

Form I-9



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Updates: August 2023

Two new rules related to I-9 compliance went into effect on August 1, 2023:

- On July 24, 2023, the Department of Homeland Security (DHS) issued a new rule allowing an alternative procedure to physical inspection of identity and employment authorization documents for I-9 verification for certain employers, which went into effect on August 1.
- On July 25, DHS announced a new version of Form I-9, Employment Eligibility Verification, that went into effect on August 1, 2023.

Remote Inspection of Documents

In response to the COVID-19 pandemic, U.S. Immigration and Customs Enforcement (ICE) allowed remote, rather than in-person physical, verification of Form I-9 documents for certain employees. This relaxed I-9 inspection policy permitted document verification by video link, fax or email until the affected employees began "non-remote employment on a regular, consistent or predictable basis:" or until the end of flexibilities on July 31, 2023, whichever was earlier. These temporary COVID-19 flexibilities for Form I-9 compliance allowing for remote inspections of I-9 form documents expired on July 31, 2023.

Starting on August 1, 2023, employers must return to physically inspecting I-9 documents for new hires and for re-verification. Also, by August 30, 2023, employers must perform in-person, physical inspections of identity and employment eligibility documents of employees whose documents were inspected remotely during the temporary flexibility period from March 20, 2020 to July 31, 2023. For employees who continue to work remotely, an employer may use an authorized representative to complete in-person, physical verification of I-9.

Alternative Procedure for I-9 In-Person Physical Document Inspection

On July 24, 2023, ICE issued regulations for an alternative inspection procedure to physical inspection of I-9 documents for certain employers. This Alternative Procedure is available only to E-Verify participants in good standing, defined as any employer who: (1) has enrolled in E-Verify with respect to all hiring sites in the United States for which it intends to use the Alternative Procedure; (2) is in compliance with all requirements of the E-Verify program, including but not limited to verifying the employment eligibility of newly hired employees in the United States; and (3) continues to be enrolled and a participant in good standing in E-Verify at any time during which the employer uses the Alternative Procedure.

The Alternative Procedure is as follows:

A qualified employer (or an authorized representative acting on such an employer's behalf, such as a third-party vendor) who chooses to use the Alternative Procedure must, within three business days of an employee's first day of employment:

- Have the employee transmit a copy of the I-9 documents to the employer;
- Examine copies (front and back, if the document is two-sided) of Form I-9 documents submitted by the employee to ensure that the documentation presented reasonably appears to be genuine;
- Conduct a live video interaction with the individual during which the individual presents the same document(s) previously transmitted to the employer to ensure that the documentation reasonably appears to be genuine and related to the individual;
- Indicate on the Form I-9, by completing the corresponding box, that an Alternative Procedure was used to examine documentation to complete Section 2;

- Retain a clear and legible copy of the documentation (front and back if the documentation is two-sided); and
- In the event of a Form I-9 audit or investigation by a relevant federal government official, make available the clear and legible copies of the identity and employment authorization documentation presented by the employee for document examination in connection with the employment eligibility verification process.

A qualified employer enrolled in E-Verify may use this Alternative Procedure starting on August 1, 2023 for all new hires and to comply with its obligation to physically inspect by August 30, 2023 of all employees for whom it conducted remote document inspections during the period from March 20, 2020 through July 31, 2023. To use the Alternative Procedure for remote inspections that occurred from March 20, 2020 through July 31, 2023, the employer must have been enrolled in E-Verify at the time of those inspections.

An employer need not use the Alternative Procedure for all of its employees but must be consistent in the manner in which it uses the Alternative Procedure and do so in a non-discriminatory manner. For instance, if an employer chooses to offer the Alternative Procedure to some employees at an E-Verify hiring site, that employer must do so consistently for all employees at that site. However, a qualified employer may choose to offer the Alternative Procedure for remote hires only but continue to apply physical examination procedures to all employees who work onsite or in a hybrid capacity, so long as the employer does not adopt such a practice for a discriminatory purpose or treat employees differently based on a protected characteristic.

Revised Form

The new Form I-9 should be used immediately, but there is a grace period until October 31, 2023 for an employer's continued use of the current I-9 Form. Thus, beginning November 1, 2023, only the Form I-9 dated 8/01/23 may be used. The following are the main revisions contained in the new Form I-9:

Reduces Sections 1 and 2 to a single-sided sheet;

Designed to be a fillable form on tablets and mobile devices;

Moves the Section 1 Preparer/Translator Certification area to a separate, standalone supplement that employers can provide to employees when necessary;

Moves Section 3, Reverification and Rehire, to a standalone supplement that employers can print if or when rehire occurs or reverification is required;

Revises the Lists of Acceptable Documents page to include some acceptable receipts as well as guidance and links to information on automatic extensions of employment authorization;

Reduces Form instructions from 15 pages to 8 pages; and

Includes a checkbox allowing employers to indicate they examined Form I-9 documentation remotely under a DHS-authorized alternative procedure rather than via physical examination.

