HR Island: Outsmart, Outwork, Outlast an I-9 Audit

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November 5, 2025

EXPECT EXCELLENCE®

Why?

- I-9 and E-Verify are subset of broader immigration compliance
- Unlawful to knowingly hire/employ a person not authorized to work in the U.S.
  - Includes both "actual" and "constructive" knowledge
  - And, constructive knowledge can include failing to complete or not properly completing I-9s

Why?

- Increased enforcement
- Potential actions:
  - Form I-9 inspections
    - Employer receives Notice of Inspection requesting production of I-9s and other documents (usually within 3 business days)
  - Worksite enforcement action
    - Unannounced visit by ICE

The Basics

Immigration Reform and Control Act (IRCA)

- IRCA requires all U.S. employers to verify the identity and employment eligibility of all employees hired after 11.6.86
  - Requirement satisfied by having employees complete a Form I-9 when hired
- To comply with IRCA:
  - Complete Form I-9
  - Retain documents as necessary
  - Do not discriminate

Form I-9 Sections

- Section 1 – Employee Information & Verification
- Section 2 – Employer Review & Verification
- Supplement A – Preparer or Translator Certification
- Supplement B – Reverification & Rehire

Section 1

- Each new employee must complete and sign this section **by their first day of work**
  - May be earlier, but not before accepting the job offer
- Must include SSN if employer is enrolled in E-Verify
- If a preparer or translator is used, must complete Supplement A
  - The date the employee enters next to their signature should match the date the preparer/translator signed the supplement

Section 1. Employee Information and Attestation: Employees must complete and sign Section 1 of Form I-9 no later than the **first day of employment**, but not before accepting a job offer.

Last Name (Family Name)	First Name (Given Name)	Middle Initial (if any)	Other Last Names Used (if any)

Address (Street Number and Name)	Apt. Number (if any)	City or Town	State	ZIP Code

Date of Birth (mm/dd/yyyy)	U.S. Social Security Number	Employee's Email Address	Employee's Telephone Number

I am aware that federal law provides for imprisonment and/or fines for false statements, or the use of false documents, in connection with the completion of this form. I attest, under penalty of perjury, that this information, including my selection of the box attesting to my citizenship or immigration status, is true and correct.

Check one of the following boxes to attest to your citizenship or immigration status (See page 2 and 3 of the instructions.):

- ☐ 1. A citizen of the United States
- ☐ 2. A noncitizen national of the United States (See Instructions.)
- ☐ 3. A lawful permanent resident (Enter USCIS or A-Number.)
- ☐ 4. An alien authorized to work until (exp. date, if any)

If you check **Item Number 4.**, enter one of these:

USCIS A-Number	OR	Form I-94 Admission Number	OR	Foreign Passport Number and Country of Issuance

Signature of Employee	Today's Date (mm/dd/yyyy)

Section 2

- Employer must complete and sign this section **within 3 business days of hire**
- Employer must review the acceptable documents showing employment authorization:
  - Confirm documents appear genuine and relate to specific employee
- Employer **cannot** specify the document(s) to be provided

Section 2 - Acceptable Documents

- Need a List A document ***OR*** List B + List C documents
  - **List A** – Establishes identity + employment authorization (ex: Passport, Permanent Resident Card)
  - **List B** – Establishes identity (ex: Driver’s License, Voter’s Registration Card)
  - **List C** – Establishes employment authorization (ex: Social Security Card, Birth Certificate)

Section 2 – Authorized Representative

- Authorized representative can be any person the employer designates or hires, or with whom employer contracts
- Authorized representative must perform all employer duties (reviewing Section 1 and completing Section 2)
- Employees cannot act as an authorized representatives for their own I-9
- Employers are liable for any violations in connection with the form or the verification process (including violations committed by the authorized representative acting on employer's behalf)

Section 2. Employer Review and Verification: Employers or their authorized representative must complete and sign **Section 2** within three business days after the employee's first day of employment, and must physically examine, or examine consistent with an alternative procedure authorized by the Secretary of DHS, documentation from List A OR a combination of documentation from List B and List C. Enter any additional documentation in the Additional Information box; see Instructions.

