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& Wieland PC

**MADERA COUNTY
FARM BUREAU**

**THE HOW TO'S
OF
AN I-9**

**March 21, 2018
Madera, CA**

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We wish to express confidence in the information contained herein. Used with discretion, by qualified individuals, it should serve as a valuable management tool in assisting employers to understand the issues involved and to adopt measures to prevent situations which commonly give rise to legal liability. However, this text should not be considered a substitute for experienced labor counsel, as it is designed to provide information in a highly summarized manner. The reader should consult with Sagaser, Watkins & Wieland at (559) 421-7000 for individual responses to questions or concerns regarding any given situation.

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What is Form I-9?

- › Employment verification form produced by the United States Citizenship and Immigration Services ("USCIS")
- › Federal form that all employers must use for newly hired employees
- › Used to verify identity and right to work in the United States.
- › Employees present documents and fill out Form I-9 to establish eligibility to work
 - Documents- List A or List B and List C
- › Employer's Tip – Do Not Make Copies Of Documents Presented By Employees

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When Do You Use Form I-9?

- › At time of hire
 - Can verify before an employee begins work, but not until after they have accepted position
 - Must fill out by the first day of employment
 - Employee must present documents within three (3) days of beginning work
- › Returning employees if there was no expectation of continued employment
- › Former employees who are rehired if they have not completed an I-9 with the Company within the past three (3) years or if their form was not retained
- › Employer is responsible for filling out correctly and at the right time
- › Employer retains form, do not mail in

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Who Must Fill Out Form I-9?

All US employers must verify all newly hired employees.

- Citizens
- Authorized non-citizens
- Small Businesses
- New hires beginning training

Not Required to fill out Form I-9:

- Applicants prior to actually being hired
- Employees hired pre-November 6, 1986?
 - Should you create one for them?
- Volunteers/unpaid individuals
- Independent contractors

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Filling Out Form I-9

› Sections 1

- Employee section
- Attestation of right to work in U.S.
- General information from employee
- May have a translator or preparer assist the employee

› Section 2

- Employer section – fill out after reviewing employee documents
- Physically examine employee documents – must accept employee documents if the documents reasonably appear to be genuine
 - Unexpired and original (expired documents ok in limited circumstances – when work authorization is extended by regulation or a Federal Register Notice)
- Must ensure I-9 is filled out correctly

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Minors And Employees With Disabilities

- › Disabled employees and minors under 18 years old when beginning employment whose parent, guardian, or representative fills out section 1
- › If guardian/parent fills out Form I-9, employees are only required to present List C documents, List B documents are not required.
- › Guardian/parent must fill out the preparer/translator area


Filling Out Form I-9 Cont.

- ▶ Section 3
 - Reverification and Rehires
 - Commonly used for employee's name changes
 - Reverification – When employee's employment authorization or authorization documents expire
 - Not expiration of permanent resident card or other documents, expiration of authorization to work
 - If employee is rehired within 3 years, you can either rely on previous Form I-9 or have them fill out a new one
 - Should be a uniform policy for rehires
 - Seasonal Employees – if continued expectation of employment, no need to reverify
 - If treating employee as a new-hire, follow general I-9 requirements

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H-1B and H-2A Workers

- ▶ Must first receive authorization to hire.
- ▶ Once employee begins work, must fill out Form I-9
- ▶ If employee switches jobs, new employer must submit Form I-129 and complete Form I-9 after receiving authorization.

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Acceptable Documents

- ▶ Form I-9 includes instructions and lists of acceptable documents
- ▶ Must accept documents that reasonably appear to be genuine and relate to the employee
- ▶ Cannot specify which documents an employee is to present
- ▶ Must only accept originals, photocopies are not acceptable
- ▶ Cannot accept expired documents, except if they have been extended by USCIS or automatically extended by Federal Register notice.
- ▶ Documents with different last names – can accept, but must resolve

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E-Verify

- ▶ Electronically confirms an employee's eligibility to work in US after employee completes Form I-9
- ▶ Compares employee's I-9 information to Dept. of Homeland Security and Social Security Administration information to confirm employment eligibility.
- ▶ Approximately 700,000 employers currently using nationwide
- ▶ Some differences between Form I-9 and E-Verify
 - E-Verify is voluntary for most employers
 - E-Verify requires a SSN
 - E-Verify requires a photo ID for List B documents
 - E-Verify may not be used to reverify expired employment authorizations
 - Minors must present List B and List C documents

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E-Verify Cont.