Employers should download and use the new form immediately for all new hires. The form is available at <https://www.uscis.gov/i-9>.

BEST PRACTICE: Always download the latest I-9 form when you hire a new employee as there are frequent changes to the form, sometimes more than once a year.

Background

All U.S. employers must complete and retain a Form I-9 for each individual they hire for employment in the United States. This includes citizens and noncitizens. The purpose of this form is to document that each new employee (both citizen and noncitizen) hired is authorized to work in the United States. Form I-9s are available in English and Spanish at: <https://www.uscis.gov/i-9>. You must have the latest version of the free Adobe Reader to download Form I-9. Do not file Form I-9 with any government agency. Form I-9 must be kept on file by the employer. There are no fees to the employer. NOTE: The Spanish version of Form I-9 may be completed by employers and employees in Puerto Rico ONLY. Spanish-speaking employers and employees in the 50 states

and other U.S. territories may print this version for their reference but may only complete the form in English to meet employment eligibility verification requirements.

Form I-9 has been made easier to complete on a computer. Enhancements include drop-down lists and calendars for filling in dates, on-screen instructions for each field, easy access to the full instructions, and an option to clear the form and start over. When the employer prints the completed form, a quick response (QR) code is automatically generated, which can be read by most QR readers. Other changes include the addition of prompts to ensure information is entered correctly; the ability to enter multiple preparers and translators; a dedicated area for including additional information rather than having to add it in the margins; and a supplemental page for the preparer/translator. The instructions have been separated from the form, in line with other USCIS forms, and include specific instructions for completing each field.

Completing the Form

Section 1 of the Form I-9, Employee Information and Verification, must be completed **no later than the first day of employment**. However, this section should never be completed before the employee has accepted a job offer.

An employee can be either a citizen, a noncitizen national of the United States, a lawful permanent resident, or an alien authorized to work.

- **Noncitizen nationals** are persons born in American Samoa, certain former citizens of the former Trust Territory of the Pacific Islands, and certain children of noncitizen nationals born abroad. More information on noncitizen nationals can be found on the Department of State website at: <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/us-citizenship/Certificates-Non-Citizen-Nationality.html>
- **Lawful permanent residents** are individuals who are not U.S. citizens and who reside in the U.S. under legally recognized and lawfully recorded permanent residence as an immigrant.
- **Aliens authorized to work** are individuals who are not citizens or nationals of the U.S. or lawful permanent residents, but are authorized to work in the U.S.

Employers should note the work authorization expiration date (if any) shown in Section 1. For employees who indicate an employment authorization expiration date in Section 1, employers are *required* to reverify employment authorization for employment *on or before the date shown*. Providing a Social Security Number is voluntary. However, if the employer participates in E-Verify, then employees must provide Social security numbers. Preparer/Translator Certification area to a separate, standalone supplement that employers can provide to employees when necessary. This must be completed if Section 1 is prepared by a person other than the employee. A preparer/translator may be used only when the employee is unable to complete Section 1 on his or her own. *However, the employee must still sign Section 1 personally.*

The employer completes Section 2, Employer Review and Verification, of the Form I-9. There is a separate Lists of Acceptable Documents to establish identity and employment authorization. *Employers cannot specify which documents an employee should present.* Employees may present any List A document *OR* a combination of a List B and a List C document. In Section 2 of the form, Employer Review and Verification, List A has space for including three documents. This may be confusing because, clearly, according to the instructions, employees must present one selection from List A *OR* a combination of one selection from List B and one selection from List C. The explanation is that some List A documents are actually combination documents. The employee must present combination documents together to be considered a List A document. For example, a foreign passport and a Form I-94 containing an endorsement of the alien's nonimmigrant status must be presented together to be considered a List A document. Hence, the added space.

On the Lists of Acceptable Documents, under List C. point 1., there are three restrictions for the use of social security cards that, when included on the card, render that social security card an INVALID document for

completing the I-9: 1) Not Valid for Employment; 2) Valid for Work Only with INS Authorization; and 3) Valid for Work Only With DHS Authorization. Also in Section 2, employers must record: the document title, the issuing authority, the document number, the document expiration date (if any) and the date employment begins. Employers must sign and date the certification in Section 2. Section 3, Updating and Reverification, is completed by the employer upon the rehiring of a former employee or when a previous grant of work authorization has been expired. Employers also have the option of completing a new Form I-9 instead of completing Section 3.

