

# EVERYTHING HAS A SHELF LIFE (EVEN PAPER!)

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# FORM I-9 AND E-VERIFY



# WHAT IS FORM I-9?

- The Immigration Reform and Control Act of 1986 (IRCA) required all U.S. employers to complete Form I-9 for each individual they hire for employment in the U.S. regardless of citizenship.
- Employees must present documents to establish and verify identity and employment eligibility.

# WHAT IS E-VERIFY?

- E-Verify does not replace Form I-9 compliance.
- E-Verify is an internet-based system that compares information from an employee's Form I-9, Employment Eligibility Verification, to data from U.S. Department of Homeland Security and Social Security Administration records to confirm employment eligibility.
- The retention requirements for E-Verify case information and documentation are the same as I-9 requirements.

## HOW SHOULD FORM I-9 BE STORED?

- Form I-9 requires the collection of personal information about employees. Employers should keep this in mind when determining how to retain and store completed Forms I-9 so that personal information does not get into the wrong hands.
  - On-site or at an off-site storage facility
  - Paper
  - Microfilm or microfiche
  - Electronic

# FORM I-9 RETENTION

- Employer must retain I-9s for three (3) years after employee begins work or one (1) year after date of termination – whichever is longer.
- If employer utilizes E-Verify, attach case verification print-out to I-9.
- Keep I-9s separate from personnel files.



## DOES THE EMPLOYER NEED TO RETAIN COPIES OF DOCUMENTS PRESENTED BY THE EMPLOYEE?

- No – retaining copies of the supporting documents is voluntary.
- Maintaining documentation could provide a good faith defense for an employer in showing that it had reason to believe a worker was authorized even if the paperwork was not properly completed.
- The policy must be applied consistently – keep copies for all employees or for none of them

# HOW LONG DOES AN EMPLOYER NEED TO RETAIN FORM I-9?

To calculate how long to keep an employee's Form I-9, employers should complete the following:

1. Date the employee began work for pay	1. _____
A. Add three years to the date on line 1.	A. _____
2. The date employment was terminated	2. _____
B. Add one year to the date on line 2.	B. _____
3. Which date is later: A or B?	3. _____
C. Enter the later date.	C. _____



# SUGGESTED RETENTION METHOD - BINDERS

- Binder 1:
  - For ACTIVE Employees who **do not** need reverification
    - Use alphabetical tabs to keep I-9s in order.
- Binder 2:
  - For ACTIVE Employees who **do** need reverification
    - Use month/year tabs to keep track of reverification dates.
    - Additionally need another “tickler” system to notify of impending expiration date. (e.g. 90 days out)
- Binder 3: For INACTIVE Employees
  - Use month/year tabs to keep track of disposal date.

# CAN I-9S BE COMPLETED AND RETAINED ELECTRONICALLY?

Form I-9 can be electronically generated and retained provided that:

- Include controls to ensure the integrity, accuracy and reliability of the electronic storage system.
- Include controls to detect and prevent the unauthorized or accidental creation of, addition to, alteration of, deletion of or deterioration of an electronically stored Form I-9, including the electronic signature, if used.
- Include controls to ensure an audit trail so that **any** alteration or change to the form since its creation is electronically stored and can be accessed by an appropriate government agency inspecting the forms.
- Include an inspection and quality assurance program that regularly evaluates the electronic generation or storage system, and includes periodic checks of electronically stored Forms I-9, including the electronic signature, if used.
- Include a detailed index of all data so that any particular record can be accessed immediately.
- Produce a high degree of legibility and readability when displayed on a video display terminal or reproduced on paper.

**PUBLIC ACCESS FILE**

## WHAT IS THE PUBLIC ACCESS FILE?

- Employers of foreign nationals holding H-1B, H-1B1, and E-3 statuses are held to certain requirements stemming from the underlying labor condition applications (LCAs) filed with the U.S. Department of Labor (DOL). One such requirement is to maintain a file that is available for public inspection. This is commonly referred to as the public access file.
- The DOL may audit the public access file as well as payroll records to make sure the foreign worker is/was being paid the wage stated in the application.
- The Public Access File must be created within one working day of the LCA filing.

# WHAT DOCUMENTS SHOULD THE PUBLIC ACCESS FILE CONTAIN?

- A signed copy of the certified labor condition application including all pages and cover sheet.
- Documentation which provides the wage rate to be paid to the non-immigrant.
- A clear explanation of the system that the employer used to set the “actual wage” the employer has paid or will pay workers in the occupation sought.
- Documentation which the employer used to establish the “prevailing wage” for the occupation sought.
- A copy of the notice of posting including dates of posting, and a statement identifying the two posting locations.
- A statement confirming that a copy of the approved LCA was provided to the H-1B worker.



# ADDITIONAL DOCUMENT REQUIREMENTS FOR H-1B DEPENDENT OR WILLFUL VIOLATORS

- The public access files of these employers must contain specific proof of their efforts to recruit U.S. workers, if required. This recruitment is not a standard H-1B requirement; it is an additional requirement for a limited group of employers.



