THE ESSENTIALS

OF ELECTRONIC

I-9 COMPLIANCE

What employers
need to know about
electronic I-9 systems
to ensure compliance
with federal law.

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When hiring new employees, employers must coordinate many onboarding tasks, including setting up payroll, benefits, computer access, employee identification and office space. These processes involve a seemingly endless sea of paperwork. Although it is sometimes lost in the shuffle, the Form I-9 process may be the most critical and potentially damaging of these tasks.

The I-9 requirement was established in 1986, but increased enforcement initiatives over the past five years have led employers to revisit their I-9 compliance programs. Many employers are looking at electronic systems to automate and streamline their employment eligibility verification processes. However, electronic I-9 systems offer risks as well as rewards, and employers must be cautious when instituting an electronic I-9 system (see, for example, the more than $1 million fine assessed against Abercrombie & Fitch in 2010 and the recent pattern or practice of discrimination charges filed against Rose Acre Farms).

This article examines the key issues employers should consider when using electronic I-9 systems, including:

- The basic Form I-9 requirement.
- Electronic I-9 system requirements.
- The advantages and disadvantages of using electronic I-9 forms.
- How to evaluate different electronic I-9 systems.

>> This article is taken from a practice note on our website. For the complete, continuously maintained version of this resource, search Navigating Electronic I-9s on our website.

THE FORM I-9 REQUIREMENT

Congress introduced the basic Form I-9 employment eligibility verification requirements in the Immigration Reform and Control Act of 1986 (IRCA) (*Pub. L. No. 99-603, 100 Stat. 3359 (1986)*, as codified as amended in scattered sections of *8 U.S.C.*).

Under IRCA, employers must verify the identity and employment authorization of each person they hire. To do so, employers must complete and retain a Form I-9, Employment Eligibility Verification, for each employee hired after November 6, 1986, the date of IRCA's enactment. In completing the I-9 process, employers review original documents presented and selected by the employee from the lists of acceptable documents, to verify both identity and employment authorization. All the while, employers must refrain from discriminating against individuals on the basis of national origin or citizenship. (See *Box, Enforcement Surge*.)

>> For detailed information on the I-9 process, search Demonstrating the Right to Work in the United States on our website.

>> For more information on discrimination under IRCA, search Discrimination: Overview on our website.

US Citizenship and Immigration Services (USCIS) and US Immigration and Customs Enforcement (ICE) (both agencies of the Department of Homeland Security (DHS)), are the key government agencies responsible for the I-9 process and its regulation. USCIS is responsible for:

- Most documentation for foreign national employment authorization.
- Forms I-9.
- The E-Verify electronic employment eligibility verification program, a closely linked companion to the I-9 process. Form I-9 requires employers to collect information about the identity and employment eligibility of a new hire, while E-Verify verifies electronically with the Social Security Administration and DHS that the collected information is accurate and valid. Participation in E-Verify is voluntary for most employers. For more information on E-Verify, search E-Verify for Employers: Best Practices on our website.

ICE is responsible for enforcement of the penalty provisions of Section 274A of the Immigration and Nationality Act (INA) (*8 U.S.C. § 1324a*) and other immigration enforcement in the US.

In addition, the Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) enforces IRCA's anti-discrimination provisions.

ELECTRONIC I-9 SYSTEM REQUIREMENTS

In October 2004, Congress enacted legislation permitting employers to complete, sign and store electronic versions of Form I-9 (*Pub. L. No. 108-390, 118 Stat. 2292*). Previously, employers could only retain I-9s in paper, microfilm or microfiche format and the form could not be electronically completed and signed.

Currently, as long as the electronic storage system used meets certain performance standards, employers may:

- Complete, sign and store I-9s electronically.
- Scan and store existing paper I-9s.

(*71 Fed. Reg. 34510 (June 15, 2006)* and *75 Fed. Reg. 42575 (July 22, 2010)*.)

