



RECENT CHANGES TO THE I-9 FORM REQUIREMENTS AND THE VOLUNTARY E-VERIFY PROGRAM



On November 7, 2007, the U.S. Citizenship and Immigration Services (USCIS) released a revised Form I-9 to be used by employers to verify the employment eligibility of all newly hired employees. Employers should begin using and complying with the revised Form I-9 immediately, as the new I-9 Form requirements go into effect once the notice is published in the Federal Register. The new I-9 Forms are available online at www.uscis.gov.

Jerry Pinn

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I-9 Form Changes

The most significant change to the I-9 Form was the elimination or modification of documents under List A that can be accepted by employers to establish an employee’s identity and employment eligibility. The following documents were removed from List A: Certificate of U.S. Citizenship (Form N-560 or N-570); Certificate of Naturalization (Form N-550 or N-570); Alien Registration Receipt Card (Form I-151); the unexpired Reentry Permit (Form I-327); and the unexpired Refugee Travel Document (Form I-571). USCIS claims that these documents were removed because they lack features to help deter counterfeiting, tampering, and fraud. On the other hand, the most recent version of the Employment Authorization Document (Form I-766) was added to List A of acceptable documents on the revised I-9 Form.

E-Verify Changes

Changes have also been made to the Memorandum of Understanding (MOU) which sets forth the terms and conditions governing an employer’s voluntary use of the electronic employment eligibility verification program or E-Verify, formerly know as the Basic Pilot Program. Most notably, employers that wish to use the E-Verify System are now required under the new MOU to make photocopies of Permanent Resident Cards (DHS Form I-551) or Employment Authorization Documents (Form I-766) used by newly hired employees to satisfy the requirements of the I-9 and attach these copies to the employee’s I-9. This obligation places a significant new burden on employers who were never previously required to maintain copies of any employment verification documents under the I-9 Form. The employer must then verify the photo on the Permanent Resident Card or Temporary Employment Authorization Document with the photo listed on the E-Verify System. If the employer finds a photo non-match for an alien who provides a document for which the automated system has transmitted a photo, the employer must print the tentative non- confirmation notice as directed by the system and provide it to the employee so that

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KNOW YOUR ATTORNEY

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USE OF DIFFERENT RATES IN CALCULATING OVERTIME DOESN'T VIOLATE WAGE-HOUR LAW

Fred Bissinger

"The court ruled that the law does not contain a requirement that employees performed different types of work in order for employers to lawfully pay them different rates."

..... Most everyone knows that absent an exemption, overtime pay is required at the rate of one and a half times the employee regular rate, for hours worked over 40 in a work week. The application of this concept, however, is often more complex than it seems. A federal appeals court ruled that a school district did not violate the law when it paid its bus drivers different rates of pay depending on the type of route driven, and calculated overtime through the use of a blended rate. Allen v. Board of Public Education for Bibb County, 12 WH Cases 2d 1422 (C.A. 11, 2007).

The ruling goes through the statutory and regulatory provisions, noting that the statute itself provides that: "the amount paid to the employee for the number of hours worked . . . in such workweek in excess of the maximum workweek applicable to such employee . . . in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during non-overtime hours."

Thus, under the above provision, where employees perform two or more kinds of work, overtime can be paid on the rate applicable to the same work when performed during non-overtime hours.

Another method of paying overtime is to use the so-called "blended rate." Relevant regulations provide that: "[W] here an employee in a single workweek works at two or more different types of work for which different nonovertime rates of pay . . . have been established, his regular rate for that week is the weighted average of such rates. That is, his total earnings . . . are computed to include his compensation during the work week from all such rates, and are then divided by the total number of hours worked at all jobs."

In the Bibb County case, the plaintiffs mistakenly assume that the rate paid by the employer for regular routes was their "regular rate" for calculating overtime pay. Instead, the employer had a policy of blending the rates for regular and other routes and calculating overtime based on the blended rate. The court ruled that the law does not contain a requirement that employees performed different types of work in order for employers to lawfully pay them different rates. Rather, as long as the minimum wage is respected, the employer and employee are free to establish the regular rate.

PERSPECTIVE



HOW TO REACT TO REPORTS THAT YOU MAY HAVE ILLEGALS IN YOUR WORKFORCE

Anita Patel.....

