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Form *And* Substance: Employers Must Transition To New I-9 Forms

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Is your company using the right I-9 form? On December 27, 2007, the federal immigration services began enforcing the use of an updated I-9 form. This is much more than a routine revision of a basic form. The revised I-9 form affects the documents employers may accept to verify the identity and work authorization of their employees.

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Background

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), which, among other things, reduced the number of documents an employer may accept as verification of the identity and work authorization of new hires. In September 1997, the Immigration and Naturalization Service ("INS") published an interim rule providing an updated list of verification documents consistent with IIRIRA. The INS, however, did not revise the I-9 form to reflect this updated list. Consequently, with an out-of-date form still in circulation, the immigration authorities never enforced the 1997 interim rule.

Finally, on November 26, 2007, the U.S. Citizenship and Immigration Services ("USCIS") issued a notice mandating the use of a new I-9 form. With a new form in place, USCIS indicated that immigration authorities will begin enforcing the current list of acceptable verification documents.

The New I-9 Form

The new I-9 form is posted on USCIS's web site (<http://www.uscis.gov>). Beginning on December 27, 2007, the immigration authorities may seek penalties against any employer who does not use the updated version of the I-9 form. Put simply,

if an employer is using any I-9 form other than that marked "Form I-9 (Rev. 06/05/07) N" on the bottom right corner of the document, it is using an out-of-date form and may be subject to penalties, including civil fines.

There is also a new Spanish-language form available for employers in Puerto Rico. Employers in the 50 states may use the Spanish-language form as a translation guide for Spanish speakers, but they must still complete the English language version of the form. Employers in Puerto Rico may use either form.

The revised I-9 form should be used for new employees, employees rehired after a break in service, or for reverifications of current employees when their work authorization expires.

Additionally, USCIS recently revised its Handbook for Employers, Form M-274, to make it consistent with the changes to the I-9 form. The Handbook provides photographs of sample verification documents and other helpful information for employers and is available at <http://www.uscis.gov> under the "For Employers" section. This Handbook is an important resource for personnel completing I-9 forms on behalf of an employer.

Changes To The I-9 Form

As listed on the new Form I-9, there are only five documents that employers may accept to evidence both an employee's identity and employment eligibility (List A documents):

- a U.S. passport (unexpired or expired);
- a Permanent Resident Card or Alien Registration Receipt Card (Form I-551);
- an unexpired foreign passport with a temporary I-551 stamp;
- an unexpired Employment Authoriza-

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tion Document that contains a photograph (Form I-766, I-688, I-688A, I-688B); or

- an unexpired foreign passport with an unexpired Arrival-Departure Record (Form I-94) bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, if that status authorizes the alien to work for the employer.

Eliminated from the list of acceptable verification documents are the following:

- the Certificate of United States Citizenship (Form N-560 or N-561);
- the Certificate of Naturalization (Form N-550 or N-570);
- the Form I-151, an out-of-date version of the Alien Registration Receipt Card ("green card");
- the Unexpired Reentry Permit (Form I-327); and
- the Unexpired Refugee Travel Document (Form I-571).

There are no changes to acceptable List B or List C documents. For example, employees may still use a driver's license or school ID to establish identity and a Social Security card or birth certificate to establish employment eligibility.

Also noteworthy, the amended I-9 form instructs employees that providing their Social Security number is voluntary in Section 1 of the form unless their employer participates in E-Verify.

Retention Requirements

Employers still do not submit completed I-9 forms to the immigration services. Instead, employers must retain the forms for three years after the date of hire or one year after the date of termination, whichever is later. The forms may be retained in a number of different formats, including paper, microfilm, microfiche, and, most recently, electronically.

In June 2006, the Department of Homeland Security ("DHS") adopted an interim rule establishing the standards for completing and retaining I-9 forms electronically. Employers may now complete and retain I-9 forms electronically using the fillable PDF form available at www.uscis.gov or scan and save completed paper I-9 forms.

