

10 Questions To Ask Before Managing Form I-9s Electronically

By **Melissa Allchin and Matthew Gorman** (August 21, 2020)

In an increasingly digital world, many employers are looking to rely less on paper and move to electronic systems. In recent years, the concept of electronic Form I-9 completion and maintenance has become an attractive option for companies looking to achieve this goal.

The U.S. Department of Homeland Security has provided some guidance relating to electronic completion and maintenance, although the law has arguably not yet caught up to the technology.

In this article, we will provide background information on software programs that provide electronic Form I-9 completion and maintenance, review the critical protocols that must be in place for employers looking to move Form I-9s into the digital world, and provide the 10 must-answer questions for employers exploring electronic platforms for Form I-9 completion, maintenance and storage.

The Form I-9 Requirement

Form I-9, Employment Eligibility Verification, requirements come out of the Immigration Reform and Control Act.[1] The law prohibits employers from hiring and employing an individual for employment in the U.S. knowing that the individual is not authorized with respect to such employment.

Employers also are prohibited from continuing to employ an individual knowing that they are unauthorized for employment. This law also prohibits employers from hiring any individual, including a U.S. citizen, for employment in the U.S. without verifying his or her identity and employment authorization on Form I-9.

At a high level, the Form I-9 completion requirement is as follows:

- The employee must complete Section 1 of the Form I-9 no later than the first day of work for pay.
- The employee must present original documents that verify their identity and employment eligibility, and the employer must review the employee's original documentation and complete Section 2 of the Form I-9 no later than the third business day that the employee starts work for pay.[2]



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Both the employee and employer must sign the Form I-9 under the penalty of perjury. Employers are required to maintain a valid Form I-9 for each employee hired on or after Nov. 6, 1986. Employers must also retain a Form I-9 for each terminated employee for a period of three years after the date of hire, or one year after the date employment is terminated, whichever is later.

Electronic Completion and Maintenance

Under the Immigration Reform and Control Act, the Form I-9 must contain an original signature from the employee, verifying their information, as well as the signature of the employer representative, attesting to the review of the employees' original documentation.

On Aug. 23, 2010, U.S. Immigration and Customs Enforcement's final rule on Form I-9 electronic signatures and storage went into effect. The DHS' Handbook For Employers M-274 discusses the guidelines for the electronic completion and storage of Form I-9s and, more specifically, the utilization of electronic signatures.

The guidelines for electronic signatures[3] require that the electronic signature: (1) allow signatories to acknowledge that they read the attestation; (2) attach and affix the electronic signature at the time of the transaction; (3) create and preserve a record verifying the identity of the person producing the signature; and (4) upon request of the employee, provide a printed confirmation of the transaction to the person providing the signature.

The DHS' handbook also confirms that employers may retain the Form I-9 electronically and, once securely stored, may destroy the original paper form. The time considerations for electronic Form I-9 maintenance remain the same as for the paper version.

Allowing for the electronic completion and maintenance of Form I-9s brought forth new questions regarding how ICE would conduct audits of companies utilizing Form I-9 electronic software. It is important to note that most Form I-9 audits provide a 72-hour turnaround for production.

On Aug. 22, 2012, DHS released an internal memorandum to its field directors and agents regarding how to complete audits for electronically stored Form I-9s. While updated guidance could be forthcoming, this is the only memorandum presently available, due to requests under the Freedom of Information Act.

