MITRATECH

I-9 Top Questions and Answers

1. Who can/has to use E-Verify?

Any employer can elect to use E-Verify. However, there are several circumstances in which an employer may be obligated to use E-Verify, which include certain federal contracts and subcontracts, employers in states that require E-Verify use, and employers hiring employees with certain visa statuses.

2. Do we have to keep hard copies of docs? Front and back?

An employer (who is ***not participating in E-Verify*** and therefore not using the "**alternative procedure**") can handle the copies of the supporting documents for Form I-9s one of three ways, but should be consistent in their choice for all employees:

1. No copies are made or retained
2. Take copies and destroy the copies after they've been used
3. Keep copies of the supporting documents and attach them to the Form I-9

The third option, keeping copies, may be best if there is ever a question of the authenticity of a document that was presented to an employer. This helps demonstrate to an auditor that the employer made a good faith effort to ensure that the documents presented are genuine.

When making copies of documents, it is important to make clear copies of both the front and back of the document.

Above all, remember to avoid saving copies for some employees, but not all.

3. What are the I-9 electronic storage requirements?

Employers may use a paper system, an electronic system, or a combination of paper and electronic systems to store completed Form I-9s.

In Chapter 10 of the Handbook for Employers M-274, the U.S. Citizenship and Immigration Services (USCIS) states that any electronic system used to generate or retain complete I-9s must include:

- Reasonable controls to ensure the system's integrity, accuracy, and reliability
- Reasonable controls designed to prevent and detect the unauthorized or accidental creation of, addition to, alteration of, deletion of, or deterioration of an electronically completed or stored Form I-9, including the electronic signature, if used
- An inspection and quality assurance program that regularly evaluates the system and includes periodic checks of electronically stored Form I-9, including the electronic signature, if used
- An indexing system that allows users to identify and retrieve records maintained in the system
- The ability to reproduce legible and readable paper copies.

Employers must also meet certain requirements related to producing specific information for any electronic systems used. In the ***Handbook***, USCIS also provides additional requirements relating to using electronic signatures, effective security measures, etc.

4. There is a new version of the I-9. Does everyone need to complete a new one?

A current employee with a completed, valid I-9 on file should not be asked to complete another I-9 during employment, even when an updated version of the Form I-9 is released.

The current version of the Form I-9, identified by the date in the lower left corner of the form, must be used for newly hired employees only. An employer may not request that current employees (those with a completed, valid I-9 on file) complete another I-9 during employment. So, you'll simply begin using the new version of the form for newly hired employees no later than the effective date of the updated version. Note that USCIS often provides a grace period to phase in the use of the new form — during this period the previous or new version of the form may be used.

If you have employees that require reverification of their employment authorization, whether or not you must use the new version of the I-9 to complete this process is dependent on the specific situation.

5. What are the retention rules, and can you provide an example?

The Form I-9 must be retained for the full length of employment, plus the later of:

- 3 years after the date of hire, or
- 1 year after the date of termination

Here's an equation to assist with proper retention periods:

- Enter the date the employee started work + 3 years = Answer A
- Enter the employee's termination date + 1 year = Answer B

Store the I-9 until the later date, A or B.

Example:

An employee hired on 3/1/2022 with a termination date of 6/1/2024:

- 3/1/2022 + 3 years = 3/1/2025
- 6/1/2024 + 1 year = 6/1/2025

Store the employee's I-9 until the later date, 6/1/2025.

Once an I-9 is past its retention period, you may destroy it. It is a best practice to use a secure shredding company to ensure I-9s are properly disposed of and that documents related to an employee's identity are secure.

6. Do owners need an I-9?

Owners who perform work for the organization or are on the payroll should have an I-9 on file. Ideally, another representative of management should complete the "employers" part of Section 2 of Form I-9. An individual should not complete the employer section of their own I-9 form in most cases.

Whether an owner is an employee or not can be a complicated question with different answers depending on the law in question and the tax classification of the organization. If the owner is on the payroll, they are generally an employee in many but not necessarily all respects. A working owner who is on the payroll will often be an employee for the purposes of the Form I-9.

