The New I-9 Form: Time to Get Smart on I-9 Compliance

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What is the law?

The Controlling Law: IRCA

What is IRCA?

• The Immigration Reform and Control Act of 1986 (IRCA)
  – No “knowing employment of unauthorized aliens.”
  – Employers must verify the “employment eligibility” and “identity” of Employees.
What is IRCA?
- Who it applies to:
  - ALL employers
  - No matter how many employees
  - ALL employees (hired after 11/1986)
  - Not Independent contractors
    - Hired through agency or otherwise
    - No protection if you know

What is IRCA?
- What it does:
  - "Deputizes" employers
  - Requires that they "assist" the government
  - Describes their "job"

Why Should Employers Care?
Penalties
Penalties

• Employers are penalized for failing to comply
  – Not doing a good job
  • Paperwork errors/mistakes
  – Ignoring the job/REALLY not doing a good job
  • Failing to verify or to do an I-9 at all

Penalties

• What is considered a failure to comply?
  – Not completing an I-9 properly
    • Mistakes in completing form
    • Mistakes in documenting employment or identity documentation
    • Mistakes in types of documents accepted
  – Not completing an I-9 on time
  – Not following up on expiring work authorizing documents

Penalties

• What is considered a failure to comply?
  – Hiring/employing someone without authorization
    • Knowingly / Should have known
  – Contracting to obtain the services of someone without authorization
  – Accepting false documents
  – Excessively documenting employees
  – Discriminating
**Penalties**

- **Administrative Fines**
  - Substantive/Uncorrected Technical Violations:
    - $216 - $2,156/employee
    - ± 25%
  - Employing unauthorized aliens:
    - $539 to $21,563 per alien
    - ± 25%

- **Discrimination (authorized individual):**
  - $445 to $17,816 per individual

- **Participating in Document Fraud:**
  - $445 - $8,908 per document

- **Requiring Indemnification (of an individual):**
  - $2,156/indv + restitution

- **Document Abuse:**
  - $178 to $1,782 per individual

- **Failing to notify DHS of a Final Non-confirmation (FNC) (E-Verify):**
  - $751 to 1,502 per violation
Penalties

- Administrative Fines
  - Fine amount determined by the total number of I-9s divided by the number of I-9s with violations.
  - Percentage of total violations determines value per violation
  - This total fine amount is increased (enhanced) or decreased (mitigated) by the discretionary application of factors

Penalties

- Fine Matrix:

<table>
<thead>
<tr>
<th>Substantive / Uncorrected Technical Violations</th>
<th>1st Offense</th>
<th>2nd Offense</th>
<th>3rd Offense</th>
</tr>
</thead>
<tbody>
<tr>
<td>0% - 9%</td>
<td>$110</td>
<td>$550</td>
<td>$1100</td>
</tr>
<tr>
<td>10% - 19%</td>
<td>$275</td>
<td>$650</td>
<td>$1100</td>
</tr>
<tr>
<td>20% - 29%</td>
<td>$440</td>
<td>$750</td>
<td>$1100</td>
</tr>
<tr>
<td>30% - 39%</td>
<td>$605</td>
<td>$850</td>
<td>$1100</td>
</tr>
<tr>
<td>40% - 49%</td>
<td>$770</td>
<td>$950</td>
<td>$1100</td>
</tr>
<tr>
<td>50% or more</td>
<td>$935</td>
<td>$1100</td>
<td>$1100</td>
</tr>
</tbody>
</table>

Note that penalties have increased since the release of the Fine Matrix.

