U.S. Department of Justice
Civil Rights Division

U.S. Immigration and Customs Enforcement, Homeland Security Investigations

How to Avoid Unlawful Discrimination and Other Form I-9 Violations When Using Commercial or Proprietary Programs to Electronically Complete the Form I-9 or Participate in E-Verify

This fact sheet discusses what employers should keep in mind if they use private sector commercial or proprietary products to electronically complete, modify, or retain the Form I-9. Although this document refers to these products collectively as **Form I-9 software programs**, the information here also applies to employers who use these programs to participate in E-Verify. The Form I-9 software programs discussed in this fact sheet do not include programs that the Department of Homeland Security directly oversees and administers, such as E-Verify.

Using the Form I-9 and E-Verify

Employers use the Form I-9 to complete the employment eligibility verification process. Under federal law, all U.S. employers must complete and retain a Form I-9 for each person they hire for employment in the United States after November 6, 1986. Employers can find a free, fillable Form I-9 at www.uscis.gov/i-9.

Some employers also participate in E-Verify. E-Verify is a voluntary web-based system that compares information from a Form I-9 to government records to electronically confirm an employee's authorization to work in the United States. Federal law prohibits employers from discriminating during the Form I-9 and E-Verify processes. All employers enrolled in E-Verify must follow the obligations as explained in the E-Verify Memorandum of Understanding and E-Verify guidance.

Using a Form I-9 software program does not guarantee an employer's compliance with federal law. Employers are responsible for ensuring that any Form I-9 software program used to electronically complete, modify, or retain the Form I-9 or participate in E-Verify complies with all legal requirements.

Free, direct access to E-Verify is available at www.e-verify.gov.

If an employer chooses to use a Form I-9 software program to electronically complete and retain the Form I-9 or participate in E-Verify, the employer should ensure the Form I-9 software program's compliance with:

- Form I-9 legal requirements, enforced by U.S. Immigration and Customs Enforcement, Homeland Security Investigations (HSI) and found at 8 U.S.C. § 1324a, 8 C.F.R. § 274a.2, and in agency guidance.

- E-Verify requirements, administered by U.S. Citizenship and Immigration Services and found at 8 U.S.C. § 1324a and in agency guidance; and

- Prohibitions against unfair employment practices, enforced by the Department of Justice's Civil Rights Division, Immigrant and Employee Rights Section (IER), and found at 8 U.S.C. § 1324b and 28 C.F.R. § 44.000.

If You Use a Form I-9 Software Program

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1. **Requirements for completing the Form I-9, including in a software program**:

- Everyone who completes the Form I-9 must have access to the current acceptable version(s) of the Form I-9, including Instructions and Lists of Acceptable Documents.

- Employees must complete Section 1 before the employer completes Section 2.

- Employees and employers must be allowed to leave optional and unused fields blank when appropriate and where Form I-9 rules permit, such as the Social Security number in Section 1 for employers who do not use E-Verify, the expiration date field in Section 1 next to the "A noncitizen authorized to work" attestation, and any inapplicable document information fields in Section 2.

> Employers must be able to enter any acceptable documentation, including acceptable receipts, that employees choose to present at the time of hire or for reverification.

- Employees with only one name must be allowed to enter their name in the last name field and enter "Unknown" in the first name field.

- The employer certification in Section 2 must include the title, last name, and first name of the person who examined the documents and completed Section 2, as well as the employer's business name and physical address.

2. **Requirements for Form I-9 accountability and reliability when completing, modifying, and retaining Forms I-9:**

- Employers must follow electronic Form I-9 requirements found in 8 C.F.R. § 274a.2(e) - (i) relating to the integrity, accuracy, and reliability of the

system; security and documentation; indexing; electronic signatures; retention; audit trails; location, retrieval, reading and reproduction abilities; as well as the ability to provide Form I-9 summary files (such as a spreadsheet) containing all the information fields on electronically stored Forms I-9 requested by the inspecting agency.

- Employees and preparers/translators must be able to make and record corrections to the information entered in Section 1.

> Employers must follow all applicable retention requirements for Forms I-9 and any attachments, including copies of supporting documents.

- Employers must be able to make and record corrections to Section 2 and information relating to reverification and rehire.

- All Forms I-9 must record and display all information entered, including for reverification and rehire.

- The Form I-9 software program must uniquely identify each person accessing, correcting, or changing a Form I-9.

3. Using Form I-9 software programs to create E-Verify cases:

- Employers participating in E-Verify can create cases directly through E-Verify's website or through a "web services" access method. The E-Verify web services access method allows an employer to participate in E-Verify by using customized software to connect with E-Verify. All employers that participate in E-Verify, whether as direct users or through web services access, must follow the E-Verify requirements detailed in the Memorandum of Understanding and E-Verify guidance.

