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Form I-9 – Employee Eligibility Verification

Who, What, Why . . .

Who does it apply to: All business owners hiring employees to work within the United States.

What is an I-9 Form: Hopefully, you are all familiar with the I-9 Form. All employers are required to complete one for all new employees by the Department of Homeland Security and the U.S. Citizenship and Immigration Services (“USCIS”). Its purpose is to help employers determine whether applicants are authorized to work in the United States. Of course, it is also used by USCIS to make sure employers don’t hire workers who are unauthorized to work in the United States.

How do I properly complete the form:

- *How does the form work:* An I-9 Form requires both the completion of basic citizenship information and verification of identification proving the right to work. There are three parts or “Sections” to the document. Section 1 is information about the employee. Section 2 is the verification of documents for employers. Section 3 can be used if an employee is rehired within 3 years of separation.
- *When to fill it out:* An I-9 Form must be completed for every new employee hired after November 6, 1986. Prepare the form before the employee begins work on their first day by completing Section 1. Then, be sure the employee meets the requirements of Section 2 within 3 business days of the first day of work. Never complete the form before the prospective employee is offered employment and accepts the job. Doing so earlier creates a possible discrimination claim if the person is not hired.
- *How do I fill out Section 1:* Employers do not fill out Section 1. It is to be completed by the new employee before beginning work on their first day. The employee must complete their full name, address, date of birth, attest to citizenship or immigration status, and sign and date the form. Employers do have responsibility to make sure the employee has completed all of Section 1 with information that conforms to the questions asked in Section 1, i.e., putting an address in the address box.
- *How do I fill out Section 2:* Within three business days of the first day of work, the employee must present original documents found on the Lists of Acceptable Documents at the end of the I-9 Form. The employee must be sure

the documents you accept are not expired. You then fill out Section 2 of the I-9 Form and retain it. Do not specify to your new employees which documents they provide or ask for different or additional documents, or comment on their choices.

- *How do I fill out Section 3:* Employers may choose to complete Section 3 if rehiring an employee within 3 years of prior separation. Employers are not required to use Section 3 for a rehire and may fill out a new I-9 Form.

How do I know the documents are real . . . or should I care:

Employers are required to accept documents that “reasonably appear” to be genuine. This gets into sticky territory for employers. After all, you are not an expert on documents. If you complain that documents are not real when they are or appear to be, you can get in trouble for discrimination. If you accept documents as real when they are not, you again make a mistake and get in trouble with USCIS. My advice – print yourself a copy of the illustrations of acceptable documents from Part 8 of the USCIS Handbook for Employers. Unless the documents appear patently false, accept them. If you make copies for examination by the human resources office at hire, don’t keep the copies. If you keep them, USCIS can examine what you looked at and decide for you.

What if I get contradictory documents: If the employee correctly follows the List of Acceptable Documents, you should not get contradictory documents. Sometimes, however, an employee will bring in what appears to be a valid non-immigrant alien document from List A and a social security card or US Citizen ID card. If the person only presented the non-immigrant documents, you would be fine, but we all know it would be difficult to have a social security card and a non-immigrant status at the same time. In this situation, you have a judgment call to make. You can take the document from List A and move on or you may consider calling USCIS for advice.

What do I do with the completed form: Employers must retain every employee’s I-9 Form while the employee works for them. As noted above, I don’t recommend keeping copies of the documents you receive, but remember to keep them for all employees if you keep them for some. I-9 Forms can be retained either on paper, or electronically. No matter how I-9

Forms are stored, they must be in a secure location or system that protects against the alteration or loss of the Forms.

What about reverification: Employers are not permitted to reverify employees who present permanent right to work documentation, however, employers are specifically required to reverify all employees who present documents of a temporary right to work. Reverification must be done by the expiration date so employers need to calendar this responsibility.

What do I do after the employee leaves: After termination, employers must keep the I-9 Form for the longer of: (a) three years after the date of hire, or (b) one year after the date employment terminated, whichever is later.

What is E-Verify: E-Verify is a federal database to help employers confirm the employment authorization of new hires that is free and available in all 50 states. Employers who participate in E-verify must complete an I-9 Form and then create a “case” in E-verify that includes information from both Sections and the employee’s social security number. E-verify will issue a response regarding the employee’s authorization status. Employers may not use E-verify to pre-screen applicants for employment, check employees hired before the company became an E-verify participant, or reverify employees. If an employer uses E-verify to authorize one employee, it must use it for all employees. E-verify is currently voluntary for all Texas employers, except for federal contractors, but may be made mandatory for all employers soon.

Common Situations:

Consistency is key: Ray has attested to being a U.S. citizen on Section 1 of the I-9 Form, but presented his new employer, Callahan Auto, with a “green card” the next day to complete Section 2. Should Callahan accept this document? No. Employers are not expected to be immigration law experts, but

the document is inconsistent with the status attested to and therefore, is not reasonably related to Ray.

But I didn’t do it: SMI acquired McGuire, Inc. along with its employees. SMI did not take any action towards verifying Maguire’s employees’ identity and employment authorization. Is SMI liable for errors made on Maguire’s I-9 Forms? Yes. Companies acquiring another company’s employees have the option to either retain the previous owner’s I-9 Forms or complete new I-9 Forms.

English as a second language: Estoban’s Fine Restaurant hires Isabella because of her world famous cooking skills. She speaks only Spanish. Estoban locates and prints off the Spanish I-9 form which Isabella completes with no complications. Six months later the restaurant is audited. The only violation they can find is Isabella’s I-9. Why? As ridiculous as it may sound, the Spanish I-9 form is only for use in Puerto Rico.

What should I do:

Good: Don’t complete the I-9 Form before the employment relationship is consummated. Notify new employees to bring documents for the completion of Section 2 on the first day of employment and get it out of the way. Don’t keep copies of the documents for Section 2. Be careful not to discriminate against employees based on their documentation. Make sure the I-9 Forms are stored in a secure location that can still be accessed on three days’ notice.

Better for Some, Not for All: All of the above, and use the E-verify system to ensure you are maintaining a legal workforce. Certain industries, however, may not want to voluntarily subject themselves to E-verify. You know who you are.



Michael Kelsheimer focuses his practice on the employment law needs of Texas businesses and executive employees. He recognizes that the cost and expense of litigation make resolving employment disputes challenging. To help avoid these concerns, he utilizes his experience in and out of the courtroom to prevent or quickly resolve employment disputes through proactive employer planning and timely advice. When a dispute cannot be avoided, Michael relies upon his prior experience as a briefing attorney for the United States District Court and his extensive experience in employment and commercial lawsuits to secure favorable resolutions for his clients.

This guide is one in a series. For more information, or to receive the entire collection contact Michael Kelsheimer by email at mkelsheimer@grayreed.com or by phone at **469.320.6063**