



Advising Clients on the Selection of an Electronic I-9 Software Provider¹

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Employers are increasingly turning to electronic I-9 solutions to help them manage their I-9 and E-Verify compliance responsibilities. However, there are specific legal requirements in the Department of Homeland Security (DHS) regulations that such programs must meet. Practitioners should be aware that Immigration and Customs Enforcement (ICE) has signaled that future audit efforts will focus on ensuring that employers who utilize electronic solutions are in compliance.

This practice pointer provides an overview of the regulatory requirements that allow employers to create and retain Forms I-9 electronically and proposes an updated series of due diligence questions that employer representatives should ask an electronic I-9 vendor in order to assess whether the vendor's system meets the regulatory requirements and provides functionality that best suits the client's needs.²

Legal Background

The ability to complete and retain I-9 forms electronically is still a fairly recent development, first authorized on October 30, 2004, when President George W. Bush signed Pub. L. No.108-390 into law. Before this, "electronic Forms I-9" had been limited to images of paper I-9s stored on microfilm or microfiche. Interim final regulations³ published by the Department of Homeland Security (DHS) on June 15, 2006 mirrored prior guidance issued by ICE, but did not specifically identify which system(s) would be acceptable under the law. In the supplementary information to the interim final rule, DHS acknowledged that there was no single government-wide electronic signature or storage protocol, and that it was taking a technology-neutral approach with regard to the requirements imposed on electronic programs. The preamble to the interim regulations also indicates that ICE would follow standards set by Internal Revenue Service Rulings for maintaining books and records electronically.

A final rule amending the interim rule was published on July 22, 2010 and became effective August 23, 2010.⁴ On January 5, 2011, U.S. Citizenship and Immigration Services (USCIS) issued an update to its M-274, Handbook for Employers that incorporated a new section on electronic I-9s that

¹ The original version of this article was published on April 1, 2010 and updated on January 26, 2011. Neither AILA nor the authors endorse any particular software vendor or product through the publication of this article.

² This article will not discuss the costs and benefits of recommending that a client move from a traditional paper-based employment verification system to an electronic-based system.

³ 71 Fed. Reg. 34510 (June 15, 2006).

⁴ 75 Fed. Reg. 42575 (July 22, 2010).

essentially repeats the key requirements in the regulations.⁵ More recently, the following developments have occurred:

- On June 19, 2012, the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) filed a complaint against a U.S. egg producer alleging discrimination against protected individuals as a result of its electronic I-9 system.⁶
- On October 2, 2012, as a result of a Freedom of Information Act request, ICE released guidance on electronic audit trail requirements. This document is critical for practitioners and employers because it is the first official guidance that outlines ICE's expectations for electronically generated and stored I-9s and provides insight into how ICE will assess electronic records during an audit.⁷
- In 2012 and 2013 ICE officials made a number of statements regarding the propriety of electronic programs that pre-populate employee information into Section 1 of the I-9 form.⁸
- The standard ICE Notice of Inspection (NOI), which puts an employer on notice that the agency will be auditing its I-9s, was modified to request specific information regarding the electronic I-9 program if the employer uses one; and
- On August 13, 2013, the OSC issued a Technical Advisory Letter (TAL) on pre-population of information.⁹

Employers selecting a new electronic I-9 system, or reviewing the compliance of an existing system, and practitioners assisting or advising employers with regard to questions about electronic I-9 systems should be aware of these important developments and should incorporate them into their review and analysis.

From a public policy perspective, DHS identifies three advantages that it believes employers are likely to realize through the use of an electronic I-9 system:

- Electronic forms will allow employers to better ensure that each Form I-9 is properly completed and retained.
- Electronic completion and storage may render the process less prone to error; and
- Electronically retained Forms I-9 are more easily searchable, which is important for re-verification, quality assurance, and ease of inspection.¹⁰

The first two items are assumptions—that software providers will incorporate software logic to ensure ease of use and storage. The final rationale identifies a potential advantage for the

⁵ M-274, Handbook for Employers, Instructions for Completing Form I-9 (Employment Eligibility Verification Form), (<http://www.uscis.gov/files/form/m-274.pdf>).

⁶ See <http://www.justice.gov/crt/about/osc/pdf/publications/RoseAcre.pdf>.