- Employers must display notices letting prospective and newly hired employees know the employer uses E-Verify consistent with applicable E-Verify requirements.

> Employers must allow employees to take actions to resolve a mismatch. In addition, employers cannot take adverse action against the employee — for example, suspending or refusing to pay the employee — because of the mismatch, if the employee chooses to take actions to resolve the mismatch.

- Employers must use current versions of the E-Verify Tentative Nonconfirmation ("mismatch," previously known as a TNC) Further Action Notices and Referral Date Confirmation letters.

- Employers must provide the English and any relevant translated Further Action Notices and Referral Date Confirmation letters to employees with limited English proficiency.

- Employers must promptly notify employees in private of a mismatch and provide them with the Further Action Notice. If the employee elects to take action to resolve the mismatch, the employer must also provide the Referral Date Confirmation letter containing information specific to the employee's E-Verify case.

- Employers must be able to delay creating E-Verify cases when E-Verify rules

instruct them to do so. For example, E-Verify instructs employers to postpone creating E-Verify cases for employees who have not yet received their Social Security numbers and for employees who show certain acceptable receipts for the Form I-9.

4. **Employers who use Form I-9 software programs should provide the personnel administering them with training and other support, such as:**

- Establishing procedures to complete a Form I-9 or create an E-Verify case outside the Form I-9 software program if, for example, the person completing the Form I-9 cannot use the Form I-9 software program or it does not function properly.

- Providing access to applicable resources, including I-9 Central, USCIS's Handbook for Employers (M-274) for the Form I-9 Process, the E-Verify User Manual (M-775), and IER's materials discussing employee rights and how employers can avoid discrimination.

What to Avoid When Using Form I-9 Software Programs

1. **Employers must not**:

- Automatically pre-populate the Form I-9 with employee information derived from information that the employer has accessed externally, such as by importing information from an employee's job application.

- Complete a Form I-9 on an employee's behalf unless the employer is helping an employee complete Section 1 as a preparer or translator. In such cases, the employer must complete the required fields for preparers and/or translators.

- Remove any Form I-9 fields, or request more or different information than the Form I-9 requires.

- Add or remove steps in the E-Verify process if the employer uses E-Verify. In addition, any software integration must comply with the E-Verify web services Interface Control Agreement.

- Prevent preparers or translators from assisting an employee to complete Section 1.

- Auto-correct, use predictive text, or post-date a Form I-9.

- Fail to document any changes made to a Form I-9 in an audit trail.

- Change or update an employee's Section 1 citizenship or immigration status attestation. If an employee is correcting a previously made error, the employee (or their preparer or translator) must be the one to make the correction in Section 1.

- Request unnecessary documentation (such as reverifying an employee's identity or impermissibly reverifying an employee's permission to work in

Employers must not (*continued*)**:**

> the United States). For example, employers should avoid Form I-9 software programs that generate notifications suggesting that an employee must show a different or additional document based on an expiring List B identity document or a Permanent Resident Card.

- Create new E-Verify cases due to corrections made to the Form I-9 if the employee already received an "employment authorized" result.

2. Employers should be cautious of Form I-9 software programs that:

- Claim government endorsement, certification, or approval. The federal government does not approve, endorse, or certify any Form I-9 software programs, including any private sector commercial or proprietary products.

- Impose unnecessary obstacles that make it harder for employees to start work or get paid, such as by requiring a Social Security number to onboard or by not paying an employee who can complete the Form I-9 and is <u>waiting for a Social Security number</u>.

- Do not provide technical assistance and support.

Resources

- **Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section:**
  Call IER's free employer hotline for information on how to avoid unlawful discrimination, including when using Form I-9 software programs: **1-800-255-8155** (1-800-237-2515 for the hearing-impaired), available from 9:00 a.m. – 5:00 p.m. ET, Monday-Friday. Calls can be anonymous and language services are available. Visit <u>www.justice.gov/ier</u> for videos, other educational materials, and frequently asked questions for employers and HR professionals. (Available in Spanish at <u>www.justice.gov/crt-espanol/ier</u>).

- **E-Verify, U.S. Citizenship and Immigration Services**:
  1-888-464-4218
  <u>www.e-verify.gov</u> | <u>www.uscis.gov/i-9central</u>

- **U.S. Immigration and Customs Enforcement**:
  <u>www.ice.gov</u> | <u>www.ice.gov/factsheets/i9-inspection</u>

Note: This information addresses commonly seen questions related to Form I-9 software programs, but is not exhaustive or dispositive of all issues, questions, or concerns employers and employees may encounter when using such products. Employers should **follow all laws, rules, regulations, and agency guidance, and always do their own due diligence if they are considering using such programs.**