

I-9 Issues — Electronic Filing and Storage, the Three Day Rule, and Clarification of Hire Date and E-Verify

July 27, 2010

Electronic Filing and Storage Form I-9

On July 22, 2010 U.S. Immigration and Customs Enforcement (ICE) published a final rule providing that employers and recruiters or referrers for a fee, who are obligated to retain the Form I-9, Employment Eligibility Verification, may sign this form electronically and retain it in an electronic format. This final rule amends and updates an interim rule published on June 15, 2006.

The rule makes it clear that employers may use paper, or electronic systems, or a combination. Thus, a company that is transitioning to electronic filing, may choose to maintain its paper I-9 records for employees already processed while initiating electronic filing prospectively, or in the alternative, to scan and incorporate previously executed paper I-9 forms into its new electronic system.

Employers may also change their electronic systems as technology evolves and improves, as long as the systems meet the performance requirements of the regulations. The final regulation clarifies that the electronic system must be so constructed as to retain an audit trail, not for each time a Form I-9 is electronically viewed, but rather, only for when the Form I-9 is created, completed, updated, modified, altered, or corrected. The audit trail must be able to establish the identity of the individual who accessed the electronic record and the particular action taken.

The rule also provides that the I-9 maintenance systems must have the capability to issue a receipt or confirmation of a Form I-9 transaction, but that the employer must provide that receipt or confirmation to the employee only if it is specifically requested by the employee. The regulation also confirms that there is no obligation to issue such receipt or confirmation within the three day deadline for executing an I-9 form, but rather within a reasonable period of time.

ICE opined that it would be permissible for an employer to store the I-9s and E-Verification documentation in either a separate I-9 file, or as part of the employee's other employment records. In advising our clients, we have observed that, given how I-9 forms are subject to separate audit, in many instances, it is not advisable to commingle or store I-9 records together with general employment records. This is a determination that has to be carefully made by each employer.

ICE also clarified that only the pages on which the employer and employee enter data must be maintained. Other pages of the current form, which include instructions and list of acceptable documents, need not be maintained.

We have always recommended and continue to recommend to our employers, that one copy of the instruction sheet, including the list of acceptable documents, for each version of the I-9 form that has been used historically, be preserved and maintained as a reference for each relevant eligibility period, so that the employer can clearly demonstrate that it has been in compliance with the document requirements applicable at that particular point in time.

As to the record of signatures, the regulation provides that the "paper" I-9 with original handprint signatures, electronic with acceptable electronic signatures, or original paper scanned into an electronic format, or a combination of paper and electronic formats are all acceptable.

ICE Addresses the "Three Day Rule"

In this regulation, ICE "clarifies" that the requirement to execute the I-9 form within three (3) days actually refers to three (3) "business" days, which though not specifically defined, is assumed to be weekdays, not weekends, also excluding all federal holidays.

This amplifies on the announcement made a few weeks ago by USCIS as to the so-called "Thursday" rule. USCIS clarified that the actual date of hire is not included in the three (3) day calculation, so that if an individual is hired on Monday, Thursday would be the last day on which I-9 and E-Verify processing must take place. Applying the ICE regulatory clarification, we can conclude that if an individual is hired on the Friday before a Monday legal holiday (e.g., President's Day), the following Thursday would be the latest day on which I-9 and E-Verify processing could be completed.

USCIS Clarifies What is the Hire Date for I-9 and E-Verify

In the latest version of the Employer's Handbook, USCIS confirmed that one may execute the I-9 form and complete the E-Verify process no later than three (3) days after hire, defined as the date the employee starts work for pay, but may execute the I-9 and complete the E-Verify process earlier.

Acknowledging that the term "hire date" is very confusing, USCIS posted on its website ([click here](#)) a chart to clarify the parameters for employers. USCIS confirms that the earliest you may complete the Form I-9 is when an offer of employment has been made, and accepted by the employee, and the earliest that E-Verify can be completed, would be after the employee has accepted an offer of employment and Form I-9 has been completed.

It confirms further that the latest you may complete the Form I-9 is the third business day after the employee has started work for pay. This is the so-called "Thursday Rule." If an individual is hired on a Monday, given the position of USCIS now that the day of hire is not included in the three days, a Monday hire would have until Thursday to complete the I-9 process. The third day after the date of hire would also be the latest that E-Verify could be processed, after Form I-9 is completed.

We now see that for purposes of E-Verify, the "hire date" is determined, depending on when the employee starts work for pay and the date the case is actually created in E-Verify. If the case is created in E-Verify before the employee starts work for pay, the date the case is created in E-Verify is the "hire" date. If the case is created in E-Verify on or after the employee starts work for pay, the day the employee actually started work for pay is the "hire" date.

An E-Verify process is not late as long as it is created no later than the third business day after the employee has started work for pay. It does not matter how many days have passed between the employee completing Form I-9 and the employer creating the case in E-Verify, as long as it all has occurred prior to the third day, after the employee has commenced work for pay.

In the case of a federal contractor, operating with the FAR E-Verify clause, E-Verify for an existing employee may take place long after the employee associated with the contract was actually hired by the company. In this case, even if the I-9 is reverified, updated, or reexecuted, the hire date indicated will always be the actual original hire date of the employee, even though this will be many days or perhaps even years, prior to completing E-Verify processing. In essence, the three day rule is not applicable to executing the E-Verify process for federal contractors e-verifying employees associated with the contract. The reference point for when E-Verify must take place for such an employee is the date that he or she has become associated with the contract and the time limit within which E-Verify must take place is thirty (30) days thereafter. If the employer has just registered as a federal contractor, the timeframe within which the current employee must be registered in E-Verify is within ninety (90) days of registering the federal contractor for E-Verify, or thirty (30) days from the date when the employee has become associated with the contract, whichever of these two dates is later.

The regulation on electronic filing published by ICE was intended to provide clarification, and flexibility. The posting as to “hire date” by USCIS had the same purpose. Both subdivisions of the Department of Homeland Security might be disappointed to find out that employers are still confused and find it frustrating and difficult to comply with these complex rules.

You should feel free to reach out to your contact at Proskauer’s Immigration Practice Group, if you have any questions or require further guidance.