

# Avoiding Fines, Security Breaches and Bad Press

## *The Importance of Proper I-9 Management*

AVOIDING FINES, SECURITY BREACHES AND BAD PRESS .....	1
THE IMPORTANCE OF PROPER I-9 MANAGEMENT .....	1
IRCA .....	2
WHY I-9 COMPLIANCE IS A PRIORITY NOW .....	3
IRCA ENFORCEMENT EFFORTS HAVE INCREASED .....	3
LEGISLATIVE ACTIVITY .....	4
PROCESS EFFICIENCY .....	5
WHAT DOES THIS MEAN FOR YOU? — EVALUATING YOUR RISK .....	5
AUDIT GUIDELINES .....	6
THE BASIC PILOT PROGRAM .....	7
LIMITATIONS OF THE BASIC PILOT PROGRAM .....	7
THE DESIGNATED AGENT .....	8
OUTSOURCING I-9 MANAGEMENT .....	8
SELECTING AN I-9 PARTNER .....	8
I-9 SOFTWARE FEATURES .....	9
SERVICE OFFERINGS .....	9
ADDITIONAL SELECTION CRITERIA .....	10
CONCLUSION .....	10
SOURCES .....	10

## IRCA

The Immigration Reform and Control Act (IRCA) of 1990 requires all U.S. employers to verify the employment eligibility and identity of all employees hired to work in the U.S. after November 6, 1986. To implement the law, employers are required to complete Form I-9, Employment Eligibility Verification forms, for all employees, including U.S. citizens.

Employers are required to maintain I-9 records in their files for three years after the date of hire or one year after the date of termination, whichever is later. The employer must be able to show the completed I-9 documents within three days of an official request for the documents for inspection.

Many consider the IRCA an utter failure. The intention of the proponents of the IRCA was to reduce the number of undocumented workers being hired by US companies. Several flaws in the Act make it less than effective in reaching this goal.

- ➔ Any employee of a company may view the documents of a worker and determine them to be legitimate. This is like asking a clerk in the hospital gift shop to look at an x-ray to determine if a patient needs an operation.
- ➔ Illegal aliens can purchase a counterfeit drivers license, social security card, or green card for as little as \$25.00. Employers lack the ability to detect high-quality forged documents. In many American cities, document forgers operate openly, producing documents that allow unscrupulous employers to hire untold numbers of undocumented immigrants while claiming to have complied with the law.
- ➔ Employers are confused by the requirements and feel themselves between the proverbial rock and a hard place: if they accept documents on their face value, they may be hiring illegal aliens; if they ask for additional documentation without sufficient cause, they will be discriminating.
- ➔ The I-9 form itself is confusing. Employers are unclear as to what dates to enter where and unclear on the documentation requirements. They are unclear on the types of documentation required with good reason. The document requirements have changed and the I-9 form does not reflect these changes. For example, an I-94 issued by U. S. Immigration and Customs Enforcement is not listed on the document, but is an acceptable form of ID.

# Why I-9 Compliance Is a Priority Now

## *IRCA Enforcement Efforts Have Increased*

The world has changed since 9/11 and one of the most significant changes has been the increase in the government's efforts to control illegal immigration. In March of 2003, the ICE was created to enforce immigration and customs laws and to protect the United States against terrorist attacks. Before 9/11, immigration and customs authorities were not widely recognized as an effective counterterrorism tool in the United States. ICE changed this by creating a host of new systems to better address national security threats and to detect potential terrorist activities in the U.S. These systems include a Worksite Enforcement Initiative that investigates employers and targets illegal workers as well as an Identity and Benefit Fraud Program focused on identifying fraudulent illegal documents.

