to work” verification (EVP) Integrated with the Basic Pilot Program, with one click newly hired employees employment eligibility is checked against the databases of SSN and DHS and electronically verifies of the accuracy of Social Security, Immigration “A” and I-94 arrival/departure numbers. The report contains a unique DHS-issued verification number.

Social Security Numbers verification Proactively audit current and former employees for wage reporting (Form W-2) purposes, through the SSA’s Social Security Number Verification Service (SSNVS). Results of “no match” situations are returned normally within 24 hours.

Value Added Aspects of Form I-9 Services

- Automated ability to pre-populate the Form I-9 with employee information previously within the system entered to perform a background check.
- Provides various management reports on Form I-9 and Employment Verification (EVP) activity.
- Available scanning and/or Auditing current employee’s Form I-9’s including digitizing fields for instant electronic retrieval.

- Protects clients from monetary fines and negative publicity by performing professional audits to transform that which is illegal, into a legally defensible status.
- Augments clients' needs to create a paperless environment (electronic storage) with the attendant "hard dollar" cost savings.