ELECTRONICALLY COMPLETING THE I-9

The regulations permit but do not require the electronic completion of Form I-9. USCIS offers a fillable and printable Form I-9 on its website, but employers may also electronically generate and retain their own Form I-9 if:

- Their employees receive instructions for completing the form.
- The resulting form is legible.
- The form's name and content and the sequence of the data elements and instructions are unchanged.
- No additional data elements or words are inserted.
- The standards specified in the regulations are met (*8 C.F.R. § 274.2(e), (f), (g), (h), (i) (2012)*).

Completing the Form I-9 seems like a matter of simple data entry. However, the I-9 presents many pitfalls for employers and, in light of recent enforcement activity, the proper completion of the form is crucial to risk management efforts.

Although the I-9 is just one page, there are more than 100 errors employers can make when completing I-9s. If an employer commits just one of these errors on an I-9 it may be fined between $110 and $1,100 **per I-9**. Because employers must maintain an I-9 for every employee hired after November 6, 1986 and retain the I-9 for a specified period of time even after termination, potential liability can rise quickly if the I-9 is not completed properly.

>> For more information on potential liability for IRCA violations, search IRCA Violations: Employer Liability Assessment Chart on our website.

>> For more information on I-9 investigations, search Government Audits of I-9 Forms and Form I-9 Audit Best Practices Checklist on our website.

Over the past few years, potential liability has morphed into actual liability due to significantly increased enforcement efforts by ICE:

- In fiscal year 2011, ICE conducted 2,496 I-9 audits and initiated 3,291 worksite enforcement cases, a more than 375% increase from the number issued in fiscal year 2008.

- By the end of June 2012, ICE had sent 1,000 audit notices to employers, which followed 2,000 notices sent at the end of May 2012.

- In all, between October 1, 2011 and June 30, 2012, ICE has issued more than 3,500 notices, already surpassing the total for fiscal year 2011.

These latest audits have led to significant employer fines: ICE has issued 275 final orders totaling $6 million in fines, plus $9 million in judicial fines, forfeitures and restitutions.

Penalties are not limited to fines. During fiscal year 2011, ICE charged 221 employers with violations related to employment and disqualified 115 individuals and 97 businesses from participating in federal contracts. This enforcement activity will likely increase, as DHS' annual budget proposal for fiscal year 2013 allots $1.7 billion towards interagency law enforcement task forces and operations, conducting I-9 audits and enforcement investigations, and managing ICE's national security work.

Now more than ever, it is critical that employers strictly comply with the regulations related to I-9 completion, storage and retention.

ELECTRONIC SIGNATURES

The regulations permit I-9 completion using electronic signatures. If an employer accepts electronic signatures, the system for capturing the signatures must ask signatories to acknowledge that they read the attestation and attach the signature to an electronically completed Form I-9. The system must also:

- Affix the electronic signature at the time the I-9 is completed.

- Create and preserve a record verifying the identity of the person producing the signature.

- Provide employees a printed confirmation of the transaction if requested.

The system used to capture the electronic signature must also include a method for the employer to acknowledge that the attestations to be signed have been read by each signatory (the employer and the employee).

>> For more information on completing I-9 forms, search Demonstrating the Right to Work in the United States on our website.

ELECTRONIC STORAGE

To store I-9s electronically, employers may use any electronic recordkeeping, attestation and retention system that complies with DHS standards, including commercially available off-the-shelf programs and commercial automated data processing

systems. However, employers must properly vet programs prior to selection and implementation, as many commercially available programs do not meet DHS standards (see below *Evaluating Electronic I-9 Systems*). In addition, the system must not be subject to any agreement that restricts access to and use of the system by ICE or any other US agency.

ELECTRONIC I-9 RETENTION

Employers must retain I-9s for three years after the date of hire or one year after the employment ends, whichever is later. They may use paper, electronic systems or a combination of paper and electronic systems to retain the I-9s. Employers may complete or retain I-9s in an electronic generation or storage system if the system includes:

- Reasonable controls to:
  - ensure the integrity, accuracy and reliability of the electronic storage system; and
  - prevent and detect the unauthorized or accidental addition to or creation, alteration, deletion or deterioration of an electronically completed or stored I-9, including any electronic signature.

- An inspection and quality assurance program that regularly evaluates the electronic generation or storage system, including periodic checks of electronically stored I-9s, and any electronic signature.

