

DEVELOPMENTS IN EMPLOYMENT ELIGIBILITY VERIFICATION

Frequently Asked Questions

I-9 ADMINISTRATION

What I-9 form is required to verify employment eligibility?

As of April 3, 2009, use of the revised Form I-9 (Rev. 02/02/09) is required to verify the employment eligibility of all new hires. Previous versions of the form should not be used.

Have the acceptable forms of identification changed?

Yes. First, no expired document is acceptable. Further, documents that have been **removed** from List A are:

- Temporary Resident Card on Form I-688
- Employment Authorization Card on Forms I-688A and I-688B

and documents that have been **added** to List A are:

- U.S. Passport Card
- Foreign Passport with Temporary I-155 printed notation on a machine-readable immigrant visa
- Arrival-Departure Record on Form I-94A is added next to each reference to Form I-94 and either is acceptable when presented with other documents as specified on List A
- Passports from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) are now acceptable with 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 as List A documents

What are other changes to the I-9 form?

Section 1 attestation divides “citizen of the United States” and “non-citizen national of the United States” into two separate categories.¹

¹ The definition of a “non-citizen national” is included in the I-9 instructions.

The instructions clarify that an employee is not required to provide a Social Security number on Form I-9, unless the employer participates in E-Verify.

The Social Security Card is now referred to as Social Security Account Number Card.

The instructions state that some foreign nationals whose work authorization does not expire may leave the expiration date in section one blank (e.g., asylees, refugees, citizens of the Federated States of Micronesia, citizens of the Republic of the Marshall Islands) and reverification would not apply unless they choose to present in Section 2 evidence of employment authorization that contains an expiration date (e.g., Employment Authorization Document (Form I-766)).

If a current employee requires reverification, may I use Section 3 - Updating and Reverification to reverify the employee's employment authorization if a prior version of the I-9 form was used?

No. When an employee must be reverified because employment authorization has expired, the revised Form I-9 (Rev. 02/02/09) with its List of Acceptable Documents must be used.

What are common I-9 Issues?

- Not timely complying with the I-9 requirements. Note: the time requirements have not been modified by the new regulations. Section 1 must be completed and signed by the employee on the first day of work. The verification and I-9 form must be completed within three business days unless the employment is only three or fewer days, in which case it must be completed on the first day of employment.
- Not following up on reverification. Reverification must occur on or before the work authorization expiration date recorded in Section 1 (if any) and a new I-9 form must be completed.
- Ensuring that the documents that the employee produces satisfy the current list of acceptable documents on revised Form I-9 (Rev. 02/02/09).
- Ensuring that the employee is **not** requested to provide specific documents, rather that the employee is provided the list and allowed to decide which documents to produce.
- Ensuring that the I-9 is retained for three years after the date of hire or for one year after employment is terminated, **whichever is later**, and ensuring that the record retention policy complies with this requirement and is followed.

How should an institution handle the electronic generation or storage of I-9's?

- Utilize reasonable controls to ensure integrity, accuracy and reliability of the electronic generation or storage system;
- Utilize reasonable controls designed to prevent and detect the unauthorized access or alteration of an electronically completed or stored I-9;
- Operate within an inspection and quality assurance program;
- Incorporate an indexing system to facilitate searches by any data element (i.e., name, date of hire, etc.); and
- Have the ability to reproduce legible and readable hard copies.

Where can additional information be obtained regarding I-9 requirements?

USCIS has prepared a *Handbook for Employers, Instructions for Completing Form I-9 (Employment Eligibility Verification Form) M-274 (Rev. 04.03/09)*. This document can be found on the USCIS website <http://www.uscis.gov/files/nativedocuments/m-274.pdf>

E-VERIFY

What is the status of the June 9, 2008 amended Executive Order 12989 requiring all federal contractors (and subcontractors) to participate in E-Verify?

As a result of litigation, the government initially suspended application of the new rule, which was to become effective January 15, 2009, until February 20, 2009. On January 28, 2009, the parties agreed to a new effective date of May 21, 2009. On April 16, 2009, the Obama Administration announced that implementation of the rule would be delayed until June 30, 2009. The government has now decided to postpone the effective date until **September 8, 2009**.

