

Alert

Final Rule Allows Electronic Signature and Storage of Employment Eligibility Verification Form I-9

September 1, 2010

Employers may now allow employees who are required to complete and sign a Form I-9, Employment Eligibility Verification ("Form I-9"), to sign the form electronically, and signed forms may be retained in an electronic format. On July 22, 2010, the Department of Homeland Security ("DHS") published a Final Rule, effective 30-days after publication in the Federal Register, that provides employers with the option to complete, sign, scan and store the Form I-9 electronically, as long as the standards promulgated by the rule are satisfied. In light of increasing government enforcement, employers, regardless of whether they maintain the forms electronically, should be aware of common Form I-9 mistakes, discussed herein.

Background

The Immigration and Nationality Act, *as amended*, requires all employers to verify the employment authorization of, and to identify, all employees hired to work in the United States. The law requires that, for each new employee, a Form I-9 be completed and kept on file with the employer for the later of three years after the date of hire or one year after the date that employment is terminated.

The Final Rule

The Final Rule provides that employers may now implement any of various systems for completing and storing the Form I-9, so long as the system ensures accessibility and can produce a reasonable facsimile or copy of the Form I-9. The Form I-9 does not need to be stored as part of the employee's other employment records. Indeed, to avoid discrimination claims, the Form I-9 should *not* be stored with personnel files or other locations to which an employee's supervisor has access. Employers may still use a paper system, an electronic system or any combination of the two. Further, employers may change electronic storage systems as long as the requirements of the Final Rule are met. An audit trail is necessary only when a record itself is created, completed, altered, updated or otherwise modified. The Final Rule requires that the employer be able to provide or transmit a confirmation of the electronic Form I-9 if the employee requests it, and that the employer provide such confirmation within a reasonable time. This policy allows both the employer and the employee time to confirm the accuracy of the information provided. The Final Rule also clarifies that the employer has three (3) business days from the date of hire to complete the verification section of the Form I-9.

Common Issues

Although electronic completion and storage of the Form I-9 may have its benefits, among them rendering the process less prone to error, employers need to be aware of several considerations. First, it is important to ensure that all of the requirements of the Final Rule are satisfied. Second, it is critical that the information stored electronically is complete and accurate. Although the Final Rule only requires that the pages completed are stored, employers must ensure that all necessary sections have been addressed. Often it is not the employee but someone else who enters the information into a system. This leaves room for error. The DHS's Bureau of Immigration and Customs Enforcement ("ICE") heavily relies on Form I-9s to pursue,

prosecute and penalize employers who employ undocumented workers and is cracking down on employers whose forms are not completely filled out or filled out incorrectly. The average fine for a Form I-9 with errors is \$750.

According to ICE's "Notice of Technical or Procedural Failures," issued on February 22, 2010, some common mistakes employers make when converting from paper-based Form I-9s to electronic versions are:

1. In Section 1, the employee's maiden name, address or birth date is missing.
2. In Section 1, no "A" number is filled-in next to the phrase, "A Lawful Permanent Resident," where the number is in Sections 2 or 3 of the I-9 (or on a document retained on the Form I-9 and presented at the I-9 inspection).
3. In Section 1, no Alien or Admission number is filled-in next to the phrase, "An alien authorized to work until," where the number is in Sections 2 or 3 of the I-9 (or on a document retained on the Form I-9 and presented at the I-9 inspection).
4. In Section 1, the employee attestation date is missing.
5. In Section 1, the employee attestation was not completed at the time of hire.
6. In Section 1, the name, address or signature of the preparer and/or translator is missing.
7. In Section 1, there is no date in the preparer and/or translator certification box.
8. In Section 2, there is no document identification number of a List A, B or C document, where a copy of document(s) is retained with the Form I-9 and presented at the I-9 inspection.
9. In Section 2, there is no document expiration date of a List A, B or C document, where a copy of document(s) is retained with the Form I-9 and presented at the I-9 inspection.
10. In Section 2, the business title, name or address is missing.
11. In Section 2, the date of hire is missing.
12. In Section 2, there is no employer attestation date.
13. In Section 2, the employer attestation was not completed within three (3) business days of the hire or, if the employee was hired for 3 business days or less, at the time of hire.
14. In Section 3, there is no document identification number of a List A, B or C document, where a copy of document(s) is retained with the Form I-9 and presented at the I-9 inspection.
15. In Section 3, there is no document expiration date of a List A, B or C document, where a copy of document(s) is retained with the Form I-9 and presented at the I-9 inspection.
16. In Section 3, the date of rehire is missing.

Employers should be diligent in the completion and storage of Form I-9s. Immigration enforcement—including Form I-9 audits and unannounced site visits—has been increasing in recent years. Employers should not only develop, but successfully implement, immigration crisis management protocols.

Authored by [Mark E. Brossman](#), [Ronald E. Richman](#), [Holly H. Weiss](#), [Scott A. Gold](#) and [Alisa H. Tschorke](#).

If you have any questions concerning this Alert, please contact your attorney at Schulte Roth & Zabel or one of the authors.

New York

Schulte Roth & Zabel LLP
919 Third Avenue
New York, NY 10022
+1 212.756.2000
+1 212.593.5955 fax

www.srz.com

Washington, DC

Schulte Roth & Zabel LLP
1152 Fifteenth Street, NW, Suite 850
Washington, DC 20005
+1 202.729.7470
+1 202.730.4520 fax

London

Schulte Roth & Zabel International LLP
Heathcoat House, 20 Savile Row
London W1S 3PR
+44 (0) 20 7081 8000
+44 (0) 20 7081 8010 fax

U.S. Treasury Circular 230 Notice: Any U.S. federal tax advice included in this communication was not intended or written to be used, and cannot be used, for the purpose of avoiding U.S. federal tax penalties.

This information has been prepared by Schulte Roth & Zabel LLP ("SRZ") for general informational purposes only. It does not constitute legal advice, and is presented without any representation or warranty as to its accuracy, completeness or timeliness. Transmission or receipt of this information does not create an attorney-client relationship with SRZ. Electronic mail or other communications with SRZ cannot be guaranteed to be confidential and will not (without SRZ agreement) create an attorney-client relationship with SRZ. Parties seeking advice should consult with legal counsel familiar with their particular circumstances. The contents of these materials may constitute attorney advertising under the regulations of various jurisdictions.