

Do You Store Your I-9s Electronically?

New Rules Go Into Effect on August 23, 2010

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Introduction

The Department of Homeland Security (DHS) has clarified electronic signature and storage of I-9s. Among those clarifications, the DHS has specified that there is no longer any need to copy both sides of the I-9 for electronic storage. The DHS' Immigration and Customs Enforcement (ICE) has stated that its main goal in promulgating these new rules is to make it easier for employers to prepare, store and retain their Forms I-9s electronically. The DHS announcement of these new rules was issued by press release dated 7.22.2010, stating that the rules are to become effective 08.23.2010, superseding interim rules that have been in effect since 10.30.2004.

Changes to the Interim Rules

1. The Form I-9 must be completed within three business days, not calendar days, after the employee's first day of work for pay.
2. An employer may choose to store existing Form I-9s electronically as well as complete new ones electronically.
3. Employers may use electronic systems or a combination of paper and electronic systems to complete and store Forms I-9.
4. The audit trail retained for an electronic Form I-9 does not need to include information as to each time a Form I-9 is electronically viewed. The audit trail need only contain a record of when the Form I-9 was created, completed, modified, altered, updated, or corrected.
5. Employers may provide or transmit a confirmation of a Form I-9 transaction to the employee but are not required to do so, unless the employee requests a copy.
6. Only the page of the Form I-9 containing employer and employee-entered data need to be retained. Therefore, pages of the Form I-9 containing instructions and the list of acceptable documents do not need to be retained when storing I-9s electronically.
7. The I-9 electronic storage system must permit the identification and retrieval for viewing or reproducing in hard copy all relevant documents and records.
8. The employer must be able to provide any United States agency making such a request with the resources (e.g., appropriate hardware and software, authorized personnel accessing I-9s, and documentation) necessary to locate, retrieve, and reproduce in hard copy any electronically stored Forms I-9, as well as any supporting documents and associated audit trails. The employer must be able to demonstrate the authenticity, integrity, and reliability of the I-9s and

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related records so retained to the United States agency requesting such information. This provision does not require unlimited government access; it seeks to prevent contract and licensing restrictions from denying government access.

9. If the employer chooses to copy or electronically scan the employee documentation provided, it must either be retained with the Form I-9 or stored with the employee's records, and be readily retrievable and printable.
10. Employers may change electronic I-9 storage systems to meet the performance requirements of these regulations.

Conclusion

Please note at item 6 above that the back of the Form I-9 listing acceptable documentation does not need to be stored electronically. The new rules are not clear if a paper Form I-9 is required to be two sided since this Rule deals exclusively with Electronic Signature and Storage of Form I-9. However, it is at least arguable that it would be unreasonable to have different requirements for a complete Form I-9 depending solely upon whether an employer chooses an electronic storage system or paper I-9. Until there is further clarification, using two sides of a paper Form I-9 would be a conservative approach.

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