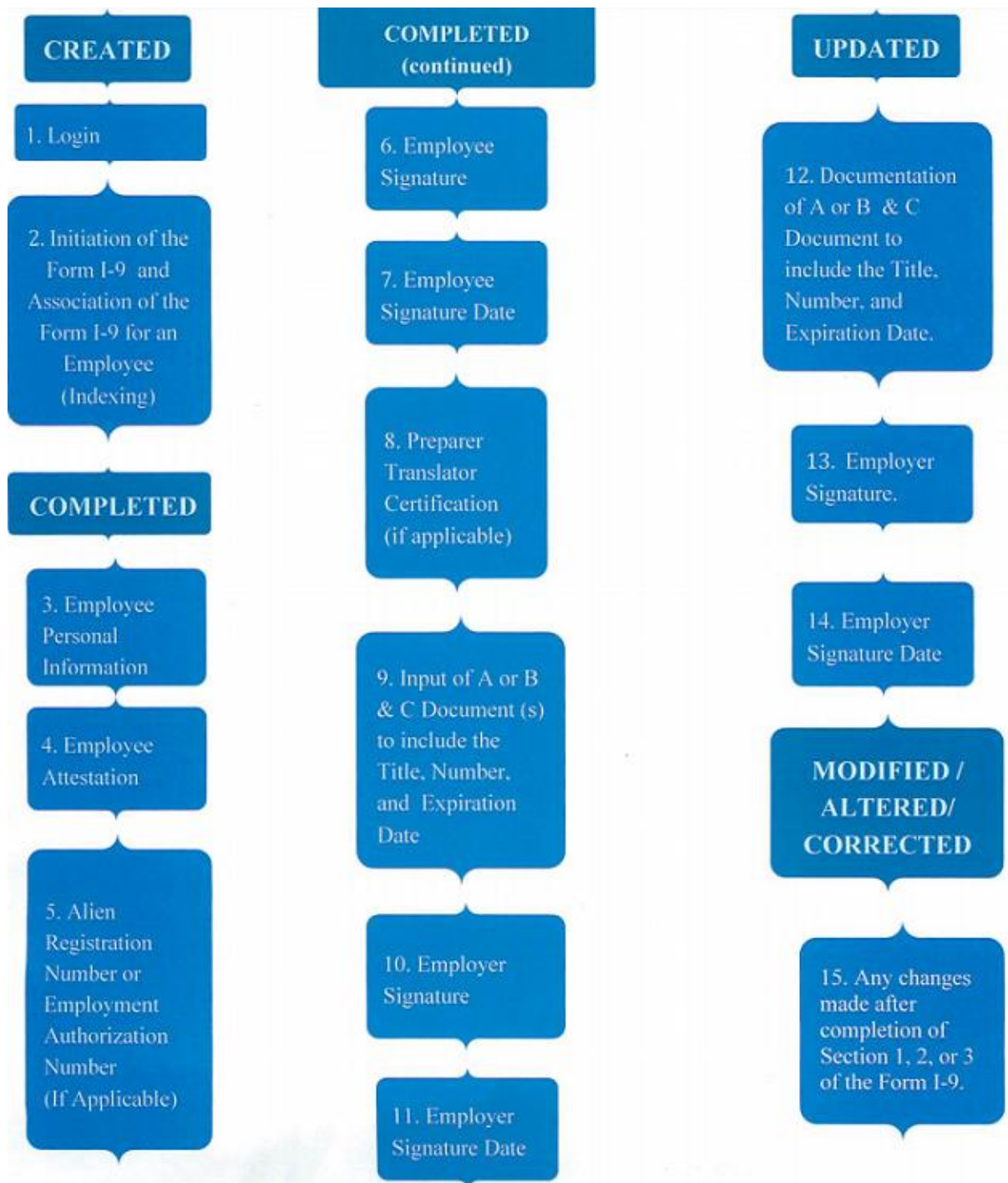
The timing of the 2012 memorandum is significant, as it was created when the idea of electronic Form I-9 completion and maintenance existed but many commercially available electronic software did not. As a result, this guidance was, to some degree, created in a vacuum without understanding the capabilities of such electronic software.

The DHS memorandum instructs officers to do the following:

- Ensure proper documents are obtained for electronically generated Form I-9s to be inspected for compliance.
- Request the name of the software being utilized and any internal business practices and protocols related to the generation of, use of, storage of, security of, and inspection and quality assurance programs for the electronically generated Form I-9s.
- Request the indexing system identifying how the electronic information contained in the Form I-9 is linked to each employee and documentation of the system to capture the electronic signature, including the identity and attestation of the individual electronically signing the Form I-9.
- Request one printed/completed electronically generated Form I-9 to ensure compliance with the regulation.
- Request access to the system for a demonstration of the generation of an electronic Form I-9.
- Ensure the audit trail has been properly captured.

The last instruction — the audit trail — merits further discussion. In short, the electronic Form I-9 platform must electronically capture and store each action taken with respect to the completion and/or updating of all forms.

For example, the system must capture each entry/edit to any Form I-9 field, who made the entry/edit, and the date/time of the entry/edit. The DHS memorandum includes the following flowchart to clarify which actions must be captured by the electronic audit trail.



Exploring Electronic Form I-9 Platforms

Several electronic Form I-9 platforms are available for purchase in today's market. In our experience, most electronic Form I-9 platforms fall short of full compliance with the regulations and DHS guidance.

