

## I-9 Reminder and Update on Non-solicitation Agreements in Wisconsin

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As we turn the calendar to 2017, we wanted to remind employers of two important issues:

**New I-9 Forms.** As you are already hopefully aware, the U.S. Citizenship and Immigration Services (USCIS) released a new version of the Form I-9, employment eligibility verification, late last year. This form is dated November 14, 2016, and employers must begin using it no later than *January 22, 2017*. Not having Forms completed or using the wrong version of the Form can lead to significant penalties.

A Form I-9 has been required for all new hires after November 6, 1986, to verify employment authorization. The new version of the Form does not change the substantive questions or the list of acceptable identity and work authorization documents.

The new Form I-9 was designed to be easier to fill out on a computer. It features interactive form fields, including drop down menus and calendars; embedded instructions; and the automatic generation of the quick response (QR) code when printed. Although employers can access and complete the new Form I-9 on the USCIS website, they must still print a completed Form, obtain hand written signatures, store the hard copy securely, and follow the same reverification practices they have followed when working with the old, paper version of the Form. Employers can continue to use a plain paper version when completing the new Form, which can be printed out from the USCIS website.

Changes in the new version of the Form include the following:

- Section 1 asks for “other last names used” rather than “other names used;”
- A dedicated area for including additional information rather than having to add it in the margins;
- The ability to enter multiple preparers and translators; and
- A supplemental page for the preparer/translator.

The instructions have also been separated from the Form and include specific instructions for completing each field.

Employers should remain aware, however, that it is still the employer’s responsibility to review proper documentation from the employee and to abide by anti-discrimination provisions.

## **Considerations For Employers**

1. Decide if you will access and complete the new Form I-9 manually or electronically. Electronic execution will prevent some errors but will require training for those completing the Form.
2. Determine the identity of and train those in your organization who are responsible for the execution of the new Form I-9 to ensure compliance with the proposed changes.
3. Consider a Form I-9 compliance review or audit.

## **Tips For Form I-9 Audits**

- Do not conduct audits that could be seen as discriminatory or retaliatory. If you have many Form I-9s on file it may not be practical to review them all. You may audit a sampling of them. How you choose that sample is very important. You should not conduct internal audits based on citizenship status, national origin, or on any other protected classification like gender, age, disability, or religion. You should also take care not to have it appear that you used a discriminatory basis for sample selection.
- Employers should not correct errors or omissions in Section One of Form I-9 - have the employee do it. Section One of Form I-9 must be completed by the employee. Therefore, they must correct any errors or omissions. Have the employee enter the correct information and initial and date the correction.
- Employers should correct any errors or omissions in Sections 2 or 3 of the Form. Do not conceal the original information via erasure or use of whiteout, and do not backdate any forms.
- If you discover that an employee never completed a Form I-9 or his/her Form is missing, complete a new Form as soon as possible. Do not backdate the Form. Employers should attach a signed and dated explanation and state the date employment actually began in the certification portion of Section 2.
- Do not request specific documents if issues are uncovered with the original documents. The standard for evaluating employment verification documents during an internal audit is the same as when the employee initially completed the Form - does the document reasonably appear to be genuine and relate to the individual presenting it? If you conclude the document does not appear genuine or relate to the individual presenting it, ask the employee for different acceptable documents. You can tell the employee the problem document will not be accepted again, but you cannot otherwise specify which documents the employee must present.
- Do not ask existing employees to complete new forms in lieu of conducting an internal audit.
- Take appropriate action when problems are uncovered. If you receive a credible tip that a specific employee is not work-authorized, you should review the employee's Form. Employees who have a deficiency with their Form I-9s should be given a reasonable amount of time to address the deficiencies and should not be summarily discharged. What is considered "reasonable" should be determined on a case-by-case basis.
- An internal audit is not complete until you have addressed all issues uncovered. If you document errors and then take no action, that may be worse than not doing the audit itself.

## **General Tips For Employers**

- Make sure the employee fills out Section 1 on the first day of employment.
- Make sure the employer fills out Section 2 and 3 within three business days of employment.
- Keep Form I-9s separate from personnel files. Keeping all of your Form I-9s in one place will make it easier if you ever have a Form I-9 audit from USCIS or the Department of Labor. It will also make it easier for you to do an internal audit, if desired.
- Keep photocopies of documents presented by employees. There is a debate as to whether employers should make photocopies of any documents that an employee presents. Making photocopies is not required. One argument is that if the government audits the employer's Form I-9s and the government sees documents which are clearly unacceptable, that may prove the employer's guilt. However, if the employer makes a reasonable effort to ensure the document reasonably appears to be genuine and relates to the individual presenting it, copies of those documents may be the employer's best defense. Employers are not expected to spot counterfeits or otherwise be experts on the documents. They are required to use reasonable judgment.
- Keep Form I-9s for the later of three years after the employee's date of hire or one year after the employee's termination.

## **Summary**

Because the Form I-9 has been around for forty years, employers may become somewhat complacent in completing the Form. This new Form may help employers comply with their responsibility. Given that the Trump administration will be taking office, and given President Trump's emphasis on immigration control or reform, it would not be surprising to see increased enforcement efforts with respect to Form I-9 compliance in the coming years. Penalties for non-compliance with Form I-9 requirements can be substantial. Employers should take time to review their processes and seek guidance if they have questions. The USCIS website has a lot of useful information as well. See [uscis.gov](http://uscis.gov).

## **Employee Non-solicitation Agreement Update**

As we previously informed you in an earlier HR Heads-Up (See, *Employee Non-solicitation Agreements Face New Hurdles*: <http://www.boardmanclark.com/publications/employee-non-solicitation-agreements-face-new-hurdles/>), a Wisconsin Court of Appeals decision has made it significantly harder for employers to use agreements which seek to prevent employees from "poaching" other employees to leave their employment and work with the former employee at their new place of employment. See, *Manitowoc Company v. Lanning*, 2015 AP 1530 (August 17, 2016).

Since we reported on that case the Wisconsin Supreme Court has agreed to hear an appeal of the Court of Appeals decision. Whether the Supreme Court will uphold, reverse or modify that decision is unknown but it will be an important decision for employers to watch for in the coming months. A decision should be issued by the end of July, 2017.

In the meantime, employers who use non-solicitation agreements or have such provisions in their employment agreements may wish to have them reviewed by legal counsel to see if they are too broad or if they comply with the Court of Appeals decision. Alternatively, employers may want to exercise caution before they attempt to enforce an existing agreement against a former employee. Until the Wisconsin Supreme Court provides further guidance, a cautious approach may be a wise approach.

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**Disclaimer:** This information is not intended to be legal advice. Rather, it seeks to make recipients aware of certain legal developments that affect human resource issues. Recipients who want legal advice concerning a particular matter should consult with an attorney who is given a full understanding of the relevant facts pertaining to the particular matter.