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Does it Make Sense to Go Electronic for our I-9s?

On July 22, 2010, the Department of Homeland Security (DHS) published a final rule to implement new electronic I-9 regulations **effective August 23, 2010**. The final rule attempts to clarify certain regulatory provisions through what are described in the *Federal Register* notice as "minor" and "modest" modifications to the interim final rule of five years prior. How minor and modest and whether those changes provide any real clarity for employers remains to be seen.

What are the major changes made by this rule as to electronic I-9s?

- Employers must complete the Form I-9 within three business (not calendar) days of the hire and must sign the attestation with a handwritten signature or electronic signature in accordance with the regulation;

- Employers may use paper, electronic systems, or a combination of both and may change electronic storage systems as long as the new system continues to meet the performance requirements of the regulations;

- Employers need not retain electronic audit trails of each time a Form I-9 is viewed, but rather only when the Form I-9 is created, completed, updated, modified, altered, or corrected;

- Employers are not required to use only those electronic systems searchable by any data element, but rather the system may use a more general "indexing" system that produces results "comparable" to systems using separate description databases; and

- Employers are not required to provide (hard copy) or transmit (electronic) confirmation of a Form I-9 transaction, unless the employee requests such a transaction receipt.

Each of these clarifications, although late in coming, is not necessarily straightforward. The changes described are not as clear cut as the *Federal Register* notice would indicate. Comparing this new final rule against the prior interim final rule shows just where the clarification is rather murky for employers focused on strict compliance. Let's look at the rules before and after.

Employers must complete the Form I-9 within three business (not calendar) days.

Before: The 2006 interim final rule did not distinguish between business or calendar days. While the updated instructions on the revised Form I-9 (rev. 06/05/07) were relatively clear and stated, "[e]mployers must complete Section 2…within three (3) business days of the date employment begins," the interim final rule inadvertently omitted the word "business."

After: The final rule brings the I-9 form's instructions and the regulations at Section 274a.2(b)(1)(ii)(B) into sync by stating compliance is required in three "business" days of the hire date instead of the implied three calendar days.

Still unclear: Are business days Monday through Friday, which is to ask, are these federal business days? Or will an employer who operates 365 days a year have to count Saturday and Sunday? Usually, the interpretation of this rule focuses upon when the business is open. While Immigration and Customs and Enforcement (ICE) has indicated it will be reasonable in its approach during an audit, the question remains unsettled for employers seeking a bright line test for compliance.

Employers may use paper, electronic systems, or a combination of both and may change electronic storage systems as long as the new system continues to meet the performance requirements of the regulations.

Before: The 2006 interim final rule did not specify any technology based system for electronic storage of the Form I-9. All that was required under Section 274a.2(a)(2), and (e)(7) was that the employer produce a "reasonable facsimile of the Form I-9 or generate a copy of it." It was unclear whether an employer had to commit to either paper or electronic storage or if a combination of systems was permissible.

After: The final rule now allows employers to use either paper or electronic systems, or paper in conjunction with electronic systems. Further, employers may change electronic storage systems as long as the systems meet the requirements of Section 274a.2(e), discussed below and regarding the "indexing" of data fields; Section 274a.2(f) pertaining to maintaining the government's subpoena power; and Section 274a.2(g) relating to the extent of the electronic audit trail, also discussed below. DHS indicated that it intends to provide no further guidance on these system requirements than what is stated in the rule currently, which does provide some finality on the issue. For employers choosing to use contract electronic storage and generation systems, that is good news. DHS's stated goal is to be as flexible as possible, which is also good news.

Still unclear: DHS promises of flexibility are welcome, but such latitude can certainly cut both ways. By not requiring employers to create digital images or other electronic data capturing the information on existing paper records, while allowing the expanded use of electronic systems going forward encourages many to maintain both paper and electronic storage systems. This approach poses a challenge for many employers who, despite the best of intentions to maintain both a paper and electronic system, will be successful at maintaining neither given the complexity of possible logistical challenges of doing both. Will ICE be reasonable during an audit, especially of a small business with high employee turnover when the employer has failed to comply fully due to being overwhelmed with maintaining essentially two different monitoring systems simultaneously?