- An indexing system permitting the identification and retrieval of relevant documents and records maintained in the electronic storage system.
- The ability to reproduce legible paper copies.

Employers that choose to complete or retain I-9s electronically may use one or more electronic generation or storage systems, if I-9s retained in the system remain fully accessible. Employers may also change electronic storage systems if the systems meet the regulations' performance requirements. For each electronic generation or storage system used, an employer must maintain and make available on request complete descriptions of:

- The electronic generation and storage system, including all procedures relating to its use.
- The indexing system that permits the identification and retrieval of relevant documents and records maintained in an electronic storage system. Employers are **not** required to maintain a separate description database for each system if comparable results can be achieved without separate description databases.

Only the pages of the I-9 on which the employer or the employee enter data must be retained.

If employers choose to complete or retain I-9s electronically, they must maintain and make available on request the documented business processes that:

- Create the retained I-9s.
- Modify and maintain the retained I-9s.
- Establish the authenticity and integrity of the forms, such as audit trails (records showing who has accessed a system and the actions performed in the system).

>> For more information on document retention requirements, search Demonstrating the Right to Work in the United States on our website.

PAPER COMPLETION AND ELECTRONIC RETENTION

Although the electronic storage of I-9s creates many efficiencies for employers, many still find that paper completion remains the best option when onboarding a new hire. An employer may choose to fill out a paper Form I-9 and scan and upload the original signed form to retain it electronically. Once an employer has stored the I-9 in electronic format, it may destroy the original paper form.

ADVANTAGES OF USING ELECTRONIC I-9 FORMS

Because of the high risk of fines for even seemingly minor I-9 errors, many employers turn to electronic I-9 software programs to minimize the risk of errors and maximize compliance with I-9 and E-Verify laws, rules and regulations. A proper software system combined with a comprehensive compliance program may reduce the risk of I-9-related sanctions.

"IDIOT PROOF" PROCESS

The best electronic I-9 software programs contain quality control mechanisms that make it difficult for an employee or employer to improperly complete the proper I-9 section. For example, some programs prevent the employee from signing the form if data is either missing or does not conform to built-in data checks (for instance, that a social security number contains nine digits or an address is a street address rather than a PO box). In addition, the best electronic programs:

- Prevent over-documentation.
- Require the employer to complete all relevant fields on the I-9.
- Require document numbers to conform to a defined format.
- Integrate with onboarding and other HR systems to ensure timely completion and reverification of I-9s.

These quality control mechanisms can help employers avoid fines related to an ICE inspection. However, electronic programs do not protect employers that commit IRCA violations.

>> For more information on over-documentation and other prohibited employer conduct, search Discrimination: Overview on our website.

EASIER TO LOCATE I-9S

Employers that have been audited by ICE know it is difficult to gather the required documents in the three-day timeframe provided. An electronic I-9 program allows employers to avoid digging through cardboard boxes in the office basement, trying to locate I-9s stored off-site or sorting through employee files.

>> For more information on ICE's timing requirements, search Government Audits of I-9 Forms on our website.