The safe and simple answer is to have a completed Form I-9 for any working owners. This is especially so if any owner is on the payroll. A sole proprietor with no employees would not complete a Form I-9.

USCIS guidance states the following with regard to "working" owners:

"If you are self-employed, you do not need to complete Form I-9 on your own behalf unless you are an employee of a separate business entity, such as a corporation or partnership. In that case, you and any other employees must complete Form I-9."

7. What should we do if we discover we are missing I-9s for long-time employees or terminated employees?

According to USCIS **guidance on internal audits**, if a Form I-9 was never completed or is missing, the current version of the Form I-9 should be completed as soon as possible.

The employer should provide all employees who claim they are work-authorized with a reasonable amount of time to address any deficiencies associated with their Form I-9 and should not summarily discharge employees without providing a process for resolving the discrepancy.

If an employee fails to provide you with documentation within the required timeframe, you may terminate employment based on failure to complete the I-9 and substantiate work authorization.

As for the dates on the form, the following applies:

- **Section 1:** The employee must enter the date they complete the Form I-9 on their signature line (don't back-date this date)
- **Section 2:**
  - For the date the employee began employment in the "Certification" block of Section 2, enter the employee's original start date with the company
  - For the date next to your signature, as the representative of the company, enter the date you reviewed the employee's documents/IDs and are signing the form, thus completing the Form I-9

Then, you'll want to include a memo with the I-9 to document why it wasn't completed within 3 days of the employee's hire date. State that as a result of conducting an internal audit, you determined that the I-9 was missing and completed one promptly, which is why the date of completion is not within the required 3 days of the date employment began.

If you discover missing I-9s for individuals who are no longer employed by your company, simply include a memo in their records.

8. How do you make a correction if you find an error?

Per USCIS, for minor corrections to the form you or the employee — depending on where the error is — may:

1. Draw a line through the incorrect information
2. Enter the correct information
3. Initial and date the correction on the original form

If your audit results in finding multiple errors on an employee's I-9, redo the section on a new I-9 and attach it to the original form. Any major errors will also require a new I-9, and again you need to attach a memo when a new I-9 is completed.

Never use correction fluid, a black-out marker, or other method to eliminate the original information. Do not attempt to conceal any changes made.

9. Do rehires need to complete a new I-9?

When rehiring an employee within 3 years from the date their original Form I-9 was completed, employers have two options, but should be consistent in their choice for all rehires:

1. The company may rely on the original I-9 and complete Supplement B as an update to the original; or
2. The company may ask the employee to complete a new I-9. However, note that the company must still preserve the original I-9 for the full retention period

If more than 3 years have elapsed since the rehired employee's original I-9 was completed, then the company must have the employee complete a new Form I-9.

10. Can we use the alternative procedure for non-remote employees if we will use it for remote employees?

Yes, employers can use the alternative procedure for onsite or hybrid employees. If an employer offers the alternative procedure at a particular hiring site, it needs to be offered to all employees at that site.

In contrast, if employers want to offer the alternative procedure only to remote employees and do in-person inspection for onsite and hybrid employees, they may do so.

11. Do we have to actually terminate an employee who can't produce acceptable documents, or can we just not have them work until they are able to do so?

If an employee cannot produce acceptable I-9 documentation, the safest approach is to end their employment, as federal law prohibits the employment of individuals who cannot provide this documentation within the specific timeframe.

With that said, an employer could choose to hold the job open for a specified period to allow the employee to obtain documentation. Alternatively, an employer could make the employee aware that they can reapply for open positions when they can produce acceptable documentation.

12. Can we ask for extra documentation from an employee?

The laws that govern the Form I-9 strictly prohibit employers from specifying which documents the employee must provide, requesting more documents than necessary to establish identity and work authorization, or requesting verification of these documents more often than required. If the employee has presented acceptable documentation for their I-9, asking for extra documentation can be considered a violation of anti-discrimination provisions of the Immigration and Nationality Act (INA).