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New Form I-9 Means More Immigration-Related Change In 2017



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Law360 (December 6, 2016) -- Despite President-elect Donald Trump's promise to build "an impenetrable physical wall on the southern border" of the United States,¹ workers from all backgrounds and nationalities will continue to be hired in this country. And employers must continue to comply with the Immigration Reform and Control Act of 1986, verifying employment eligibility by properly and timely completing a Form I-9 for each employee.



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Last month, U.S. Citizenship and Immigration Services published a revised Form I-9, which becomes mandatory as of Jan. 21, 2017 (coincidentally, the day after Donald Trump's inauguration). Between now and Jan. 21, employers may either use the new form or continue using the prior version (revision date March 8, 2013).² The revised Form I-9 offers new features and imposes some different requirements. Some new features enhance the form, while some modifications may result in more technical violations, particularly for employers who continue to use paper versions of the form. (This latest iteration of the Form I-9 is set to expire on Aug. 31, 2019, at which point a new host of changes will inevitably be imposed.)

Electronic Version of Form I-9

USCIS has created a new electronic version of the Form I-9, which should prove beneficial to employers and employees navigating the technical requirements of the form. Certain changes in the revised form were designed to decrease "common mistakes" listed on the USCIS website, for instance, employers and employees leaving blank items that must be completed.³ For example, when completed electronically, the revised Form I-9 detects information that is not entered correctly or is incomplete. The English version of the electronic form also provides helpful drop-down lists, details about the requested information, and calendars to facilitate accurate completion. (Notably, the Spanish version does not contain all of these features.) By incorporating comments and instructions into a single location within the Form I-9 itself, this tool adds value when the electronic form is utilized.

Instructions for Form I-9

The instructions for the revised form have ballooned from seven pages to 15, but now include more detailed information for employees and employers. One important fact to note: although the instructions are now encompassed in a separate document, employers using paper versions of the Form I-9 are required to make these instructions available, either in paper format or electronically, during the completion of the form. This is a requirement that will likely trip up employers, given that the instructions are now contained in a separate document.

Other Changes

Other changes that were likely meant to simplify the process or reduce errors may not have the intended effect. For instance, the "Preparer and/or Translator Certification" is now a supplement to the Form I-9, on a separate third page. For employers using paper forms, this will increase the likelihood of the

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certification becoming separated from the remainder of the form. Additionally, the revised Form I-9 now requires employees to affirmatively indicate whether they used a translator or preparer to complete Section 1, and to check “no” if they did not do so. This new step is likely to increase the number of technically incomplete I-9 forms. Employers should always carefully review the forms to ensure that all required information is inserted.

“Additional Information” Box

The revised form now has a box in Section 2 for “additional information.” Examples of what the employer might include there are noted on the electronic version of the form (e.g., employment authorization extensions, additional documents that cannot be entered in the drop-down boxes, E-Verify case numbers, employee termination dates, form retention dates, etc.). Employers, particularly those using the paper version of the Form I-9, should be cautious not to include in the “additional information” box any information that should not properly be included on the form, such as data regarding additional documentation provided by the employee beyond those legally permitted and other extraneous and potentially inappropriate information. And employers should keep in mind that anything appearing in that box will be available to USCIS in the course of any later audit.

Recommended Action

Human resources professionals and other company representatives tasked with Form I-9 completion would be well-advised to review in detail the electronic version of the new form, including familiarizing themselves with the explanatory details provided in connection with each box, as well as the expanded instructions. This information is valuable, even if the employer continues to use the paper version of the Form I-9.

Given the helpful information and features contained in the electronic version, though, many employers likely will opt to toss the paper and transition to electronic completion of the form, which may assist in avoiding technical and substantive errors. However, there are additional specific requirements relating to electronic signature and storage of the Form I-9 that complicate the switch from paper to electronic, and with which employers must strictly comply.⁴

Governmental Compliance Audits

The importance of organization and compliance with all Form I-9 requirements cannot be overstated. U.S. Immigration and Customs Enforcement reports that in the fiscal year 2013 it made 452 criminal arrests tied to worksite enforcement investigations, 179 of which were owners, managers, supervisors or human resources employees who face charges such as harboring or knowingly hiring illegal aliens.⁵ Additionally, ICE reportedly served 3,127 notices of inspection in the fiscal year 2013, totaling \$15,808,365 in administrative fines.⁶ These (rather scary) consequences of noncompliance underscore the value in conducting regular self-audits of Form I-9 compliance.

In the authors’ experience, typical audits uncover 85 to 90 percent error rates, with most of the issues being technical errors that can be corrected before the government comes knocking on the company’s door. Such proactive self-audits should be conducted in conjunction with legal counsel, and will prove

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invaluable if the company is suddenly served a notice of inspection from ICE, which gives the company just 72 hours to provide the requested documentation. The impending changes to the Form I-9 should prompt employers to examine their compliance through a self-audit with legal counsel, while simultaneously ensuring that company representatives are prepared for and understand the general requirements, as well as the new changes.

What's In Store for the Future?

Trump has indicated his desire to make E-Verify mandatory for all employers. In addition, Trump has indicated his intent to focus on legal immigration as well as illegal immigration,⁷ such as skilled guest workers on H1-B visas (the same type his wife utilized to work in the U.S. as a model), workers from certain regions or of specified nationalities, ethnicities or religious groups, and potentially EB-5 investors, which could have a significant impact on tech companies, hotels and resorts, and agricultural and seasonal industries, among other sectors. What exactly that will mean for employers remains to be seen.

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This document is intended to provide you with general information regarding updates to the Form I-9 and related issues. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact one of the attorneys listed above or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.

¹ <https://www.donaldjtrump.com/policies/immigration>

² Both the March 8, 2013, and Nov. 14, 2016, versions of the Form I-9 can be found [here](#).

³ <https://www.uscis.gov/i-9-central/complete-correct-form-i-9/common-mistakes-and-how-avoid-them>

⁴ <https://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-111373/0-0-0-114668/0-0-0-114987.html>

⁵ <https://www.ice.gov/factsheets/worksite>

⁶ Id.

⁷ <https://www.donaldjtrump.com/press-releases/donald-j.-trump-address-on-immigration>