Some electronic I-9 systems allow employers to access their I-9s from anywhere in the world, sorted by location, and to batch print them for presentation to ICE. Most electronic systems also allow for the storage of related identity and employment authorization documents, attestation documents for states requiring them and E-Verify documents.
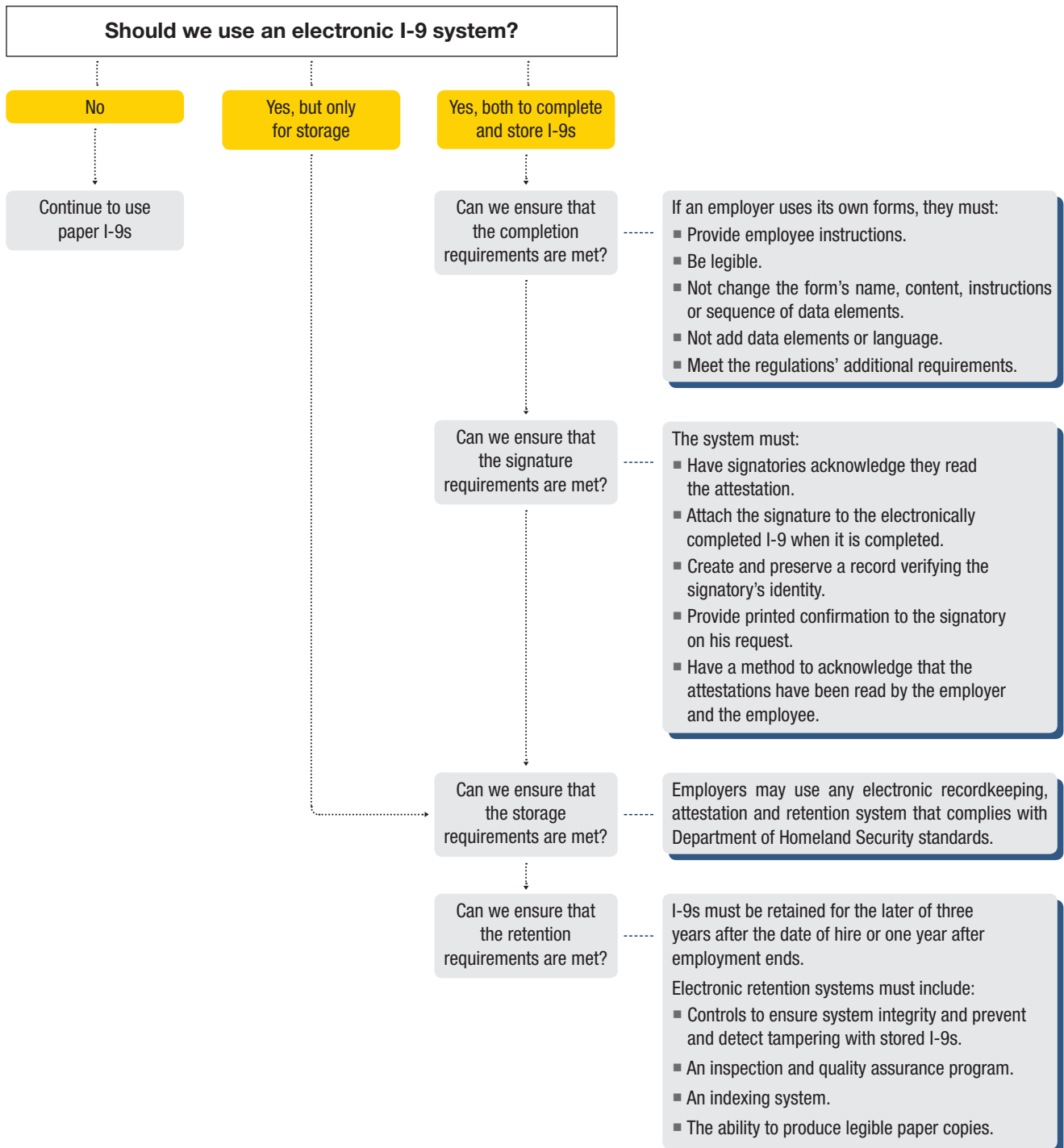
BUILT-IN TICKLER SYSTEMS

Most electronic I-9 systems track employment authorization expiration dates and notify employers of an upcoming expiration date requiring reverification. This helps employers remind their employees of upcoming expirations to avoid gaps in employment authorization. Because a failure to reverify work authorization is among the most serious I-9 violations, these tickler systems are key, particularly for employers that hire nonimmigrant workers whose employment authorizations expire and require extension before the I-9 can be reverified.

>> For more information on reverification of employment authorization, search Drafting an Employment Eligibility Verification Compliance Policy on our website.

ELECTRONIC I-9s: ENSURING COMPLIANCE

Electronic I-9 software helps minimize risk with its built-in quality control mechanisms, easy access to stored I-9s, automatic notification of employment authorization expiration dates, integration with E-Verify and data security measures. However, improperly developed or misapplied software may expose an employer to discrimination lawsuits, additional cost and technology problems, potential data breaches and liability for deficient I-9 systems. When deciding how to proceed, employers should examine the following issues.