	List A	OR	List B	AND	List C
Document Title 1					
Issuing Authority					
Document Number (if any)					
Expiration Date (if any)					
Document Title 2 (if any)		**Additional Information**			
Issuing Authority					
Document Number (if any)					
Expiration Date (if any)					
Document Title 3 (if any)					
Issuing Authority					
Document Number (if any)					
Expiration Date (if any)		☐ Check here if you used an alternative procedure authorized by DHS to examine documents.			

Certification: I attest, under penalty of perjury, that (1) I have examined the documentation presented by the above-named employee, (2) the above-listed documentation appears to be genuine and to relate to the employee named, and (3) to the best of my knowledge, the employee is authorized to work in the United States.

First Day of Employment (mm/dd/yyyy):

Last Name, First Name and Title of Employer or Authorized Representative	Signature of Employer or Authorized Representative	Today's Date (mm/dd/yyyy)

Employer's Business or Organization Name	Employer's Business or Organization Address, City or Town, State, ZIP Code

Supplement A - Preparer/Translator Certification

- Must ensure this page is completed and retained if preparer or translator assists employee with Section 1
- Preparer/translator must complete, sign, and date one of the certification areas provided
- If the employee does not use a preparer or translator, no need to print, provide, or retain this supplement with an employee's I-9

Last Name *(Family Name)* from **Section 1.**	First Name *(Given Name)* from **Section 1.**	Middle initial (if any) from **Section 1.**

Instructions: This supplement must be completed by any preparer and/or translator who assists an employee in completing Section 1 of Form I-9. The preparer and/or translator must enter the employee's name in the spaces provided above. Each preparer or translator must complete, sign, and date a separate certification area. Employers must retain completed supplement sheets with the employee's completed Form I-9.

I attest, under penalty of perjury, that I have assisted in the completion of Section 1 of this form and that to the best of my knowledge the information is true and correct.

Signature of Preparer or Translator			Date *(mm/dd/yyyy)*
Last Name *(Family Name)*	First Name *(Given Name)*		Middle Initial *(if any)*
Address *(Street Number and Name)*	City or Town	State	ZIP Code

I attest, under penalty of perjury, that I have assisted in the completion of Section 1 of this form and that to the best of my knowledge the information is true and correct.

Signature of Preparer or Translator			Date *(mm/dd/yyyy)*
Last Name *(Family Name)*	First Name *(Given Name)*		Middle Initial *(if any)*
Address *(Street Number and Name)*	City or Town	State	ZIP Code

I attest, under penalty of perjury, that I have assisted in the completion of Section 1 of this form and that to the best of my knowledge the information is true and correct.

Signature of Preparer or Translator			Date *(mm/dd/yyyy)*
Last Name *(Family Name)*	First Name *(Given Name)*		Middle Initial *(if any)*
Address *(Street Number and Name)*	City or Town	State	ZIP Code

I attest, under penalty of perjury, that I have assisted in the completion of Section 1 of this form and that to the best of my knowledge the information is true and correct.

Signature of Preparer or Translator			Date *(mm/dd/yyyy)*
Last Name *(Family Name)*	First Name *(Given Name)*		Middle Initial *(if any)*
Address *(Street Number and Name)*	City or Town	State	ZIP Code

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Supplement B - Reverification & Rehire

- Formerly Section 3 of the I-9
- Only complete if employee:
  - Requires reverification
  - Is rehired within 3 years of the date of the original I-9 being completed
  - Provides proof of a legal name change
- Complete one of the reverification sections provided for each applicable event