Last fiscal year, ICE initiated 511 criminal worksite investigations, resulting in 165 criminal arrests, 140 criminal indictments, and 127 criminal convictions. In addition, these efforts resulted in the arrest of 980 individuals on administrative immigration violations. ICE is seeking \$41.7 million in new funding for fiscal year 2007. The budget increase would support the hiring of an additional 171 special agents and 35 support personnel to enhance existing worksite enforcement investigations. This means an increase in the likelihood that your company will be subject to a worksite inspection. The possible fines and sanctions are large. The possible negative financial effects of your company name being included in a headline like those below may be significantly larger.

The budget request also provides an additional \$135 million to U.S. Citizenship and Immigration Services (CIS) to expand the current Employment Verification pilot program to support a national electronic employment authorization verification system. The current basic pilot program is a voluntary electronic authorization program enabling an employer to confirm the employment eligibility of all newly hired workers:

- ➔ June 28, 2006, Restaurant owners criminally charged with harboring illegal aliens. Five employees also arrested. If convicted, the defendants face a maximum sentence of 10 years in prison and a maximum fine of \$250,000.
- ➔ June 28, 2006, ICE arrests 22 illegal alien workers working for an engineering company that services Camp Pendleton Marine Corps Base.
- ➔ June 6, 2006, ICE agents arrest 25 illegals working at Memphis Chemical Plants, Lucite International, and Arkema. Each case will be evaluated for possible federal criminal prosecution.
- ➔ May 16, 2006, ICE agents arrested five unauthorized workers employed by the Los Angeles Department of Water and Power.
- ➔ March 13, 2006, ICE worksite enforcement operation nets more than 50 illegal aliens working for Super Bright Car Wash. The company faces administrative fines of up to \$11,000 per person.
- ➔ December 20, 2005, 14 illegal aliens arrested working at Wal-Mart Distribution Center by ICE Special Agents
- ➔ March 18, 2005. Wal-Mart Stores, Inc. agrees to pay a record \$11 million to ICE to settle Nationwide Worksite Enforcement Investigation. Twelve other companies agree to enter criminal guilty pleas and forfeit \$4 million to US.

## Legislative Activity

There are several bills being considered that will result in changes to the I-9 process. It is likely that employers will be required to store I-9 forms electronically, validate social security numbers, and check employment eligibility. It is also likely that the fines for improper I-9 management will increase significantly. The table below outlines the legislation that is currently under review.

<b>Senate Bill</b>	<b>Mandatory Verification of Employment Eligibility</b>	<b>Time To Comply</b>	<b>Worksite Enforcement</b>	<b>Penalties</b>
<b>McCain – Kennedy</b>	Guest Workers Only	Not defined – Gradual basis	Allow DHS to investigate H-5A aliens if there is reasonable cause	No change
<b>Specter</b>	New biometric machine-readable immigration documents  Annual review of all aliens	5 years or less based on size of company	Adds 10,000 worksite investigators and 1,000 immigration agents	Hiring Unauthorized Aliens–Increased from \$250-\$10,000 to \$500 - \$20,000.  Penal-ties for Non-compliance range from \$200 - \$6,000.  Criminal Fines range from \$3,000 to \$20,000
<b>Frist</b>	All employees and all employers, but DHS has the authority to make an employer exempt	5 years or less based on size of company	Adds 10,000 worksite investigators and 1,000 immigration agents	Hiring Unauthorized Aliens–Increased by 100% from \$250 - \$10,000 to \$500 - \$20,000  Penalties for Noncompliance range from \$200 - \$6,000  Criminal Fines range from \$3,000 to \$20,000
<b>Hagel – Martinez</b>	All employers and all employees, but DHS has the authority to make an employer exempt	6 years or less based on size of company	Adds 10,000 worksite investigators and 1,000 immigration agents	Hiring Unauthorized Aliens–Increased by 100% from \$250 - \$10,000 to \$500 - \$20,000  Penalties for Non-compliance range from \$200 - \$6,000  Criminal Fines range from \$3,000 to \$20,001

