



Changes in I-9 Acceptable Documents

The Immigration Control and Reform of 1986 Act mandates that employers may only hire persons legally permitted to work in the United States. In other words, aliens authorized to work in the U.S. and, of course, U.S. citizens and nationals. To ensure the Act's requirements, employers must verify the identity and employment eligibility of anyone to be hired, including completing Form I-9, also known as the Employment Eligibility Verification Form.

In accordance with Form I-9, employers are required to receive certain "acceptable documents" in order to establish both the person's identity and U.S. employment eligibility. Acceptable documents are formatted into List A (satisfactory proof of both identity and employment eligibility), List B (satisfactory proof of identity only), and List C (satisfactory proof of employment eligibility only). Employees may satisfy I-9 requirements by producing one (1) document from List A or one document from **both** List B and List C.

On November 7, 2007, the U.S. Citizen and Immigration Services announced changes to Form I-9 and what documents are acceptable. Specifically, documents identified in List A (those documents acceptable to establish both identity and employment eligibility) were narrowed.

Prior to these new changes, the following documents were acceptable under List A: (i) Certificate of U.S. Citizenship (Form N-560 or N-570); (ii) Certificate of Naturalization (Form N-550 or N-570); (iii) Alien Registration Receipt Card (Form I-151); (iv) an unexpired Reentry Permit (Form I-327); and (v) an unexpired Refugee Travel Document (Form I-327). These forms are no longer acceptable.

Now, the following documents are the only ones acceptable under List A:

- (i) U.S. Passport (expired or unexpired);
- (ii) Permanent Resident Card or Alien Registration Receipt Card (Form I-551);
- (iii) Unexpired foreign passport with a temporary I-551 stamp;
- (iv) Unexpired Employment Authorization Document that contains a photograph (I-766, I-688, I-688A, I-688B); or,
- (v) Unexpired foreign passport with an unexpired Arrival-Departure Record, Form I-94, bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, if that status authorizes the alien to work for the employer.

The I-9 Form must be completed by all employees hired in the United States. Since December 26, 2007, employers are required to use the new I-9 Form for all new employees. In addition, employers should be reminded that they may not specify which documents its prospective employee must produce to satisfy Form I-9 requirements, and that employers must keep each I-9 for at least three years, or one year after employment ends, whichever is longer.

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Northern District of California enjoins Dept. of Homeland Security and the Social Security Administration from implementing the Final Rule entitled “Safe Harbor Procedures for Employers who receive a No-Match Letter”

Annually, employers are required to report its employees’ wages on Form W-2 Wage and Tax Statements, which are processed by the Social Security Administration (SSA), who use the information to determine eligibility for and the amount of Social Security benefits each employee is entitled. The SSA then reports that information to the IRS, along with instances where the name and/or social security number submitted matches the information contained in SSA’s records. In response, the SSA sometimes sends an “Employer Correction Request” letter, informing the employer of the mismatch. These letters are commonly known as “no-match” letters. Although mismatches may result from clerical errors or name changes, they may also result when employers submit information from an alien who is not authorized to work in the United States or who may be using a false social security number or a social security number assigned to someone else.

On August 10, 2007, final “no-match” regulations (the “Final Rule”) were announced by the Department of Homeland Security related to the hiring and employment of undocumented employees. The regulations describe the legal obligations of employers under the Immigration Reform and Control Act of 1986 when employers receive a “no-match” letter. The Final Rule also describes the procedures employers must follow after receiving a “no-match” letter to prevent the DHS from using the letter as proof that the employer had constructive knowledge the referenced employee could not legally be employed in the United States, effectively securing immunity for the employer from prosecution or penalty.

In order to avoid being deemed to have constructive knowledge of employing illegal workers, the Final Rule required employers to take reasonable steps to resolve the discrepancies outlined in a received no-match letter. These steps, known as the rule’s safe harbor provisions, require (i) the employer check its records within 30 days of receipt of the letter to determine if the discrepancy was the result of a clerical error; or (ii) if not, the employer should request the employee to confirm the employer’s records are correct. If the discrepancy is still unresolved, the employer should request the employee bring necessary documents to the SSA or the DHS to resolve the discrepancy. If the discrepancy is not resolved within 90 days, the employer must complete a new I-9 Form before the 93rd day or, if the discrepancy remains unresolved and the employee’s identity and employment eligibility remain unverified with a new I-9 Form, the employer must terminate the employee. (Failure to terminate the employment in that situation may lead to the DHS finding the employer had constructive knowledge of the employee’s lack of employment eligibility.) An employer who follows the safe harbor procedures is deemed to have taken reasonable steps in response to receipt of a no-match letter. If an employer fails to follow the safe harbor procedures, it could face fines up to \$10,000 for failing to fire workers who use fake or stolen social security numbers and could be subject to additional criminal and civil sanctions for those workers whose legal status could not be verified within 90 days of the notice from the SSA.

