

SPECIAL REPORT:

FORM I-9

Audits & Compliance

What Every Employer Should Know




**W. GARNETT
& ASSOCIATES**

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EXECUTIVE SUMMARY

The Immigration Reform and Control Act or Employer Sanctions Act (IRCA) was passed by Congress in 1986 as a measure to reduce illegal immigration and imposes strict sanctions for the employment of illegal immigrants by U.S. companies.

The IRCA makes it illegal to knowingly recruit or hire immigrants who do not possess lawful work authorization and imposes penalties on any employer who knowingly hires or employs aliens not authorized to work in the United States.

The responsibility for enforcement of the Immigration Reform and Control Act or Employer Sanctions Act law falls squarely on the shoulders of employers, requiring them to screen all new workers to ensure they are not undocumented.

To comply with the law, employers are required to verify the eligibility of all new employees at the time of hire by accurately completing the Form I-9, Employment Eligibility Verification.

Employers must also retain and store the Form I-9 for each employee in such a manner that they must be able to produce all Forms I-9 and supporting documents within three (3) business days of receiving a Notice of Inspection by the Department of Homeland Security's U.S. Citizenship and Immigration Services Bureau.

All employers, regardless of size or number of employees must comply with Form I-9 rules and make these forms available for inspection at anytime.

Failure to accurately complete and store the Form I-9 for every employee, regardless of nationality, can cost an employer thousands of dollars in fines levied by the U.S. Immigration and Customs Enforcement.

BACKGROUND



USCIS
.gov



The U.S. Department of Homeland Security (DHS) absorbed the United States Immigration and Naturalization Service in 2003 and thus took over responsibility for implementing and enforcing the employment eligibility program.

Beginning in early 2009, the Department of Homeland Security (DHS), and the Division of Immigration and Customs Enforcement (ICE) implemented several key changes to employment verification laws that dramatically impact all employers.

Federal law requires employers to hire only individuals who may legally work here: citizens and nationals of the United States, lawful permanent residents, and aliens authorized to work

To comply with the law, the identity and employment authorization of each person hired must be verified using Form I-9, which is retained for each employee.

On April 3, 2009, the U.S. Citizenship and Immigration Services (USCIS) implemented the revised Employment Eligibility Verification Form (I-9) – also known as the “Form I-9” –resulting in changes to the Form I-9 Compliance process, which also affects a company’s ability to comply with the law.

The challenge all employers face, for which this guide is intended, is to comprehend and comply with a complex set of rules regarding the Form I-9.

Form I-9 audits are not uncommon, and this guide is intended to help employers understand the Form I-9 process and institute a set of Best Practices to achieve a state of readiness and above all, minimize or eliminate risk of fines and penalties.

INTRODUCTION

The Immigration Reform and Control Act (IRCA) of 1986 requires employers to use the Form I-9 to verify the identity and work eligibility of all employees hired after November 6, 1986, and to properly complete the form whenever a new employee is hired to perform labor or services in return for wages.



“Many employers are unaware that they **MUST** comply with Form I-9”.

- Wes Garnett
President

But changes to our nation’s immigration laws, at both the state and federal levels, have resulted in much confusion about Form I-9 Compliance. Many employers are not simply aware of the laws that mandate compliance with the law, or in other cases, employers may be deficient in specific areas of Form I-9 Compliance.

In addition, responsibility for overseeing Form I-9 Compliance at the federal level has shifted from various agencies, and at the state level, responsibility for the management of Form I-9 Compliance falls to various state agencies.

Today, as requirements for Form I-9 Compliance have been tightened, employers are finding that they, and not illegal employees, are the targets of enforcement actions by governmental agencies, and that failure to fully comply with the IRCA, can and will result in criminal prosecutions and civil penalties.

Form I-9 Compliance is critical for all employers who wish to avoid the time and expense to defend themselves and their companies from unnecessary legal actions for non-compliance.

FORM I-9 COMPLIANCE FOR EMPLOYERS

About Form I-9

“Form I-9 Compliance” is a term commonly used to explain the requirements of an employer to verify the employment eligibility of an individual employee in the United States, and takes its name from the form used in this process: the Employment Eligibility Verification Form (I-9).