Once the rules are implemented, will the E-Verify process be substituted for the I-9 process for employees working under federal contracts?

No. Once the E-Verify rules are implemented, UT System institutions will be required to complete the I-9 and then, for employees hired under certain federal contracts, will be required to submit the information obtained from the I-9 into the E-Verify System.

Has the UT System Office of General Counsel prepared a summary of E-Verify program requirements?

Information prepared by OGC in December 2008 and distributed via the OGC website can be found at <http://www.utsystem.edu/ogc/docs/general/EVerifyFAQ.pdf>. **Note that**

the I-9 process and the E-Verify process are different, but related processes for employment verification.

Did the 81st Texas Legislature pass any bills that would require UT System institutions to participate in E-Verify?

No. There were several bills filed including some that required state contractors to participate in E-Verify; however, none of the E-Verify legislation was passed in the regular session.

NO-MATCH LETTERS

What is a Social Security Administration (SSA) no-match letter?

A letter sent by the SSA to the employer informing the employer that the name and the social security number given on the W-2 do not match. If an employer fails to respond to the information in an SSA no-match letter, the employer may be deemed to have constructive knowledge that an employee is not authorized to be employed in the U.S.

What is the status of the federal regulations regarding no-match letters that were published in August 2007?

The United States District Court for the Northern District of California has enjoined their implementation while the legal proceedings are ongoing. As of June 2, 2009, the implementation of the regulations is still on hold.

What do the No-Match Letter regulations require an employer to do upon receipt of such a letter? [Note: The regulations are currently the subject of an injunction.]

The regulations provide a safe-harbor that can be used by the employer to avoid a finding of constructive knowledge that an employee is not authorized to be employed in the U.S.:

Within 30 days of receipt of the No-Match Letter:

- Employer checks records
 - If the discrepancy was a result of the clerical error:
 - Employer notifies SSA and verifies with SSA that the corrected name and social security number match the SSA record.
 - The employer keeps a record of how, when the verification with SSA occurred.

- The employer updates the Form I-9 with the corrected information only.
- If the discrepancy was not a result of a clerical error employer can identify:
 - Employer “promptly” asks the employee to confirm that the name and SS account number in the employer’s records are accurate. If there is an inaccuracy, the employee provides correct information and the employer notifies SSA and verifies with SSA that the corrected name and SS number match the SSA record.
 - The employer keeps a record of how and when the verification with SSA occurred.
- If employee states that the information that the employer has is correct:
 - Employer “promptly” informs the employee of the no-match letter and informs the employee that he/she should resolve the matter with SSA no later than 90 days from receipt of the no-match letter.
 - If the employee resolves the matter with SSA, the employer updates the Form I-9 with the corrected information only.

Within 93 days of receipt of the no-match letter:

- Employer completes new I-9 if employee had not resolved the matter within 90 days of receipt of no-match letter.
- Employer may not accept for the new I-9 any document with the no-match SS number.
- Employee must present a document with a photograph to establish identity.
- If the employee completes the new I-9 as required, the employer preserves both the old and the new I-9.
- If the employee does not complete the new I-9, the employer must terminate the employee or risk that the employee is unauthorized and the employer knowingly continued to employ.

DEPARTMENT OF HOMELAND SECURITY NOTICE

What should an employer do if it receives notice from DHS that a document referenced by an employee in completing the I-9 form is questionable?

The regulations provide a safe-harbor that can be used by the employer to avoid a finding of constructive knowledge that an employee is not authorized to be employed in the U.S.:

Within 30 days of the notice, contact DHS and attempt to resolve matter.

Within 93 days of receipt of the DHS letter:

- Employer completes new I-9 if matter has not been resolved with DHS within 90 days of receipt of the DHS letter.
- Employer may not accept any suspect document for the new I-9.

- Employee must present a document with a photograph to establish identity.
- If the employee completes the new I-9 as required, the employer preserves both the old and the new I-9.

If the employee does not complete the new I-9, the employer must terminate the employee or risk that the employee is unauthorized and the employer knowingly continued to employ.