However, under the 2006 interim rule, employers who elect to retain I-9 forms electronically must follow a variety of requirements that go far beyond simply saving the forms on an existing computer system. A complete list of these standards can be found on pages 12-14 of the Handbook, and below are some of the more noteworthy requirements:

- reasonable controls to ensure the integrity, accuracy, and reliability of the system;

- reasonable controls to prevent and detect the unauthorized or accidental creation, alteration, or deletion of the electronically stored I-9 forms;

- an inspection and quality assurance program evidenced by regular evaluations of the system, including periodic checks of the stored I-9 forms;

- a retrieval system with an index that is at least comparable to a hardcopy filing system; and

- the implementation of a records security program that limits access to the records, protects against information loss through the use of backup and recovery systems, trains employees, and creates an audit trail indicating the identity of any person accessing the I-9 records, the date of access, and the actions performed therein (*i.e.*, whether the person created, accessed, viewed, updated, or corrected an I-9 form).

Further, if an employer completes the I-9 form electronically (*i.e.*, does not scan a signed paper I-9 form), it must provide for an electronic signature that is compliant with the requirements listed on page 13 of the Handbook, including the following:

- the system must provide a method to acknowledge that the attestation to be signed was read by the signatory;

- the signature must be attached, or logically associated, with the electronically completed I-9 form and must be affixed at the time of the transaction;

- the system must create and preserve a record identifying the person producing the signature; and

- the system must provide a printed confirmation of the transaction to provide to the person signing the form at the time of the transaction.

Employers that maintain paper I-9 forms should also ensure that they are following appropriate retention practices. First, the completed forms and supporting documentation should always be kept secure to protect against identity theft. Second, the forms should be maintained in an organized fashion, usually alphabetically by employee name, so that requested documents can be located quickly and easily in the event of an immigration audit. Further, the employer should create a separate spreadsheet with the expiration dates of any work authorizations in order to facilitate timely reverifications. Finally, the completed I-9 forms should be maintained separately from personnel files. Otherwise, if audited, the employer will have to provide the immigration authorities full access to their personnel files and an isolated I-9 compliance audit could grow into something worse.

Enforcement

Various immigration authorities (*e.g.*, ICE, DOL, USCIS, DHS) may conduct on-site immigration compliance audits with a minimum of only three days' advance notice. Within those three days, the employer must be able to make available all retained I-9 forms and supporting documentation. If an employer has elected to retain its I-9 forms electronically, the supporting documentation should include the following:

- an audit trail indicating who accessed the computer system containing the I-9 forms and the actions that they performed;

- appropriate hardware, software and other support to locate and read the electronically stored I-9 forms; and

- if reasonably available, an electronic summary of the information contained on the I-9 forms.

Employers who fail to complete, retain, or make available proper I-9 forms are subject to civil penalties of between \$110 and \$1,100 for each individual violation. Also, employers deemed to have knowingly hired unauthorized workers may also be subject to civil fines of up to \$11,000 for each violation and, if there is a pattern of violations, criminal fines of up to \$3,000 per employee and/or six months in prison.

Overall Immigration Compliance

With the increasing publicity of immigration issues and the recent regulatory changes, employers should take special care to ensure compliance with the ever-evolving requirements of immigration law. For example, recent regulations require employers to take specific steps in response to no-match letters. These regulations were due to go into effect in September 2007, but interests on all sides (from the U.S. Chamber of Commerce to the AFL-CIO) objected, and a federal judge in the Northern District of California issued an injunction barring the implementation of the challenged regulations. The immigration authorities, however, refuse to back down and are revising the regulations to address the judicial concerns but maintain its central requirements. The fight over no-match letters is likely just beginning.

Therefore, all employers, not just those traditionally concerned about immigration, should consider taking steps to ensure that their immigration compliance house is in order. Using the right forms is an important first step in this regard. But there is more: Documented compliance programs and established immigration policies and practices can minimize the length, cost, and stress of any immigration audit.