⁷ Memorandum from James Dinkins, Executive Associate Director, Guidance on the Collection and the Audit Trail Requirements for Electronically Generated Forms I-9 (Aug. 22, 2012), *published on* AILA InfoNet at Doc. No. [12101240](#) (*posted* October 12, 2012).

⁸ See Minutes from the AILA Verification and Documentation Liaison Committee Meeting with ICE Homeland Security Investigations, April 11, 2013, *published on* AILA InfoNet at Doc. No. [13062401](#) (*posted* June 24, 2013); Practice Alert: Prepopulation of Section 1 by Electronic Programs Is Prohibited, *published on* AILA InfoNet Doc. No. [13050647](#) (*posted* October 9, 2013).

⁹ Technical Assistance Letter from Seema Nanda, Deputy Special Counsel, to Leslie Carr, (Aug. 20, 2013), *published on* AILA InfoNet at Doc. No. [13082752](#) (*posted* Aug. 27, 2013).

¹⁰ See DHS Interim Rule, “Electronic Signature and Storage of Form I-9, Employment Eligibility Verification, 71 Fed. Reg. 34510, 34511 (June 15, 2006).

government where employers move to an electronic I-9 system—namely, electronic records will be easier for agencies, including ICE, USCIS, and OSC, to review in the inspection of an employer’s I-9s or in the evaluation of an electronic I-9/integrated E-Verify system.¹¹ The advantage that the government may gain when auditing an employer whose electronic system meets the storage and indexing requirements under the regulations is something that practitioners must also carefully consider when advising their clients on whether to go paperless.¹² Employers may experience cost savings by storing I-9s electronically rather than storing paper copies or transferring the forms to microfilm or microfiche.

Minimum Requirements

The regulations at 8 CFR §274a.2 specify that the Form I-9 can be electronically generated or retained, provided that the resulting form is legible; there is no change to the name, content, or sequence of the data elements and instructions; no additional data elements or language are inserted; and various other recordkeeping and security standards are met.¹³ More specifically, 8 CFR §274a.2(e) specifies that any person or entity that is required to complete and retain I-9 forms may complete or retain them electronically if that system includes:

1. Reasonable controls to ensure the integrity, accuracy and reliability of the electronic generation or storage system;
2. Reasonable controls designed to prevent and detect the unauthorized or accidental creation of, addition to, alteration of, deletion of, or deterioration of an electronically completed or stored Form I-9, including the electronic signature, if used;
3. An inspection and quality assurance program evidenced by regular evaluations of the electronic generation or storage system, including periodic checks of the electronically stored Form I-9, including the electronic signature, if used;
4. In the case of electronically retained Forms I-9, a retrieval system that includes an indexing system that permits the identification and retrieval for viewing or reproducing relevant documents and records maintained in an electronic storage system. Note: the government does not require that the retrieval system maintain both a separate repository for

¹¹ New NOIs routinely request employers to provide all available information in an electronic format.

¹² The government’s increased ability to verify an employer’s compliance was made abundantly clear when, on September 28, 2010, ICE announced a \$1,047,110 administrative fine settlement with clothing retailer Abercrombie & Fitch for violations of the employment eligibility requirements. The settlement was the result of a November 2008 I-9 inspection of Abercrombie & Fitch’s retail stores in Michigan, during which ICE reviewed records contained in the company’s internally developed electronic I-9 system. The audit apparently uncovered numerous problems in the company’s I-9 records, including deficiencies in the data and in the electronic system itself. Note then, that even though ICE recommends that employers move to electronic I-9 systems, it will not hesitate to hold the employer responsible when a system is deficient. *See* Dinkins Memorandum, *supra* note 7 at 2, recommending that Special Agents and ICE auditors request access to the system for a demonstration of the generation of an electronic I-9 as part of an audit.

¹³ There has been some debate among practitioners about the meaning of this section of the electronic I-9 regulations. The authors do not believe that the regulation requires a system to completely mirror the paper I-9 process; we believe the regulation rightly gives some flexibility to vendors in the process design by which the system captures the required I-9 information. This flexibility, however, is limited: a system that incorporates data elements which are not required by or contained in the current version of the I-9 form, or fails to require the employee or the employer to attest to the exact representations contained in the official paper version of the form exposes an employer to a risk that the government will determine the system to be noncompliant, even if a print out from the system appears fully compliant. Such risk should be evaluated carefully, as it may result in all I-9 forms created in the system to be deemed invalid.

electronically stored documents and a records description database provided that comparable results can be achieved without a separate description database;¹⁴

5. The ability to reproduce legible and readable hardcopies.¹⁵

The employer is only required to retain those pages of the Form I-9 from which employers and employees enter data in the electronic storage system.