<b>Specter –Hagel</b>	All employers and all employees after \$400 million is appropriated to fund the system	18 months after funds appropriated	Adds 11,000 ICE agents over 5 years and requires 25% of ICE hours to be dedicated to worksite inspections	Hiring Unauthorized Aliens–Increased by 100% from \$250-\$10,000 to \$500-\$20,000  Penalties for Noncompliance range from \$200 - \$6,000  Increases criminal penalty from 6 months to 3 years  Criminal Fines range from \$3,000 to \$20,001
<b>Sensenbrenner</b>	All employees and Previous Hires	2 years	Requires DHS to investigate employers who submit duplicate SSNs	Hiring Unauthorized Aliens–Increased from \$250-\$1,000 to \$5,000-\$40,000  Increases the criminal penalty for a pattern of hiring unauthorized aliens from a fine of \$3,000 and up to 6 months to a fine of \$50,000 and not less than 1 year
<b>Hunter - Goode</b>	All employees	1 year	Adds 10,000 worksite investigators  Allows private parties to file complaints	Increases penalties for hiring unauthorized aliens to a maximum of \$50,000

## ***Process Efficiency***

All of the pending legislation includes increased employer responsibility for employment eligibility verification resulting in additional resource and training requirements. Employers will be required to check documents and complete the I-9, send information to the social security administration and the Department of Homeland Security for validation, follow up on invalid results, re-verify when employee documents expire, and assist unauthorized workers. What started as a simple form will likely become a full time position for companies who hire regularly.

## ***What does this mean for you? — Evaluating Your Risk***

The best way to evaluate your risk is to perform an I-9 audit. To ensure a thorough audit, select a company with proven experience and expertise to conduct the audit. Audits are available through employment law firms and workforce management companies.

## **Audit Guidelines**

1. Create a list of all employees hired since November 6, 1986. Include the employee's name, date of hire, date of termination and social security number. Make sure that employees that have been hired more than once appear on the list the same number of times they have been hired.
2. Identify those employees for which you are required to have an I-9 on file based on the rule that you must retain a copy for three years after the hire date or one year after the termination date which ever is later.
3. Pull the I-9 forms for those workers identified in step 2.
4. Put a check mark next to the name of each worker on the list for which you have an I-9. If you have I-9s for workers, who are not on the list, do not discard them. They may be for employees whose names have changed.
5. Check each form for errors. The most common errors and the steps to correct the errors are listed below. Indicate forms with errors on your list. Indicate corrections on the list as they are made.

### **■ Section 1**

- Section 1 has not been signed by the employee:
  - The employee must sign Section 1 and note updated (month/date/year) (using the current date)
- Section 1 was not dated by the employee:
  - Have employee date with current date, initial, and note updated after the date
- Section 1 was not completed within 3 days of hire:
  - No correction possible for this error, unless the form was misdated.
- The citizenship box not checked by the employee:
  - Employee must check the appropriate box, initial, date with the current date and note updated after the date
- The employee left information missing, such as date of birth, Social Security Number, or home address:
  - Employee must complete the missing information and initial and date where completed

### **■ Section 2**

- List A or B and C not completed (or completed incorrectly):
  - HR can fill in accurate information and sign and date (current date) with the notation updated.
- The documents provided by the employee are not acceptable (not included in List A, B, or C):
  - HR should request acceptable documents from the employee and complete a new Form I-9.
- The information in Section 2 is entered in the wrong A, B, C columns:
  - HR should correct, initial, and date (current date) with the notation updated.
- The employee's hire date is missing:
  - HR can fill in the hire date, initial, and date with the current date.
- Section 2 has missing or incomplete employer information:
  - HR can fill in the needed information, initial, and date (current date) with the notation updated.
- Section 2 is not signed by the employer:
  - HR must fill sign and date (current date) with the notation updated.

- Section 2 is not dated by the employer:
  - HR must date (current date) Section 2 with the notation updated.
- Section 2 was not completed within 3 days of hire:
  - No correction possible for this error, unless the form was misdated.

