

THE ABC'S OF IMMIGRATION: ELECTRONIC I-9 SYSTEMS

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The short answer for most employers is almost always yes. For the past few years, employers have been eligible to file and store Forms I-9 electronically. As the national crackdown on employers of illegal immigration grows more intense and a number of vendors are now offering electronic I-9 products, employers are starting to weigh the benefits of ditching paper I-9s and going digital. This article first discusses the laws surrounding filing and then reviews why companies would want to make the switch.

1. Can a Form I-9 be completed electronically?

In October 2004, President Bush signed Public Law 108-390 which for the first time authorized employers to retain Employment Eligibility Verification Forms (Forms I-9) in an electronic format. In April 2005, the law took effect and employers began to manage their Forms I-9 electronically. Immigration and Customs Enforcement issued rules setting standards for using electronic I-9s in June 2006 (they are found in the Code of Federal Regulations at 8 CFR §274a.2) and the agency is actively encouraging employers to store their Forms I-9 electronically.

2. Why would companies want to switch to electronic I-9 systems?

There are numerous reasons why companies would prefer electronic I-9s over paper-based systems.

- Most of the major vendors use web-based systems. That means employers do not have to install software and only need Internet access and a web browser.
- Employees are not able to complete the Form I-9 unless the data is properly entered. Many vendors offer systems that guide workers and human resource officials through proper completion of the forms.
- Some of the systems are "intelligent" and ensure that based on answers provided in Section 1 of the Form I-9 only appropriate documents show up in Section 2.
- Some systems allow for certain sections of the form that are the same from applicant to applicant to be pre-filled to save time.

- The better electronic I-9 systems include help features that make it easier for human resource officials and employees to answer questions on the Form I-9.
- Employers with employees at multiple sites can more easily monitor I-9 compliance at remote locations.
- Reverification is automated and employers are less likely to incur liability due to an inadvertent failure to update an employee's I-9. Many systems send email reminders.
- Employers can integrate the system with E-Verify or other electronic employment verification systems in order to minimize the chances that unauthorized workers end up employed.
- Using an electronic I-9 system reduces the risk of identity theft from the robbery of paper I-9 records (a problem that has been occurring with more frequency of late). By law, electronic I-9s must have built in security systems to protect the privacy of employees and the integrity of the data.
- Using an electronic I-9 system can make it easier to respond to ICE audits. In addition to the audit trails required by regulation, some of the systems archive communications relating to the I-9.
- Electronic I-9 systems can integrate with payroll and employee database systems.
- Data from the electronic Form I-9 can be automatically uploaded in to E-Verify, the government's electronic employment verification system. Several electronic I-9 vendors are federally approved E-Verify Designated Agents thus allowing for them to automate the entry of an employer's data in E-Verify.
- An electronic I-9 system allows for the automation of the purging of Forms I-9 for employees no longer with the employer and for whom Forms I-9 must no longer be retained.
- Some of the systems contain instructions in multiple languages for employees that have difficulty understanding English.
- Employers can potentially achieve cost savings by storing Forms I-9 electronically rather than using conventional filing and storage of paper copies or converting paper forms to microfilm or microfiche.

- Electronically retained I-9s are more easily searchable and, hence, often a time saver for HR personnel. The better systems produce a variety of reports that make it easier to monitor I-9 compliance.
- Some of the systems also track visa and I-94 expiration dates.

3. Are there downsides to using an electronic I-9 system?

There are some potential problems with using a digital system. They include the following:

- There are no 100% secure electronic systems (though the law requires electronic I-9 vendors and their employer customers to implement security measures).
- The electronic systems do not totally stop identity theft since a person can present doctored identification and employment authorization paperwork making it appear that the employee is another person (though employers can undertake additional background checking to reduce the likelihood of problems).
- The cost of a paper I-9 form is free (aside from indirect costs like storage, training, etc.). Electronic systems typically charge a flat monthly fee or a per employee fee (though the per employee costs are usually no more than a few dollars with any of the major vendors).
- Most I-9s are Internet dependent. When the Internet is not available, the I-9 form may not be able to be completed (though an employer may be able to use a paper I-9 in such a case).
- If an electronic I-9 vendor goes out of business, the employer could be in a bind if precautions are not in place to make it easy to retrieve the employee's data (such as having back ups on the employers own computer system).

4. What requirements must electronic I-9 systems meet?

The 2006 rules set standards for completing forms electronically and also for the scanning and storage of existing I-9 forms. Since the change in the law a number of software products have come on to the market allowing for the electronic filing of I-9s and there are advantages to using such a system including improving accuracy in completing forms and setting up automated systems to prompt employers to re-verify I-9s for employees with temporary work authorization.

