

# I-9 & Employment Verification: Don't Play with Fire; Stay Compliant

Lynda S. Zengerle

When Experience Matters®

STEPTOE & JOHNSON LLP

[steptoe.com](http://steptoe.com)

October 20, 2008

# High Stakes for Employers

Under the Immigration and Nationality Act (“the INA”), employers who violate employment eligibility requirements are subject to civil and criminal penalties.

# Immigration Related Minefields

Employers may be fined for:

- Knowingly employing unauthorized aliens
- Failure to comply with requirements relating to employment eligibility forms (Form I-9)
- Wrongful discrimination against job applicants or employees on the basis of nationality or citizenship
- Immigration-related document fraud

# Work Authorization and Identity Documents

“Knowingly” includes actual *and* constructive knowledge

# Examples of Employer's Constructive Knowledge

- Failure to complete Form I-9 for unauthorized worker
- Failure to reverify I-9
- Employer has information available that indicates worker is not authorized for employment
- Failure to reconcile conflicting information given by employee
- Hiring contracting companies that employer knows have used or are using unauthorized workers

# NOT Constructive Knowledge

- Rumor or hearsay (e.g. report from another employee)
- Social Security No Match letter (as of now – more on this in next section)
- Employee request for permanent residence sponsorship (unless information obtained in conjunction with request or process conflicts with I-9 information)

# Stakes Get Higher: Increased Civil Penalties

- On March 27, 2008, the U.S. Department of Justice enacted higher civil fines against employers who violate immigration laws.
- According to the DOJ, the fines have been adjusted for inflation, with the average adjustment approximately 25 percent.

# Increased Civil Penalties

- Knowing employment of an unauthorized alien increased from \$275 to \$375 per count
- Some higher civil penalties increased by \$1,000
- Maximum penalty for first violation increased from \$2,200 to \$3,200 per count
- Largest increase is maximum civil penalty for multiple violations, which was raised from \$11,000 to \$16,000

# Criminal Penalties

Certain violations can be considered criminal offenses and therefore subject to penalties including jail time.

These are typically reserved for serious and repeat offenders who have clearly demonstrated an intention to evade the law.

## Criminal Penalties

For example, under INA section 274(a)(3)(A) it is a criminal offense carrying a penalty of up to five (5) years, for:

“any person who during a 12-month period knowingly hires for employment at least 10 individuals with actual knowledge” that the individuals are not authorized to work and were brought into the U.S. illegally.

# Heavy Costs

Penalties are assessed on a per-alien basis; thus, if an employer knowingly employed or continued to employ five (5) unauthorized aliens, the result could be five fines.

# **New Form I-9: Do's and Don'ts**

# Work Authorization and Identity Documents

The I-9 Employment Eligibility Verification process, created by the Immigration Reform and Control Act of 1986 (IRCA), provides employers with a means to verify an employee's:

- Identity; and
- Eligibility to work in the U.S.



# I-9 Verification

I-9 Verification must be performed for all employees (U.S. citizens and noncitizens) including:

- New hires
- Employees (reverification)
- Acquired employees (mergers, acquisitions, and reorganizations)

# Who is not I-9'ed?

- “Grandfathered” employees hired before November 7, 1986
  - Independent contractors
  - Internal transfers
  - Rehires within three (3) years of initial I-9\*
- \* If version of the Form I-9 dated before June 5, 2007 was used in initial verification of the employee, employer must complete a new Form I-9 upon rehire.

# Form I-9 Deconstructed

- Section 1, Employee Information and Verification: must be completed by employee indicating citizenship or alien status
- Section 2, Employer Review and Verification: must be completed by employer after inspecting original documents submitted by employee
- Section 3, Updating and Reverification: must be completed by employer on/before expiration of work authorization or upon re-hire (if applicable)

# List A Documents

List A documents establish identity and work authorization.

# List B Documents

List B documents establish identity.

# List C Documents

List C documents establish work authorization.

# I-9 Timeline

Section 1 must be completed at “time of hire”.

Section 2 must be completed within three (3) business days of hire.

Exceptions: in some circumstances, employer may complete I-9 on or before first day of hire. (e.g. hires of 3 days or less must complete I-9 on first day).