The Immigration Reform and Control Act (IRCA) of 1986 requires employers to use the Form I-9 to verify the identity and work eligibility of all employees hired after November 6, 1986, and to properly complete the form whenever they hire an employee to perform labor or services in return for wages.

The IRCA introduced Form I-9 when it made hiring an illegal immigrant a criminal offense, and established penalties for doing so.

The Form I-9 Process

The employment eligibility verification process begins with the completion of the Department of Homeland Security's Form I-9.

The employment eligibility verification process can be initiated before the employee's first day of work, and the I-9 verification process must be completed within three (3) business days of the employee's start date.

However, Form I-9 cannot be completed until AFTER the individual employee has been hired. In addition, employers CANNOT terminate existing or potential employees over possible non-confirmation of the data provided.

FORM I-9 COMPLIANCE FOR EMPLOYERS

Which Employers Must Comply?

All companies and organizations which employ workers, regardless of tax status (for-profit or non-profit), and regardless of whether employees work full-time or part-time, must comply with Form I-9 rules.

In addition, the definition of “employer” has been expanded to include:



- All who employ individuals in their homes for domestic work on a regular basis such as every week, or every other week, must complete the Form I-9. Form I-9 must be completed on the first day of employment.
- All agricultural employers, associations, and farm labor contractors who employ workers must complete the Form I-9. No one is exempt.

Which Employers Are Exempt?

There are several narrow exemptions when employers are not required to complete Form I-9, which include:

- Domestic services in a private household which are sporadic, irregular or intermittent.
- Services for the employer as an independent contractor, for whom the employer does not set work hours, provide tools to do the job or have authority to hire and fire.
- Employees working outside the United States or its territories (United States for Form I-9 purposes = 50 States, DC, Guam, Puerto Rico, Virgin Islands, and later in 2009, the Commonwealth of the Northern Mariana Islands.)

FORM I-9 COMPLIANCE FOR EMPLOYERS

New Changes To Form I-9

The most noticeable difference to the Form I-9 is that all documents presented during the verification process must now be UNEXPIRED.



The old edition of the Form I-9 (dated 6/5/2007) is no longer valid for use after April 3, 2009.

Expired documents may not portray a valid status and are also prone to tampering and fraudulent use. Therefore, the Department of Homeland Security wants to ensure that documents presented for use in the Form I-9 process are valid and reliably establish both identity and employment authorization

This new change takes into account the limits placed on these documents by their issuing authorities. For instance, if a document does not contain an expiration date, such as a Social Security card, it is considered unexpired.

In addition, some documents have been added or removed from the list of eligible documents, which, according to the Department of Homeland Security:

- **The changes will significantly improve the security of the employment eligibility verification process.**
- **An expansive document list makes it more difficult for employers to verify valid and acceptable forms and single out false documents, which compromises the overall effectiveness and security of the I-9 process.**

Which documents have been added and which documents have been removed from list of acceptable documents for the new Form I-9?

FORM I-9 COMPLIANCE FOR EMPLOYERS

Changes To Acceptable Documents - Added

Two (2) types of documents have been added to List A on the List of Acceptable Documents:

- **A temporary I-551 printed notation on a machine-readable immigrant visa in addition to the foreign passport with a temporary I-551 stamp**
- **A passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with a valid Form I-94 or Form I-94A**

Changes To Acceptable Documents - Removed

Three (3) documents were removed from List A of the List of Acceptable Documents:

- **Form I-688, Temporary Resident Card**
- **Form I-688A, Employment Authorization Card**
- **Form I-688B, Employment Authorization Card**

New Noncitizen National Block Added

A new noncitizen national block has been added to Section 1 of Form I-9. Now, an employee has a choice to attest to being either a citizen or a noncitizen national of the United States.

