

Duff on Hospitality Law

## **The New 2016 Form I-9: Smart, Flat and Complicated**

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November 2016 held more than one shock for many in America. Not only did the presidential election cycle come to a dramatic close, but the government introduced its new Form I-9, Employment Eligibility Verification.

First introduced in 1986, the “[Form I-9, Employment Eligibility Verification](#),” must be completed for every new employee. Over time, it has been expanded from one page to two. And its instructions have grown from less than a page, to six pages for the 2013 edition to 15 pages of Instructions – more than four for the employee section alone – for the 2016 edition in English and in Spanish.

### **Two Editions Available for Use Until on January 22, 2017**

An employer may continue to use the 2013 edition, denoted by the footer “Form I-9 03/08/13 N” through January 21, 2017, even though it specifically indicates at the top right that it “Expires 03/31/2016.” The “new” form, denoted by the footer “Form I-9 11/14/2016 N” can also be used now, and is the only form that can be used on and after January 22, 2017.

Employers are advised to take the time to carefully review and “try out” the 2016 edition before proceeding with it as the Form of choice. This two page form is complicated, and the cost of making a mistake is significant. We suggest taking at least one of the many webinars, including private presentations [offered by the government](#) or consulting with counsel.

### **The 2016 Edition – Smart and Flat, but not Electronic**

The Form I-9 web page provides easy access to several versions of the “new” Form I-9.

The one denoted as “Form I-9 (PDF, 535 KB)” is the “smart” form. While viewing this on a computer, the user has access to drop-down menus and lists, and instructions specific to each field, accessible by moving the cursor over the field and “hovering” – or by clicking on the question mark symbol.

The “smart” version can be completed on a computer while on-line, but USCIS recommends downloading it using the latest version of Adobe Reader and then completing it before printing, signing and dating it. Employers have reported problems using the Chrome web

browser.

Don't confuse the "smart" form with an "electronic" Form I-9, which is a completely different issue, subject to significantly more requirements. The "smart" form is still a "paper" form and requires an original (often called "wet") signature by the employee and the employer's representative.

The second document is titled "Form I-9 Paper Version. (This version is unfillable and must be printed for completion on paper only.) (PDF, 73 KB)." But don't refer to this as the "paper version," because this version and the "smart" version must both be printed on paper, signed and dated. It may be better to refer to this version as the "flat" version. It cannot be completed on a computer, whether while on-line or after downloading. It must be printed and completed by hand.

You'll also find a Spanish language Form I-9, which is "fillable," but not "smart." It, too, must be printed, signed and dated. But note that this Spanish language version can be used only by employers and employees in Puerto Rico. Spanish-speaking employers and employees in the 50 states and other U.S. territories may print this for their reference and even use the Spanish language instructions, but may only complete the English language form to meet employment eligibility verification requirements.

### **Important Protocols**

Employers should be sure to provide all those who have accepted an offer of employment with the full Instructions to the Form I-9 (whether by computer, on paper, or even as laminated pages at the worksite), the two-page Form I-9, and the one-page "Lists of Acceptable Documents." Employers must retain only the two-page Form I-9 for the prescribed period – double-sided is acceptable but not required.

### **Complicated and Confusing**

Until January 22, 2017, we have two editions of Forms, two different sets of Instructions, drop-down instructions for the 2016 "smart" version, and the 66-page M-274, *Handbook for Employers, Guidance for Completing Form I-9* that does not fully explain or relate to the 2016 edition. The government has promised that a new, more detailed M-274 will be introduced by no later than January 22, 2017. This combination of documents is bound to create confusion and consternation among users.

While many employers might prefer to use the "smart" form for both completion of Sections 1 and 2, the reality is that many newly hired employees may not have access to a computer, requiring them to use the "flat" version, which eliminates the benefits of the drop-down menus and instructions. Employers should be aware that the Instructions provide that employers are "responsible for ensuring all parts of Form I-9 are properly completed" and are "subject to penalties under federal law if the form is not completed correctly." Employers should carefully

review Section 1 to be certain that it has been properly completed before proceeding to prepare Section 2.

What should an employer look for in Section 1, whether in “smart” or “flat” format?

- Almost all fields must have some information.
  - “N/A” must be used if the field has no information, including the optional fields “Employee’s E-mail Address” and “Employee’s Telephone Number.”
  - “U.S. Social Security Number” is optional also, unless the employer is enrolled in the E-Verify program.
- In the four citizenship/immigration attestation boxes, the third box (lawful permanent resident) distinguishes between “A” numbers and “USCIS” numbers, and the fourth box (alien authorized to work) now separates some previously combined notation requirements.
- The employee must indicate whether a “Preparer and/or Translator” was used.
  - This section is *after* the employee’s signature and date, so don’t let the employee forget it.
- Far more detailed requirements are now in place for preparers or translators.

If the employee completed Section 1 of the “smart” form on the employer’s computer, the employer’s representative will find that several portions of Section 2 will have been automatically filled with information. If the employee did *not* complete Section 1 on the same computer, the only way for the employer to gain access to all of the information available in Section 2’s “smart” form drop-down menus is to first complete “Employee Info from Section 1” at the top of page 2, including the number (1 – 4) from the “Citizenship/Immigration Status” fields completed by the employee in Section 1.

Section 2 is too complicated to also explain in this short blog. Suffice it to say that the “smart” form does a good job of preventing “over-documentation,” when an employer improperly notes information in Sections A and Section B and/or Section C. The “smart” form automatically populates “N/A” in the fields that shouldn’t be completed.

But don’t deceive yourself – the “smart” form does not eliminate the likelihood of errors that can result in government-imposed financial penalties. The employer’s representative should double-check information entered in Section 2 to confirm the accuracy of it as compared to the information in Section 1.

#### **A New and Welcome Field for “Additional Information”**

Page 2 of the 2016 edition of the Form I-9 has a new and helpful field called “Additional Information.” This is supposedly a non-space limited location for an employer to write information that previously had to be written in the margins, such as for E-Verify Case numbers, for when employment is temporarily authorized after the filing of an application for extension of certain employment authorization documents, for when employment is temporarily authorized for H-1B “portability,” for TPS extensions, for OPT STEM extensions, for employee termination dates and dates for retention and destruction, and more.

### **Are You Ready to Move to the 2016 Edition?**

As you can see, there is much to learn about the new edition of the Form I-9. It is advisable to take time to become thoroughly familiar with it before casting the 2013 edition to the side. Figure out what works best for your employee induction process. Is it a combination of “flat” and “smart” form? Can you allocate one or more computers with the latest version of Adobe Reader to have forms completed on-site? Only when fully comfortable with the new edition should an employer proceed with the new edition, but you have only until January 22 to get there.

We’ll write more about the new Form I-9 in the coming weeks, including discrepancies in the instructions and the new, significantly higher penalties that can be levied, not just for employing unauthorized aliens, but for mere “paperwork” errors.

**Tags:** 2016 Form I-9, certain employment authorization documents, E-Verify Case numbers, electronic Form I-9,, employee termination dates,, employees, employers, employment eligibility verification, financial penalties, Form I-9, Form I-9 Paper, Form I-9 Paper Version, Form I-9 web page, government-imposed financial penalties, H 1B “portability”, I-9 Central, OPT STEM extensions, smart form, TPS extensions