## I-9 Employment Verification: Employer Responsibilities

- Ensure that employee properly and timely completed Section 1 and presents acceptable documents
- Physically examine identity and work authorization documents presented by employee
- Complete all fields of Section 2 of Form I-9
- Sign and date attestation within 3 days of hire date

# I-9 Employment Verification: Employee Responsibilities

- Complete Section 1 filling in each field
- Attest to immigration status including expiration of work authorization and provide A# or I-94#
- Sign and date Form I-9
- Present to employer original documents establishing identity and employment eligibility

# USCIS Revises Form I-9



As of December 26, 2007, USCIS requires the use of the revised Form I-9 (version dated 06/06/2007). Key to the revision is the elimination of five (5) documents from List A of the List of Acceptable Documents for proof of both identity and employment eligibility.

# New Form I-9 Removes from List A

1. Certificate of U.S. Citizenship
2. Certificate of U.S. Naturalization
3. Alien Registration Receipt Card (Form I-151)
4. Unexpired Reentry Permit (Form I-327)
5. Unexpired Refugee Travel Document (Form I-571)

# Acceptable Documents for List A

These documents were removed because they were vulnerable to counterfeiting, tampering, and fraud.





# New Form I-9: Acceptable Documents for List A

1. NEW: Employment Authorization Document (Form I-766)
2. U.S. Passport (unexpired or expired)
3. Unexpired Permanent Resident Card or Alien Registration Receipt Card (Form I-551)
4. Unexpired foreign passport with temporary I-551 stamp
5. Unexpired Employment Authorization Document with a photograph
6. Unexpired foreign passport with an unexpired Arrival-Departure Record (form I-94) (for nonimmigrants authorized to work for a specific employer)

# Other Changes on New Form I-9

- All employment authorization documents with photographs in circulation are now included as one item on List A (I-688, I-688A, I-688B, I-766)
- Employee is not obliged to provide Social Security Number in Section 1 of I-9 unless employed by an E-verify employer
- Added information about electronically signing and retaining I-9 forms
- Improvements in format, font, organization, and grammar of text to make Form I-9 more readable and user-friendly

# Utilizing New Form I-9

- Employers who use outdated versions of I-9 will be subject to fines and penalties.
- Unless reverifying, employers do not need to complete new forms for existing employees to replace older version.

# Updating or Correcting Information

- To update the June 5, 2007, version of the Form I-9, employer may line through any outdated information and initial and date any updated information in contrasting colored ink. In the alternative, employer may also choose to complete a new Form I-9.
- If a version of the Form I-9 dated before June 5, 2007 was used to originally verify the employee, the employee must provide any document(s) he or she chooses from the current List of Acceptable Documents, which employer must enter in Section 3 of the latest version of the Form I-9 for reverification.

# **Proving Worker Eligibility: What is Really Expected?**

Under the Immigration Reform and Control Act (IRCA), it is illegal for employers to **knowingly hire or continue to employ employees who are not authorized to work in the U.S.**

## I-9 Documentation Issues

Employer must avoid document abuse:

- Cannot request more or different documents than required to establish identity and eligibility
- Cannot specify which documents an employee must provide
- Cannot reject valid qualifying documents



# Inspection of Documents

Employers are not document police. They must accept I-9 documents that “appear genuine and relate to employee.”

However, if documents do not reasonably appear to be genuine or relate to the employee, then employer must refuse them and ask for other documentation from the list of acceptable documents without specifying documents.

# Document Fraud

Imposes liability on employers who **knowingly**:

- Accept forged, counterfeit, or altered documents
- Accept documents issued to another individual

\*Standard of proof: must prove **knowing acceptance**

# Potential Defenses

Good faith defense available for paperwork violations:

- Employer complies if failure corrected within 10 business days (should initial and date correction)

Reasonableness standard applies

# **Social Security No Match Letter Rule Issues and Update**

## **“No-Match” Letters**

When earnings reports (W-2 Forms) sent by employers to the SSA contain a combination of employee name and Social Security number (SSN) that do not match, the SSA sends an "Employer Correction Request" informing the employer of the mismatch. Such letters are commonly referred to as employer "no-match letters."