Penalties

- Enhancement/Mitigation Matrix:

<table>
<thead>
<tr>
<th>Factor</th>
<th>Aggravating</th>
<th>Mitigating</th>
<th>Neutral</th>
</tr>
</thead>
<tbody>
<tr>
<td>Business size</td>
<td>+5%</td>
<td>- 5%</td>
<td>+/- 0%</td>
</tr>
<tr>
<td>Good Faith</td>
<td>+5%</td>
<td>- 5%</td>
<td>+/- 0%</td>
</tr>
<tr>
<td>Seriousness</td>
<td>+5%</td>
<td>- 5%</td>
<td>+/- 0%</td>
</tr>
<tr>
<td>Unauthorized Aliens</td>
<td>+5%</td>
<td>- 5%</td>
<td>+/- 0%</td>
</tr>
<tr>
<td>History</td>
<td>+5%</td>
<td>- 5%</td>
<td>+/- 0%</td>
</tr>
<tr>
<td>Cumulative Adjustment</td>
<td>+25%</td>
<td>- 25%</td>
<td>+/- 0%</td>
</tr>
</tbody>
</table>
Other Penalties
- Criminal Violation for pattern or practice:
  - $3,000 per unauthorized alien + 6 months in prison
- Federal Criminal Charges:
  - aiding and abetting
  - harboring illegal aliens
  - knowingly hiring illegal aliens
  - money laundering
  - aggravated identity theft

Other Penalties
- Major fines
  - $10,000 - $250,000
- Incarceration (Company Representatives)
  - 6 months – 20 years
- Seizure of personal and company property
- Responsibility
  - Company <-> Individual

Yes, but, really, WHAT would motivate employers to do anything about it?

Enforcement
**Enforcement**

- **Multiple Agencies**
  - Interagency Cooperation
- **Investigative Agencies**
  - Department of Homeland Security (DHS)
  - U.S. Immigration and Customs Enforcement (ICE)
  - Office of Special Counsel (OFSC)
  - Department of Labor (DOL)

- **Investigative Agencies (con't)**
  - Internal Revenue Service (IRS)
  - Social Security Administration (SSA)
  - Federal Bureau of Investigations (FBI)
  - Local Law Enforcement

- **Immigration and Customs Enforcement (ICE)**
  - New records set annually – investigations, arrests, deportations, penalties and criminal charges of employers
  - More Personnel
  - Seizures = $Millions
Enforcement

- Current ICE Strategy
  - Key component = targeting businesses
  - Remove financial incentives/infrastructure
  - Achieve DETERRENCE
  - Current administration’s focus includes infrastructure AND identifying unauthorized aliens

- Worksite Enforcement Activities
  - Investigations
    - Administrative + Criminal
    - Notice + Subpoena
  - Community Sweeps
  - Raids

- Worksite Enforcement Activities
  - Wide Range of Industries
  - Infrastructure Initiative

- More than just fines
  - Disruption to business activities
  - Loss of workforce
  - Bad press
  - Damage to trust/relationships
The New Form I-9

Procedures and Changes

- Verify both identity and employment eligibility
- View ORIGINAL Documents from The “List of Acceptable Documents”
- “Reasonable” Inspection
  - Not expected to be document “experts”
  - Current standards are higher than past

Executing the I-9

- NEW I-9 FORM
  - “11/14/2016 N” (lower left corner)
  - May (should) use now
  - MUST use (only) by 01/22/17
  - Previous Editions may not be used after COB on 01/21/2017
  - No other editions are valid
  - https://www.uscis.gov/i-9
Executing the I-9

- NEW I-9 Form
  - Smart Form (fillable PDF) and Paper Versions
  - Pull down menus
  - Auto-population
  - Barcoded
  - Pop up information
- Forms, Document List, Instructions and Preparer/Translator Certification now separated

Executing the I-9

- NEW I-9 Form
  - Use for new hires and verifications only
  - Do not redo existing forms
  - As before, Spanish version only for employers in Puerto Rico
  - All others may use for translation (only)
- Form has changed, RULES have not

Executing the I-9

- Timing:
  - I-9 must be fully executed within three business days of “hire”
  - Includes
    - Employee’s completion of Section 1
    - Employer’s review of employee’s original documents
    - Employer’s completion of Section 2
**Executing the I-9**

- **Provide new employee with a blank I-9 Form**
  - Best Practice: have the instructions and Document List available
  - Computer needed if using Smart Form form
- **Give form to employee as soon as possible after decision to hire**
  - Policy decision: when to hand over form / Document List
  - Avoid other methods

