

The Form I-9

6 costly mistakes most employers make



Katie Loehrke, PHR, SHRM-CP

J. J. Keller & Associates, Inc.



The Form I-9

6 costly mistakes most employers make

Employers must have I-9s on file for all employees hired on or after November 7, 1986.

The Immigration Reform and Control Act (IRCA) requires you to verify that employees hired after November 6, 1986, are eligible to work in the United States. By complying with the verification requirements, you demonstrate a good-faith effort in not knowingly hiring an illegal alien. A Form I-9, Employment Eligibility Verification, must be completed for every employee — including U.S. citizens — to give evidence of your compliance with the law and the employee's work authorization.

By following Form I-9 requirements, you ensure that employees possess proper work authorization and that your hiring practices do not unlawfully discriminate based on immigration status. Unfortunately, while most employers make a good-faith effort to comply, most still make mistakes on the form.

Even more unfortunate for employers, Form I-9 mistakes are less and less likely to fly below the radar, as federal audits of employers' Form I-9 practices and the fines that come with them have risen considerably over the past several years. As many unlucky employers could tell you, when I-9 mistakes are found in an audit, they can result in substantial fines, penalties, and even criminal sanctions — not to mention the mark such sanctions can leave on your company's reputation.

Who is covered

The I-9 requirements apply to all employers, whether you have one employee or many. However, you do not need to complete a Form I-9 for individuals:

- Hired before November 7, 1986, who continue in employment and have a reasonable expectation of employment at all times.
- Providing domestic services in a private household that are sporadic, irregular, or intermittent;
- Providing services as an independent contractor (i.e., carry on independent business, contract to work according to their own means and methods, are subject to control only as to results); and
- Providing services under a contract, subcontract, or exchange. In such cases, the contractor (like a "temp" agency) must complete the Form I-9. However, you cannot contract for the labor of someone you know is not authorized to work in the United States.

Employers are not expected to be document experts, but must ensure that documents reasonably appear to be valid.

The basics

To fulfill your I-9 obligations, you must:

- Ensure that the employee completes Section 1 in full.
- Have the employee sign the I-9.
- Make sure the form is properly completed and legible.
- assess the documents presented by the employee for validity. You must accept any valid documents presented that reasonably appear to belong to the individual.
- Verify that you have seen documents establishing identity and work authorization, review the documents, and fully complete Section 2 within three business days of the start of work.

- Keep the Form I-9 on file for at least three years from the date of hire or for one year after the employee leaves the job, whichever is later.

A new employee must complete Section 1 no later than the close of business on his or her first day of work. If someone accepts a job offer with your company but will not start work for several days or weeks, he or she can complete Section 1 upon accepting the job. The law only requires that Section 1 be completed when the person actually begins working, so it may be filled out earlier.

As indicated, you must complete Section 2 no later than the third day after the employee starts work for pay. The employee must present documents that establish identity and work authorization for Section 2. You cannot continue to employ an individual who cannot produce the required documents within three business days.

Filling out the I-9

The Form I-9 is two pages followed by the Lists of Acceptable Documents. The form is accompanied by 15 pages of instructions. The instructions explain how to complete the form and how to update and reverify employees' information if necessary.

On the form itself, Section 1 is for the employee (and the translator or preparer, if applicable) to fill out. You complete Section 2 by reviewing documents presented and certifying that they appear to be genuine and belong to the employee.

If you hire employees who don't physically come to your office to complete paperwork, you may designate agents to carry out your I-9 responsibilities. Agents may include notaries public, accountants, attorneys, personnel officers, foremen, etc. Choose an agent cautiously, since you will be held responsible for their actions.

Has your I-9 compliance gone off course?

Even employers who have an understanding of the Form I-9 basics will sometimes veer off course in Form I-9 compliance. While there are many ways that you can go astray with the Form I-9, some mistakes are more common than others. A few of the areas in which employers are most likely to go wrong are outlined in this whitepaper.

1. Requesting specific documentation

You may not demand to see specific documents, or ask for more documents than are required by the form. If an employee presents a document or documents that satisfy the Form I-9 requirements (one document from List A or one document from each of List B and List C), you should accept whatever combination the employee presents.

Even if an employee presents more than the required documentation (an individual might present a document from each of List A, B, and C), you shouldn't record all three items on the Form I-9. Instead, explain to the employee what's required, show him or her the Lists of Acceptable Documents, and allow the employee to decide which documents he or she will ultimately provide to complete the Form I-9.

Employers with remote employees may need to enlist employer agents to complete the Form I-9 process with employees.