# Background

- On August 15, 2007, the US Department of Homeland Security (DHS) issued final regulations outlining the legal obligations of an employer who receives a "no-match letter" from the Social Security Administration (SSA) or a letter regarding employment verification forms from DHS and sets forth "safe harbor" guidance for employers dealing with either situation.
- Originally, the new regulation was scheduled to take effect September 14, 2007.

There are several reasons why a “no match” letter may be issued:

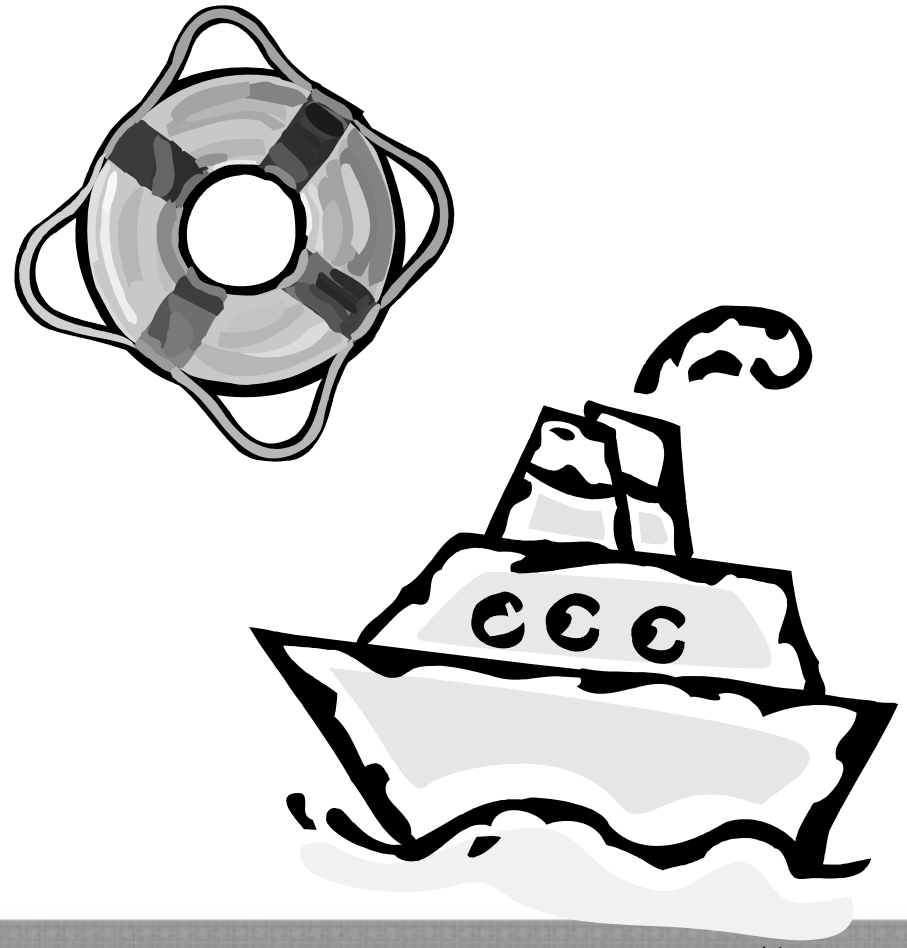
- Clerical Errors
- Employees with several different surnames
- Incomplete or missing name on W-2 form
- Employee name changes due to marriage or divorce
- Worker providing false documentation to employers

# Constructive Knowledge

- Immigration law makes it illegal for employers to knowingly hire an employee not authorized to work in the United States, whether through actual or constructive knowledge.
- The DHS rule also broadens the legal definition of “constructive knowledge”.
- Previously employers who received no match letters were under no obligation to act. The new rule sets forth “safe harbor” procedures that an employer receiving a letter must follow to protect against a finding of constructive knowledge.

# Safe Harbor Procedures

The DHS regulations set forth a "safe harbor" protocol describing what steps a reasonable employer should take promptly upon receipt of a no-match letter from SSA or DHS to protect itself from fines or worse.





## Within 30 Days



Of receipt of a no match letter, an employer must:

- Review records and correct error if it is internal
- Verify with SSA or DHS that the number and name match and employee is indeed authorized to work

## Within 90 Days

Of receipt of no match letter, if actions taken do not resolve the no match, the Employer must:

- Complete new I-9 for employee
- Complete Section 1 of Form I-9 within 93 days of receipt of no match letter

- In completing new I-9, employer cannot accept any disputed documents used for initial I-9 to establish employment eligibility (i.e. the Social Security card and number in question).
- In completing the new I-9, employer cannot use a document without a photograph to establish identity.