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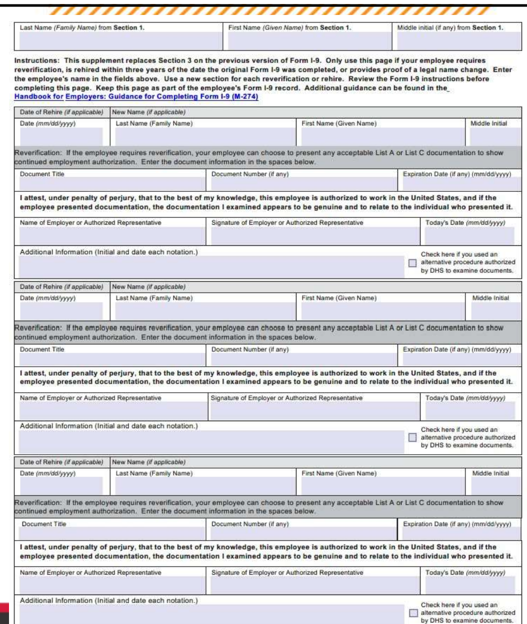

Last Name *(Family Name)* from **Section 1.** | First Name *(Given Name)* from **Section 1.** | Middle initial (if any) from **Section 1.**

Instructions: This supplement replaces Section 3 on the previous version of Form I-9. Only use this page if your employee requires reverification, is rehired within three years of the date the original Form I-9 was completed, or provides proof of a legal name change. Enter the employee's name in the fields above. Use a new section for each reverification or rehire. Review the Form I-9 instructions before completing this page. Keep this page as part of the employee's Form I-9 record. Additional guidance can be found in the Handbook for Employers: Guidance for Completing Form I-9 (M-274)

Date of Rehire *(if applicable)* | New Name *(if applicable)*

Date *(mm/dd/yyyy)* | Last Name (Family Name) | First Name (Given Name) | Middle Initial

Reverification: If the employee requires reverification, your employee can choose to present any acceptable List A or List C documentation to show continued employment authorization. Enter the document information in the spaces below.

Document Title | Document Number (if any) | Expiration Date (if any) (mm/dd/yyyy)

I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the United States, and if the employee presented documentation, the documentation I examined appears to be genuine and to relate to the individual who presented it.

Name of Employer or Authorized Representative | Signature of Employer or Authorized Representative | Today's Date *(mm/dd/yyyy)*

Additional Information (Initial and date each notation.) | Check here if you used an alternative procedure authorized by DHS to examine documents.

Date of Rehire *(if applicable)* | New Name *(if applicable)*

Date *(mm/dd/yyyy)* | Last Name (Family Name) | First Name (Given Name) | Middle Initial

Reverification: If the employee requires reverification, your employee can choose to present any acceptable List A or List C documentation to show continued employment authorization. Enter the document information in the spaces below.

Document Title | Document Number (if any) | Expiration Date (if any) (mm/dd/yyyy)

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Name of Employer or Authorized Representative | Signature of Employer or Authorized Representative | Today's Date *(mm/dd/yyyy)*

Additional Information (Initial and date each notation.) | Check here if you used an alternative procedure authorized by DHS to examine documents.

Date of Rehire *(if applicable)* | New Name *(if applicable)*

Date *(mm/dd/yyyy)* | Last Name (Family Name) | First Name (Given Name) | Middle Initial

Reverification: If the employee requires reverification, your employee can choose to present any acceptable List A or List C documentation to show continued employment authorization. Enter the document information in the spaces below.

Document Title | Document Number (if any) | Expiration Date (if any) (mm/dd/yyyy)

I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the United States, and if the employee presented documentation, the documentation I examined appears to be genuine and to relate to the individual who presented it.

Name of Employer or Authorized Representative | Signature of Employer or Authorized Representative | Today's Date *(mm/dd/yyyy)*

Additional Information (Initial and date each notation.) | Check here if you used an alternative procedure authorized by DHS to examine documents.