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**Executing the I-9**

- **Employee Must:**
  - Complete Section 1 of Form I-9 no later than the end of the first day of work.
  - Smart Form form: employee must complete Section 1
- **Employer Must:**
  - Complete Section 2 no later than the end of the third day of work.
  - Includes reviewing Employee's original supporting documents

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**Executing the I-9**

- **Section 1:** Employee completes it
  - Then returns the Form to Company HR representative to be checked
Executing the I-9

• Do not require Employee to provide social security number
  – Voluntary except where employer participates in E-Verify
  – Do not required Employee to provide E-Mail Address or Telephone Number
  – These are voluntary/employee’s choice

Section 1: New Procedures – Smart Form

• Section 1: New Procedures – Smart Form
  – All cells require data, except for SSN
  – Enter N/A if not applicable
  • Note changes from prior version:
  – Other Last Names Used (from Other Names Used)

Section 1: Employment Information and Affidavit

• Employee must complete and sign Section 1 of Form I-9 no later than the 3rd day of employment, the first day of working at job site

Note changes from prior version:

– EITHER Alien Registration/USCIS, Form I-94 OR Foreign Passport Number now required
• Section 1: Note change from prior version
  – Pop up information windows

• Best Practice: Ensure employee completes by end of first day of work
  – Executing in advance is acceptable, so long as applied uniformly
  – Check to ensure properly completed
    – All information entered / boxes checked
    – Signed & dated
    – Have employee complete/correct
Executing the I-9

• Old Form: Section 1: Preparer/Translator Certification

Prepare/Translator Certification is ONLY to be completed if one is used

– If EE needs another person to translate and/or assist with the form
– Ideally, personnel responsible for executing I-9 should not serve this function

Executing the I-9

• New Procedures - Smart Form

– NEW Requirement: Check box reflecting use/non use of Preparer or Translator

Executing the I-9

– Section 1: New Procedures - Smart Form
– NEW Requirement: Check box reflecting use/non use of Preparer or Translator
Executing the I-9

• Section 1: New Procedures - Smart Form
  – Note change from prior version: multiple preparers/translator
  – Form I-9 Supplement

Executing the I-9

• Section 1: New Procedures - Smart Form
  – Employee must click to finish
    • barcode

Executing the I-9

• NEW FORM: Employee must sign and date
  – Electronic signature not supported
Before three days from the employee’s hire/first day of employment elapse, you must:

- (1) review the employee’s ORIGINAL documents and
- (2) complete Section 2

Three day count includes first day for completing section 1

Reviewing Original Documents
- Follow the instructions on Form I-9
- Only ONE List A document
  - OR
  - One List B document AND one List C document

Documents must be
- On the List of Acceptable Documents
- ORIGINAL documents
- Valid when presented
  - New Rule (04/2009)
  - Related to the person presenting them
Executing the I-9
• Review documents for authenticity
  – Document is acceptable if it reasonably appears on its face
    • (1) to be genuine and
    • (2) to relate to the individual
  – Dates of Validity on Documents
    • expiration date ≠ employment decision

Executing the I-9
• Examine documents carefully
  – Look for tampering
  – Look for clear indications that not genuine
    • Typing/font/dashes
  – Question documents when in doubt
    – If uncomfortable with questioning employee, seek assistance from counsel or government

Executing the I-9
• Once you are presented with acceptable documents, STOP!

• If too many, return documents to Employee and have him/her make the choice
Executing the I-9

Document Exemption: “Receipt Rule”
- A receipt for a replacement document(s) is acceptable in the case of lost, stolen or destroyed documents
- S/he must produce the actual document(s) within 90 days of the date employment begins
- Must apply this practice uniformly to all employees.

