

# **Practical Implications Of The DHS Final Rule On Electronic Form I-9 Signatures And Storage**

by [Robert F. Loughran and Susan Kelly](#)

On July 22, 2010, the Department of Homeland Security (DHS) published a final rule amending the June 2006 interim regulations relating to signatures and storage of electronic Forms I-9. In light of this final rule, we wish to share with employers who have electronic Form I-9 verifications systems, or those employers who are considering moving to an electronic system, some of the practical implications that the final rule has on using an electronic system for Form I-9 completion and storage.

First, the final rule clarifies that the employer has three business days to complete Section 2 of the Form I-9, where information is recorded relating to the employee's identity and work authorization, as well as the employee's date of hire, the employer's certification signature, and the business name and address. This modification reduces the confusion previously created by the instruction that the form be completed "within three days." Thus, because the final rule makes clear that only business days will be counted, most employers need not count weekends or federal holidays when determine its Form I-9 completion deadlines. Retailers and other similarly situated employers may still be held responsible for weekends and holidays if those days are ordinarily "days on which the employer conducts business" pursuant to 1997 INS guidance.

What the final rule does not address on this topic is when the clock starts on these three days. Recent guidance from DHS' U.S. Citizenship and Immigration Services (USCIS) instructs employers not to count the day of hire as Day 1 in this calculation. Therefore, if an employee starts work on Monday, the third business day would be Thursday according to this recent interpretation. Immigration & Customs Enforcement (ICE), the enforcement branch of DHS, has recognized this policy, albeit not in any officially published guidance. Until there is consistent guidance relating to the three day clock, employers may want to take the more conservative approach of completing the Form I-9 within three days of hire, counting the first day of work as Day 1.

## **Paper or Plastic? or both?**

Another point the final rule raises is that employers may use paper or electronic systems, or a combination of the two, for Form I-9 completion and storage. This provides an employer with flexibility to use an electronic Form I-9 system in certain company locations while maintaining paper records in other locations. In some instances, there may be remote hiring sites that do not have the logistics worked out for a company representative or agent to certify the genuine-ness of the documents being presented resources for an electronic Form I-9 system. Those sites could continue using paper Forms I-9, and the company has the choice as to whether those paper Forms I-9 ultimately get stored in the electronic system. For a variety of business and logistical reasons employers may elect to leave historic Forms I-9 for terminated employees in paper form and move forward electronically as they are able. There also instances where independent business units are ready for electronic records at varying times, and this new rule reinforces the concept that the record keeping need not be simultaneously electronic company-wide. Those paper forms could be filed and cataloged in cabinets or boxes according to the proper destruction date or they can be digitized, linked and calendared into HR software for electronic management at any time the employer chooses.

## **What is The Government Going to Want to See?**

The final rule clarifies the audit trail requirements such that an electronic Form I-9 system need not include every time a Form I-9 is viewed or accessed, but it must track any:

1. creation,
2. completion,
3. alteration,
4. update, or
5. other modification

of a Form I-9 by recording:

1. the date of access,
2. the identity of the individual taking the action, and
3. the particular action taken.

Many of the leading electronic Form I-9 software tools are designed to create an audit trail compliant with these standards, but not all systems are created equally. Form I-9 tools included in packages designed for other human resources functions may not have this level of sophistication. Employers should ensure that any electronic system being used or considered meets this standard to ease the burden of creating such an audit trail manually.

Employers must ensure that their electronic Form I-9 storage method contains an *indexing system* that is comparable to a reasonable hardcopy filing system. This standard replaces the former regulation requiring that the system permit searches by any data element in the Form I-9. This deletion allows employers more flexibility in the cataloging of Form I-9 records. Again, the more advanced software systems will generally allow searches by any data field, including the employee name, birth date or Social Security Number. However, some employers may wish to store copies of all Form I-9s electronically in a simple .pdf format without using an electronic software for data entry. So long as these electronically saved images of the Forms I-9 are indexed according to one or more reasonable data fields, the employer will be compliant with this standard. The final rule also makes clear that these records may be stored in a separate Form I-9 file or as part of other employee records.

### **Can Paper Receipts Result in Carelessly Discarded Personal Data?**

Lastly, DHS addressed the requirement that electronic Form I-9 systems be capable of printing a transaction record that must be given to the employee at the time of Form I-9 completion. Commentators in the interim period argued that this requirement fundamentally undermines the conversion to a paperless system, whereby paper resources are saved and data is safely secured in a centralized, secured location. A transaction receipt akin to a copy of the Form I-9 itself circulates sensitive employee information that could be used for identify fraud. DHS argued that the receipt allows for confirmation of the accuracy of the record and is a proactive defense for employers if errors are later discovered on the form. It is interesting to note that DHS does not require that employees be given a receipt when a paper Form I-9 is completed, even though a paper Form I-9 is perhaps even more vulnerable to error as there are no data checks being performed.

DHS did modify the regulation in part, however, by only requiring that a receipt be provided *when an employee requests it*. In addition, the receipt need not be issued at the time of the transaction so long as it is provided within a reasonable time, and it may be transmitted rather than printed. Thus, the final rule greatly reduces the burden on employers and company resources to produce a receipt for every Form I-9

that is completed. When requested by the employee, the employer may also send the receipt electronically via secured email, rather than print a paper copy that could be carelessly discarded, misplaced or otherwise fall into the wrong hands. Because the final rule does not elaborate on the type of receipt that must be provided, employers may consider drafting a receipt for company use as an alternative to printing a copy of the Form I-9. A receipt that provides the employee name, date of completion and certification that all information entered was true and correct could satisfy the receipt rule without opening the door to identity fraud and scrutiny of company hiring practices. Like all Form I-9 practices, consistency is crucial, and any policies should be adopted company-wide for all employees.

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### **About The Author**

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