- **A noncitizen national is a person born in American Samoa, certain former citizens of the former Trust Territory of the Pacific Islands, and certain children of noncitizen nationals.**

FORM I-9 COMPLIANCE FOR EMPLOYERS

Acceptable Documents for Employee Identification

<u>LIST A</u>	OR	<u>LIST B</u>
Documents That Establish BOTH Identify & Employment Authorization		Documents That Establish Identity Only
<ol style="list-style-type: none"> 1. U.S. Passport or U.S. Passport Card 2. Permanent Resident Card or Alien Registration Receipt Card (Form I-551) 3. Foreign Passport that contains a temporary I-551 stamp or temporary I-551 printed notation on a machine readable immigrant visa 4. Employment Authorization Document that contains a photograph (Form I-766) 5. Foreign Passport with unexpired Arrival-Departure record, I-94, bearing the same name as the passport and containing an endorsement of the alien's non-immigrant status, if that status authorizes the alien to work for the employer 6. A Passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with a valid Form I-94 or Form I-94A. 		<ol style="list-style-type: none"> 1. Driver's License or ID card issued by a U.S. State 2. Photo ID card issued by Federal, State, or Local Government 3. School ID card with photograph 4. Voter's Registration Card 5. U.S. Military Card or Draft Record 6. Driver's License issued by Canadian Government Authority. 7. U.S. Coast Guard Merchant Mariner Card 8. Military Dependent's ID card 9. Native American Tribal Document
<div style="border: 1px solid black; background-color: #ADD8E6; padding: 10px; margin: 10px auto; width: fit-content;"> <p style="margin: 0;">IMPORTANT NOTE:</p> <p style="margin: 0; text-align: center;">All documents must be UNEXPIRED.</p> </div>		

FORM I-9 COMPLIANCE FOR EMPLOYERS

Acceptable Documents for Employee Identification – Cont’d.

<u>UNDER 18</u>	AND	<u>LIST C</u>
For Persons Under Age 18 Unable To Present Documents Listed In A Or B		Documents That Establish Employment Authorization
<ol style="list-style-type: none"> 1. School Record or Report Card 2. Clinic, Doctor or Hospital Record 3. Daycare or Nursery School Record 		<ol style="list-style-type: none"> 1. U.S. Social Security Card 2. Certification of Birth Abroad, issued by Department of State (Form FS-545) 3. Certification of Report of Birth, issued by the Department of State (Form DS-1350) 4. Original or Certified copy of a Birth Certificate 5. Native American Tribal Document 6. U.S. Citizen ID Card (Form I-197) 7. ID Card for use of Resident Citizen in the U.S. (Form I-179) 8. Employment Authorization Document issued by DHS
<div style="border: 1px solid black; background-color: #ADD8E6; padding: 10px; width: fit-content; margin: auto;"> <p>IMPORTANT NOTE: Employers can only verify employee identity and work authorization by seeing original documents.</p> </div>		

<u>LIST A</u>	<u>LIST B</u>	<u>UNDER 18</u>	<u>LIST C</u>
■			
	■		■
		■	■

FORM I-9 COMPLIANCE FOR EMPLOYERS

The E-Verify System

Employers must use the revised Form I-9 for all new hires and re-verifications as of April 3rd, 2009. To assist employers with compliance, the government offers the E-Verify system, a federal program run by the Department of Homeland Security.

The E-Verify system provides employers with a paperless solution to employment eligibility verification. Growing in popularity, laws in many U.S. states require its usage in some form.

More than 120,000 U.S. businesses, both public and private, are now currently using this voluntary program to verify social security numbers of employees, and 1,000 new businesses enroll each week.



E-Verify is projected to be used to verify employment eligibility of one in eight workers by the end of 2009.

In addition to its many benefits, using E-Verify offers employers “Safe Harbor”, protection in the event of a fraudulent social security number. It’s extremely important to know that the E-Verify system CANNOT be used as a pre-employment screening tool and must be used Post-Hire.

Discrimination

Employers should be forewarned that the IRCA anti-discrimination clauses prohibit four (4) different types of unlawful, discriminatory conduct against employees, including:

- **Citizenship or immigration status discrimination**
- **National origin discrimination**
- **Document abuse**
- **Retaliation**

It is also against the law to complete the Form I-9 in Spanish in most of the United States. Although the Form I-9 is available in Spanish, it may be used only in Puerto Rico.

FORM I-9 COMPLIANCE FOR EMPLOYERS

Document Storage & Maintenance



The Form I-9 must be stored in such a manner that upon the request of an authorized officer of the Department of Homeland Security (DHS), the U.S. Department of Labor (DOL), or the Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) they can be retrieved within three (3) days.