The government did not intend to establish specific requirements for the application of new products, but rather to require that they meet minimum performance standards. Accordingly, a vendor's product must meet the following minimum record keeping and security requirements:

- Secure database;
- Password-protected, unique user profiles;
- Indexing;
- Audit trails;
- Electronic summary files/spreadsheet;
- Backup redundancy; and
- Confirmation of electronic signature at the time of the transaction.

8 CFR §274a.2, clarifies that employers:

- Must complete a Form I-9 within three business (not calendar) days;
- May use paper, electronic systems, or a combination of paper and electronic systems;
- May change electronic storage systems as long as the systems meet the performance requirements under the regulations;
- Need not retain an audit trail of each time a Form I-9 is electronically viewed, but only when the Form I-9 is created, completed, updated, modified, altered, or corrected; and
- May provide or transmit a confirmation of a Form I-9 transaction, but are not required to do so unless the employee requests a copy.¹⁶

The final rule provides employers with more flexibility and clarifies that DHS will not require an employer to adhere to a single compliance process. Employers may use a combination of compliance systems and may change compliance systems from paper to electronic or from electronic to paper as long as the combination or subsequent systems meet the minimum standards. The final rule's audit trail requirements are also fairly relaxed compared to the prior requirements. Unlike the interim final rule, under which a compliant system's audit trail was required to include a record of every instance that an electronic I-9 was accessed, the final rule limits the audit trail to those instances when the electronic record is created, completed, updated, modified, altered, or corrected. No audit trail is required when the record is simply viewed or accessed. Also, the final rule no longer requires that the electronic storage system be searchable by any data element. Instead, the system's

¹⁴ It appears that the government is clarifying that two databases are not required. As long as a log exists establishing the profile of the generator and the time of creation, a separate audit database should not be necessary to establish a compliant system.

¹⁵ See 8 CFR §274a.2(e)(1).

¹⁶ Note that these provisions represent some slight but significant changes between the interim final rule and the final rule.

“searchability” must be consistent with the definition of “indexing system” under 8 CFR §274a.2(e)(6). Finally, the final rule only requires the employer to provide the employee with a receipt of the electronic I-9 transaction if the employee requests it.

Practitioners should also be aware that NOIs are now routinely requesting that employers provide “the name of the software product being utilized, copies of any internal business practices and protocols related to the generation of, use of, storage of, security of, and inspection and quality assurance programs for the electronically generated Forms I-9.” Furthermore, the guidance issued by ICE directs Special Agents and auditors to request a copy of the indexing system to demonstrate how the I-9 information is linked to each employee and how the system’s electronic signature is captured and linked to the identity and attestation of the individual electronically signing the Form I-9.¹⁷

From a practice standpoint, the final rule is sufficiently flexible such that it is in the employer’s best interest to periodically reassess its compliance systems to determine whether the existing mechanism best suit its current needs. Of course, employers and practitioners must still consider the full array of due diligence issues associated with the transition to an electronic I-9 software vendor. Of the many vendors in the marketplace, some are stand-alone providers, while others offer an I-9 module that integrates with traditional HR personnel management software or employment screening/background check applications. Regardless of the business model, it is to the employer’s advantage not only to research the nine areas of inquiry listed below, but to also request a demonstration to see the application interface and features first-hand. Additionally, employers should implement a review process to monitor the ongoing compliance of any such system as new releases, updates, and features are added.

Accessibility of Electronic Information

The Forms I-9 reproduced from the data in the software application must be legible, readily producible to the government, and “indexable.”¹⁸ Moreover, if requested by the government during an inspection, the employer is also required to provide an audit trail showing who has accessed a computer system and the actions performed within or on the computer system during a given period of time.¹⁹ The government may also request an electronic summary file, such as a spreadsheet, containing all of the information fields on all of the electronically stored I-9s.²⁰

- How are documents maintained in the system? How easy or difficult is it to upload images of supporting documents into the product and how easy or difficult is it to access such records concurrently with the Form I-9?
- Does the system offer alternative methods of uploading supporting documents through secure smart phone or tablet applications?
- What types of reporting features are available? Are reports run automatically or manually?
- Which of the data elements are “indexable”? Does the system automatically check for duplicate A numbers, Social Security numbers and other document numbers?

