

## I-9s: Substance Over Form?

by Suzanne B. Seltzer\*

The recently revised “*Handbook for Employers: Instructions for Completing the Form I-9*” notes that “*Employment is often the magnet that attracts individuals to reside in the United States illegally. The purpose of the employer sanctions law is to remove this magnet by requiring employers to hire only individuals who may legally work here...To comply with the law, [employers] must verify the identity and employment eligibility of each person [they] hire...*”. In this way, employers are expected to do their part to combat illegal immigration.

Specifically employers must document that they have verified the identity and employment eligibility of each employee by completing Form I-9. In completing Form I-9, employers must examine evidence of identity and employment eligibility within three (3) business days of the date employment begins. The instructions to the I-9 include a “List of Acceptable Documents” that may be used for this purpose, which was revised by the November 7, 2007 release of the new version of Form I-9. This list is comprised of three sections, List A – documents that establish both Identity and Employment Eligibility; List B – documents that establish identity; and List C – documents that establish employment eligibility. For employees that present a document from List A, they do not also need to provide a document from List B or C. However, for those that present a document from List B, which only establishes identity, they must also present a document from List C, to evidence that they are also authorized to work.

While making me nostalgic for the Chinese menus of yore, it also makes some sense. If the purpose of the I-9 is to verify the employee’s identity *and* employment eligibility, then it follows that a document that covers both is sufficient, but documentation that establishes only one (B or C) would need to be supplemented by the other (B or C). Yet somehow this seemingly logical approach to verify *both* identity and employment eligibility has confounded employers, as there are numerous instances of I-9s completed with two identity documents and no employment authorized documents, or expired employment authorized documents, or documents that are not on the list and neither establish identity nor employment eligibility, and so on. Moreover, some employers almost make completing the I-9 voluntary for the employee, in that it is included with a package of other

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documents that new employees need to complete – W-4, benefit registration, emergency contact sheet – and hand in on his or her own time.

Is this really such a big deal? Isn't the I-9 just some form that is completed and stuck in a file that no one ever looks at anyway? It's not like it has to be sent anywhere.

Well, it is such a big deal. And becoming a bigger one, as the government steps up its enforcement efforts. First are the civil penalties. Each improperly completed I-9 carries a penalty of up to \$1100, and that's assuming the employee is authorized to work. For each employee that is not authorized to work, effective March 27, 2008, those penalties were raised approximately 25%, with the maximum penalty for a first violation increased from \$2200 to \$3200. Additional fines may also be imposed if there is found to be a "pattern or practice" of non-compliance. Then there are the criminal penalties, which includes both additional monetary fines and jail time starting with those tasked with administering the employer's I-9 process and on up.

Civil and criminal penalties for failure to maintain I-9 records are not new, they have been part of the law since 1986. What is new is the government's focus on I-9 compliance, as evidenced by its worksite raids and by its efforts to get employers to register with the E-verify program. E-verify is the government's program to enable employers to electronically verify the employment eligibility of newly hired employees, by comparing employee-provided information from I-9s against records in the Social Security Administration (SSA) and Department of Homeland Security (DHS) databases. So no longer would I-9s be completed haphazardly and stuck in a drawer, because with E-verify, the employer obligation to verify the identity and employment eligibility of each employee would be done online, via a government database.

Although the federal government describes E-verify as a "voluntary" program, many states have passed legislation making participation mandatory. More recently, new immigration benefits were made contingent upon employers' participation in E-verify. Participation in E-verify includes agreeing to give the federal government the right to conduct site visits with full access to employment records, with only three days advance notice. For those employers who have not been meticulous in maintaining I-9 records, now is certainly the time to start.

For those employers who have been vigilant in maintaining I-9s, they should know that the "List of Acceptable Documents" does not cover all situations. For example, certain foreign nationals are authorized to work when an extension for employment authorization is pending on their behalf, yet there is no clear guidance on documenting employment eligibility in those circumstances. When the government was recently asked how best to document employment eligibility in these not so clear, and not so new, situations, it responded simply that it "*appreciates your concerns and [is] in the process of reviewing this matter in depth.*" In addition, the aforementioned newly revised "*Handbook for Employers*" does not define a "good faith attempt to comply" or the "technical and procedural" failures that may support a "good faith defense." Therefore, even those employers who have been meticulous in maintaining I-9 records may find themselves under investigation and subject to penalties. Unfortunately, in its zeal to hold employers accountable for illegal employment, the government seems to have forsaken legal employment.