- ▶ Required to use if:
 - You are an employer in Arizona or Mississippi
 - Federal contractors with Federal Acquisition Regulation (FAR) provision
- ▶ Enroll in the E-Verify program online
- ▶ Post notice of E-Verify – must inform applicants/employees that your company uses E-Verify
- ▶ Must still complete Form I-9
- ▶ If employee presents DHS Form I-551 (Permanent Resident Card), Form I-766 (Employment Authorization Document), or U.S. Passport or Passport Card to complete Form I-9, you must retain a photocopy of the document with the employee's Form I-9

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Form I-9 Updates

- ▶ Must Use I-9 Form issued July 17, 2017 for all new verifications.
 - Two forms released in less than a year, make sure you use the right one!
- ▶ After September 18, 2017, must use July 17, 2017 version.
- ▶ Updates to new Form I-9 include:
 - Revised list of acceptable documents
 - Renumbered List C documents
 - Updated supplemental instructions for filling out Form I-9
 - Changed the name of the Office of Special Counsel for Immigration-Related Unfair Employment Practices to its new name, Immigrant and Employee Rights Section.

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AB 450 - Immigrant Worker Protection Act

- ▶ Effective January 1, 2018
- ▶ Shields workers from immigration enforcement while on the job
- ▶ Prohibits employers from voluntarily providing federal immigration enforcement agents access to a non-public portion of business without a warrant.
- ▶ Prohibits employer from allowing access to personnel records without subpoena or court order
- ▶ Prohibits employer from allowing inspection of I-9 forms without "Notice of Inspection"

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Immigrant Worker Protection Act

- ▶ Requires employers to notify employees of *Form I-9* inspections within 72 hours of receipt of Notice of Inspection
 - Must post notice in workplace & notice to any authorized employee representative
 - Labor Commissioner will develop template for notice
 - Must provide copy of Notice of Inspection to employees upon request

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Immigrant Worker Protection Act

- ▶ Employer must provide each affected employee and employee representative with copy of notice from immigration agency within 72 hours of receipt
 - Must also provide each affected employee and employee representative with notice of employer's and employee's obligations as result of inspection
 - "Affected" employee is one whose work authorization documents have been identified to have deficiencies
 - Notice hand delivered to affected employee only in workplace (or mail and email if hand delivery not possible)

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Immigrant Worker Protection Act

- ▶ Enforced by Labor Commissioner
- ▶ Civil penalties of \$2,000-\$5,000 for first violation & \$5,000-\$10,000 for subsequent violations
- ▶ Prohibits employer from re-verifying employment eligibility of current employee at time or in manner not required under federal law
- ▶ Civil Penalty of up to \$10,000

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AB 450 - Immigrant Worker Protection Act Cont.

- ▶ Conflicts with Federal law
 - Only prevents voluntary consent
- ▶ 7-11 January 9, 2018 ICE raids
 - 98 stores in 17 states and D.C., including CA and NY
 - 21 people arrested

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What should you do to prepare for Immigrant Worker Protection Act?

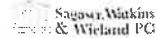
- ▶ Employers should review I-9 requirements and company I-9 processes
 - <https://uscis.gov/i-9>
- ▶ Understand I-9 audit process and "Notice of Suspect Documents"
 - Notice identifies individuals whose documents appear deficient
 - Informs employers that they are employing individuals that likely lack work authorization
 - Instructs employers to terminate employees who are unable to correct deficiencies in work authorization within a reasonable time (10 days?)
- ▶ Prepare for possible workplace ICE raid

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IMMIGRATION RAIDS?

Here is what is different about the ICE enforcement actions ("raids") compared to the past several years under the Obama Administration:

- › ICE agents are making "collateral arrests" — arresting unauthorized immigrants who happened to be in the place they were raiding, even if they didn't have a warrant for them.
- › The agency deliberately coordinated a series of nationwide raids, scooping up more people in less time than ICE raids typically do.

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COLLATERAL ARRESTS

- › Non-targeted individuals are being arrested with the targeted individuals (pursuant to warrants) because they are in the location where the ICE agents are enforcing the warrant. The locations are usually residences but may be at work locations.
- › The non-targeted individuals have likely not committed any crime beyond being here illegally.
- › The non-targeted individuals tend to be family members or friends who are determined by the arresting officers to be interfering with the enforcement of the warrant on the targeted individual.
- › Results in reports of ICE arresting non-criminal illegal aliens.