# Consequences

If the employer cannot verify the employee's work eligibility through completion of a new I-9 form, the employer must decide whether to terminate the employee, or face the risk in any subsequent DHS enforcement action of being determined to have constructive knowledge and being penalized for the continuing employment of an unauthorized alien.

## Controversy Over the Rule

Implementation of the controversial rule has been delayed due to litigation initiated by leading prominent organizations including the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the American Civil Liberties Union (ACLU), and National Immigration Law Center to challenge the rule.

# Ongoing Litigation



Major arguments against the DHS rule include concerns that the rule:

- Is inconsistent with certain existing immigration laws
- Delegates to DHS and SSA impermissible statutory authority
- Will result in discrimination and potential firing of lawfully employed workers

## Cost to Employers

On September 18, 2007, the Small Business Administration (SBA) sent a letter to DHS Secretary Michael Chertoff expressing the SBA's concerns with the no match rule and its significant economic impact on small businesses. The SBA's actions represented an unusual display of intergovernmental dissent.

# Potential Harm to Authorized Workers

Judge Breyer, U.S. Supreme Court Justice Stephen Breyer's brother, granted the preliminary injunction blocking the rule. He believed that making employers liable for failure to respond to a SSA or DHS letter based on errors and inaccuracies attributable to the government's Social Security records would pose a direct threat to the jobs of US citizens and legally authorized workers.



## No Match Letters Curbed

The injunction issued on October 15, 2007 restrained DHS and SSA from mailing or sending employers SSA No Match letters that include or reference the DHS final rule. This injunction remains in place and no No Match letters have been sent since August 2007.

# Recent Developments

On March 21, 2008, DHS issued a supplemental proposed rule. This rule leaves substantive provisions of the previous rule largely unchanged, including the safe harbor provisions.

Instead, the supplemental proposed rule responds to the concerns raised by the Court and provides a more detailed analysis of DHS' rationale in promulgating the No Match Rule.

DHS argues that the rule does not create new legal obligations for businesses but rather outlines steps an employer may take in response to receiving a no match letter.

## Current Status of No Match

The 60 day comment period on the supplemental proposed rule closed in April 2008, with the rule drawing sharply critical responses from business coalitions and immigrant rights groups.

However, there have been no substantial developments since April 2008. While the preliminary injunction remains in place, the fate of the No Match Rule remains unclear.

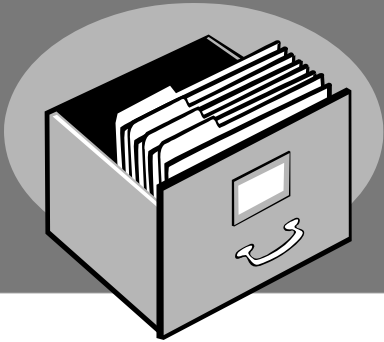
Employers and counsel will have to stay tuned for further developments in this continuing, contentious debate.

# Important I-9 Tips for Employers

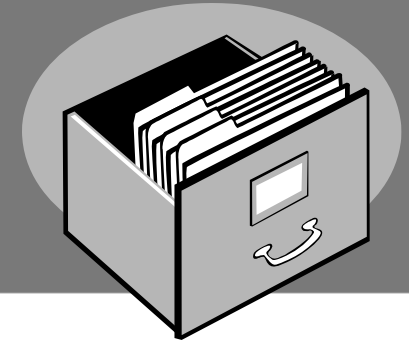
# I-9 Tips for Employers

- Institute uniform policy for I-9 verification
- Retaining copies of identity and work authorization documents will be helpful for internal audits and potentially avoiding paperwork violation fines





## I-9 Retention



- Employers are responsible for retention of I-9 records
- I-9 records must be retained throughout the employee's period of employment
- After an employee's termination, I-9 must be retained either three years after the date of hire or one year after the date of termination, whichever is later

## I-9 Retention

Form I-9 records may be stored at the work site, company headquarters or another location, but storage site must be feasibly accessed by the worksite within 3 days of official request for production of documents for inspection.