¹⁷ See *supra* Note 7.

¹⁸ 8 CFR §274a.2(e)(2)–(8).

¹⁹ 8 CFR §274a.2(e)(8)(i).

²⁰ 8 CFR §274a.2(e)(iii).

Audit Trails

One of the most critical compliance areas for employers using electronic I-9 systems is the recording and maintenance of audit trails which provide a detail of the “who, what, when, where, and why” behind each electronic I-9 record. Under the regulations, an electronic I-9 system must ensure that whenever an I-9 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 on that I-9 record. If the system fails on any of these points, ICE may question the integrity of the I-9 records, and in the worst case scenario, these records could be deemed “invalid,” leading to substantial civil fines. ICE guidance outlines the following data elements as “events” that must be tracked in an electronic I-9 system audit trail in order to be deemed minimally compliant.²¹

Creation of Form I-9

- Login
- Initiation of Form and Association of Form with Employee (Indexing)

Completion of Form I-9

- Employee Personal Information
- Employee Attestation
- Alien Registration Number or EAD Number (if applicable)
- Employee Signature
- Employee Signature Date
- Preparer / Translator Certification (if applicable)
- Input of A or B & C Documents to include:
 - Title
 - Number
 - Expiration Date
- Employer Signature
- Employer Signature Date

Update of Form I-9

- Documentation of A or B & C Document to include:
 - Title
 - Number
 - Expiration Date
- Employer Signature
- Employer Signature Date

Modification /Alteration of Completed I-9 Form

- Any Changes made after completion of Section 1, 2, or 3 of the Form I-9.

²¹ See *supra*, Note 7.

Practitioners and employers should request vendors to provide them with a copy of an actual (redacted) audit trail produced by the system in order to ensure that the audit trail at a minimum follows the outline above. A number of electronic I-9 programs available to employers may only record very basic and general levels of information. Some systems may only record general milestone events, such as the date and time that Section 1 was signed, and the date and time that Section 2 was signed. Audit trails that only record information at this general level may be deemed insufficient in the event of an I-9 inspection. The risk for employers is that if the audit trail of the I-9 form they have presented in response to an NOI is deemed non-compliant the corresponding I-9 form will be invalidated. As can be seen by the guidance, audit trails are regarded as the cornerstone of compliance for electronic I-9 systems. In light of this, careful due diligence must be undertaken when evaluating a system's audit trail. Employers and counsel should evaluate their electronic I-9 system in order to address the following:

- Do the audit trails include sufficient detail as outlined in the guidance?
- Do the audit trails capture all of the relevant information regarding the electronic signatures (if used)?
- Are the audit trails independently generated from the I-9 system?
- Are the audit trails clearly associated with the relevant I-9 records to which they pertain?
- Do the audit trails record potential internal and external data feeds and accurately capture the source of all information contained in the form?
- Are the audit trails immutable?
- In the event that an employer wants to switch to a different electronic I-9 solution, is it possible, and what is the process for transferring the associated audit trails to a new system in addition to the basic I-9 data?

Business Process and Integrity

A business that chooses to complete and retain Forms I-9 electronically must also maintain and make available upon request, evidence of the provider's business processes that document the (i) creation; (ii) modification; and (iii) authenticity of the Forms I-9 within the database.²²

- What type of indexing system and printing functions are available in the product?
- What type of tracking does the system provide for changes made to the Form I-9 post-initial completion?
- Does the provider have ready-made documentation that explains how an electronic I-9 is created, accessed, modified, and secured within the system?²³

Security Program

Additionally, a business that chooses to complete or retain Forms I-9 electronically must implement an effective records security program that (i) limits access to authorized personnel; (ii) provides a backup for recovery of records to protect against data loss; (iii) ensures that employees

²² 8 CFR §274a.2(f).