- **Employers must retain Form I-9 for all employees 3 years after the date of hire or 1 year after the date the employee terminates employment, whichever is later.**
- **Form I-9 may be stored at worksite, company headquarters, off-site storage facility, or electronically.**
- ***The Form I-9 should never be kept in an employee's personnel file.***

Binder/Folder I-9 On-Site Storage (Recommendation)

- **Binder/Folder 1: Current Employees' Form I-9**
- **Binder/Folder 2: Current Employee's State Immigration Forms, (if applicable)**
- **Binder/Folder 3: Terminated Employees' Form I-9**
- **Binder/Folder 4: Monitoring Forms I-9**
- **Binder/Folder 5: Company Policies/Communication Regarding Employer Compliance**

FORM I-9 COMPLIANCE FOR EMPLOYERS

Retention of Form I-9

The Department of Homeland Security has created a specific set of guidelines for the retention and storage of Form I-9 to which every employer must adhere.

Employers must be ready for inspection of the Forms I-9 at any given time.

- **EMPLOYER'S CURRENT EMPLOYEES MUST HAVE A FORM I-9 ON FILE FOR EACH CURRENT EMPLOYEE**
- **Employers may store photocopies of the documents together with the Form I-9, but if so, must do it for all employees**
- **Employers must ensure that only authorized personnel have access to stored Forms I-9**

Copies of Employee Documentation



While current federal law and regulations do not require the employer to copy identity and employment eligibility documents presented by the employee, employers should copy both the front and back of documents.

Making these copies shows you acted in good faith to verify the documents.

FORM I-9 COMPLIANCE FOR EMPLOYERS

“Form I-9 Questions”



Form I-9 Receipt Rules?

Receipts and other documents that serve as proof of temporary employment eligibility are:

- Receipts for the application of a replacement document where the document was lost, stolen, or destroyed, which can be a List A, List B, or List C document.
- The employee must present the replacement document within 90 days from the date of hire.

Discover A Missing Form I-9?

- Provide the employee a copy of Form I-9 immediately and allow him/her to provide acceptable documents.
- Date Form I-9 when completed. Never back date the form.

Discover Unauthorized Employees?

- The employer must request the employee provide proper Form I-9 documentation immediately. If the employee is unable to do so, the employer may terminate employment.

Correct A Mistake on Form I-9?

- Cross out incorrect information with a single line, so it is still legible. Date and initial the correction.

Authorize an Agent to Complete Form I-9?

- Employers may choose to delegate the authority to complete Forms I-9 to a responsible agent. If they choose to do so, employers retain liability for errors.

FORM I-9 INSPECTIONS & AUDITS

It is critical that all employers be ready at any time for a Form I-9 inspection or audit. Earlier this year, the Department of Homeland Security announced it would step up investigations and enforcement actions against employers.



Notification of Inspection & Audit

Employers may have just 72 hours or three (3) days notice prior to an inspection of retained Forms I-9, by the Department of Homeland Security, the Office of Special Counsel, and/or the Department of Labor.

In some cases, an employer may waive the 3-day notice and also request an extension of time to produce the Forms I-9.

Issuance of Warrants or Subpoenas

The DHS or DOL officer is NOT REQUIRED to show subpoena or a warrant at the time of the inspection. Employers who refuse or delay an inspection will be in violation of DHS retention requirements.

- This does not preclude DHS or DOL from obtaining warrants based on probable cause for entry onto the premises of suspected violators without advance notice.

Inspections & Audits

- Employers must make Forms I-9 available upon request at the location where DHS, OSC, or DOL requests to see them.
- The inspecting officers can perform an inspection at an office of an authorized agency of the United States, if previous arrangements are made.
- If Forms I-9 are stored at an off-site location, employers must inform the inspecting officer of the location where these documents are stored, and make arrangements for the inspection.
- Failure to provide Forms I-9 for inspection is a violation of the employer sanctions laws and could result in the imposition of civil money penalties.