Nearly all of the major electronic Form I-9 platforms available use their long list of clients and/or sales to infer that the program must be compliant — everyone is using it. Yes, going

paperless is an attractive option for many but the buyer of any electronic Form I-9 software should beware: It is your company that faces the risk of potential penalties for noncompliance after implementing the electronic Form I-9 system — not the vendor or any other company.

This article does not discuss potential Form I-9 penalties for noncompliance, which are the same in the context of electronic and paper forms. However, penalties can be financial and significant, and willful disregard of Form I-9 regulations can, in the extreme, result in criminal penalties. While the technology utilized by electronic Form I-9 platforms may allow the system to become compliant with some effort, it is critical to not take the vendor's word without further examination.

10 Questions to Determine Whether an Electronic Form I-9 Platform Is Compliant

If you have received the mandate, or your company has decided, to go electronic with Form I-9 completion and maintenance, here are the questions that you should be asking potential vendors and confirming by trial.

Completion and Maintenance

1. Does the system allow for accurate completion of the Form I-9?

This seems like an obvious question, but one may be surprised at the answer. There is absolutely no excuse for any electronic program that does not properly complete every single field on the Form I-9 — and yes, that includes those pesky "not applicable" entries.

2. Does the system include an easy printing option to provide to employees?

As a reminder, employees have a right to a copy of the completed Form I-9 upon request.

3. Does the electronic signature option meet the DHS guidelines?

4. How does the platform store the forms and supporting documentation? Does it commingle documents?

For purposes of avoiding potential discrimination claims, Form I-9 documentation should be kept entirely separate from personnel files or unrelated documents. Many Form I-9 platforms are all-in-one human resources platforms — and many systems are inappropriately set up to house all supporting and personnel documents together.

5. Who on my team would be responsible for electronic Form I-9 completion and maintenance?

A simple, yet critical question. Given the nature of the company, the number of locations and the number of employees, it may be necessary to designate several HR representatives or managers to be Form I-9 specialists within the company. This not only requires the ability to master the technology itself, but the ability to respond to an ICE office in an audit situation as discussed below.

Audit Readiness

6. Are the forms easily edited?

7. Does the platform properly capture the audit trail?

The audit trail is the portion of an ICE Form I-9 audit that is most clear; there is no gray area. The electronic platform must capture all actions covered in the audit trail flowchart.

8. Is the platform electronically sortable by: name, hire date, termination date, location?

Form I-9 audits come in all shapes and forms. For example, a company may have five worksite locations: three manufacturing, one retail and one corporate. An audit may request the forms for any single worksite, or perhaps only the three manufacturing sites. Or, the audit could be time-limited by date of hire or termination date. It is therefore essential for the platform to sort by these data points without issue.

9. Can the platform easily print electronic forms with their supporting documentation?

ICE agents are instructed to request printed electronic Form I-9s for inspection even for electronic platforms. The DHS memorandum does not limit the number of forms that can be requested, and it should be assumed that an agent could request that all of the forms and supporting documents be produced in hard copy.

During the 72-hour window in which the documents must be produced, you do not want your HR team to be stuck printing each form, and supporting documents, one by one.

10. Is my team ready to respond to an audit?

ICE agents are instructed to request specific information about the software being used for Form I-9 completion and maintenance and for all company policies relating to this topic. This creates an additional burden for the employer to ensure its entire HR team is aware of these additional requirements and the obligations that flow from them.

It is important to remember that an ICE agent can conduct an audit at any worksite location. Therefore, you must have an audit response team capable of producing this information succinctly within 72 hours.

ICE agents are also instructed to conduct a demonstration of the system's capability. It is therefore critical to have designated employees capable of performing the demonstration without showing too much or simply giving the keys to the office to explore the system.

Conclusion

In the end, if the answers to these 10 questions are not clear, your company should continue its search for the right electronic Form I-9 platform or even consider reverting to paper completion and maintenance. While the value of the electronic Form I-9 platform is clear — paper reduction — the value only outweighs the risks if the proper diligence is conducted before the platform is purchased.

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[1] <https://www.uscis.gov/tools/glossary/immigration-reform-and-control-act-1986-irca>.

[2] Temporary policies permitting versions of remote completion of Form I-9 have been released due to COVID-19. The COVID19 considerations of Form I-9 completion are beyond the scope of this article.

[3] <https://www.uscis.gov/i-9-central/1032-electronic-signature-form-i-9>.