Recordkeeping Requirements

Employers must keep I-9 Forms for all current employees. Do not keep the Form I-9 records with personnel records as this could compromise the privacy of employees by allowing government inspectors to review items during an audit that are completely unrelated to the Form I-9. **NOTE:** While retaining copies of the supporting documents is voluntary, there are pros and cons to doing so: On the one hand, some would argue that maintaining copies of documents leaves an unnecessary paper trail for government inspectors. On the other hand, maintaining documentation could provide a good faith defense for an employer in showing that it had reason to believe a worker was authorized even if the paperwork was not properly completed. *Whatever an employer decides, it is of the utmost importance to be consistent: **Keep copies of documents for every employee or none at all***, since keeping copies only for certain employees could open the employer up to charges of discrimination. An employee who fails to produce the required document(s) or a receipt for a replacement document(s) (in the case of lost, stolen or destroyed documents) within three business days of the date employment begins can be terminated. These practices must be applied uniformly to all employees. If an employee has presented a receipt for a replacement document(s), he or she must produce the actual document(s) within 90 days of the date employment begins.

Upon termination of employment, employers should calculate two dates: The first is the date three years from the date of the employee's date of hire. The second is the date one year from the termination date. *The later date is the date until which the Form I-9 must be retained.* **Example:** An employee is hired on May 1, 2015. He terminates his employment on October 1, 2017. Using the formulas above, we calculate the two dates as May 1, 2018 and October 1, 2018. The date on which this employee's I-9 should be destroyed is October 1, 2018. It is best practice to establish a reminder system to make sure you destroy forms no longer required to be retained.

Employer Retention of Documents

Workers sometimes request their employers hold their identity documents for them for safekeeping. **This practice is not recommended.** Retention of your workers' identity documents can easily be construed as an infringement of your workers' rights by providing the appearance that you are restricting their freedom as a means to bind them to you or are forcing them to do work they may not have consented to for fear of losing their documents permanently. Instead, where workers fear the loss or theft of their identity documents, employers may provide a safe, voluntary storage option, such as individual lockers in a secure location that offer workers unrestricted access to their valuables. Only the worker should possess a key to such storage.

If You Are Audited

If you receive a notice of inspection from the Department of Homeland Security, you are usually able to request three days to prepare for the audit. (If a subpoena or warrant is issued, the three day rule is not valid.) Take advantage of the option of taking the documents to the local DHS office as opposed to scheduling a farm visit. While this may be difficult, take the time to travel to the regional office rather than inviting an inspector to your farm. You will be asked for a list of employees. Instead of providing payroll records, which will give DHS additional information about your business, simply type up a list of all employees along with the information required by the inspection notice. The agent may request to take your original documents. Request a receipt and keep a copy if this occurs. It is advisable to contact a qualified attorney to assist you with this preparation. Finally, you would do well to conduct a self-audit to identify and correct problems, where possible, prior to receiving an actual audit notice.

What is E-Verify?

E-Verify is a free, voluntary, internet-based system that allows employers to confirm the legal working status of **new** hires by matching a new hire's Social Security Number and other Form I-9 information. E-Verify is *not* a pre-employment screening tool and cannot be used to check the status of an existing employee. Employers with as few as one employee can register for participation in E-Verify at: <https://e-verify.uscis.gov/enroll/>. **Please Note:** Upon logging in for the first time, users will be required to complete a one-time 20-minute tutorial. The system will be inaccessible until you do so; users' existing IDs and passwords will not change.

IMPORTANT NOTE: This information is a general overview of the legal issues discussed herein and should not be considered legal advice. Readers are urged to consult with legal counsel for precise answers to individual questions and the application of these legal principles to their individual situations. NYF B's Legal Affairs Department, 518-431-5628, can refer members to an attorney who specializes in immigration issues. General Information on immigration laws, regulations and procedures can be obtained by telephoning the Department of Homeland Security National Customer Service Center at 1-800-375-5283 or by visiting www.uscis.gov. New York Farm Bureau's *Farmer's Guide to Labor and Employment Laws* and *Farmers Guide to ICE and Immigration Law Enforcement Activities: An Employer's Rights and Responsibilities* are available for purchase by calling Member Support at 1-800-342-4143