Foster Garvey

Important (but not surprising) Changes to Form I-9 Effective Immediately

Legal Alert
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Garvey Schubert Barer Legal Update, November 18, 2007.

The Department of Homeland Security (DHS) introduced a new Employment Eligibility Verification Form, the Form (I-9)[i], on November 7, 2007. The new Form I-9 includes a revised and reorganized list of Section 2 documents that may be used for proof of both identity and employment eligibility. The instructions to the new Form I-9 also provide a clarification of the Section 1 request for a listing of the Social Security number.

Section 1 box for "Social Security #"

Providing the Social Security number in Section 1 is voluntary, except for employees hired by employers participating in the U.S. Citizenship and Immigration Services Electronic Employment Eligibility Verification Program (E-Verify).

Section 2's New List A Documents

1. U.S. Passport (unexpired or expired)
2. Permanent Resident Card or Alien Registration Receipt Card (Form I-551)
3. An unexpired foreign passport with a temporary I-551 stamp
4. An unexpired Employment Authorization Document that contains a photograph (Form I-766, I-688, I-688A, I-688B)
5. An unexpired foreign passport with an unexpired Arrival-Departure Record, Form I-94, bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, if that status authorizes the alien to work for the employer

Technically, the new Form I-9 is the only version that is valid for use for individuals hired on or after November 7, 2007. It can be identified by the notation "Form I-9 (Rev. 06/05/07) N" on the lower right corner of the form. (Yes, the Form's revision date is June 5, 2007, but it was not made public until November 7, 2007.) It is available at www.uscis.gov/i-9. Employers should immediately begin using the new version. This does not mean that employers should "re-I-9" individuals for whom the previous version has already been completed. DHS has confirmed that employers who use any other edition of the Form I-9 on or after December 26, 2007 will be subject to penalties.

The new Form I-9 and its related Handbook represent the most significant changes to an employer's responsibilities for collecting and maintaining employment identity and eligibility documentation in more than a decade.

DHS has significantly increased its enforcement efforts this year, partially because of the failed immigration-related legislative efforts in Congress. The new Form I-9 is just one aspect of a wide-ranging effort to use every resource available to it to reduce unauthorized employment; others including recently introduced regulations regarding the recommended employer response to receipt of Social Security No-Match letters[ii] and significantly increased worksite audits and raids around the country.

The announcement of a new Form I-9 was both expected and disappointing. It is expected because it is based on regulations published in 1997 and 1998, but which were never incorporated into the Form I-9. It is disappointing in that it came almost without warning and does not address many issues that have become apparent in the decade since those regulations were published.

Changes based on decade-old regulations

Employers will quickly notice and welcome a more streamlined Form I-9, with fewer documents to consider. Several of the "List A" documents have been eliminated and one has been added. Observant employers will realize that DHS had subtly noted the elimination and addition of those very documents on its Form I-9 web page for quite some time. These changes have finally been introduced to the Form itself. *Employers may accept only those documents listed on the new Form I-9 after it becomes effective.*

Another change noted in the instructions to the new Form I-9, but which has also been a DHS standard for some time, is that the employee is not always obliged to provide the Social Security number in Section 1 of the Form I-9. This issue had not previously been noted in the instructions. With the introduction of the new Form I-9, it will now be clear that the Social Security number is now required only when an individual is employed by an employer who participates in the E-Verify program.

The new Handbook, which can be found at www.uscis.gov/files/nativedocuments/m-274.pdf, is a welcome change to the old Handbook for Employers (M-274), which was last revised in 1991 and which included documents that are no longer used, issued, or valid for Form I-9 purposes.

Expect more changes in 2008

The rush to update and streamline the Form I-9 left DHS with no time to publish new regulations that reflect the many changes that it has sought since the creation of DHS in the post-9/11 world. Employers should expect that further revisions to the Form I-9 can be expected as DHS continues to use the Form I-9 as a weapon in its war against illegal immigration.

Recommendations

Employers should immediately begin preparing to use the new Form I-9 and Handbook. GSB strongly recommends that employers identify and carefully train specific people to be responsible for Form I-9 issues. Civil and criminal penalties, including jail time, can be assessed against employers – far beyond just those people who prepare the Form I-9. DHS has made it clear that it intends to use the Form I-9 to punish employers who it determines knew, or should have known through proper compliance with Form I-9 requirements, that they employ unauthorized aliens.

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[i] *All U.S. employers are responsible for completion and retention of a Form I-9 for each individual hired for employment in the United States. This includes citizens and noncitizens. The employer must verify the employment eligibility and identity documents presented by the employee based on a list of documents provided by the government. Employers must record the document information on the Form I-9 and retain the Form I-9, making it available for government review, for a period of either three years after the date of hire or for one year after employment is terminated, whichever is later.*

[ii] *For more information about this issue, see "New Regulations Regarding Social Security No-Match Letters."*