## I-9 Retention

I-9 records may be stored in original paper form, electronic, or microfilm/microfiche formats.

# Electronic Retention of I-9 Records

System must have:

- Controls for integrity, accuracy and reliability
- Controls to prevent/detect unintentional changes
- A quality assurance program including regular system inspections
- Retrieval system that is functionally equivalent to filing system
- Ability to produce legible hard copies

System must not be subject to licenses restricting government access.

# Inspections

- Upon request of DHS, all I-9 records subject to retention must be made available for inspection in their original form or on microfilm/microfiche
- Employers are entitled to at least three (3) days of advance notice before the inspection

# Inspections

Upon notice of inspection, employers should contact and consult with counsel immediately.

# Auditing Internal I-9 Processes

- Employers are well served to internally audit existing I-9 processes in-house or with assistance of counsel on a regular basis
- Internal I-9 audits allow employers to review and correct I-9 documentation and processes and preempt potential DHS penalties

# Discovering Unauthorized Employees

- When an employer learns that an employee is not authorized to work, the employer should question the employee and allow for another opportunity for review of proper I-9 documentation
- If the employee is unable to provide satisfactory documentation, employment should be discontinued

# Discovering False Documentation

False documentation includes documents that are counterfeit or those that belong to someone other than the employee presenting them.

# Discovering False Documentation

- U.S. law does not require an employer to terminate an employee who initially presents false documentation to gain employment and subsequently obtains proper work authorization
- However, an employer's personnel policies regarding provision of false information to the employer may apply and must be applied consistently
- The employer should correct the relevant information on the Form I-9

Employers navigating employment verification can feel like they are playing with fire. However, an employer who exercises good faith and follows the proper procedures can protect against getting burned.



# Payment Form for Continuing Legal Education Credits

Subject Matter: **I-9 & Employment Verification: Don't Play with Fire; Stay Compliant**  
Event # : 1589

**Number of attendees requesting CLE Credits:**

\_\_\_\_\_ attendees requesting CLE credits @ \$65 each = \$\_\_\_\_\_ **TOTAL DUE.**

Credits will not be processed until payment is received.

**Main Registrant:**

**Name:** \_\_\_\_\_  
**Firm:** \_\_\_\_\_  
**Address:** \_\_\_\_\_  
\_\_\_\_\_

**PAYMENT OPTIONS:**

**Payment Enclosed.** *My check or credit card authorization is enclosed. Make check payable to National Constitution Center Conferences or check for credit card below:*

**MC**    **VISA**    **AMEX**    **Discover**

**Credit Card #:** \_\_\_\_\_  
**Expiration Date:** \_\_\_\_\_  
**Signature:** \_\_\_\_\_  
**Billing Address:** \_\_\_\_\_

**EASY WAYS TO PAY**

**by Telephone:**  
 1-800-859-8676

**by FAX:**  
 215-689-3435

**by Mail:**  
 National Constitution Center Conferences  
384 Technology Drive  
Malvern, PA 19355

**by E-mail:**  
 dchellel@constitutionconferences.com



# NATIONAL CONSTITUTION CENTER CONFERENCES

384 TECHNOLOGY DRIVE • MALVERN, PA 19355

PHONE 800.859.8676 • FAX 215.689.3435

## Audio Conference Evaluation (1589)

### **“I-9 & Employment Verification: Don’t Play with Fire; Stay Compliant”**

**Thursday, October 23, 2008 – 1:00 PM ET**

Please take a moment to fill out this evaluation form and return it to National Constitution Center via fax (215-689-3435) or mail. Your comments will help us make future audio conferences even more valuable. If you would like your comments to remain anonymous, do not fill out the contact information below. We recommend that you complete and return the evaluation as evidence of your attendance for CLE Credit.

