

# PUBLICATION

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## ICE Finalizes Electronic I-9 Rule

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**ICE has finalized its regulation implementing the 2005 law allowing electronic storage of Forms I-9. The interim rule in 2006 had been unnecessarily restrictive, and the final rule yields to some sensible comments. Still, electronic I-9 creation or storage requires careful planning.**

- Employers have three *business* days – not calendar days – to complete Form I-9. This leaves some things unclear, such as whether Saturdays, Sundays and holidays count if the employer is open for business on those days. It also fails to address the recent posting on USCIS' website concerning "what's the Hire Date for E-Verify," in which USCIS stated that the deadline for completing I-9 and E-Verify for a worker hired on Monday is Thursday, not Wednesday. The USCIS posting also sought to clarify confusion arising when the employer opts to complete Form I-9 after an agreement for employment but before actual work starts. USCIS has indicated that ICE agrees with its posting, but it would have been nice for ICE's regulation to make these clarifications for the record.
- Employers may use paper, electronic systems, or a combination of paper and electronic systems. This seems to mean that an employer could have different storage practices for different locations or even for different sets of workers within the same location.
- Employers can use electronic systems that store I-9 data as data as long as the system is able to produce a reasonable facsimile or copy of the Form I-9. Only the pages of the form containing employer data – not instructions – need be involved, but employers need to show workers the instructions when the worker is completing Form I-9 section 1.
- Storage systems must have an "audit trail" recording every time an I-9 is created, completed, altered, updated, or otherwise modified, but not when it was simply accessed as the interim rule had required. Even some of the most sophisticated document management systems do not make audit trails of mere access. The audit trail must show the modifying action taken, the person who made the change, and the date. Even this relaxed standard from the interim rule, applied literally, seems to require more robust document management capability than would be afforded by storing scanned images of paper I-9 Forms in a Microsoft Explorer folder structure, even with restricted access.
- Electronic systems do not need to be searchable by any data element in Form I-9, as the interim rule required. The "indexing system" for electronic I-9 storage need only be "functionally comparable to a reasonable hardcopy filing system."
- Employers need not provide the employee with any paper confirmation transaction at the time of the transaction unless the employer requests it, and even then only within a reasonable time, which could include mailing it to the employee. This accommodates many remote situations where printers may not be available. DHS emphasizes, however, that the employer's representative still must personally inspect the documents presented by the employee before completing Section 2 of the Form.

### How We Can Help

Baker Donelson's Immigration Group regularly counsels employers on I-9 compliance. We perform private audits of I-9 documents, prepare compliance programs, and train managers and workers in implementing those programs. We evaluate particular questionable documents and situations. We help employers decide whether and how to create or store I-9 forms electronically, to use Social Security Administration's Number Verification System, or to participate in the Department of Homeland Security's E-Verify program. We help

federal contractors design and implement E-Verify programs in compliance with Executive Order 13465 as implemented in Federal Acquisition Regulations.

We defend sanctions actions by ICE for "paperwork" and "knowingly hire" violations of I-9 rules. We work with our strong Litigation Department to bring and defend claims against competitors based on employment of unauthorized aliens. We advise and defend claims against competitors based on employment of unauthorized aliens. We advise and defend employers and managers in the increasingly common criminal investigations and proceedings relating to employment of aliens.

We coordinate our Team's services closely with our firm's well-respected Labor and Employment Law Group and with our firm's White Collar Crime Group. We provide advice and coordinate with U.S. and foreign preparers concerning U.S. taxation of international companies doing business in the U.S., and concerning the U.S. taxation of international workers placed in the U.S. and abroad.