Executing the I-9

NEW FORM: Section 2

Old Form: Section 2
Executing the I-9

• NOTE on Smart Form: Section 2, on top

- Instructions: Takes you to USCIS website
- Start Over: Warns you before resetting data on form

Executing the I-9

• NOTE on NEW Form: Section 2, Employee's name/information at top

- Citizenship Status now requested here
- If complete Smart Form, this will auto-populate; otherwise must select corresponding number of choice in section 1

Executing the I-9

• There is NO EXCEPTION to the proper entry of document information
  - Photocopies are not a substitute
  - ALL information must be entered for EACH document
    - Document Title, Issuing Authority, Document Number for EVERY document
    - Expiration Date where applicable
Documents must be consistent with citizenship status selected in Section 1. If complete Smart Form version, warning will appear if select inconsistent document.

• NOT foolproof

Issuing authority auto-populates when U.S. Passport selected.

• Driver’s License: Only choices for issuing authority are states.

Smart Form will auto-populate info and enter n/a where no information is required.
Executing the I-9

• Smart Form will ONLY show available document options once a citizenship status has been selected in Section 1

• Can change/choose different documents so long as they comport with status

Executing the I-9

• Commonly accepted abbreviations allowed
  – Do not abbreviate “Card”
  – Do not use abbreviations that in any way make it unclear that you accepted a document not precisely the one listed on the Acceptable List of Documents

• Issuing Authority
  – Previous recommendation was to List AGENCY (not state or country alone)

Executing the I-9

• Section 2: Other Changes
  – Section for notes/annotations

• Commonly accepted abbreviations allowed
  – Do not abbreviate “Card”
  – Do not use abbreviations that in any way make it unclear that you accepted a document not precisely the one listed on the Acceptable List of Documents

• Issuing Authority
  – Previous recommendation was to List AGENCY (not state or country alone)
**Executing the I-9**

- No requirement to make copies
  - But if do copy, must copy for everyone AND retain copies with the I-9 Form
  - Copy only those documents presented
  - Copies should be clear and legible
  - NEVER a substitute for completing the form
- Policy Decision: whether to keep copies of documents

**Executing the I-9**

- NEW FORM: Certification
  - Electronic signature not supported in Smart Form

**Executing the I-9**

- Old Form: Certification

Certificate: I, [Name of Person Certifying], the undersigned, on behalf of the person or entity responsible for the employer, hereby certify that:

1. I have examined the documents presented by the above-named employee.
2. The above-listed documents were presented to me by the employee.
3. The above-listed documents are, to the best of my knowledge, true and correct and are authentic to the extent possible.

The employer’s first day of employment (mm/dd/yyyy): [Date]

Signature of Person Certifying

[Signature]

[Print Name of Person Certifying]

[Title or Position]

[Employer’s Name or Business/Organization Name]

[Employer’s Address (Street Name and Number)]

[City or Town]

[State or Province]

[Postal Code]

[Employer’s Telephone Number]

[Email Address]

[Website]

[Employer’s Tax ID Number]

[Employer’s Employer Identification Number (EIN)]

[Employer’s Federal Employer Identification Number (FEIN)]

[Employer’s Business/Organization Address (Street Number and Name)]

[City or Town]

[State or Province]

[Postal Code]

[Employer’s Telephone Number]

[Email Address]

[Website]

[Employer’s Tax ID Number]

[Employer’s Employer Identification Number (EIN)]

[Employer’s Federal Employer Identification Number (FEIN)]
Executing the I-9

- Enter Date of Hire (first day of work)
  - DOH now clearly marked on form as employee's first day of employment
- Sign, print name and date the form
  - The person who reviewed the original documents must sign
- Company name and Address
  - Preprinted or stamped is acceptable (paper version)

Executing the I-9

- Review and Confirm:
  - verify that the entire form has been fully and accurately completed
  - Immediately correct any errors or omissions
- Follow remediation procedures (line out/add info; initial and date)
- Return Original Documents to Employee

Executing the I-9

- Section 2: Other Changes
  - Last Name/First Name now clearly references Employer or Employer’s Authorized Representative
  - “Today’s” Date

Executing the I-9

- New Requirement in Smart Form: Click to Finish (bottom of Section 2)

**Click to Finish**

Section 2 completion in progress.