#### **Contact Information:**

Name: \_\_\_\_\_ Title: \_\_\_\_\_ Company \_\_\_\_\_  
Phone: \_\_\_\_\_ Fax: \_\_\_\_\_ E-mail \_\_\_\_\_

May we use your comments in future promotions? \_\_\_ Yes \_\_\_ No

1. Did the conference cover topics that you are currently faced with?

Comments: \_\_\_\_\_  
\_\_\_\_\_

2. Were recommendations presented during the conference that you found useful in your current situation?

Comments: \_\_\_\_\_  
\_\_\_\_\_

3. How valuable was the live question and answer session to you on a scale of 1-5 (1 poor, 5 excellent)

Comments: \_\_\_\_\_  
\_\_\_\_\_

4. Did you face any technical difficulties prior to or during the conference? If yes, please explain:

\_\_\_\_\_  
\_\_\_\_\_

5. Please rate **Lynda Zengerle**, the conference presenter, on a scale of 1-5 (1 poor, 5 excellent)?

\_\_\_ Preparation                      \_\_\_ Verbal Presentation                      \_\_\_ Question-and-Answer Session  
\_\_\_ Expertise                              \_\_\_ Conference Materials

Comments: \_\_\_\_\_  
\_\_\_\_\_

6. How many people listened in on the conference from the phone line you dialed in from? \_\_\_\_\_

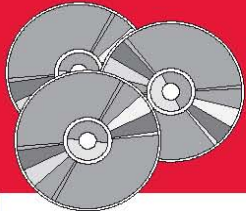
7. Do you have any suggestions for improvement? \_\_\_\_\_  
\_\_\_\_\_

8. Based on your experience with this conference, would you consider attending a future conference offered by our company?

If no, please explain: \_\_\_\_\_  
\_\_\_\_\_

9. Are there topics you would like to see covered in future conferences? \_\_\_\_\_  
\_\_\_\_\_

**Thank you for your evaluation and feedback!**



**Audio Conference CDs**  
*Reduced Price for Paid Attendees*

**Supply limited  
order today!**

**Yes!** I want to reserve my copy of the “**I-9 & Employment Verification: Don’t Play with Fire; Stay Compliant**” #1589 audio conference at the special discounted price of only \$99 (regularly \$199). This price is for conference attendees only.

**Payment information:**

Check enclosed for \$ \_\_\_\_\_  
(payable to Progressive Business Conferences)

Please charge my credit card \$ \_\_\_\_\_

Visa     Mastercard

AmEx     Discover

Account # \_\_\_\_\_

Exp. date \_\_\_\_\_

Signature \_\_\_\_\_

**Contact information:**

Name \_\_\_\_\_

Title \_\_\_\_\_

Company \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_

State \_\_\_\_\_

Zip \_\_\_\_\_

Telephone ( \_\_\_\_ ) \_\_\_\_\_

Fax ( \_\_\_\_ ) \_\_\_\_\_

E-mail \_\_\_\_\_

Customer Pin Code \_\_\_\_\_

*To help us serve you better, please supply all requested information.*

**Rush this form to:**

PBC, 384 Technology Drive,  
Malvern, PA 19355

**For fastest service, call:**

800-964-6033 or fax:  
215-689-3435

**NATIONAL CONSTITUTION CENTER**

**AUDIO CONFERENCES**

**384 Technology Drive  
Malvern, PA 19355  
Phone: 610.854.6259  
Fax: 610.408.9904**

IMPORTANT AUDIO CONFERENCE INFORMATION

Dear Audio Conference Attendee:

We have received a number of inquiries about audio conferences and the permissibility of copying and distributing materials, recording the conference as well as conferencing of calls to other sites by our listeners. Here are the main questions we receive.

**Q: How many people may listen for the \$199 conference fee?**

A: The \$199 registration charge is a “per phone line” charge. You may have as many people as feasible gather around one phone and listen to the conference.

**Q: May I photocopy, fax or email a copy of my attendee packet to one or more colleagues for the purpose of calling from another location?**

A: No. Only one phone line per registration is permitted. The first party to use your unique confirmation code will be the only phone line connected to the audio conference.

**Q: May we tape the conference during the call.**

A: No. Taping the conference and not purchasing the recording is an infringement on our copyright. However you may purchase the Audio Conference Tape or CD at the special paid attendee discounted price of only \$99 (regularly \$199). This price is reduced for conference attendees only.

We trust that our audience of professionals such as you will respect our legal copyright “on the honor system.” But if we learn of willful violations, we may have to seek legal remedies. If you have questions about the legal use and distribution of our conference materials not answered here, please contact us at 800-859-8676.

Sincerely,



Tina Perelli  
Conference Manager  
National Constitution Center Audio Conferences