²³ This will greatly assist an employer in responding to an NOI.

are trained to minimize the risk of alteration of the data; and (iv) ensures the audit trail tracks dates and times of access, identification of the “accessor,” and the particular action taken.²⁴

Security is undoubtedly the most critical part of the assessment. Because breaches of security can expose your client to private actions by employees, it is important to know whether the vendor will provide:

- Assurances against security breaches
 - An affidavit of no breach
 - Review contractual damage limitations/provisions
 - Review indemnification provisions, specifically with regard to flaws or lack of compliance in the provider’s system which lead to an I-9 violation
 - Written plans, policies and procedures for dealing with the detection, resolution, and prosecution of security incidents and/or breaches
 - Information on any previous security breaches, if any
 - Protocol to notify customers of any breach (i.e. timelines, remediation, etc.) or security incident.
- Secure tenant architecture where data is not co-mingled from multiple customers within a database.
 - If the data is comingled how is it protected?
- Appropriate and specific insurance which sufficiently covers the risk of I-9 compliance failures and/or breach of security.
- Encryption “at rest” of employee Personal Identification Information (PII) data (e.g., social security number and date of birth).
- Automated tools to detect and prevent virus and denial of service attacks. Encryption of all communication over the Internet using 128-bit Secure Socket Layer (SSL) or higher.
- Confirmation that employee profiles require a unique one-time-only link or a private Uniform Resource Locator (URL) rather than accessing a public website to enter Form I-9 data.
- Explanation of the format of a complete data export if your client terminates service, including whether it automatically includes the Forms I-9 in Portable Document Format (PDF), E-Verify results and complete detailed audit trails and details of any additional cost associated with the data export.
- Certification that the data is housed at secure, audited and certified data center (Statement on Standards for Attestation Engagements No. 16: (SSAE 16)).
- Information on whether the vendor offers on-premises hosting. For example, is the application only available over the Internet, or may a client elect to place the application behind its firewall? If so, what are the charges associated with this and what features, if any, will not be available should it be utilized on a client’s server?
- An overview of the vendor’s security and data protection process, including whether independent third party testing was done for cyber security, who performed such testing, and what specific safeguards are integrated into the product.
- Information concerning security and notice protocols surrounding a government request for document production. In addition, consider provisions related to which party bears the costs related to responding to government requests for production or informal inquiries.

²⁴ 8 CFR §274a.2(g).

Electronic Signature

Any electronic system allowing for an electronic signature to represent the affirmation of Sections 1-3 of Form I-9 must (i) affix the signature to the record at the time of the transaction; (ii) create and preserve a record of the identity producing the signature; and (iii) provide a printed confirmation of the transaction, at the time of the transaction, to the person providing the signature.²⁵

- Does the system include an acknowledgment in the form of an attestation that the accuracy of the information on the form has been read by the employer and employee, and provide for the attachment or association of the electronic signature to the Form I-9?
 - Can the employee request a paper printout or electronic receipt of the acknowledgment?
- What are the specifics of such a system?
- Does the system use a method to acknowledge that the attestation to be signed by either the employer or the employee has been read by the individual signing the form?
- Does the vendor require that electronic signature pads be purchased?
- If Personal Identification Numbers (PINs) are used, how are they created?
 - Is the method acceptable and secure (i.e. is a random number/password assigned or do the user and employee need to create their own PIN)?
 - Are biometric identifiers available to be used or integrated?
- Do they use “click to accept” dialog boxes?
 - Is the method acceptable and secure?
 - How can the employer be sure that the person whose “signature” appears on the I-9 with the “click to accept” signs the document?
- How is the identity of a signatory maintained and how is it presented upon an inspection to a government agency?

Additional Features Beyond the Minimum Requirements

After you have made a determination that one or more of the vendors provide an application that is compliant with the minimum regulatory requirements, other considerations are cost and whether the application’s features improve the client’s internal I-9 processes.

Corporate Capacity and Long-Term Viability of Product

While this may not be important to all clients, and may not necessarily be indicative of the quality of the product, the client may prefer a provider with a proven track record of service and business continuity. Accordingly, the following are recommended questions:

- How long has your company been in business?
- How did your company ensure its product compliance with the applicable regulations?
- Who advises the company on changes in law and policy?
- Can you provide the name of the counsel you have retained to advise on I-9 compliance issues? Is such counsel available for a discussion on product features with the attorney who handles our compliance?
- How many total full-time employees are dedicated to I-9 and E-Verify support services?