The employee should always determine which documentation to use for the Form I-9.

Example: Social Security cards

A relatively common mistake in asking for an employee's documentation is to require a Social Security card. Remember that the Social Security number is optional in Section 1 of the Form I-9 (unless you are an E-Verify employer), and an employee can present whatever documentation he or she chooses from the Lists of Acceptable Documents for Section 2. That means that a Social Security card should not be required.

Even if you are an E-Verify employer, the employee is not required to present the Social Security card for your examination in Section 1; he or she must provide only the number. You should examine a Social Security card only if the employee chooses to present one as a List C document to complete Section 2 of the Form I-9.

Requiring a specific type of documentation, such as a Social Security card, could be grounds for a discrimination claim, since employees who are not citizens of the United States may not have a Social Security card.

Suggesting documents

While you shouldn't request specific documents, you may explain I-9 requirements to employees and present them with the Form I-9 Lists of Acceptable Documents to help clarify their options for documentation to present. However, it's not a good idea to give employees individual examples of documentation that they might present (for example, suggesting they bring in a Social Security card and a driver's license). This could create the impression that certain documentation is preferred, which is not allowed.

Getting picky with reverification

The requirement not to ask for specific documentation from employees also extends to situations in which an employee's documentation needs to be reverified. Where reverification is required, employees are still allowed to choose whichever document or combination of documents they like to satisfy the requirements of the Form I-9. You should not ask to see an updated version of the employee's expired documentation or any other specific employment authorization document.

2. Accepting receipts or copies

In most cases, you cannot accept receipts for documents. The only time that a receipt for a document is acceptable is when it is a receipt for a replacement document. Receipts for an employee's initial application for a document are not acceptable. If an employee presents an acceptable receipt for a replacement document, he or she must produce the actual document within 90 days of the date employment begins.

If an employee fails to produce the required documents or a receipt for a replacement (in the case of lost, stolen, or destroyed documents) within three business days, you must terminate employment, regardless of citizenship status.

3. Incomplete forms

Many employers who audit their I-9s discover that information is missing. Perhaps the employee failed to sign a form or the employer failed to fully record the required information. When completing a

You may only accept receipts for replacement documents.

Form I-9 with an employee, make sure all required fields are completed. Where an audit detects missing information on a Form I-9, you should insert the missing information conspicuously. You (or the employee) should initial and date the form to indicate that a change was made.

As a representative of the employer, you should not fill in information that was originally omitted in Section 1, since that portion of the form is to be completed by the employee. If information is missing in Section 1, the employee should be the one to insert it and initial and date the change.

4. Reverification issues

Some employment authorization documents have an expiration date. If an employee's temporary work authorization expires, you need to reverify by completing Section 3 on or before the date that the document expires. Otherwise, your records indicate that you are employing someone who is no longer authorized to work in the United States.

You do not need to reverify the status of permanent residents.

When an employee's temporary work authorization expires, there is no grace period after the document expires for the employee to present valid documentation. If an employee cannot present work authorization that satisfies the I-9 requirements by the time his or her temporary authorization expires, you cannot continue to employ that individual. However, if the individual is able to provide proper documentation at a later date, you may always rehire him or her.

Many employees' documentation will never require reverification. This is the case when employees present permanent work authorization for the Form I-9 (such as a U.S. Passport or a Permanent Resident Card). If unexpired at the time of initial I-9 verification, these documents provide permanent work authorization even though the documents themselves may have an expiration date. Do not reverify documents that establish permanent work authorization.

5. Discrimination

The Form I-9 process cannot be used to screen applicants. The Immigration Reform and Control Act prohibits employers with four or more employees from discriminating based on national origin or citizenship status, and the Equal Employment Opportunity Commission regulations prohibit employers with 15 or more employees from discriminating on the basis of national origin in hiring, discharging, recruiting, assignment, compensation, or other terms and conditions of employment.

This means that the Form I-9 may not be completed before an offer of employment has been made and accepted. Forms I-9 may not be completed with employment applications. Doing so creates the opportunity for an applicant to allege that he or she was discriminated against because of information provided on the Form I-9 (national origin or citizenship status, for example).

Likewise, while you may ask an applicant if he or she is authorized to work in the United States during the interview process, you may not ask

whether the individual is a U.S. citizen, or whether the employee's work authorization provides him or her with permanent or temporary status. If an employee is authorized to work, you must consider him or her as you would any other applicant.