# ADDITIONAL DOCUMENT REQUIREMENTS FOR COMPANIES WHO UNDERGO A CORPORATE CHANGE

- Sworn or notarized statement by successor entity accepting all liabilities of predecessor entity;
- List of H-1B workers transferred to successor entity;
- Each affected LCA number and effective date;
- A description of successor entity's actual wage system;
- Successor entity's employer identification number.

## PUBLIC ACCESS FILE RETENTION REQUIREMENTS

- The petitioning employer must keep the public access file for a period of one year beyond the date of employment under the LCA.
- Public access files must be maintained for a period of one year beyond the last date on which any H-1B nonimmigrant was employed under the labor condition application.

# PENALTIES FOR NOT MAINTAINING THE PUBLIC ACCESS FILE

- When violations are found, the Administrator of the Wage and Hour Division may assess civil monetary penalties with maximums ranging from \$1,000 to \$35,000 per violation, depending on the type and severity of the violation.
- These are separate from any penalties that may be assessed for failure to demonstrate compliance with the LCA requirements.

# PERM COMPLIANCE FILE



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- Copies of PERM applications filed with the Department of Labor and all supporting documentation must be retained by the employer for five years from the date of filing the PERM application
- Obligation is on the employer (not the attorney)
- DOL expects all documents to be assembled prior to submitting PERM application
- No particular method of retention is mandated, but the burden is on the employer to establish the validity of the documentation

# WHAT DOCUMENTS SHOULD BE KEPT IN THE COMPLIANCE FILE?

- Prevailing wage determination
- Advertising and other recruitment activities
- Notice of postings/notice to unions
- Evidence of business necessity
- Recruitment reports
- Evidence of resumes received and detailed reasons for rejections
- Evidence of attempts to contact applicants
- Documentation relating to audit/supervised recruitment requests (copies of DOL requests and responses)



# WHAT HAPPENS IF THE COMPLIANCE FILE IS NOT MAINTAINED?

- DOL “Soft” Enforcement Tools:
  - Denial
  - Audit
  - Supervised recruitment
- DOL “Hard” Enforcement Tools:
  - Investigation
  - Revocation/invalidation
  - Criminal indictment
  - Disbarment

*\*\*PERM violations are often linked to violations of other labor laws, such as the Fair Labor Standards Act\*\**

# H-2B COMPLIANCE FILE



# H-2B COMPLIANCE FILE – RETENTION REQUIREMENTS

- The employer must retain records and documents for three (3) years from the date the Application is certified, or from the date of adjudication if the Application is denied, or from the day the Department receives the letter of withdrawal if the employer withdraws the Application.

<https://www.dol.gov/WHD/regs/compliance/whdfs78i.htm>

# WHAT RECORDS MUST BE KEPT?

- Documents and records not previously submitted during the registration process that substantiate temporary need.
- Proof of recruitment efforts, as applicable, including:
  - Job order placement as specified in 20 CFR § 655.16;
  - Advertising as specified in 20 CFR §§ 655.41 and 655.42;
  - Contact with former U.S. workers as specified in 20 CFR § 655.43;
  - Contact with bargaining representative(s) or a copy of the posting of the job opportunity, whichever is applicable, as specified in 20 CFR § 655.45(a) and (b); and
  - Additional employer-conducted recruitment efforts directed by the Certifying Officer, as specified in 20 CFR § 655.46.

# WHAT RECORDS MUST BE KEPT? (CON'T)

- Records to substantiate the information submitted in the recruitment report prepared in accordance with 20 CFR § 655.48.
- The final recruitment report and any supporting resumes and contact information as specified in 20 CFR § 655.48.
- Records of each worker's earnings, hours offered and worked, location(s) of work performed, and other information specified in 503.16(i) (see itemized list of required pay stub information below).
- If appropriate, records of when and how much the employer reimbursed workers for transportation and subsistence costs, as specified in 29 CFR 503.16(j).
- Evidence of contact with U.S. workers who applied for the job opportunity, including documents demonstrating that any rejections of U.S. workers were for lawful, job-related reasons, as specified in 29 CFR§ 503.16(r).



# WHAT RECORDS MUST BE KEPT? (CON'T)

- Evidence of required contact with any former U.S. worker in the occupation and place of employment, including documents demonstrating that the U.S. worker had been offered the job opportunity and either refused it or was rejected for lawful, job-related reasons, as specified in 29 C.F.R § 503.16(w).
- The written contracts with agents or recruiters, as specified in 20 CFR §§ 655.8 and 655.9, including the written contract prohibiting an agent or recruiter from receiving prohibited payments, as specified in 29 CFR§ 503.16(p), and the list of identities and locations of persons working for the agent or recruiter, and these entities' agents or employees, as specified in 20 CFR § 655.9.
- Written notice provided to and informing the Office of Foreign Labor Certification (of the Department of Labor's Employment and Training Administration) that an H-2B worker or worker in corresponding employment has separated from employment before the end date of employment certified in the Application, as specified in 29 CFR § 503.16(y).
- Any collective bargaining agreement, individual employment contract, or payroll records used to substantiate any claim that certain incumbent U.S. workers are not included in corresponding employment.



# QUESTIONS?