²⁵ 8 CFR §274a.2(h).

- What is the average number Forms I-9 created or generated in your system in the past three years?
- How many “clients” are currently using the I-9 and E-Verify product?
- What is the total number of worksites where the I-9 and E-Verify product is deployed?
- Describe the internal resources deployed to ensure adequate changes are made to your product thereby ensuring clients remain in compliance with the latest changes in the law and regulations, including frequent changes that are required as new versions and enhancements to E-Verify are announced.
- Do you provide specific warranties and guarantees to follow the I-9 and E-Verify regulations?

Reference Requirements

Just as potential clients may request references before retaining an attorney, be sure to ask vendors for references. Recommended areas of discussion for companies considering electronic I-9 systems include:

- Information on accounts across various market segments that are currently using the I-9 product (and E-Verify product, if applicable). For example, if you represent a company with a high number of new hires who speak a particular foreign language, be sure to ask if the vendor has represented similarly situated employers and does he or she know whether there are any unique challenges servicing this type of customer? Or, perhaps the employer has a sizeable number of foreign workers such as H-1Bs or H-2Bs. Does the vendor have an automatic system in place to record work authorization for porting H-1B workers or track new hires without Social Security numbers?
- Information on whether the vendor retained a third-party legal expert to evaluate the product.
- Information on, and reports from, any certified third-party penetration testing for systems and environment. For example, did the vendor engage a cyber-security firm to attempt to hack the site or disrupt the application from outside of the database? What was the outcome of such report if completed?
- The number of customers, if any, that ended their contract with the electronic I-9 vendor, and information on whether they returned to paper or switched to another vendor, if known.

Migrating Errors on Previously Completed Forms I-9

As a related matter, the most challenging aspect of moving to an electronic verification software application may be moving existing Form I-9 and employee data into a new database. It is not required under the regulations to migrate existing Forms I-9, but many companies consider this option in their efforts to go completely paperless. Alternatively, companies should seriously consider the benefits of maintaining Forms I-9 in paper format for the time period before the electronic migration and in electronic format thereafter.²⁶ If the client decides to consider data migration and integration with existing systems, the following questions will help to understand the vendor’s services and costs related to moving existing data into the new application:

²⁶ If an employer chooses to migrate previously completed Forms I-9 to an electronic database, it is important to make sure that the resulting electronic version is compliant. It is also useful to consider auditing and correcting paper I-9 forms prior to the conversion.

- What type of current I-9 migration services do you offer? In other words, how does the vendor integrate the existing Forms I-9 into the system on a going forward basis?
- Is all of the data transferred and tracked in such a way that it will meet the regulatory indexing requirements upon conversion?
- Can an I-9 error be audited and corrected during such migration?
- What is the role of the client's attorney in such an audit and is the exclusive use of a vendor to audit I-9s promoting the unauthorized practice of law?²⁷
- Will the original Forms I-9 be preserved or destroyed?
- Will the company's existing payroll and human resource systems integrate such that the vendor will know if an I-9 has not been completed for a new hire?
- Will the company's human resources information system (HRIS)/payroll/applicant tracking software (ATS)/background screening/on-boarding system be fully integrated with the electronic I-9 software?
- Which, if any, of the major brand applications have been successfully integrated (Oracle, PeopleSoft, SAP, SunGard, etc.)?
- Does the integration enable automated notification?
- Does the integration use a secure web service such as Application Programming Interface (API) or File Transfer Protocol (FTP)?
- Does the integration employ accepted standards, such as Extensible Markup Language (XML), Human Resources Extensible Markup Language (HR-XML), and secure Hyper-Text Transport Protocol (HTTP) with 128-bit SSL encryption?
- How many total successful audit/migration/merge projects have you completed?

Efficiency and Internal Administration

- Does the system provide an "auto fill" or drop down feature to complete the employer's standardized information in Section 2? Is such auto fill cleaned after each employee's entry?
- Does the system provide drop downs or other similar features to automate input of Section 2 related documents while ensuring that the employer does not inadvertently commit document abuse?²⁸
- Does the system provide help text for newer users and accommodations that can simplify data entry for more experienced HR personnel?
- Is the system intuitive and user friendly?
- How do you handle a company with multiple Employer Identification Numbers (EINs) or hiring sites?
- Do you have different levels of privileges and administrative rights (e.g. for front-line HR employees vs. managers)? If so is there an additional cost for such access?
- Do you offer a remote hire interface for employees who are being hired at remote sites with one time access for notaries or others completing Section 2 on behalf of the company?
- Can multiple employees use the system simultaneously?
- What type of Form I-9 and E-Verify integration workflow do you provide?

