

# PUBLICATION

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## **New Form I-9 is Latest in DHS Immigration Enforcement Strategy**

**November 09, 2007**

The Department of Homeland Security has announced and published a new, long-awaited version of the I-9 Form used to confirm the identity and work authorization of every new hire since 1986. The new form puts into practice the reduction of the number of documents that had been technically required since 1996. Employers should start using the new I-9 form as quickly as possible, and no later than December 7. DHS will publish a Federal Register notice imminently giving employers 30 days from then to begin using the form.

The changes in the new forms are as follows:

### **Five documents have been removed from List A of the List of Acceptable Documents:**

- Certificate of U.S. Citizenship (Form N-560 or N-561)
- Certificate of Naturalization (Form N-550 or N-570)
- Alien Registration Receipt Card (I-151)
- Unexpired Reentry Permit (Form I-327)
- Unexpired Refugee Travel Document (Form I-571)

### **One document was added to List A of the List of Acceptable Documents:**

- Unexpired Employment Authorization Document (I-766)

### **All the Employment Authorization Documents with photographs in circulation are now included as one item on List A:**

- I-688, I-688A, I-688B, I-766

Instructions regarding Section 1 of Form I-9 now indicate that the employee is not obliged to provide the Social Security Number in Section 1 of Form I-9, unless he or she is employed by an employer who participates in E-Verify. (Of course, other laws may require collection of the social security number in the hiring process.) The instructions section on Photocopying and Retaining Form I-9 now includes information about electronically signing and retaining I-9 forms.

I-9's format, font, organization and grammar have changed slightly, but the manner in which the form is completed has not changed. Previously completed I-9 forms should not be re-done with the new form. If, however, an employer needs to "re-verify" an existing employee whose I-9 was completed on the old version and whose work authorizing document has now expired, the new version of Form I-9 must be used, thus completing a new form altogether, rather than using the bottom portion of the old version.

DHS has also published a new Handbook for Employers, Form M-274, which had not been updated since 1991. The new Handbook contains clearer explanations of employers' obligations and updated examples of acceptable documents. Unfortunately, the Handbook fails to show all the different variations of the shown document types that can be valid, fails to explain sufficiently that other versions might be valid, fails to depict

several types of acceptable documents at all, and depicts some types of documents incorrectly. Thus, employers continue to lack clear governmental guidance in their role as involuntary document reviewers.

DHS had been planning to re-vamp the Form I-9 more completely through a comprehensive rulemaking and delayed the effort in part from anticipation of comprehensive legislation that might have required even more changes. DHS has decided to publish the just-announced version with only the above changes as part of its publicized effort to pursue all available measures to enforce existing immigration laws in the employment context.

The new form and information can be found on the Internet at the following locations:

- I-9: <http://www.uscis.gov/i-9>
- Employer Handbook: <http://www.uscis.gov/files/nativedocuments/m-274.pdf>

DHS recently published a regulation that announced an intention to hold employers accountable for "constructive knowledge" of their employment of unauthorized aliens, including admissions from alien workers themselves, requests by workers for immigration sponsorship, "no-match" letters from the Social Security Administration (SSA) and notifications from DHS. DHS and SSA announced that this Fall's round of no-match letters would contain also a letter from DHS warning the employer not to ignore the no-match finding. The regulation and the DHS letter set forth specific steps for an employer to take in response to the SSA no-match letter that would provide a "safe harbor" for the employer from DHS administrative sanctions. A federal court has since enjoined the regulation and the DHS insert for no-match letters, but DHS is expected to take an aggressive stand concerning constructive knowledge in prosecutions of employers and their managers that are ongoing all over the United States.

Meanwhile, numerous states have enacted laws that require employers in different situations to participate in otherwise voluntary federal verification programs and certify their avoidance of unauthorized workers under penalty of lost state contracts, lost business licenses and other lawsuits and enforcement actions. The pattern of regulation concerning immigration compliance has become increasingly complex with high stakes.

Baker Donelson's experienced Immigration Group, Labor & Employment Department and White Collar Crime Group have been performing a wide range of services to help employers establish effective compliance policies, audit procedures and training programs; amend vendor agreements; and defend against government audits, investigations and prosecutions.

Baker Donelson has organized a webinar for Thursday and Friday, November 15 and 16 from 2:00 p.m. - 3:00 p.m. Eastern to explain the implications of DHS's enforcement strategy and the steps employers can take to avoid devastating liability. Call Ana Faulk at 423-209-4156 for information and registration.