

### Electronic Signatures and Storage of Form I-9: New DHS Regulations

July 21, 2010

On July 22, 2010, the Department of Homeland Security will publish a Final Rule that regulates how employers may use electronic systems to complete and to store their I-9 Forms. The Final Rule will take effect on August 22, 2010. The rule is substantially similar to an interim rule issued in 2006, but there are some meaningful changes.

#### Background

##### **Employment Eligibility Verification Requirement**

Section 274A of the Immigration and Nationality Act, as amended (INA), 8 U.S.C. § 1324a, requires all U.S. employers, agricultural associations, agricultural employers, farm labor contractors, or persons or other entities that recruit or refer persons for employment for a fee, to verify the employment authorization and identity of all employees hired to work in the United States after November 6, 1986. To comply with the law, an employer, or a recruiter or referrer for a fee, is responsible for the completion of a Form I-9, Employment Eligibility Verification (Form I-9), for each new employee, including United States citizens. 8 C.F.R. § 274a.2.

The completed Form I-9 is not filed with the Department of Homeland Security (DHS). Rather, the Form I-9 is retained by the employer, who must make it available for inspection upon a request by Immigration and Customs Enforcement (ICE) investigators or other authorized federal officials. Employers are required to retain a Form I-9 in their own files for three years after the date of hire of the employee or one year after the date that employment is terminated, whichever is later. 8 C.F.R. § 274a.2(c)(2). Recruiters or referrers for a fee are required to retain each Form I-9 for three years after the date of hire. *Id.* at (d)(2). Failure to properly complete and retain each Form I-9 may subject the employer or recruiter or referrer for a fee to civil money penalties. INA § 274A(e)(5), 8 U.S.C. § 1324a(e)(5).

##### **Format of the Form I-9**

The Form I-9 has been available to the public in numerous paper and electronic means since 1986. The Form I-9 is available online at the U.S. Citizenship and Immigration Services (USCIS) website, <http://www.uscis.gov/files/form/i-9.pdf>, as a Portable Document Format (.pdf) fillable and printable form. The final rule permits employers to complete, sign, scan, and store the Form I-9 electronically (including an existing Form I-9), as long as certain performance standards set forth in this final rule for the electronic filing system are met.

#### Changes Made by This Final Rule

The principal changes effected by this rule are as follows:

- Employers must complete Section 2 of the Form I-9 within three **business** (not calendar) days.
- Employers may use paper, electronic systems, or a combination of paper and electronic systems.
- Employers may change electronic storage systems as long as the systems meet the performance requirements of the regulations.
- Employers need not retain an audit trail that reflects each time a Form I-9 is electronically viewed; the trail need only reflect when the Form I-9 is created, completed, updated, modified, altered, or corrected. (The audit trail is intended to help ICE determine whether the data on an electronically generated Form I-9 has been improperly tampered with.)

- Employers may provide or transmit a confirmation of a Form I-9 transaction, but are not required to do so unless the employee requests a copy.

There remains confusion and controversy related to how DHS calculates the three business days for purposes of completing Section 2 of the Form I-9. In the Form I-9 context, past agency publications explain that the date of hire is day number one, so that for a person hired on Monday, the Form I-9 must be complete by the start of work on Thursday. The confusion stems from a recent announcement by U.S. Citizenship and Immigration Services (USCIS), a sister agency of ICE and a subagency of DHS, that in the specific context of the E-Verify program (for employers registered to use E-Verify), the date of hire is not counted in the three-day calculation for purposes of determining when the E-Verify query must be initiated. For example, a person hired on Monday would need to have the E-Verify query initiated before the start of work on Friday (date of hire plus three days). We expect that ICE will eventually align its policy with that of USCIS; however, until this discrepancy between the sister agencies is clarified, employers should assume that the Form I-9 must still be completed by the end of the third day of work, counting the date of hire.

## How We Can Help

The Morgan Lewis Immigration Compliance Practice assists clients of all sizes in the creation and management of effective immigration compliance programs. Our services include I-9 training, I-9 audits, I-9 and E-Verify counseling, and the design and development of internal immigration and immigration compliance policies. We are also active in representing and defending clients in connection with ICE Form I-9 inspections and investigations, charges of immigration compliance violations, and claims and investigations before the Department of Justice Office of Special Counsel for immigration-related discrimination.

We will continue to monitor the situation and update you with any new information. For more information, or if you have any questions regarding the issues discussed in this Immigration Alert, please contact any of the following attorneys:

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### Now Available: *AILA's Focus on Immigration Practice Under AC21*

Written by Eleanor Pelta and A. James Vázquez-Azpiri, *AILA's Focus on Immigration Practice Under AC21* provides invaluable insight on the effect AC21 has had on the H-1B visa category. For more information, please visit [www.ailapubs.org/ac21.html](http://www.ailapubs.org/ac21.html) or call 1.800.982.2939 to order a copy.

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