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Federal Government Issues Comprehensive Guidance for Employers Using Form I-9 Software Programs

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In the ever-evolving landscape of employment verification, the use of Form I-9 software programs is increasingly prevalent. These programs, often part of an HRIS (Human Resource Information System), streamline the process of verifying an employee's eligibility to work in the U.S., making the onboarding process more efficient for employers. However, their use also comes with a set of obligations.

Form I-9 software programs digitize a traditionally paper-based process and offer a streamlined way to complete, modify, and retain Forms I-9. The guided process in these programs tends to minimize human errors and increase employer compliance. However, with so many software programs available in the market, it is important for employers to understand that not all programs may comply with the law. Any compliance violations by these software programs may lead to civil fines assessed against employers.

In light of the increased reliance on Form I-9 software programs, the U.S. Department of Justice and Immigration and Customs Enforcement's Homeland Security Investigations published a Fact Sheet in December 2023. This document provides a comprehensive guide to using commercial or proprietary programs to electronically complete, modify, or retain the Form I-9 or participate in E-Verify, and what to avoid when using such programs. It also reminds employers that simply using a Form I-9 software does not guarantee an employer's compliance with federal law; employers are ultimately responsible for confirming that their I-9 software program complies with all legal requirements.

Based on the Fact Sheet, employers should be particularly aware of several requirements when using a Form I-9 software program, including:

- Compliance with the electronic Form I-9 requirements, including "the integrity, accuracy, and reliability of the system; security and documentation; indexing; electronic signatures; retention; audit trails; location, retrieval, reading and reproduction abilities; as well as the ability to provide Form I-9 summary files (such as a spreadsheet) containing all the information fields on electronically stored Forms I-9."

- The ability to leave the optional and unused fields blank when appropriate and where allowed by the Form I-9 rules, such as the employee's Social Security number for employers who do not use E-Verify, and the expiration date in Section 1 next to the "A noncitizen authorized to work" attestation.

- The ability to make and record corrections to Section 2 and information relating to reverification and rehire.

- The form must record and display all information entered, including for reverification and rehire.

- The Form I-9 software program must uniquely identify each person accessing, correcting, or changing a Form I-9.

Further, when using a Form I-9 software program to create E-Verify cases, the requirements found in the Memorandum of Understanding and E-Verify guidance must be followed. Additional requirements from the Fact Sheet include the following:

- Employers must display notices letting prospective and newly hired employees know the employer uses E-Verify consistent with applicable E-Verify requirements.

- Employers must use current versions of the E-Verify Tentative Nonconfirmation ("mismatch," previously known as a TNC) Further Action Notices and Referral Date Confirmation letters.

- Employers must provide the English and any relevant translated Further Action Notices and Referral Date Confirmation letters to employees with limited English proficiency.

- Employers must promptly notify employees in private of a mismatch and provide them with the Further Action Notice. If the employee elects to take action to resolve the mismatch, the employer must also provide the Referral Date Confirmation letter containing information specific to the employee's E-Verify case.

- Employers must be able to delay creating E-Verify cases when E-Verify rules instruct them to do so.

In addition, the Fact Sheet warns employers of Form I-9 software programs that claim endorsement, certification, or approval by the government. Employers should also be wary of Form I-9 software programs that make it difficult for employees to start working or receive compensation when an employee's application for a Social Security number is pending.

It is important for employers to know their I-9 software program's capabilities and confirm its compliance with federal law. Failure to comply may result in assessment of civil fines in the event of a government audit.

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