### ■ Section 3

- The employee's Employment Authorization has expired and Section 3 is not completed.
    - The employee must provide renewal information.
    - HR must complete Section 3 and sign and date with the current date
6. There may be some forms that simply cannot be corrected. For example, you may have terminated employees from whom you accepted invalid documents, but the form cannot yet be discarded. Annotate the list to show a "major" problem. Note that you may wish to create a "tickler" file or some other system for reminding you to discard defective forms when you no longer need to retain them.
  7. Once you have reviewed all existing forms, check the list to see what forms you are missing. See if any of the forms that were set aside in step 4 have a match a social security number on the list. Forms for existing employees who do not have a form on file should be completed immediately.
  8. Calculate your financial exposure. Missing forms are generally penalized at around \$800 per form for the record-keeping violation plus around \$1500 per form for a knowing employment violation. (INS assumes that persons without forms are illegal.) Major problems usually result in fines of between \$600 and \$800 per form. These fines are likely to increase based on pending legislation.

## *The Basic Pilot Program*

IRCA required the development of pilot programs used to reduce the likelihood of hiring unauthorized workers. The Basic Pilot program involves automated verification checks against the Social Security Administration and Department of Homeland Security databases

The Basic Pilot program was originally rolled out in five states. Of the 2.1 million employers in these five states, only 876 or .04% joined the program. The reasons for not participating included too much paperwork, the burden of additional procedures, competitive hiring disadvantages, fear of additional scrutiny by the INS, and the belief that it is better to not know that they have an issue with hiring unauthorized workers. A survey of 626 employers who signed up for the Basic Pilot program showed that only 461 or 75% were actually using the program. Reasons given for not fully implementing the program were technical difficulties with the software, a lack of required equipment, the lack of staff to facilitate the program, the lack of training resources and the inability to reach INS support.

Much of the legislation being considered calls for expanding the Basic Pilot program and making the use of the program mandatory for all employers. The cost estimates for expanding the program range from \$400 million to \$1.2 billion.

## *Limitations of the Basic Pilot Program*

The Basic Pilot was designed to:

- Remove guesswork from document review during the Form I-9 process
- Allow participating employers to confirm employment eligibility of all newly hired employees
- Improves the accuracy of wage and tax reporting
- Protect jobs for authorized United States workers

The Basic Pilot program is not foolproof. It is estimated that .05% to .09% of the U.S. workforce or 7 to 12 million U.S. workers are illegal aliens. In 2004, of the 757,000 workers submitted to the Basic Pilot

program, only 208 or .027% were deemed unauthorized for employment. This is a strong indication that at least some workers have found a way to get around the Basic Pilot program.

Basic Pilot program database checks confirm the validity of the forms of identification submitted, but cannot confirm that the person providing those forms of identification is the person for whom they were created. MSNBC.com research and government reports suggest hundreds of thousands of American citizens unknowingly lending their identity to illegal immigrants so they can work. Often, this doesn't come to light until the person whose social security number is being used seeks employment.

The Social Security database includes everyone who has a social security number. Not everyone who has a social security number is eligible for employment. Some social security cards are stamped "not authorized to work." This means that a check of the database showing that the social security number is valid does not confirm the holder's eligibility for employment.

In June, 2004, U.S. Citizenship and Immigration Services (USCIS) issued a report to Congress on the "Basic Pilot" program for employment verification. The report was required by the Basic Pilot program Extension and Expansion Act of 2003, which also mandated that the Basic Pilot be expanded to all 50 states by December 1, 2004. The following problems were found to exist in the Basic Pilot program:

- An "unacceptably high" tentative non-confirmation rate for foreign born work-authorized employees and a "higher than desirable" rate for U.S. born employees
- A lack of full employer compliance with the pilot requirements
- Many employers did not consider the pilot program to be attractive which limited the extent to which a volunteer program could reduce unauthorized employment on a national basis
- Many users found the application confusing.