Should we use an electronic I-9 system?

No

Continue to use paper I-9s

Yes, but only for storage

Yes, both to complete and store I-9s

Can we ensure that the completion requirements are met?

If an employer uses its own forms, they must:
- Provide employee instructions.
- Be legible.
- Not change the form's name, content, instructions or sequence of data elements.
- Not add data elements or language.
- Meet the regulations' additional requirements.

Can we ensure that the signature requirements are met?

The system must:
- Have signatories acknowledge they read the attestation.
- Attach the signature to the electronically completed I-9 when it is completed.
- Create and preserve a record verifying the signatory's identity.
- Provide printed confirmation to the signatory on his request.
- Have a method to acknowledge that the attestations have been read by the employer and the employee.

Can we ensure that the storage requirements are met?

Employers may use any electronic recordkeeping, attestation and retention system that complies with Department of Homeland Security standards.

Can we ensure that the retention requirements are met?

I-9s must be retained for the later of three years after the date of hire or one year after employment ends.

Electronic retention systems must include:
- Controls to ensure system integrity and prevent and detect tampering with stored I-9s.
- An inspection and quality assurance program.
- An indexing system.
- The ability to produce legible paper copies.

SEAMLESS INTEGRATION WITH E-VERIFY

Most electronic I-9 systems are provided by E-Verify web services agents, vendors that can take information from their clients' completed I-9s and submit it to the government's E-Verify system without separately logging in to the E-Verify website.

The most comprehensive I-9 systems allow employers to customize their system configuration to match their E-Verify registration. These systems also automatically update when an E-Verify query status changes (from Tentative Nonconfirmation (TNC), meaning that a social security number or employment authorization cannot be found, to Employment Authorized, for example) and may even be set up to send e-mail notifications to the responsible employer representatives when an E-Verify query requires action.

>> For more information on E-Verify, search E-Verify for Employers: Best Practices on our website.

COMPREHENSIVE DATA SECURITY

An electronic system with proper data security measures may protect the sensitive data on I-9 forms more securely than with paper I-9s. Paper I-9s are more likely to be misplaced, inadvertently destroyed or viewed by unauthorized personnel than electronic I-9s. However, a system that does **not** use proper data security measures may leave an employer, and its employees, more vulnerable than if the employer had used paper I-9s (see below *Insufficient Data Security*).

DISADVANTAGES OF USING ELECTRONIC I-9 FORMS

Improperly developed or misapplied electronic I-9 systems may expose employers to great liability, especially when the employer's use of the system creates a false sense of security.

RISK OF DISCRIMINATION

Some features of electronic I-9 systems that appear to automate employer responsibilities may instead create liability for them. For example, some systems:

- Limit the list of acceptable documents to those that pertain to the immigration status selected by the employee.
- Require every "alien authorized to work" to provide an expiration date.
- Send notifications about expiring documents to all employees.

In certain circumstances, these features may lead to discrimination suits. For example, a new hire may present any suitable combination of authorized documents to complete the I-9 process. However, if the system limits the list of acceptable documents, the employer may be committing document abuse. The OSC recently filed suit against Rose Acre Farms for this very infraction, because the employer's electronic system required specific documents from non-US citizen workers in violation of IRCA.

>> For more information on acceptable documents to use in the I-9 process, search Demonstrating the Right to Work in the United States on our website.

>> For information on documentation abuse by an employer, search Discrimination: Overview on our website.

COST

The costs associated with paper I-9s include those for paper, printing and storage, if necessary. A system accommodating electronic I-9s rarely comes without a cost either, with each I-9 costing between $2 and $20 to produce and maintain, depending on the system selected by the employer. For many employers, however, the cost of a compliant I-9 system is preferable to the fines that they may face due to Form I-9 errors, which are more likely to occur on paper I-9s.

TECHNOLOGY

For some employers, accessing a computer, printer or scanner is difficult, impossible or impractical. Employers that hire workers directly on a job site, such as in the agriculture and construction industries, or where the job site is not an office environment, may find using an electronic system challenging.