Electronic Form I-9s

- Employer permitted to complete, sign, and store electronic versions of Form I-9 since October 2004
- May electronically generate and retain Form I-9 if:
  - Employees receive instructions for completing the form
  - Resulting form is legible
  - Form's name and content and the sequence of the data elements and instructions are unchanged
  - No additional data elements or language are inserted
  - The standards specified in the regulations are met

E-Verify

- Internet-based system that compares information from the I-9 to government records to confirm that an employee is authorized to work in the U.S.
- Requires employee’s social security number and photo on the identity document provided
- If applicable, must use E-Verify within 3 business days of the date of hire

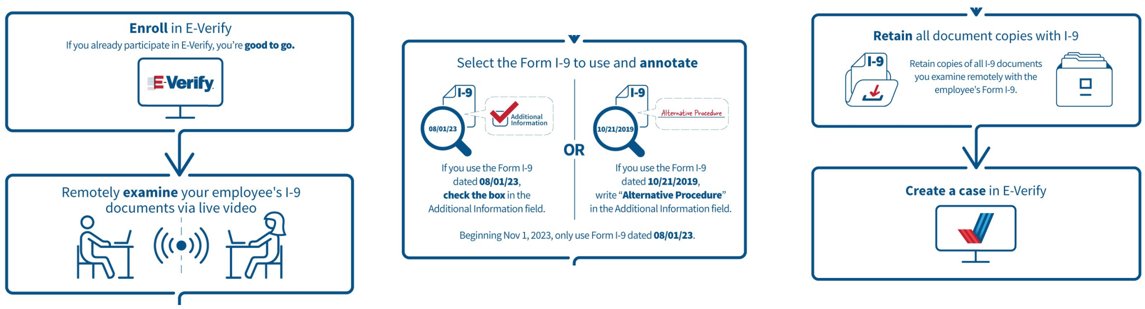
E-Verify, cont.

- Employers may use voluntarily
- Use may be required by federal contract (look for E-Verify clause)
- Required under some states' laws
  - North Carolina: mandatory for employers with 25 or more employees in the state

COVID-era regulations

- Historically, employers had to physically examine documents presented by employees to prove their identity and employment eligibility
- During COVID - temporary flexibilities offered by ICE allowed employers to defer in-person document review under certain circumstances
  - **EXPIRED on July 31, 2023**
- But, remote inspection is still allowed for employers enrolled in E-Verify if they meet certain criteria and follow a specific process (that includes a live video interaction)

How to Participate in Remote Examination



Training is essential

- It's not "just paperwork"
- Train HR/applicable staff on proper I-9 completion and compliance:
  - Don't request specific documentation
  - Complete the form timely
  - Keep the forms separate & accessible
  - NEVER backdate
  - Ensure legible
  - Only re-verify if necessary

Training is essential, cont.

- Failure to train:
  - May be deemed “bad faith” on part of employer
  - May cause technical violations to be converted to substantive violations

The Problems

Common Form I-9 Issues

- Completion on an expired I-9 form
  - CHECK to make sure using current form
- Omitting required information (birthdate, address, full name, document numbers or expiration dates)
- Sections 1 or 2 not signed/completed within the required timeframe
  - Remember – Section 1 by or on first day of work; Section 2 within 3 business days of first day of work

Common Form I-9 Issues, cont.

- Incomplete acceptable document information (or in the alternative, more documents than necessary to satisfy the I-9 requirements are provided)
- Invalid or expired documents accepted
- Completion on a Spanish form for an employer not located in Puerto Rico
  - Only employers in Puerto Rico may complete the Spanish-language version (but any employer may use as a translation tool)

Penalties

- Paperwork violations - $288 to $2,861 ***per*** violation
  - Substantive (examples: missing I-9; completing late; missing name; no signatures; unacceptable documents recorded; Supplement B issues)
  - Technical (examples: missing birthdate; missing employee or employer address; missing date of hire; missing company rep title, company name, or address; failing to complete preparer/translator certification)

Penalties, cont.

- Five factors considered in determining total civil penalty amount:
  1. Size of the business
  2. Good faith of the employer
  3. Seriousness of the violations
  4. Involvement of unauthorized workers
  5. History of previous violations

Common E-Verify Issues

- Selecting incorrect List B document from drop-down
- Accepting restricted Social Security card
- Not ensuring List B document has a photo
- Creating duplicate cases for same employee without reason
- Creating case after third business day following first day of work
- Creating cases for employees hired before employer signed up for E-Verify

Common E-Verify Issues

- Failing to download Further Action Notices and provide to employees
- Having tentative nonconfirmation cases (TNC) open for more than 10 federal government working days following mismatch
- Taking premature action against or terminating employees who receive a mismatch
- Failing to close open cases with final case results

Do you have a problem?