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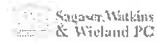
RESPONDING TO EMPLOYEE FEARS

- › Employers need to protect themselves from gaining unintended knowledge that an employee is not legally eligible to work in the United States.
- › If approached by the USCIS with a request to talk with a specific employee, consider having the employee come to the office rather than sending the USCIS to the field or other work location where the employee is. Note that if the USCIS goes to the field, it could lead to collateral arrests of other employees working with the targeted employee.

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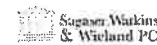
RESPONDING TO EMPLOYEE FEARS cont.

- ▶ Consider providing general information to your employees about resources that provide immigration services for "friends and family" who may have concerns, rather than providing it to specific employees.
- ▶ Do not provide assistance in the form of funds or direct referrals to immigration service providers for any employees who have given you knowledge about their lack of work eligibility.
- ▶ If employees need to return to Mexico in order to proceed with gaining eligibility, consider providing a leave of absence for "personal reasons."

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RESPONDING TO EMPLOYEE FEARS cont.

- ▶ Consider doing nothing...
 - Difficult to disengage once you begin.
 - Other employees will learn of any assistance you provide any individual employee and will approach you.
 - There are serious consequences beyond knowingly employing an illegal alien when an employer takes it a step further and provides direct assistance to an employee.

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WHAT CONSTITUTES "KNOWLEDGE?"

▶ Immigration and Nationality Act ("INA") section 274C(a) [8 U.S.C. 1324c] makes it illegal for an employer to knowingly employ an individual that is not authorized to work in the United States. (INA sec. 274C(a)(2).) An employer has knowledge that an individual is not authorized to work when they have actual knowledge that an individual is not authorized, or constructive knowledge (knew or should have known). Constructive knowledge is knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about the employee's unauthorized status. (8 CFR 274a1(i)(1).)

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WHAT CONSTITUTES "KNOWLEDGE?" cont.

- ▶ "Constructive knowledge" can include information provided to a "supervisor" (field supervisors, crew bosses, forepersons, assistant crew bosses or forepersons, human resource staff, etc.). Likewise, assistance provided by a supervisor, with or without management's knowledge or authorization, can create liability for the employer as with other laws.
- ▶ All personnel, including supervisors, human resource staff and clerical staff that normally interact with individual employees, should be advised and trained on company policy prohibiting providing assistance to employees regarding their eligibility status, and to report immediately receiving information about an employee's eligibility status to management.

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I-9 AUDITS

- ▶ Both ICE and the Department of Labor ("DOL") have jurisdiction and the authority to inspect I-9s.
- ▶ You will be provided notice of an inspection and several days in which to respond. Do not delay in responding. Additional time may be obtained.
- ▶ The ICE or DOL representative will conduct an initial meeting to explain the procedures utilized in an I-9 audit and to answer any questions you may have. You may wish to have your staff that process I-9s present, but instruct them not to respond to questions unless you authorize.

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I-9 AUDITS cont.

- ▶ Immediately begin copying all I-9s and any supporting documentation you may have copied at the time an I-9 was completed. You will retain the copies if you allow the representative to take the original I-9s to review.
- ▶ ICE has hired actual auditors from other industries (banking auditors for example) in at least one of its Southern California offices to conduct I-9 inspections, rather than utilize enforcement personnel.
- ▶ You will be provided with examples of problem areas that are being found in your I-9s and an opportunity to make minor corrections before you receive final results.

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I-9 AUDITS cont.

- ▶ You will receive Notices of Technical or Procedural Failures. Copies of the specific I-9s which include such failures will be provided and may contain specific notes concerning the failures.
- ▶ At that time, you will need to begin scheduling interviews with the individual employees in order to obtain any missing information or to reverify documents provided by the employee or to complete any missing information. These interviews are between the employer and the employee...not the ICE/DOL representative.

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I-9 AUDITS cont.

- ▶ You can provide an employee a short amount of time (no more than a week) to obtain additional information/documents that are lacking.
- ▶ Experience has shown that employees may quit when they receive written notice from you that an interview has been scheduled to address concerns about their eligibility status, or after the interview when told of what additional information or documents are needed.
- ▶ If the audit is being conducted during the off season, you will need to document an employee's need to be interviewed before returning to work the next season.

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I-9 AUDITS cont.

- ▶ You will need to discharge any employee who refuses to be interviewed or to return after an interview with requested information or documents. You may provide two or three reminders of short duration.
- ▶ You will then provide the representative with corrected or updated I-9s.
- ▶ A common issue is the failure of owners or upper management to have completed an I-9. No employee on the payroll is exempt.

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I-9 AUDITS cont.