FORM I-9 ENFORCEMENT & PENALTIES

Civil Procedures & Enforcement

There are (3) different civil enforcement sections in the Immigration and Nationality Act:

1. **Unlawful employment cases under section 274A (8 U.S.C. & 1324a)**
2. **Unfair immigration-related employment practice cases under section 274B (8U.S.C. & 1324b)**
3. **Document fraud cases under section 274C (8 U.S.C. & 274c)**

These three sections of the INA provide for the imposition of civil monetary penalties for violations of the law. Administrative hearings are necessary to adjudicate the complaints and impose civil penalties. Hearings are conducted before an administrative law judge (ALJ).

Civil Penalties

To knowingly hire or keep as an employee an unauthorized alien is punishable under the regulations by a series of civil fines. Other violations can lead to civil fines of \$110 - \$1,100 per violation and other sanctions also can be imposed.

“A pattern or practice of violations can lead to criminal fines of up to \$3000.00”.

- Department of Homeland Security

FORM I-9 FINES PER VIOLATION

1st Violation	\$250 - \$2,200
2nd Violation	\$2,200 - \$5,500
3rd Violation	\$3,300 - \$11,000

CONCLUSION

W. Garnett & Associates recommends the following Form I-9 Best Practices for employers. Taken together, these activities serve to gather and record findings of non-compliance, as well as to conduct a risk assessment.

W. GARNETT & ASSOCIATES FORM I-9 BEST PRACTICES

- **Apply risk management approaches to achieve the appropriate balance of time spent on compliance at a reasonable cost; examine vulnerabilities.**
- **Conduct an internal I-9 Audit to determine level of compliance.**
- **Identify any missing documents or expired documents and notify employees immediately.**
- **Implement an instant remedial action plan to ensure compliance.**
- **Ensure the secure storage of I-9 Forms and supporting documents and data.**
- **Develop and deploy centrally managed I-9 policies, including technologies.**
- **Train management personnel on new I-9 policies and compliance.**
- **Conduct monthly assessments on Form I-9 Compliance to minimize risk.**

Armed with this information, employers can appropriately allocate time, budget and resources to address any areas of non-compliance. By implementing a set of Best Practices, employers can better establish a corporate Form I-9 Compliance Process that supports self-compliance.

RESOURCES

Employers can use the links and phone contacts listed below to source important information relevant to complying with Form I-9. W. Garnett & Associates is available for consultations on any Form I-9 related matter.

<h1 style="margin: 0;">FORM I-9</h1> <h2 style="margin: 0;">CONTACTS & LINKS</h2>	
Download and view the revised Form I-9 (dated 02/02/09)	http://www.i-9compliance.com/pdf/i-9.pdf
Form I-9, Employment Eligibility Verification	http://www.uscis.gov/files/form/i-9.pdf
Form M-274, Handbook for Employers	http://www.uscis.gov/files/natedocument/s/m-274.pdf
Form I-9 - Call DHS	1 - 888 - 464- 4218
E-Verify - Call DHS	1 - 888 - 464- 4218
E-Verify Website	www.dhs.gov/E-Verify
W. Garnett & Associates	1 - 888 - 884 – 3910

ABOUT W. GARNETT & ASSOCIATES



W. Garnett & Associates is a Form I-9 compliance expert, as well as a strategic independent Human Resources Consulting Company. We provide a full range of support services to a variety of industry sectors, including education, hospitality, financial, manufacturing, retail and healthcare.

Areas of specialty include Human Resources Policy Development, Executive Search, Diversity/Inclusion Awareness & Employee Training and Development.

Using deep expertise in Form I-9 Compliance and employment verification, W. Garnett & Associates works closely with clients to develop processes and procedures to assist in compliance with the Immigration Reform and Control Act (IRCA), thereby significantly reducing associated time and costs.

ABOUT WES GARNETT

As President of W. Garnett & Associates, Wes Garnett has been a leader in the Human Resources community for more than 30 years, advising some of the most visible brands in the United States on Form I-9 compliance and Best Practices.

After receiving a Bachelors of Science & Masters of Education from Utah State University and his Pre-Doctorial program from the University of Pittsburgh, Wes has held positions with such prominent positions with organizations that include the Burger King Corporation, Dell Computer Corporation, Black-eyed Pea Restaurants, Buca, Inc., Taco John's International, as well as Red Robin Gourmet Burger, a publicly-traded casual dining restaurant company with over 400 restaurant locations and over 30,000 employees nationwide.

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