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The Employment Non-Discrimination Act of 2007 (H.R. 3685)

Sponsored by Massachusetts Representative Barney Frank, the Employment Non-Discrimination Act (ENDA) of 2007 aims to address sex discrimination by prohibiting certain adverse employment actions taken against an individual because of actual or perceived sexual orientation. The Bill also prohibits employment discrimination against someone based on the sexual orientation of persons associated with that individual, although disparate impact claims of discrimination based on sexual orientation are not permitted. While sex discrimination is already prohibited by federal law under Title VII, the Courts have consistently ruled that Title VII does not address sexual orientation issues.

The bill passed the House of Representatives vote 235-184 on November 7, 2007, and is currently scheduled placed on the Senate legislative calendar.

Other highlights of the ENDA include the following:

- (i) Prohibits employers from discriminating against any employee in respect to the conditions and privileges of employment based on the employee's actual or perceived sexual orientation;
- (ii) Makes it unlawful for a labor organization or a training program to discriminate against anyone based on the person's actual or perceived sexual orientation;
- (iii) Forbids employment agencies from refusing to refer a worker based on that worker's actual or perceived sexual orientation;
- (iv) Provides that the bill does not apply to organizations that are

exempt from the religious discrimination provisions under the Civil Rights Act of 1964;

(v) Provides that nothing in the bill requires employers to provide the same benefits to unmarried couples as they do to married couples, with marriage defined as a legal union between one man and one woman as husband and wife;

(vi) Provides that nothing in the bill requires or permits preferential treatment for any individual or group because of their actual or perceived sexual orientation;

(vii) Permits actions and proceedings against state governments and, in some limited instances, the federal government;

(viii) Provides that the bill does not invalidate or limit the rights, remedies or procedures available under any other federal law or regulation or any law or regulation of a state or political subdivision of a state.

Seventeen states and the District of Columbia have laws that currently prohibit sexual orientation discrimination in private employment: California, Connecticut, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, Washington, and Wisconsin. Some of these states also specifically prohibit discrimination based on gender identity. In addition, six states have laws prohibiting sexual orientation discrimination in public workplaces only: Colorado, Delaware, Indiana, Michigan, Montana, and Pennsylvania.

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In response to these new regulations, a lawsuit was filed in the Northern District of California against the SSA and the DHS, challenging the regulations' sufficiency. A temporary restraining order was entered on August 31, 2007 preventing implantation of the new regulations. On October 10, 2007, the same Court entered a preliminary injunction preventing enforcement of the new regulations, after indicating the new regulations may have legal deficiencies. Specifically, in his opinion granting the preliminary injunction, Judge Charles Breyer relayed his concerns that the DHS failed to conduct a formal Regulatory Flexibility Act¹ analysis, as well as concerns related to the high rate of errors in the SSA's database and the high costs to small businesses that would be forced to interpret and comply with the new regulations, which may force small businesses to simply fire employees who are unable to resolve

the discrepancy indicated in a no-match letter even if the employee is actually authorized to work in the U.S. Then, on November 23, 2007, the Court stayed the litigation until March 24, 2008, giving the DHS opportunity to review and revise its regulations, in light of Judge Breyer's concerns, including surveying small business owners regarding how the new regulations affects them.

As a result of this litigation, DHS announced that it will seek to rewrite the regulations. It has announced plans to publish revised regulations by March 2008. The SSA also announced that it will not issue "no match" letters this year.

¹In accordance with the RFA of 1980, where the regulatory impact is likely to be "significant," affecting a "substantial number" of small businesses, federal agencies must analyze the impact of their regulations on small entities and, if warranted, seek less burdensome alternatives for them.



Chamblee & Ryan advises clients regarding employment matters on a daily basis in a variety of industries. The attorneys draft employment policies and handbooks and advise employers on employment decisions with respect to potential discrimination or claims of wrongful discrimination, ERISA plans, and wage and hour issues. Additionally, the attorneys train managers and supervisors regarding diversity issues and how to avoid or minimize discrimination and harassment claims. Chamblee & Ryan also represents clients in litigation regarding age, race, national origin, disability, sex discrimination and sexual harassment claims, retaliation, wrongful discharge, defamation charges, family leave issues, employee benefits, health and safety matters, and wage-hour disputes. In addition to representing employers in State and Federal Courts, the attorneys successfully defend employers on a routine basis before the Equal Employment Opportunity Commission, the National Labor Relations Board, the Department of Labor, the Texas Workforce Commission, and various State agencies regarding employment matters across the country.

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