"To help an employer avoid hiring an alien who is not authorized to work, federal law imposes an obligation to verify the identity and work authorization of new hires using the Form I-9 procedures. "

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Federal law prohibits hiring for employment or continuing to employ an alien when the alien is unauthorized to work in the U.S. for the employer. To help an employer avoid hiring an alien who is not authorized to work, federal law imposes an obligation to verify the identity and work authorization of new hires using the Form I-9 procedures. However, federal law does not provide a clear procedure for dealing with all situations in which an existing employee's identity or work authorization is questioned.

It is clear that if an employer has actual knowledge that an alien employee is not authorized to work, the employer has a duty to terminate the employee. Such actual knowledge can be acquired when an employee confesses that he is not authorized to work. An employer also may be treated as knowing that an alien employee is not authorized to work even though the employer does not have an employee confession or other circumstances evidencing actual knowledge.

As an example of the dilemma faced by an employer, please consider the following situations in which an employer may be confronted.

1. The employer receives a written document from some governmental agency (other than DHS) that a person's name and Social Security number do not match.
2. The employer receives a letter from a person who claims that his/her identity has been stolen by a company employee.
3. The employer receives an anonymous letter or telephone call indicating that an employee has provided false work authorization information.
4. The employer learns from one or more employees (sources) that another employee (accused employee) is not using his/her real name.
5. The employer learns from one or more employees (sources) that another employee (accused employee) is illegal.
6. The employer learns that an employee uses a different name in other circumstances (e.g., hospitalization, insurance, etc.).

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the employee may determine whether he or she will contest the finding. The employer must then refer any employee that wishes to challenge a tentative non-confirmation based upon a photo non-match to DHS to resolve the matter within 8 federal work days. In addition, if the employee contests a tentative non-confirmation based upon a photo non-match, employers must scan and upload or otherwise mail a copy of the Permanent Resident Card or Temporary Employment Authorization Document at issue to DHS. The employer must also forward these documents to DHS when it cannot determine whether there is a photo match/non-match so that DHS can make this determination.

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HOW TO REACT TO REPORTS THAT YOU MAY HAVE ILLEGALS IN YOUR WORKFORCE *continued from page 3*

The question becomes what an employee should do in responding to these situations. This writer has reviewed case law and regulatory developments on the subject, and will attempt to suggest some general principles that may guide employers in the development of their protocols in responding to such situations.

1. If an employer acquires knowledge, either actual or constructive, that a worker is unauthorized, the employer is obligated to take some action within a reasonable period of time, or possibly be held in violation of the immigration laws. Depending on the facts and circumstances, the employer may either have an obligation to terminate the employee in question, or conduct a further investigation to determine whether the employee is authorized to work.
2. The information leading to an employer's knowledge or constructive knowledge of illegal status may come from responsible governmental sources, such as DHS, from less directly involved government agencies such as Social Security or various tax officials, or from a variety of third parties either public or private.
3. The potential for a finding of constructive knowledge and/or a duty to investigate, may depend on the credibility, quality, or detail of the information received. For example, a specific written notice from DHS that a worker is unauthorized, would probably constitute actual knowledge, while it is unlikely that a rumor of illegal status would even trigger a duty to investigate.
4. Neither the courts nor the postponed DHS regulation provide clear guidance as to what type of information can trigger the constructive knowledge standard, that it is "likely" that a worker is unauthorized. However, considerations can be determined from the case law, including the credible nature of the source, the manner in which the information is provided, and whether the information includes "why" the person is unauthorized.
5. Once an employer acquires knowledge, it is also not clear how comprehensive any subsequent investigation must be as to the status of the employee(s) in question. At least some case law suggests that simply asking the worker if he is unauthorized is an insufficient investigation. Suggestions have been mentioned by at least one judge of asking the worker for other documentation, contacting a lawyer for advice, or contacting ICE for advice.
6. Any investigation conducted by the employer as to the lawful status of certain employee(s) probably need not include the duty to suspend the employee until the outcome of the investigation is resolved.
7. There is only general guidance as to how quickly an employer should react in response to such knowledge. Where there is credible information provided to the employer of unauthorized status, such as from DHS, some case law suggests that an employer should react within a couple of week or less. When there is less credible information provided to the employer, the cases suggest that a longer period may be in order. The DHS no-match regulation, for example, allows an employer 90 days to take action, where the information received is based upon a no-match letter from Social Security.