Executing the I-9

- Click to Finish will perform a review/check

Executing the I-9

- NEW FORM: Don’t Forget to sign and date the Certification!
  - Electronic signature not supported in Smart Form
• Section 3: Updating and Reverification
  – Not part of initial execution
  – Re-hire within retention period
  – To Record Name Changes or
  – Reverification of expiring work authorizing

Executing the I-9

• Old Form

Executing the I-9

• Section 3: Other Changes
  – Minor Formatting changes
  – “Today’s” Date
Executing the I-9
• Complete Section 3 if:
  – Employee’s work authorization is expiring
  • Update before date of expiration of old
document
  • Calendar and follow up on expiring work
  authorizing documents
  – Employee’s name changes
  • I-9 records must match payroll records

Executing the I-9
• Enter all information properly and
  completely
  – Enter new name, date of hire or new
document information, as applicable
  – Sign, date and print title
• Copy new/updated documents and attached
to I-9 form
• If an older I-9 or section 3 already used, use
  a new/current form

Executing the I-9
• Reverify Temporary Employment Authorizing
  Documents
• Do NOT Reverify:
  – Legal Permanent Resident Cards
    • aka “Green Card”/“Alien Registration Receipt
      Card”
  • U.S. Passports
  • Driver’s Licenses
    – Any List B (Identity) Documents
Executin the I-9
• Items to Reverify Upon Expiration
  – List A, Item 3

3. Foreign passport that contains a temporary I-551 stamp or temporary I-551 printed notation on a machine-readable immigrant visa

Executin the I-9
• Items to Reverify Upon Expiration
  – List A, Item 4

4. Employment Authorization Document that contains a photograph (Form I-766)

Executin the I-9
• Items to Reverify Upon Expiration
  – List A, Item 5

5. For a nonimmigrant alien authorized to work for a specific employer because of his or her status:
   a. Foreign passport; and
   b. Form I-94 or Form I-94A that has the following:
      (1) The same name as the passport; and
      (2) An endorsement of the alien’s nonimmigrant status as long as that period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the form.
Executive the I-9

- Items to Reverify Upon Expiration
  - List C, Item 8

8. Employment authorization document issued by the Department of Homeland Security

The Retention Rules

No Changes

Retention

- Completed I-9 Forms are kept on file for potential inspection by the government
  - Government may give as little as 3 day notice prior to inspection
- Forms are not filed with any Agency
- Must retain original, properly executed form with clear copies of documents
Retention
• Forms I-9 must be retained on file
  — For all current Employees
  — For former Employees, the LONGER of:
    • 3 years after the date of hire
    • or
    • 1 year after the date of termination

Retention
• Completed Forms I-9s may be stored:
  — On-site or at an off-site storage facility
  — In a single format or a combination of formats, such as:
    • Paper
    • Microfilm or Microfiche
    • Electronic
  • Forms must be made available to the government for inspection within 3 business days

Retention
• For electronic retention, the electronic document (i.e. the scanned copy of the I-9)
  must
  — Be legible
  — Be indexed (i.e. searchable/identifiable by a number of parameters)
  — Be Reproducible
  — Contain a record of changes (if any are made)
Retention
• For electronic retention, the electronic document (i.e. the scanned copy of the I-9) must
  — Be retained securely (i.e. in a reliable database, backed up and data protected).
• Any photocopies you make of documents supporting the I-9 must be retained with the Form I-9, converted I-9 forms and associated documents included.

Retention
• An electronic storage system must:
  — Include controls to ensure the integrity, accuracy and reliability of the electronic generation storage system.
  — Include controls to detect and prevent the unauthorized or accidental creation of, addition to, alteration of, deletion of or deterioration of an electronically completed stored Form I-9, including the electronic signature, if used.

Retention
• An electronic storage system must:
  — Include controls to ensure an audit trail so that any alteration or change to the form since its creation is electronically stored and can be accessed by an appropriate government agency inspecting the forms.
An electronic storage system must:
- Include an inspection and quality assurance program that regularly evaluates the electronic generation or storage system, and includes periodic checks of electronically stored Form I-9, including the electronic signature, if used.
- Include a detailed index of all data so that any particular record can be accessed immediately.