Proactive approach vs. "head in the sand"?

Internal Audits

- Employers may conduct internal audits of I-9s to ensure ongoing compliance
- Key preliminary questions:
  - Why are we doing this?
  - Should we do this ourselves?
  - Do we know what we are doing?
  - Are we prepared to deal with the results?

Internal Audits, cont.

- Options:
  - Using internal resources
  - Third-party vendor (directly or under direction of outside counsel)
  - Outside counsel
- Carefully consider benefits of attorney-client privilege
- Carefully vet vendors and outside counsel

Internal Audits, cont.

- Can review all I-9s or a sample (provided the sample is selected based on <u>neutral</u> and <u>non-discriminatory</u> criteria)
- Communicate to employees before and during the audit in a transparent manner
- If discover errors - draw line through incorrect info + enter correction + initial and date (do not conceal original entries)
  - Section 1 – employee must correct
  - Section 2 – employer must correct

Internal Audits, cont.

- If discover missing I-9s, complete using current version, but do not backdate; attach memo
- If discover copies of I-9 documents that do not appear to be genuine, address with employee and give opportunity to provide other documents from Lists
- Generally cannot require new I-9s from all existing employees (outside M&A context)
- See https://www.ice.gov/doclib/guidance/i9Guidance.pdf

Planning for M&A Activity

Mergers and Acquisitions

- If selling/merging, expect that potential buyers/parties will do diligence on I-9/E-Verify compliance
  - Noncompliance can affect deal value and result in special ongoing indemnity obligations
- If buying, buyer and its lawyers should carefully explore seller's compliance

Mergers and Acquisitions, cont.

- Employers who have acquired another company or have merged with another company may choose to treat employees who are continuing their employment with the related, successor, or reorganized employer as:
  - New hires (employers must complete **a new I-9**)
  - Continuing in employment (employers must obtain and maintain the previously completed I-9)

Mergers and Acquisitions, cont.

- If treating as new hires, must complete new I-9s for all
  - Enter the effective date of sale as the employee's first day of employment
  - Must plan ahead for flurry of I-9/E-Verify activity immediately after closing
- If treating as continuing in employment, must obtain and maintain the previously completed I-9
  - Take them with all of their "warts" - liable for any errors or omissions on the previously completed I-9

HYPOTHETICALS

Hypothetical #1

- Jeff works in HR at a growing company. A new employee, Parvati, forgets to bring their acceptable documents for identification and authorization, but promises to bring them the following workday. Parvati does not bring Jeff the documents the next day and Jeff forgets to follow-up with Parvati until two weeks later.
- ***What potential compliance issues could this cause and what next steps should you take?***

Answer #1

- *Late Completion* – Section 2 of the I-9 must be completed within 3 business days of Parvati's start date. If audited by ICE, the company could face penalties.
- Next steps:
  - Complete Parvati's I-9 immediately
  - Document the delay (prepare a memo to attach to I-9 to explain why completed late)
  - Do NOT backdate
  - Train and review processes

Hypothetical #2

- Rob works in HR and is located in Boston. Rob's company has remote workers in states all over the country. The company just hired a new remote employee – Ozzy. Rob emails Ozzy a Form I-9 and asks them to complete Section 1 before their start date. Ozzy emails the Form I-9 back. Rob then asks Ozzy to scan their acceptable documents over so that Rob can complete Section 2.
- ***Is this process compliant?***

Answer #2

- **Nope**
  - The documents must be physically examined in the presence of Ozzy, unless the company is enrolled in E-Verify (in which case, additional requirements must also be met)
  - Rob should consider designating an authorized representative to inspect Ozzy's documents in person and complete Section 2 on the company's behalf

Questions?

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