

Employment Law Update: Form I-9 Guidance

12/21/21

The [Immigration Reform and Control Act](#) (“IRCA”), enacted on November 6, 1986, requires employers to verify the identity and employment eligibility of their employees. Employers must complete a Form I-9 for each of their workers in order to verify their identity and employment eligibility. IRCA provides for both criminal and civil penalties for violations. Employers must retain completed I-9 forms, stored using either a paper or electronic system, for at least three years from the date of the employee’s hire or one year from the date the employee’s employment ends, whichever is longer. Employers should be aware of two recent changes regarding the enforcement of employment verification for workers and the Form I-9.

Recent I-9 Updates for Employers

On October 12, 2021, the U.S. Department of Homeland Security released an internal memo, [“Worksite Enforcement: The Strategy to Protect the American Labor Market.”](#) The Secretary of Homeland Security states in the Memo that the Department will immediately end the “worksite raids” that occurred, under the Trump Administration, at workplaces where workers without documentation were suspected of working. Previously, these raids resulted in the mass arrests of undocumented employees. The Biden Administration’s approach is aimed at scrutinizing employers rather than employees. The strategy intends to reduce the demand for illegal employment by making the consequences of employing undocumented workers more severe. In addition, the Biden Administration wants to motivate workers to report violations of the law by employers and cooperate with labor investigations by ICE.

In mid-December, the U.S. Immigration and Customs Enforcement announced that it would again extend flexibility to employers in completing Form I-9. This flexibility is afforded to employers who hired workers on or after April 1, 2021, who currently work exclusively in a remote setting due to COVID-19. As a result, employers do not have to perform an in-person inspection of documents for these employees. That is until those employees work in-person on a regular, consistent, or predictable basis, or the flexibility extension is terminated, whichever occurs earlier. The extension currently runs through April 30, 2022.

I-9 Inspections

Employee I-9s must be produced upon notice of inspection by the U.S. Immigration and Customs Enforcement (“ICE”). ICE initiates inspections on employers by serving a Notice of Inspection (“NOI”) upon an employer. Employers receive at least three business days to produce the Form(s) I-9 requested in the NOI. In addition, ICE generally requests that the employer provide supporting documentation, which may include, but is not limited to, a copy of the employer’s payroll, a list of active and terminated employees, articles of incorporation, and business licenses. After ICE agents and/or auditors conduct an inspection of the Form(s) I-9 for compliance, ICE will notify the employer of its findings in writing. If ICE finds technical or procedural violations, the employer receives at least 10 business days to make corrections.

Penalties for IRCA Violations

Potential penalties for violations of the Immigration Reform and Control Act include:

- Monetary fines for all substantive and uncorrected technical violations

- Civil fines and, or, criminal prosecution for employers who are found to have knowingly hired or continued to employ unauthorized workers
- Debarment by ICE for employers who are found to have knowingly hired or continued to employ unauthorized workers

TAKEAWAY: Employers must take steps to ensure that every employee is authorized to work in the United States and that I-9 forms are correctly completed and maintained. If you are an employer and need help navigating the employee verification and employment eligibility process or any other federal or New Jersey employment law, contact [Stephanie Gironda](#) or any member of the Wilentz [Employment Law](#) Team.

Attorney

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Practice

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