

What Employers Need to Know About Employee Verification Requirements: Recent Changes to Form I-9 and Challenges Posed by a Natural Disaster

By: Ashley N. Ward-Singleton,ⁱ FordHarrison LLP

Executive Summary: Although immigration has been a hot political topic lately, employers' obligations to comply with the Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. § 1324a, have remained consistent for the last few years. As most employers know, they must verify the work authorization of all employees by reviewing documentation that establishes the employee's identity and authorization to work in the U.S. On July 17, 2017, the U.S. Citizenship and Immigration Services (USCIS) revised Form I-9, Employee Eligibility Verification, and its Handbook for Employers: Guidance for Completing Form I-9 but made very few substantive changes to the Form I-9 requirements. In addition, in the aftermath of Hurricane Harvey, the USCIS issued guidance to employers about how to verify employment eligibility if a newly hired employee claims that his or her verification documents have been destroyed. As explained below, employers will want to implement the Form I-9 changes by September 18, 2017, and apply the USCIS's recent guidance to avoid both civil and criminal penalties.

Revisions to Form I-9

The IRCA amended the Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.*, and set forth a framework prohibiting employers from knowingly hiring, recruiting, referring, or continuing to employ unauthorized workers. Form I-9 and E-Verify, "an internet-based system that compares information from Form I-9 to government records," provide a means by which employers can confirm that an employee is authorized to work in the United States. <https://www.uscis.gov/i-9-central/about-form-i-9/e-verify-and-form-i-9>.

Beginning September 18, 2017, employers must use the latest version of Form I-9, reflecting a revision date of "07/17/17 N." Each of the July 17, 2017, revisions are discussed below. However, the most significant change is the addition of the Consular Report of Birth Abroad (CRBA) (Form FS-240) as one of the acceptable documents under List C, "Documents that Establish Employment Authorization." A CRBA is given to a child born abroad to a U.S. citizen parent to document that the child is a U.S. citizen. This document can be used to obtain a U.S. passport, register for school, and now for employment authorization. With the addition of the CRBA, the USCIS combined all of the certifications of report of birth issued by the Department of State (Form FS-545, Form DS-1350, and Form FS-240) into one selection under List C. Given this change, all of the List C documents except the social security card were renumbered.

Additionally, the USCIS made revisions to the Form I-9 instructions including changing the name of the Office of Special Counsel for Immigration-Related Unfair Employment Practices to Immigrant and Employee Rights Section and removing the phrase "the end of" from the phrase "the first day of employment." By removing the phrase "the end of," the revised Form I-9 now requires that the form be completed on the first day of employment without any reference to the time of day.

While these changes may seem minor, they can impact whether an employer is in compliance with the law.

A Natural Disaster's Impact on Employment Eligibility Verification

Despite the devastation of natural disasters, employers are still obligated to verify the identity and eligibility of new employees. The USCIS issued a fact sheet immediately following the aftermath of Hurricane Harvey. Although the USCIS fact sheet specifically refers to Hurricane Harvey, the guidance contained therein is consistent with the USCIS's long-standing position on employees whose verification documents have been lost, damaged, or stolen. Employers affected by Hurricane Irma or any other natural disasters will want to comply with the USCIS's very specific explanation for how to document the verification process in such circumstances. As indicated in the fact sheet, "[t]he Department of Homeland Security will continue to enforce all laws, rules, and regulations related to employment verification with respect to individuals and employers affected by Hurricane Harvey." *U.S. Citizenship and Immigration Services, Fact Sheet – Form I-9 and E-Verify Guidance for Those Affected by Hurricane Harvey (2017)*.

Typically employers are required to physically examine an employee's documents within three business days of the employee's first day of employment in order to complete Section 2 of Form I-9. However, if an employee's documents are lost, stolen, or damaged, the employee may present a receipt showing that he or she has applied for a replacement document. The receipt is valid for 90 days from the date of hire, and the replacement document must be presented to the employer within that time.

If an employee provides an acceptable receipt, the employer should:

- Record the document title in Section 2 under List A, List B, or List C, as applicable;
- Write the word "receipt" and the document title and number in the Document Number space; and
- Write the last day that the receipt is valid in the Expiration Date field.

When the replacement document is received:

- Cross out the word "receipt" and any accompanying document number and expiration date;
- Record the number and other required document information from the actual document presented; and
- Initial and change the date.

For employers who also use the E-verify system, the employer cannot create a case in E-verify if the employee presents a receipt for a replacement document. The employer must wait until the employee presents the replacement document before creating a case in E-verify. At that time, E-verify will prompt the employer to enter the reason for the delay. "When E-verify asks for the reason why this case has not been submitted within three business days, select 'Other' and type 'Receipt provided. Awaiting actual document' in the field provided."

Additional information, along with the rules governing receipts, can be found in the Handbook for Employers. <https://www.uscis.gov/i-9-central/handbook-employers-m-274>.

Conclusion

The recent changes to Form I-9 should help employers with verification by providing employees an additional acceptable document to provide to an employer. Moreover, the rules related to acceptance of a receipt for a replacement document when an employee's documents are lost, damaged, or stolen provide employers with a temporary alternative for employee verification. Employers must remain current and diligent in their employee eligibility verification process because, despite natural disasters, the Department of Homeland Security will continue to enforce all requirements related to employment eligibility verification, and failure to ensure compliance could result in serious consequences for employers.

¹ If you have any questions about your company's I-9 or E-Verify process, please feel free to contact Ashley N. Ward-Singleton at (813) 261-7819 or awardsingleton@fordharrison.com.