ISSUES WITH MULTIPLE I-9 STORAGE SYSTEMS

Employers that choose to "go electronic" but do not digitize their legacy paper I-9s may have trouble maintaining or producing I-9s when required. Employers trying to manage multiple I-9 storage systems may:

- Lose track of legacy I-9s.
- Be unable to produce I-9s when requested by ICE.
- Inadvertently risk document abuse by trying to reproduce lost I-9s.

INSUFFICIENT DATA SECURITY

Electronic I-9 systems with insufficient data security measures to prevent data breaches create risks for employers by leaving the door open for unauthorized personnel to access employees' personal data (such as their dates of birth, social security numbers, addresses or driver's license numbers). Because the penalties for data breaches go beyond IRCA liability to implicate violations of employee privacy rights, ensuring data security must be among an employer's top considerations in selecting an electronic I-9 vendor.

>> For more information on privacy and data security, search Privacy in the Employment Relationship on our website.

POTENTIAL FOR INCREASED RISK

Employers that use electronic I-9s are subject to regulations specific to these systems, with added exposure to serious penalties. For example, in September 2010, ICE announced a more than $1 million fine settlement with the clothing retailer Abercrombie & Fitch for numerous technology-related deficiencies in its

electronic I-9 verification system, despite finding no instance where the retailer knowingly hired an unauthorized worker.

The electronic I-9 regulations are both complex and vague, with little government interpretation or guidance available. In addition, some software or service providers that develop these systems may have little or no knowledge of immigration law or the I-9 requirements. This can lead to an ICE determination that the employer's electronic I-9s are not I-9s at all. Compliant electronic I-9s may be better than paper I-9s, but even flawed paper I-9s are better than flawed electronic I-9s.

EVALUATING ELECTRONIC I-9 SYSTEMS

When evaluating their options, employers may be tempted to pick an electronic I-9 system offered by a well-known software or service provider as an add-on to an existing software package. However, because of the challenges involved in producing a compliant I-9 program, prudent employers should carefully review competing software systems before settling on the system that fits their culture and needs. Compliance should appear on the top of every employer's needs list.

When deciding between vendors and competing products, employers should carry out the checks listed in the checklist below.

EVALUATING ELECTRONIC I-9 SYSTEMS CHECKLIST

Expertise

Does the vendor have at least one immigration expert (preferably on staff) involved in developing the I-9 and E-Verify system?

While software developers, coders and engineers may be great at user interface and data, they often do not understand immigration laws and regulations. This can lead to noncompliant electronic signatures, incomplete or nonexistent audit trails, improper pre-population of data and other serious compliance concerns. Software developers often focus on the end user's experience, which itself is important, but many features that make an I-9 easier for the end user may result in noncompliance and expose the employer to fines.

Approvals

Is the vendor claiming that it has a government stamp of approval?

If yes, employers must be wary. ICE does not certify any I-9 or E-Verify system as compliant. It may allow a company to serve as a web services agent, but that simply means that the software communicates with the government's E-Verify system. It does not mean that the government has reviewed or approved the system.

Complexities

Is the system capable of handling complex I-9 issues?

Examples include:

- Documenting receipts for lost, stolen or damaged documents.
- Accepting an I-751, Application to Remove Conditions, receipt notice with an expired green card.
- Entering data for:
  - curricular practical training for foreign students;
  - science, technology, engineering and mathematics (STEM) extensions for foreign students' optional practical training;
  - H-1B portability hiring; or

- automatic visa status extensions based on the filing of a petition.

Many systems have no way of documenting work authorization in these situations, forcing employers to create a paper I-9. Because these complex situations present employers with the most challenges and opportunities for errors and missed deadlines, employers that encounter these circumstances should seek a system that accommodates these issues.

>> For more information on different visa categories, search Key Nonimmigrant Visa Classifications Chart on our website.

Mistakes

Does the system allow employers to correct mistakes?

Even with sophisticated error-detectors in place, mistakes are inevitably made on electronic I-9 forms. Many systems only allow employers to correct errors by creating a new I-9 (this is often because the systems have weak audit trails, so the inability to make changes should cause an employer to be extra diligent in its review of the audit trails). Creating a new I-9 can cause problems, inviting possible discrimination claims or, in a unionized environment, violating a collective bargaining agreement.