²⁷ In addition, it is important to review the application of attorney-client privilege and potential government discoverability when a review or internal audit is conducted by non-lawyers.

²⁸ See *supra*, Note 8.

Tracking and Reporting Features

- Does your system provide a standardized notification system (“tickler”) for completion of Part 2? For document expirations? For receipt notices? E-Verify timeframes? E-Verify closeouts? Re-verifications? Receipt notice follow-ups? Missing Social Security number reminders for E-Verify use?
- How does the notification system work? How can the notification system be customized?
- Which fields can be included in the reports? Can reports be customized? Can they be run only by an HR administrator or also at the worksite?
- Can reports be exported to Excel or other programs?
- Can you easily access an employee’s record directly from a report?
- Does the system alert administrators to concerning trends or issues?

Quality Control Features

- Will the system prevent the employer from completing Section 2 until Section 1 is fully completed?
- Is it a “smart” application that alerts the user to invalid input or skipped fields, using both error messages near the incorrect field and during a compliance check, before the form is completed (such as when a worker fails to check one of the status boxes or fails to sign his or her name)?
- Does the application crosscheck the immigration status response in Section 1 for consistency against the documents entered in Section 2?
- Does the application allow the user to enter inconsistent information such as different alien registration numbers in Section 1 and Section 2?
- Does the application send e-mail notifications to managers before front-line users are able to execute a Form I-9 that is not compliant, or does the system prohibit you from finalizing a non-compliant Form I-9?
- Does the application have any features to prevent users from over-documenting (i.e., accepting more documents than required by the I-9 rules)?
- Does the application allow for correcting errors discovered after an I-9 form has been completed? If so, what is the process for such corrections? Can a system administrator limit the ability to correct errors to certain user profiles?

Auditing Features

- How will internal company review audits be conducted in the electronic system environment?
- Will there be additional charges for such audits?
- How difficult is it to compare information recorded in the electronic I-9 forms against verification and identity documents that are maintained with the employee’s electronic record?
- Are there standard auditing reports and protocols available in the product?²⁹
- Does your company have experience working with ICE to deliver requested I-9 records?

²⁹ As noted earlier, consider issues related to the unauthorized practice of law as well as the application of the attorney-client privilege.

- How will our records be transmitted in case of an audit?
- Will there be a cost associated with such transmittal?
- Does the software product index all the I-9 fields and how is such information made available to ICE or any other relevant government agency?

I-9 Purging Functionality

- Does the system conduct an automatic purge of Forms I-9 that are past the retention date, or are purges conducted manually? Can this be configured pursuant to a client preference?
- Is there a reporting function for Form I-9 purging?
- Are purged Forms I-9 completely eliminated from the system or are they archived within the system?

Identity Theft Prevention

- Does the application include automatic validation of Social Security numbers and alien registration numbers against known validly issued numbers?
- Does the application offer other validations including a review of the Social Security Administration death record system?
- Does the system check internally whether a Social Security number or alien registration number is being used by another employee at the company?

Outside Counsel and Third-Party Access

- Does the system allow an attorney, or third party, to have access to the data remotely?
- Does the system allow for one-time, secure access for a notary or other third party to complete a Form I-9 for an offsite employee?
- Does the application allow for the client to designate its legal counsel to review complex issues electronically by providing a link to the electronic Form I-9 from within the system in real time?

Integration with Existing Systems Software

The ability of electronic I-9 systems to integrate with an employer's human resources, on-boarding, and other personnel systems is an important tool that can dramatically improve the efficiency of an employers overall I-9 compliance program. This ability is an important issue when reviewing electronic I-9 programs, particularly for larger employers with significant numbers of new hires. A number of I-9 programs on the market are provided as additional products by companies that already provide other HR related software products. However, both OSC and ICE have clearly voiced strong reservations with any electronic I-9 system that allows employee information in Section 1 to be prepopulated with information from other systems.³⁰

- To what extent can your product be integrated with human resources systems, payroll, immigration forms software and other applications?
- Can data from the existing system be pushed into the I-9 software?

