



Top 10 Q&As for Tough I-9 Issues

By Becki Young

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Over the next three and a half years, expect a marked increase in workplace immigration enforcement—in addition to an uptick in I-9 investigations. Employers probably will also see increased activity by the Department of Labor's Wage and Hour Division and the Department of Homeland Security's (DHS') Office of Fraud Detection and National Security. Staying informed of the latest trends and requirements will be key to companies' immigration compliance efforts.

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On June 19, I spoke at a SHRM 2017 Annual Conference & Exposition concurrent session about Form I-9 and E-Verify compliance. In an era of increasing enforcement by immigration authorities, conference attendees were clearly interested in the topic. The audience was highly engaged and asked insightful questions. Here are some of the best:

Q: I work at a summer camp, and a lot of our foreign national camp counselors come back each year. Do we need to complete a new I-9 for them?

A: If you rehire an employee (<https://www.uscis.gov/i-9-central/complete-correct-form-i-9/completing-section-3-reverification-and-rehires>) within three years of the date that a previous Form I-9 was completed, you may either complete a new Form I-9 for your employee or complete Section 3 of the previously completed Form I-9, as long as the original I-9 shows current work authorization.

Q: Must I reverify a female employee who changes her name upon getting married? What about a transgender employee who changes both name and gender?

A: You may, but are not required to, reverify an employee who has a name change ([www.shrm.orghttps://www.uscis.gov/i-9-central/complete-correct-form-i-9/completing-section-3-reverification-and-rehires](https://www.uscis.gov/i-9-central/complete-correct-form-i-9/completing-section-3-reverification-and-rehires)). Since the form does not ask about gender, the same principle should apply to a transgender employee. One other interesting point about transgender employees: The "Other Names Used" field in the form has been changed to "Other Last Names Used" to avoid potential discrimination issues and provide increased privacy for transgender individuals and others who have changed their first names.

Q: How should I complete the new field in Section 2 that asks for "Citizenship/Immigration Status" (and requires a number)?

A: The key for this field is on page 1 of the form: 1 = A citizen of the United States; 2 = A noncitizen national of the United States; 3 = A lawful permanent resident; or 4 = An alien authorized to work in the United States.

Q: I'm completing an internal I-9 audit and my predecessor collected copies of too many documents (e.g., an employment authorization document (EAD) and a driver's license), but only recorded the required documents (e.g., the EAD). May I discard the extraneous documents?

A: This question resulted in a heated debate among my lawyer colleagues. Some took the position that the extraneous document(s) could simply be shredded because they arguably were not collected "in connection with" the I-9 process. A more conservative approach, with which I agree, suggests that, while the superfluous document(s) could be shredded, a memo should be made to the file to indicate that,

while the document was collected in the course of completing the Form I-9, it was not used for the I-9 process and thus has been shredded.

Q: Are there any employers to whom you would not recommend E-Verify?

A: E-Verify is an Immigration and Customs Enforcement best practice, and we recommend it to the majority of our clients. However, employers whose workforce consists largely of unskilled or low-skilled workers should carefully consider the pros and cons of E-Verify before enrolling. In the I-9 context, employers are required to accept documents that appear facially valid. But with the sophisticated technology now available to create fraudulent identity documents, a certain percentage of undocumented workers will always slip through the cracks. For employers in industries where labor is scarce (hospitality, construction, landscaping), the temptation may thus be strong to avoid E-Verify. However, businesses in such industries that do not use E-Verify operate under a constant threat that their workforce could be decimated by an I-9 audit. Enrolling in E-Verify means they can expect to receive a large number of tentative and final nonconfirmations, which will increase hiring challenges but could ultimately provide more peace of mind.

Q: Can I scan my I-9s and store them electronically?

A: Although there are rules advising how employers can store their own I-9s electronically (<https://www.uscis.gov/i-9-central/retain-store-form-i-9/storing-form-i-9>), these rules are so complex that clients should not do this on their own. If you wish to store I-9s electronically, use a qualified vendor. (SHRM keeps a handy list ([www.shrm.orghttp://vendordirectory.shrm.org/category/pre-employment-testing-screening/i-9-verification](http://vendordirectory.shrm.org/category/pre-employment-testing-screening/i-9-verification))).

Q: What should I do with my I-9s at the end of the required retention period?

A: Shred them. However, double-check the required retention periods and ensure that you maintain I-9s for all existing employees.

Q: If an employee provides a driver's license and a restricted Social Security card, what should I do? The restricted Social Security card says "Valid for Work Only with DHS Authorization," so may I then ask for proof of DHS authorization?

A: This is a bit of a Catch-22 for the employer: Asking, directing or suggesting that the employee produce a specific document could be viewed as discrimination. Tell the employee that those two documents are not acceptable I-9 documents. You could then offer to go through the list of acceptable documents with the employee to discuss which documents or combination of documents are acceptable.

Q: What is the earliest date I may complete the I-9?

A: Form I-9 may be completed as soon as you have offered the individual a job (<https://www.uscis.gov/faq-page/i-9-central-completing-form-i-9>) and he or she has accepted the offer.

Q: May I accept an expired driver's license with a receipt for an extension?

A: No, though you may accept a receipt for a driver's license that was requested to replace a license that was lost, stolen or damaged (<https://www.uscis.gov/i-9-central/acceptable-documents/receipts>).

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