If the system allows error correction, employers should ensure that it does so properly. For example, if the system allows the employer to make changes to the employee's section of the I-9 without the employee's involvement, this should raise a red flag.

E-Verify

Does the I-9 system include companion E-Verify software?

If so, employers should carefully vet the E-Verify portion of the software. Web services providers must develop the portion of their software that communicates with E-Verify in the US, not overseas. They must also constantly modify their software to keep up with the government's system

changes. Employers should therefore inquire about where the vendor's software development is done, who does it and how quickly E-Verify updates are implemented.

Employers should also ensure that the system provides specific instructions to users for proper handling of TNCs. Recent DHS desk audits have focused on proper handling of these situations.

> >> For more information on TNCs, search E-Verify for Employers: Best Practices on our website.

Guarantees
Does the vendor offer compliance guarantees?

Employers should ask about compliance guarantees, negotiate better guarantees if possible and ensure that their contracts reflect those guarantees. A software vendor that stands behind its system's compliance may agree to pay any fines incurred after an ICE inspection if those fines relate to errors or failures caused by the system's noncompliance with the electronic I-9 regulations.

Review
Has an attorney reviewed the system?

Most software vendors claim that they are 100% compliant and many tell employers that an attorney has reviewed the system and given an opinion that the system is compliant. What they do not usually volunteer is that the attorney may be an in-house attorney with no immigration background, or an outside immigration attorney who has merely provided an opinion that the system does not necessarily violate the regulations. In addition, the endorsement may have occurred years ago and may not reflect best practices or recent enforcement actions.

Employers should work with their own immigration counsel to review the system. Ideally, the software vendor will provide a test login allowing the employer and its attorney to pressure test the system.

References
Does the vendor offer references?

If not, employers should request references for the vendor. Talking with other employers about their experience with the software and with the vendor's digitization of paper I-9s may give an employer some of the best information about the vendor's customer service and the software's practicality and usability.

Inspections
Have the vendor's clients been inspected by ICE or subjected to E-Verify desk audits?

Some vendors may provide references from clients that have survived ICE inspections. A vendor that claims none of its clients have encountered an ICE inspection may have a limited client base or be new to the market. Most employers will likely be more comfortable knowing that ICE has seen the I-9s generated by the system and that no software flaws have been detected.

Signatures
Does the vendor's software comply with I-9 regulations on electronic signatures?

To comply with electronic signature requirements, a system must "include a method to acknowledge that the attestation to be signed has been read by the signatory" and "[c]reate and preserve a record verifying the identity of the person producing the signature" (*8 C.F.R. § 274a.2(h) (2012)*). While it is unclear how a system can comply with these requirements, it is surprising how many electronic I-9 vendors struggle to explain how their system confirms that the signatory has read the relevant attestation or how the system confirms that it was, in fact, the signatory who provided the electronic signature. Several systems may even allow employers to electronically sign the form on the employee's behalf, a situation that raises major compliance concerns.

Audit Trails
Does the software comply with I-9 regulations on audit trails?

The regulations require that "whenever the electronic record is created, completed, updated, modified, altered, or corrected, a secure and permanent record is created that establishes the date of access, the identity of the individual who accessed the electronic record, and the particular action taken" (*8 C.F.R. § 274a.2(g)(iv) (2012)*). Little guidance is available to interpret this requirement. Employers should ask a prospective vendor for a list of the items recorded for the audit trail and examples of actual audit trails. The most conservative approach may be to record completion of each individual field, for example, "Date of Birth changed from (blank) to 07/13/1983 on 06/25/2012 at 2:13 p.m. EST by Jason Burritt (logged in as jburritt)." Some vendors only record key milestones such as, "Section 1 completed and signed by Nici Kersey on 6/25/2012." Some vendors may have no audit trail whatsoever.

Employers must remember that, regardless of any language in the vendor contract, the employer is responsible for choosing a system that complies with the regulations. Even if the vendor pays the fines for which it is reasonably responsible, it is the employer that bears the attorneys' fees, loss of time and damage to the employer's reputation that accompany ICE inspections and sanctions.