An electronic storage system must:
- Produce a high degree of legibility and readability when displayed on a video display terminal or reproduced on paper.

For Paper Retention:
- Do not store with personnel files
- Organize in three binders:
  - Former Employees
  - Current Employees
  - Current Employees - with an Employment Authorizing Documentation
- Organize by date of expiration
- Calendaring System
What if I made a mistake?

Correcting Errors (Remediation)

• Corrections are permitted, under specific procedures
  – Recommend private internal audit
• Reviewing and remediating records creates “GOOD FAITH”
  – Intent to comply
  – Insulation against fines
  – “Knowing” and “Intentional” components may be eliminated

Remediation

• General Procedures
  – Correct the I-9 using information on file
  – Never obliterate original information
  – Never use white out
  – Note all changes (added or amended information with initials and current date)
  – ‘Delete’ information by lining or ‘X’ing out
  – Initial and date all changes (even when made during initial execution)
Correcting Errors
• General Procedures
  – Must have employee make any/all corrections needed in Section 1
  – Any employer representative may make corrections to other Sections, based upon information on available in file
  • May not sign/execute form if not signed (perjury)
  – Add explanatory note

Correcting Errors
• General Procedures
  – If unable to complete form (e.g. missing or incomplete documentation), execute a new form
  – Employee participation required
    • If executing a new I-9 to remediate a prior form or replace a missing form, follow the same procedures as initial execution.
    • Attach to the old one
  – Add explanatory note

What else can employers do?
Plan and Protect
How to Protect Yourself

• Train
  – Educate/teach front line personnel
  – Develop and implement a compliance program including:
    • Procedures/Instructions/Guidelines
    • Levels of responsible personnel
    • Secondary review
  – Centralized vs. non-centralized human resource processing

How to Protect Yourself

• Audit
  – Private internal self audits – with or without counsel
    • Counsel can provide the protection of attorney-client privilege
  – Less arduous than the 3 day audit period forced by an inspection notice.
  – Can uncover problems early - in time to be corrected before the imposition of sanctions.
How to Protect Yourself

• Retain Legal Counsel in advance
  – immigration compliance + white collar criminal (to prepare for the worst type of investigation)

• Have a Plan
  – In place in advance = ready when you need it (always short notice)
  – Similar to disaster planning

How to Protect Yourself

• If Agents Appear at the Door
  – Call your attorney immediately
  – Get the name, title and contact information of the lead investigator
  – Determine the purpose of the agents’ visit (a search of the facility, a criminal search warrant, an administrative warrant or an audit?)

• If Agents Appear at the Door
  – Request a copy of any warrant in their possession
  – If the agents are acting pursuant to a warrant, do not interfere with their search
  – Review the warrant
  – DO NOT sign a Consent to Search document without approval of legal counsel

If Agents Appear at the Door

• Call your attorney immediately
• Get the name, title and contact information of the lead investigator
• Determine the purpose of the agents’ visit (a search of the facility, a criminal search warrant, an administrative warrant or an audit?)
• Request a copy of any warrant in their possession
• If the agents are acting pursuant to a warrant, do not interfere with their search
• Review the warrant
• DO NOT sign a Consent to Search document without approval of legal counsel
How to Protect Yourself

• If Agents Appear at the Door
  – Accompany the agents at all times
  – Take careful notes of all that is said and done
  – Make a list of every file that is searched or seized
  – Do not answer questions posed by the agents – politely advise them that you wish to await the arrival of your counsel

How to Protect Yourself

• If Agents Appear at the Door
  – Instruct employees not to interfere with searching agents
  – Let employees know that they are not required to answer agents’ questions and
  – Let employees know they have the right to have counsel present
  • It may be necessary to arrange for separate counsel for employees

Final Notes

• Immigration Laws are not static!
• Employers are not expected to be experts
  – But expectations are higher than in the past
  – Form has been redesigned to support the process, but it does not reduce liability
  – Not foolproof
• Enforcement expected to increase
  – Barcoding technology will facilitate
The New Form I-9: How it Affects You

Floor is now open for Questions
Please use your chat box