- ▶ At the end of the audit, you will be given a list of employees who can no longer be employed.
- ▶ You will need to discharge (in writing) any employee on that list. If it is during the off season, mail the letter to the last known address and document a "do not rehire" instruction for that employee for the next season.

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I-9 AUDITS cont.

- ▶ You will then receive a Final Order setting forth the violations and penalties assessed. You have the right to request review.
- ▶ I-9 document violations can range between \$216 to \$2156 per violation.
- ▶ Factors which can affect the amount of penalties assessed include:
 - Size of the business.
 - Good faith compliance efforts.
 - Previous history of violations, if any.
 - The comparative number of unauthorized workers.
 - Seriousness of the violations.

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I-9 Recommendations

- ▶ Designate a specific person or persons to process I-9s. The fewer the better to maintain consistency in processing the I-9s and to respond to questions during an audit, or, if necessary, provide testimony for any litigation which may arise.
- ▶ Keep supervisors out of the process and make it clear they may not receive documents from employees which are needed to complete their I-9s.
- ▶ Train your staff on properly completing the I-9 process and consider conducting an in-house audit.

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QUESTIONS?

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THANK YOU

For questions or comments, please
contact:

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I-9 Checklist

Items needed for Review:

- List of current employees hired after November 6, 1986
- List of employees terminated in past three years
- Original copies of all I-9 forms (both current employee forms, as well as forms for terminated employees within current retention requirements).
- Compare lists of current and terminated employees with I-9s to identify whether an I-9 is on file for each employee.

For the review of the forms themselves:

Section 1

- **Employee Information**
- Employee first and last names completed
- N/A for “Other Names Used” if it does not apply; maiden name or other names if it is applicable.
- Full address fields completed – No PO Boxes allowed
- Date of birth in mm/dd/yyyy format
- Social Security number (optional); Social Security number mandatory for E-Verify participants
- **Citizenship/Immigration Status**
- Status is selected (not more than one)
- Lawful Permanent Resident – including alien registration number
- An Alien Authorized to Work – the work until date, alien number or admission number must be included and correctly stated
- Expiration date of employment authorization is included and correctly stated
- **Employee’s Attestation**
- Employee’s signature
- Date of employee’s execution of form
- I-9 verify not signed on date of hire (first day of employment)

- **Preparer/Translator Certification**
- Signature of preparer/translator if applicable
- Name of preparer/translator correctly stated
- Address of preparer/translator correctly stated

Section 2

- One document from List A is included and completed OR one document from List B AND one from List C are
- listed and completed.
- **List A (Identity and Employment Authorization)**
- Appropriate document listed
- List A document title correctly stated
- List A document issuing authority correctly stated
- List A document number correctly stated
- List A document expiration date, if applicable, correctly stated
- Receipt showing application for document accepted; awaiting original to be presented within 90 days
- **List B (Identity)**
- List B document title correctly stated
- List B document issuing authority correctly stated
- List B document number correctly stated
- List B document expiration date, if applicable, correctly stated
- Receipt showing application for document accepted; awaiting original to be presented within 90 days
- **List C (Employment Authorization)**
- List C document title correctly stated
- List C document issuing authority correctly stated
- List C document number correctly stated
- List C document expiration date, if applicable, correctly stated
- Receipt showing application for document accepted; awaiting original to be presented within 90 days

- **Employer's Certification**

- Employee's first day of employment correctly stated (mm/dd/yyyy)
- Signature of Employer/Authorized Representative present and in correct box
- Date of certification correctly stated (mm/dd/yyyy)
- Certification signed within three days of hire (from the first day of employment)
- Title of Authorized Representative correctly stated
- Last Name and First Name of Authorized Representative correctly stated
- Employer's Business or Organization Name correctly stated
- Address of business correctly stated - No P.O. Boxes allowed

Section 3

- Reverification only applies if evidence of employment authorization (List A or List C document) presented in Section 2 expires. (Do not need to reverify: US Citizens and noncitizen nationals, or Lawful Permanent Residents)
- If employee listed an expiration date in Section 1, employment eligibility reverified on or before expiration date
- Date of rehire, if applicable (mm/dd/yyyy)
- New name listed, if applicable
- Document title correctly stated
- Document number correctly stated
- Employment authorization document Expiration Date (mm/dd/yyyy)
- Signature of Authorized Representative present and correctly placed
- Date of company certification (mm/dd/yyyy)
- Printed name of Authorized Representative

Any discrepancies that may be found will be logged and we will correct them and then we will contact you to review them to ensure we deal with them in the correct manner.