DHS regulations require I-9s generated electronically to meet the following standards:

- The forms must be legible when seen on a computer screen, microfiche, microfilm or when printed on paper.
- The name, content and order of data must not be altered from the paper version of the form.
- There are reasonable controls to ensure the accuracy and reliability of the electronic generation or storage system.
- There are backup systems to prevent the accidental creation, deletion or deterioration of stored Forms I-9.
- The software must have an indexing system allowing for searches by any field.
- There must be the ability to reproduce legible hardcopies.
- The software must not be subject to any agreement that would limit or restrict access to and use of the electronic generation system by a government agency on the premises of the employer, recruiter or referrer for a fee (including personnel, hardware, software, files, indexes and software documentation).
- Compression or formatting technologies may be used as long as the standards defined above are met.
- There is a system to be able to identify anyone who has created, accessed, viewed, updated, or corrected an electronic Form I-9 and also to see what action was taken.

Employers that know or should reasonably have known that an action or lack of action will result in loss of electronic Form I-9 records can be held liable under IRCA.

Employers may use more than one kind of electronic I-9 system as long as each system meets the standards noted above.

Employers using an electronic I-9 system must also make available upon request descriptions of the electronic generation and storage system, the indexing system and the business process that create, modify and maintain the retained Forms I-9 and establish the authenticity and integrity of the forms, such as audit trails. The I-9 software vendor should, of course, provide such documentation to the employer, though this is not a requirement in the regulations.

There are special audit requirements for electronically stored I-9s and a discussion of those requirements is set out below in the section of this chapter discussing the regulation of government inspections.

5. How is an electronic Form I-9 “signed” by an employee and employer?

DHS regulations require that electronic I-9s can be “signed” electronically through a system where the person providing the information will acknowledge that he or she has read the attestation.

The signature must be affixed to the document at the time the attestation is provided. The form must also be printed out and provided to the person providing the signature at the time the document is signed. This applies to the employee as well as the employer, recruiter or referrer for a fee.

6. What are the Form I-9 recordkeeping requirements for electronic I-9s?

Employers must keep I-9 Forms for all current employees though the forms of certain terminated employees can be destroyed. In the case of an audit from a government agency, the forms must be produced for inspection. The forms may be retained in either paper or electronic format as well as in microfilm or microfiche format.

7. Are there special storage requirements for electronic I-9s?

Yes. Forms I-9 retained in an electronic format must meet the following standards:

- There are reasonable controls to ensure the integrity of the electronic storage system.
- Controls are in place to prevent the unauthorized creation of, deletion of or alteration of the stored Form I-9.
- There are regular inspections of the electronic data to ensure the integrity of the data.
- There is a retrieval system that includes an indexing system allowing for searches on any field.
- There is the ability to produce readable hardcopies.

8. What privacy protections are accorded workers when they complete Form I-9 electronically?

Employers with electronic I-9 systems are required to implement a records security program that ensures that only authorized personnel have access to electronic records, that such records are backed up, that employees are trained to minimize the risk of records being altered and that whenever a record is created, accessed, viewed, updated or corrected, a secure and permanent record is created establishing who accessed the record.

9. How does an employer who uses an electronic I-9 system respond to an ICE audit?

Original I-9 forms must normally be provided for inspection to ICE examiners. If an employer retains Forms I-9 in an electronic format, the employer must retrieve and reproduce the specific forms requested by the inspecting officer as well as the associated audit trails showing who accessed the computer system as well as the actions performed on the system in a specified period of time. The inspecting officer must also be provided with the necessary hardware and software as well as access to personnel and documentation in order to locate, retrieve, read and reproduce the requested Form I-9 documentation and associated audit trails, reports and other related data.

Finally, an inspecting officer is permitted to request an electronic summary of all of the immigration fields on an electronically stored Form I-9.

10. Can a company using an electronic I-9 system batch load data to E-Verify?

Yes. DHS has a real-time batch method that requires a company develop an interface between its personal system or electronic Form I-9 system and the E-Verify database. Employers interested in more information on this including design specifications, should call ICE at 800-741-5023.

11. Can employers convert existing I-9s in to an electronic format?

Yes. Many employers are scanning and indexing their current I-9 Forms and storing them electronically using electronic I-9 software.

12. Where can I find out which companies offer electronic Form I-9 products and services?

Siskind Susser Bland maintains a list of vendors that provide electronic I-9 services. Please email Greg Siskind at gsiskind@visalaw.com for this information.