## ***The Designated Agent***

The Basic Pilot program allows designated agents to conduct validations on the behalf of employers. In order to become a designated agent, an individual must register and sign a Memorandum of Understanding that outlines the responsibilities of the designated agent, the US Citizenship and Immigration Services, and the Social Security Administration.

## ***Outsourcing I-9 Management***

Many companies are finding it more cost effective to outsource some or all of their I-9 management processes. Given the increase in the employer's responsibility for validating employment eligibility of workers, the inevitable increase in fines for noncompliance, the challenges of using the Basic Pilot program and the increase in the likelihood that the employer will be subject to a worksite inspection, employers are struggling to balance compliance with efficiency.

## ***Selecting an I-9 Partner***

A variety of software and service offerings are available. Background check companies, employment law firms, and some workforce management companies are now offering I-9 assistance. Employment law firms typically offer an I-9 risk assessment or audit, guidance and training. Some background check companies offer an online tool for I-9 management, but typically do not offer services. A workforce management company that provides I-9 assistance is more likely to offer a client specific comprehensive solution that includes risk assessment, online I-9 management and process facilitation. Before researching companies identify your goals and the services and features that will help you meet those goals. Available software features and service offerings are listed below.

## ***I-9 Software Features***

- Online I-9 from
  - Allow for electronic entry and storage of I-9 forms
  - Automated error checking
- Electronic Signature
  - Signature receipts available for the worker
- Electronic I-9 Storage
  - Eliminates the need for paper I-9 storage
- Alerts prior to document expiration
  - Frequency of alerts should be configurable based on your needs
- Online search of I-9s
  - Search by name, SSN, location, or status
- User Friendly Interface
- I-9 scanning
  - Allows the employer to store I-9s for all existing employees upon implementation
- Employment Eligibility Verification - checks against the DHS and SSN databases
- Regular Checks against active employee list (payroll list, HRIS, etc) to validate that all active employees have I-9s on file
- Documentations for government inspections and audits
- Administrative Abilities
  - Ability to Add/Edit Users and Locations
- Comprehensive Online Help
- Reporting
  - Compliance report
    - List employees who do not have valid I-9s on file
  - DHS Summary Report
    - Lists all verifications by status
  - Re-verification Report
    - A list of all I-9s with documents that are scheduled to expire in a certain time period

## ***Service Offerings***

- I-9 Audit and Risk Analysis
  - Assistance correcting existing I-9s
- I-9 Process Management
  - Some companies will check identification and enter I-9s online on your behalf
- Hard copy I-9 Storage
  - Electronic storage is acceptable. If you would like to keep both hard and soft copies, some companies will store the hard copies for you
- Visa Management
  - Manage the expiration dates of worker Visas
  - This is more likely to be offered by Workforce Management companies
- Supplier / Vendor I-9 Audits
  - If it is shown that a company is working with a staffing supplier or vendor who is not I-9 compliant, the company may be found liable

- Some Workforce Management companies will audit your staffing suppliers and vendors on your behalf

## **Additional Selection Criteria**

- Reputation and Track Record of the Company
  - Ask the company to provide you with a list of references. If possible, visit a client to see the program in action.
- Management Strengths
  - Does the management include people with the experience and expertise necessary?
- Company Strategy
  - Is the company dedicated to changing their offering to accommodate changing regulations?
  - Does the company listen to their clients when making business decisions?
- Financial Strength
  - I-9 outsourcing is a fairly new industry. Does the company have other, profitable offerings and a stable financial history?
- Service Levels
  - Will the company provide you with a service level agreement that meets your needs?

## **Conclusion**

Dramatic transformation of work validation requirements and an increase in worksite inspections are inevitable. Having a reputable company perform an I-9 audit and starting the process of identifying the optimal I-9 processes for your company now will allow you to focus resources on your core business while others scramble to become compliant once the new laws are in place. I-9 process outsourcing is a viable option for those companies who do not wish to invest the time and money necessary to manage the process internally.

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