Your company may also be at risk for a discrimination charge during the actual process of completing the Form I-9. As mentioned, asking for specific types of documentation or more documentation than is required is one way to invite a discrimination charge. Another is to establish different Form I-9 procedures based on an individual's appearance, name, or accent. For example, you cannot require employees who don't appear to be U.S. citizens to complete the Form I-9 immediately after a job offer is accepted, while waiting for the first day of work to have other employees complete the form.

6. Improper retention of the Form I-9

The Form I-9 retention obligations create problems for many employers who are not clear on the requirements. You must keep any employee's Form I-9 for one year after termination or three years after the date of hire, whichever establishes a **LATER** date. However, these requirements don't kick in until **AFTER** the employment relationship has ended.

This means you must have a Form I-9 on file for all current employees at all times. If you find that a form has been prematurely purged for a current employee, create a new form with the individual and affix a note explaining the circumstances.

Many employers who don't understand the retention requirements either purge forms for current employees or don't purge any Forms I-9 at all. Not having a Form I-9 for a current employee will definitely result in a penalty if you are faced with a federal audit. However, retaining forms for longer than is required is also not a good idea, since you can still be held liable for mistakes made on forms that you could have lawfully purged.

Getting it right and protecting your company

Employment is often the magnet that attracts people to stay in the United States illegally. The recent federal focus on immigration and the Form I-9 process is part of an effort to remove this attraction by requiring you to hire only individuals who may legally work in the U.S.

Compliance with the I-9 requirements provides a good-faith defense against a charge of knowingly hiring an illegal alien. Unfortunately, your company can still be held liable for costly fines and penalties if the Form I-9 is not completed correctly.

Odds are extremely high that some of your Forms I-9 contain errors, and some will likely fall into one of the six the categories outlined in this whitepaper. Not all compliance errors can be undone, but you can greatly limit your company's liability by carefully complying with I-9 requirements and correcting errors where they do occur.

You must have a Form I-9 on file for all current employees.

About the Author

Katie Loehrke, PHR

J. J. Keller & Associates, Inc.

Katie Loehrke, PHR is a human resources subject matter expert and editor with J. J. Keller & Associates, Inc. Loehrke creates content on employment law issues and best practices for HR professionals, specializing in the areas of Form I-9 and E-Verify compliance, discrimination, unemployment, employee privacy, social media, and affirmative action. She is the editor of J. J. Keller's *Employment Law Today* newsletter, *The Employment Law Essentials Manual*, and the *I-9 and E-Verify Essentials* manual.

Loehrke has authored articles for industry trade magazines such as *Talent Management*, *Diversity Executive*, and *Human Resources Executive*. Loehrke has also been published in newspapers such as the *Boston Globe*, the *Atlanta Journal-Constitution*, and the *Pittsburgh Post-Gazette*, and has been a subject matter guest on National Public Radio.

About J. J. Keller & Associates, Inc.

Since its beginning as a one-man consulting firm in 1953, J. J. Keller & Associates, Inc. has grown to become the most respected name in safety and regulatory compliance. Now over 1,400 associates strong, J. J. Keller serves over 560,000 customers — including over 90% of the Fortune 1000® companies. The company's subject-matter expertise spans nearly 1,500 topics and its diverse solutions include training via online courses, streaming video or DVD; online management tools; managed services; consulting services; publications; ELogs and mobile technology, forms and supplies.

HR professionals rely on J. J. Keller's in-house expertise and wide selection of products and services addressing core HR topics — including FMLA, ADA, HIPAA, FLSA, and employment law — to reduce risk and improve regulatory compliance, and performance management. For more information, visit JJKeller.com.

How We Can Help

To help you avoid fines and criminal charges related to employing illegal workers, J. J. Keller™ Consulting Services offers its ***I-9 Compliance Assessment***. Our team of experienced consultants provide a thorough and effective assessment of your I-9 compliance with our 14-step audit process, comprised of:

- A review of employee information, including work eligibility and documentation; your company's compliance with state requirements; recertification/rehire procedures; E-Verify compliance; and Form I-9 retention and storage
- Identification of errors, omissions, or discrepancies (items that are missing, expired, or problematic) and suggested corrective actions
- Notification of suspected discrimination
- Written summary and review of findings.

For more information or to learn about other HR Consulting offerings, call 888-473-4638 or visit JJKellerservices.com/hrcompliance.

Laws, regulations, and best practices change. The observations and comments drawn today may not apply to laws, regulations, or best practices as they may be in the future. J. J. Keller & Associates, Inc. cannot and does not assume responsibility for omissions, errors, or ambiguity contained in this white paper. Individuals needing legal or other professional advice should seek the assistance of a licensed professional in that field.