



**CAMBRIDGE**  
PROPERTY & CASUALTY

## I-9 COMPLIANCE

In 1986, the Immigration Reform and Control Act (IRCA) was passed by Congress in an attempt to help minimize illegal immigration. The Act placed requirements on U.S. employers to check the employment eligibility and identity of their employees. As a result, the I-9 Employment Eligibility Verification Form was developed.

In recent years, federal enforcement of I-9 violations has been on the rise.

For example, on October 23, 2003, federal officers from the Department of Homeland Security's Bureau of Immigration and Customs Enforcement ("ICE" or "INS") entered 61 Wal-Mart® stores in 21 states nationwide and arrested more than 250 illegal immigrants. The raids were the result of a federal investigation into employment practices concerning Wal-Mart janitors. This enforcement action followed a **2003 federal investigation of Wal-Mart's subcontracting practices, which resulted in Wal-Mart paying an \$11 million settlement.** Two years later, on November 17, 2005, federal agents again raided a Wal-Mart construction site in Pennsylvania, arresting 125 workers for I-9 related violations.

### **THE LAW**

All employees hired by U.S. employers after November 6, 1986 must have a Form I-9 completed to verify both employment eligibility and identity.

There are three prongs to Federal I-9 compliance:

- Initial verification,
- Reverification, and
- Document retention.

At the same time, the law obliges U.S. employers not to discriminate against individuals on the basis of national origin or citizenship, or require different documents from an individual.

### **I. Initial Verification**

Section 1 of the I-9 form must be completed by the employee at the time of hire, which is the actual beginning of employment. The employer is responsible for ensuring that Section 1 is timely and properly completed. Employers must complete Section 2 by examining evidence of identity and employment eligibility within three business days of the date employment begins. If the duration of employment is less than three days, the Form I-9 must be completed at the time employment begins.

The employer must examine and record documentation that proves an employee's identity and employment eligibility. In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) was enacted which greatly reduced the list of documents which could be accepted by employers as proof of an employee's

citizenship. The legal threshold for examining these documents is that the documents must “appear to be genuine and relate to the employee.” This means that employers are not liable if employees present them with false documents, as long as the employers are – and remain – unaware of the fraud.

It is common for long-term employees to reveal to management that they previously presented false documents, a practice that can create a number of liabilities for the employer. Such a disclosure requires immediate determination of the employee’s current immigration status and action based on that status.

Independent contractors and temporary workers employed thru an outside agency are not subject to the I-9 requirement, but if an employer knows that an independent contractor or temporary worker lacks work authorization, retaining the contractor would constitute a violation of the Immigration Reform and Control Act (IRCA).

## II. Reverification

Federal law also requires reverification of employment eligibility for all employees with temporary work authorization. If an employee’s work authorization expires, the employer must reverify his or her employment eligibility. If the employee cannot provide the employer with proof of current work authorization, they cannot continue to employ that person.

When an alien, upon accepting employment, has indicated that their employment eligibility is temporary, it is necessary to ensure that all required extensions have been filed, or that the employee is separated upon termination of the temporary status.

## III. Document Retention

Employers are not required to file their Form I-9’s with the U.S. government. This means that employers must retain I-9 forms for all current and terminated employees who fall within the retention window.

Form I-9 records may be stored at the worksite to which they relate or at a company headquarters or other location, but the storage choice must make it possible for the documents to be transmitted to the worksite within three days of an official request for production of the documents for inspection.

**Employers must maintain I-9 records in their own files for three years after the date of hire or one year after the date the employee’s employment is terminated, whichever is later.**

The employer must have a Form I-9 in its files for each new employee, unless:

- A. The employee was hired before November 7, 1986, and has been continuously employed by that employer;
- B. The individual is providing domestic services in the employer’s private household, and the services are sporadic, irregular or intermittent;
- C. The individual is providing services as an independent contractor (i.e. carrying on independent business, contracts to do a piece of work according to their own means and methods and are subject to control only as to results for whom the employer does not set work hours or provide necessary tools to do the job, or whom the employer

does not have authority to hire and fire); or

- D. The individual is providing services under a contract, subcontract, or exchange entered into after November 6, 1986. (In such cases, the contractor is the employer for I-9 compliance purposes for example, a temporary employment agency).

**Copies of completed Form I-9s should be kept separate from the employee's personnel file due to the fact that they contain personal information, such as national origin, citizenship status, etc. that should not be part of hiring or employment decisions.**

### RISK MANAGEMENT

In order to reduce the risk associated with I-9 violations, employers should be mindful of the following:

- Establish a nondiscriminatory system for reverification.

Employers must reverify employment eligibility on a set schedule, yet they must take care not to do so in a manner that could be deemed discriminatory under immigration status provisions. If an employer fails to reverify employment eligibility for individuals with temporary work authorization, the government considers the employer "on notice" that the employees may not be work authorized. This notice is likely to lead to increased penalties in the event of a government audit.

On the other hand, if it is determined that the employer has oververified (asking for

more documents than are legally required) that employer may be subject to penalties for document abuse or discrimination based on immigration status.

- Develop a system for document purging.

Routine purging of old, outdated documents is key for employers seeking to minimize liability. Failure to purge expired documents exposes employers to the possibility of violations for any discrepancies in the expired documents.

- Develop an audit response plan and train staff thoroughly.

Employers who have no pre-existing strategy for dealing with a government audit are most vulnerable to fines, sanctions and penalties for violations. An audit response plan should appoint a trusted employee as the audit liaison and include provisions for training key personnel.

- Know who your contractors are bringing on your work site.

Make sure your contractors are also in compliance with federal immigration laws. At a minimum, require your contractors to furnish you with copies of Forms I-9 and supporting documentation for the workers they bring onto your site.

- Conduct internal audits.

A well-directed internal audit, conducted prior to an actual DHS audit, can minimize the liabilities associated with an actual audit. Internal audits allow employers to discover correctible and recurring errors, and to provide training where necessary.

## ANTI-DISCRIMINATION

The IRCA prohibits discrimination in hiring and discharging employees based on national origin or citizenship status.

- A. An employer cannot demand more or different documents than an employee chooses to present, provided that the documents presented meet the Form I-9 compliance requirements
- B. Protected persons must be considered for employment only on the basis of qualifications, experience, and personal merit. Accordingly, the Form I-9 compliance process may not be used to pre-screen employees for hiring

## PENALTIES

The U.S. Immigration and Customs Enforcement (ICE) agency of the Department of Homeland Security is authorized to conduct investigations to ensure that employers are properly complying with I-9 obligations.

Effective March 27, 2008, Congress increased the fines associated with I-9 violations.

**An employer can be fined up to \$16,000 per violation for knowingly employing an unauthorized foreign national.**

**An employer can also be fined up to \$1,100 for each Form I-9 violation.**

In determining the appropriate civil fine, the ICE will consider the size of the employer, the employer's good faith effort at compliance, the seriousness of the violation, whether the individual was an unauthorized

foreign national and the employer's history of previous violations.

Individuals who submit false or forged documents or knowingly and falsely complete the Form I-9 may be fined or imprisoned for up to five years.

An employer's failure to satisfy each of the three prongs of I-9 compliance has the potential to result in major penalties. We recommend that employers review the status of their I-9 compliance program and contact us with any questions.