



JONES DAY
COMMENTARY

BEST IF USED BY: EMPLOYERS MUST NOW CHECK THE EXPIRATION DATE ON ALL FORM I-9 DOCUMENTS

As of April 3, 2009, the Form I-9 has changed yet again. While there are no substantive changes to the face of the form, there are substantive changes to the lists of acceptable documents to verify employee identity and employment authorization. The most important change is that now only unexpired documents are acceptable for purposes of verification. Failure to use the current form could subject an employer to fines and penalties.

BACKGROUND

Employers are required to use and maintain the Form I-9 to verify that employees may legally work in the United States. As part of this process, an employee presents documents to the employer as proof of the employee's identity and employment authorization.

The Form I-9 includes lists of acceptable documents an employee may present for purposes of verification. An employee must present either a document from List A (documents that establish both identity and employment authorization), or documents from both List B (documents that establish identity) and List C (documents that establish employment authorization¹).

In late 2007, U.S. Citizenship and Immigration Services finally amended the Form I-9 to bring it in line with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which had reduced the number of List A documents that an employer may accept to verify both the identity and employment authorization of new employees. As of December 27, 2007, the Certificate of United States Citizenship (Forms N-560 and N-561), Certificate of U.S. Naturalization (Forms N-550 and N-570), Form I-151 (an

1. The phrase "employment authorization," as used in Lists A and C, is a change from prior I-9 forms, which previously used the phrase "employment eligibility." The purpose for this change was to make the language in the Form I-9 and corresponding regulations consistent with the language used in the underlying statute.

old version of the Alien Registration Receipt Card or “green card”), Unexpired Reentry Permit (Form I-327), and Unexpired Refugee Travel Document (Form I-571) were removed from List A for purposes of the Form I-9. They are no longer valid as proof of employee identity and employment authorization.

On December 17, 2008, the Department of Homeland Security (“DHS”) published an interim rule identifying yet another change in the lists of documents an employer may use to verify an employee’s identity and employment authorization. The rule was originally scheduled to go into effect on February 2, 2009, but implementation of the rule was delayed to give the new presidential administration time to review it. The review period has come and gone, and the rule is now in effect, without substantive change from the interim rule.²

THE NEW FORM I-9

Beginning April 3, 2009, employers must use the new Form I-9. The portion of the form that is filled out by employer and employee is virtually identical to the previous version of the form, so the best way to ensure that the current form is being used is to check the bottom right corner for the phrase “Form I-9 (Rev. 02/02/09) N.” The substantive changes to the form appear in the lists of acceptable documents. The most important change appears at the top of the form: “All documents must be unexpired.” In the past, an expired U.S. passport could be used to verify an employee’s identity and work authorization. In addition, all List B documents were acceptable to establish an employee’s identity, even if they were expired. This is no longer the case. This change in the law was prompted by DHS’s concern that expired documents may be more easily obtained by counterfeiters and then used by unauthorized workers to fraudulently obtain employment in the United States.

Because only unexpired documents are now acceptable, certain documents have been removed from List A entirely. Temporary Resident Cards (Form I-688) and Employment Authorization Cards (Forms I-688A and I-688B) used to be

on List A and could be used to establish an employee’s identity and employment authorization. However, these documents are no longer issued, and any that were issued previously have since expired. Therefore, Forms I-688, I-688A, and I-688B no longer appear on List A and are no longer acceptable.

The new Form I-9 not only limits the lists of acceptable documents, it also adds some new documents and clarifies others. New List A documents that may be used to establish an employee’s identity and employment authorization are passports from the Federated States of Micronesia (“FSM”) or the Republic of the Marshall Islands (“RMI”) with Form I-94 or I-94A indicating nonimmigrant admission under the Compact of Free Association between the U.S. and FSM or RMI.

The clarifications made by the new Form I-9 are minor technical changes, such as:

- On List A, including Form I-94A as an alternative to Form I-94 to be presented with a foreign passport by nonimmigrant aliens authorized to work for a specific employer. Form I-94A is virtually identical to Form I-94, except the fields are completed using a computer rather than being written in by hand.
- On List A, including a temporary I-551 printed notation on a machine-readable immigrant visa affixed to a foreign passport as an alternative to a temporary I-551 stamp on a foreign passport.
- Noting that Form DS-1350 on List C is actually a Certification of Report of Birth issued by the Department of State, rather than a Certification of Birth Abroad.

As in the past, employers should carefully check documents presented by employees to ensure that the employee has presented a document currently on List A or documents currently on Lists B and C. Employers must also ensure that the documents reasonably appear to be genuine and related to

2. DHS issued a final rule on February 23, 2009, adding the military identification card to the list of documents acceptable to establish both identity and work authorization, but only for use by the Armed Forces in verifying enlisted personnel. This change is so limited in nature that the military identification card remains only on List B (documents that may be used to establish identity) on the Form I-9. This is likely to avoid confusion by private employers.

the employee presenting them. An additional step employers must take as a result of the new Form I-9 is to check the expiration date on all documents submitted to ensure that they are still valid. Because DHS has not indicated otherwise, it appears likely that this requirement applies to employees hired from April 3, 2009, forward and not to employees hired before that date.

INCREASE IN CIVIL FINES

Employers that fail to complete and retain proper I-9 forms can face civil penalties of between \$110 and \$1,100 for each individual violation. Employers that knowingly hire unauthorized workers may be subject to even steeper civil penalties. On March 27, 2008, civil fines for such knowing violations increased to the following:

- First offense, from \$375 to \$3,200 for each unauthorized alien.
- Second offense, from \$3,200 to \$6,500 for each unauthorized alien.
- More than two offenses, from \$4,300 to \$16,000 for each unauthorized alien.

In addition, employers that engage in a pattern or practice of hiring unauthorized workers may face criminal fines of up to \$3,000 for each unauthorized worker, imprisonment for up to six months, or both.

IMMIGRATION COMPLIANCE GENERALLY

There is increasing scrutiny on the immigration compliance of employers. Workplace audits and raids by Immigration and Customs Enforcement seek not to only to find unauthorized workers, but to hold employers accountable for their hiring practices. This makes it more important than ever for employers to ensure that they are using the proper Form I-9 and complying with all document retention requirements. Establishing a comprehensive immigration compliance program is the best way for an employer to ensure that it is complying with all immigration laws and is prepared for an immigration audit.

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