Employers need not retain electronic audit trails of each time a Form I-9 is viewed, but rather only when the Form I-9 is created, completed, updated, modified, altered, or corrected.

Before: Here, the 2006 interim final rule at of Section 274a.2(g)(1)(iv) did specify what an audit trail should accomplish: everything. The audit trail was to capture all access and interaction with the electronic data, even if that access was simply to view the form. Although most electronic verification software providers had already incorporated this level of auditing in their products, DHS did take the issue into consideration for the final rule.

After: The final rule amends Section 274a.2(g)(1)(iv) to require the electronic system to monitor only when the electronic Form I-9 is created, completed, updated, modified, altered, or corrected. The permanent record must record the date of access, system user identity, and the specific action taken.

Still unclear: Again, DHS' clarification and flexibility may in the end provide no real guidance. Will ICE be reasonable during an audit if an employer unwisely switches from a system that creates the more detailed audit trail to one that meets these lowered requirements to cut costs, for example? Or, would such a switch be viewed as a step technically in line with the regulations but also a flag that the employer is not truly committed to compliance?

Employers are not required to use only those electronic systems searchable by any data element, but rather the system may use a more general "indexing" protocol that produces results "comparable" to systems using separate description databases.

> **Before:** The 2006 interim final rule left employers with the task of deciding whether the image of an I-9 form stored in digital format, such as .pdf format, or on microfilm or microfiche, and which was searchable for retrieval and reproduction met the requirements under the regulation. ICE's enforcement actions were inconsistent, further confusing employers as to what "searchable by any data element" really meant.
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> **After:** The final rule amends Section 274a.2(e)(6) and is at least tacit acknowledgment by DHS that "searchable by any data element" taken literally was far too burdensome a requirement. Instead, the final rule mandates that an electronic storage system permit "identification and retrieval for viewing or reproducing relevant *documents* and records [presumably audit records]." The system need not be searchable by each and every field on the Form I-9 so long as "comparable" results are possible without such functionality. An employer must be able to produce a reasonable facsimile or copy of the I-9 form, even when storing data electronically.
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> **Still unclear:** First, the final rule as it amends Section 274a.2(e)(6) is cryptic at best and can hardly be accepted as public clarification of the issue. It is unclear though as to what the following in the new regulations really means: "The requirement to maintain an indexing system does not require that a separate electronically stored documents and records description database be maintained if comparable results can be achieved without a separate description database."

Employers may provide (hard copy) or transmit (electronic) confirmation of a Form I-9 transaction, but are not required to do so unless the employee requests such a transaction receipt.

> **Before:** The 2006 interim final rule at Section 274a.2(h)(1)(iii) was at odds with itself in that it required employers to provide immediately to the employee a paper record for each electronic transaction involving the employee's Form I-9, be it creating, viewing, modifying, etc. This requirement obviated one major benefit of an electronic storage system; that of reducing the amount of paper involved.
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> **After:** The final rule allows for discretionary use of proof of transactions. Specifically, generating a transaction receipt is no longer mandatory, unless an employee requests a printed copy of the transaction.
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> **Still unclear:** While not mandatory, when an employee requests a transaction receipt, be it in paper or as electronic access to such a receipt, the employer is required to provide the receipt within, yes, a "reasonable" amount of time. As always, reasonable minds may differ as to what is reasonable.

Conclusion

Before considering any change to electronic I-9 retention and/or completion, it is always important to remember that such systems assist in facilitating enforcement review. In addition, it is important to integrate documentation retention requirements as well as E-Verify related specifications as required. Further, any transition to electronic I-9 retention requires a thorough review of whether to adopt a joint paper and electronic I-9 compliance program. For federal contractors subject to E-Verify, I-9 software programs or the use of E-Verify third party agents are often useful alternatives for some. In addition, it is important to check when using Professional Employer Organizations (PEO) regarding I-9 completion duties in co-employer situations as well as whether an independent contractor designation is appropriate for certain service providers.

Our immigration group has extensive experience with worksite issues and has counseled clients on I-9 compliance since the requirement began in 1986. Members of our group have participated in state and national level presentations on the subject as well for many years. We look forward to assisting your company.

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