³⁰ See *supra*, note 8.

- Can the creation of an individual I-9 form only be initiated in the I-9 system with the transfer of employee data from another system?
- If it is integrated, what specific reports can be created to ensure the integrity and consistency of data?
- In the event of an ICE enforcement action, will the vendor be able to provide the required I-9 information to the government without compromising or exposing unrelated data in such integrated systems?

Integration with E-Verify

- Will the vendor act as the client's E-Verify Designated Agent or Web Services provider or both?
- Will the client have its own E-Verify account? Can different accounts be set up for different work sites and different EINs?
- Does the vendor use the photo tool?
- Does the vendor offer Single Sign On integration? For example, will the user have to sign-on once or twice to use the software to transmit information to E-Verify?
- What are the vendor's E-Verify batch processing capabilities?
- Does the application allow for automatic submission to E-Verify for initial verification?
- How does the system handle the issuance of a delayed Social Security number?
- How does the system resolve a Tentative Non-Confirmation (TNC)? Does the vendor automatically capture electronically signed TNC Notification and Referral letters in the employee's record and follow up with the employer for TNC resolution?

Integration with State I-9 Rules

- Does the system link to any forms mandated by state I-9 laws?

Customer Service and Support

Any electronic I-9 system application will require on-going technical support from the vendor. Here are some suggested questions regarding customer service and support:

- Do you have a customer support hotline? Does it service all time zones?
- How many employees are in your customer service department?
- Is there a guaranteed response time for customer service requests?
- In the past, how quickly has your company integrated changes to the Form I-9 and/or E-Verify?

Cost Structure

The various electronic I-9 vendors on the market offer a range of fee structures. The following questions should help understand the ultimate cost to the client of a particular vendor:

- Is the cost structured as a subscription fee, a fee per I-9 record, or a combination?
- Is there a fee for I-9 completion and subsequent re-verifications? For subsequent I-9 storage? Do fees vary by volume of I-9s completed?

- Is there an initial set-up fee?
- Is there a fee for each HR user of the system, or is there unlimited access by the company's HR staff?
- How are data-migration and rollover fees charged?
- Are there fees related to notification and reporting?
- Are there additional costs for integration with E-Verify or existing company systems?
- Are there system maintenance or update fees?
- Is there an additional cost for customer service requests? For fixing bugs?
- What are the fees for building customer-specific functionality?

Federal Contractor Transition

For employers subject to the federal contractor E-Verify rule, there are critical issues to consider when selecting an I-9 vendor. While the government has been slow to begin enforcement in the area of subcontractor flow-down, the inevitable increase in future enforcement could eventually affect many clients, regardless of whether they do any direct business with the U.S. government. The urgency created by the federal contractor E-Verify timelines has pushed many companies into making quick decisions on I-9 issues based on the ease of implementation and the price tag rather than on long-term needs, overall cost, and a full evaluation. It is critical that a company making the transition to federal contractor status consult with experienced counsel and not rely solely upon quasi-legal advice of an electronic I-9 vendor. Questions to ask include:

- Federal contractors subject to the E-Verify rule may, in some situations, choose to not prepare new I-9s. In this situation, how are existing paper Forms I-9 integrated into the system in an effort to run the employee through the E-Verify system?
- Is a record created that connects the paper Form I-9 copy and supporting documents to the E-Verify query?
- Does a "data dump" need to be manually completed to enter such employees into the system? Can company users do this themselves or must the data entry be done by the vendor, and if so at what cost?
- What assistance is offered, if any, by the vendor to compare existing paper Forms I-9 to newly created ones to ensure consistency and alert the customer to potential problems?

Conclusion

Companies that are considering transitioning from paper Forms I-9 to an electronic I-9 system need to be aware that the decision involves significant potential issues relating to legal liability, security, functionality and cost. Therefore, the corporate decision-makers, whether they are human resource executives or general counsels, should consider the advantages of obtaining advice from seasoned immigration counsel in evaluating which of the various electronic employment verification software applications in the marketplace are the best fit for their company. Knowledge of the electronic I-9 regulations and experience in navigating the maze of the general I-9 regulations make immigration attorneys uniquely qualified to provide expert advice to our clients.