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The newsletter of the ISBA's Standing Committee on Law Office Management and Economics

Navigating the Employment Eligibility Verification Process (Form I-9)

By Kevin Raica

For over two decades, employers have been required to verify that the people they hire are legally authorized to work in the United States. Fellow lawyers take note—this requirement applies to business of all shapes and sizes, so it applies to you and to your clients. In 1986, the then Immigration & Naturalization Service (now reconstituted as the U.S. Citizenship and Immigration Service [USCIS]) one of a number of agencies within the U.S. Department of Homeland Security [DHS]) created the Form I-9 “Employment Eligibility Verification Form” (may be found at <http://www.uscis.gov/files/form/i-9.pdf>). The instructions to Form I-9 required that employers complete the form after a person is hired to verify the person they hire is authorized to work in the U.S. The form must be completed AFTER the hiring has occurred, and employers must be very careful not to discriminate based on any factors during the hiring process. The instructions and form list the requirements the employer (and employee) must follow,

including review of documents and confirmation of the employee's identity.

Since first being introduced over 20 years ago, the I-9 process has been a pitfall for employers. The questions that must be answered, namely (i) what needs to be completed, (ii) what documents are acceptable, (iii) whether copies of the documents and form need to be made or kept, (iv) what consequences are there for failing to (properly) complete the I-9, and (v) what are the legal protections available if the form is completed and maintained, often leave employers bewildered. The I-9 form has received a lot of attention in the last few months. The form itself was recently updated, and the U.S. Immigration & Customs Enforcement (ICE) has stepped up its enforcement and punishment efforts of employers who employ people who are not authorized to work. Therefore, the proper completion and retention of the I-9 forms, and the execution of the overall process, has been, and should be of great concern to you and your clients. This article clarifies the I-9 process and provides you with a step-by-step guide to I-9 completion.

What Employers Should Do

Essentially, an employer has five requirements in the I-9 process: 1) ensuring that all areas of the I-9 are completed; 2) that the I-9 is signed and dated (either written or electronically); 3) to accurately record the information on the documents provided by the employee; 4) to re-verify certain documents with expiration dates; and 5) to retain the necessary documents.

While employers must be diligent

in their efforts to comply with the I-9 process, employers must be careful not to intentionally discriminate against employees based on national origin or citizenship status. The law protects most U.S. citizens, lawful permanent residents, temporary residents and asylees and refugees from discrimination on the basis of national origin or citizenship status if they are authorized to work. Employers can not refuse to hire someone and can not fire someone because of their national origin or citizenship status. Employers can not ask for specific documents in completing the I-9 Form and must accept documents from the list that accompanies the I-9 and that appear to be genuine.

1) Completing all areas of the I-9

The employer must have the employee complete Section 1 of the I-9 by the start of the employee's first day. The employee must complete Section 1 themselves. The employer must complete Section 2 of the I-9 within 3 business days of the employee's start date.

2) Signature of the I-9

If the employer is keeping a physical copy of the I-9, the I-9 must be physically signed and dated. If the employer is storing an electronic copy of the I-9, the employer can electronically sign and date the I-9. In addition to signing the I-9 themselves, the employer must make sure the employee signs the I-9. If the employee refuses to sign, the employer can not continue to employ them.

3) Accurately recording information on employment eligibility documents

After a job offer is made, an employ-

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er must verify the prospective employee's eligibility to work. An employee can produce whatever documents they choose to prove their eligibility to work and the employer can not ask for specific documents. However, the employer must make sure that the documents provided qualify as List A, B or C documents as described on the I-9 form.

An employee must prove that he is both eligible to work in the U.S. and that his identity matches the documents he provides to prove eligibility to work. List A documents such as a U.S. Passport or a U.S. Birth Certificate prove both identity to work and identity. If an employee provides a List A document, no other documentation is needed to prove identity or eligibility to work. List B documents—such as a driver's license or government issued ID - only prove a person's identity, and an employee must provide a List C document—such as a Social Security card without any restrictions on work or an unexpired Employment Authorization Document issued by the immigration service—to prove their eligibility to work. (See list of approved A, B & C documents).

The employer must review the documents and record all of the information required in Section 2 of the I-9. The documents must be originals—a copy can not be used for I-9 completion. A receipt for replacement of a lost, stolen or damaged document can be accepted, but the replacement document must be provided within 90 days, or the employee must be terminated.

The employer does not have to be a document expert, but rather must reasonably believe the document is real. Essentially, the employer must believe the document is genuine and that it relates to the employee presenting the document. If the employer does not believe the document is genuine, they can ask the employee to produce other acceptable I-9 documents and should not continue to employ the employee unless acceptable documents are provided.

If an employer discovers missing or incorrect information on the I-9, the employer should correct the errors and initial and date the changes. If an I-9 is missing, an employer must complete a new I-9 and should make a note for their records indicating the reason for completion of the new I-9.

4) Re-verification of documents

An employer must re-verify employment eligibility when an employee's

employment authorization date in Section 1 is expired or when an employment authorization document listed in Section 2 is expired. Employers do not need to re-verify expired U.S. Passports or Lawful Permanent Resident cards ("green cards"). The employer must re-verify or complete a new I-9 no later than the date the employee's employment authorization document expires. If the employee is a re-hire, a new I-9 is needed as well.

5) Retention of Documents

The employer must keep the original I-9 on file. If copies are made of any of the eligibility or identity documents, the copies must be attached to the I-9. The employer is not required to make copies of the documents. We recommend that employers do not make copies of documents presented by employees as it is not required by the law and reduces the administrative burden on employers. If a copy has been made previously and is attached to the I-9, it can not be discarded. If a copy is made during the I-9 process, it must be attached to and stored with the I-9. An employer should either make no copies of documents for all employees or make copies of documents for every employee. Essentially, an employer should apply a uniform policy to all employees.

The employer's only requirements for documents are to review them for genuineness and to accurately record the information on the documents in Section 2 of the I-9. If a new I-9 is completed during re-verification or re-hiring, the new I-9 must be attached to the previous I-9. The I-9 itself must be kept for one (1) year after an employee is terminated or three (3) years from the date of hire, whichever date is later.

What Employers Should Not Do

Employers should not:

- Knowingly hire or continue to employ workers without valid authorization to work in the U.S. Employers who do so face criminal penalties up to \$3,000 per unauthorized individual and/or up to 6 months imprisonment if the government finds that there is a "pattern or practice" of unauthorized employment. 8 U.S.C. § 1324a(f)(1)
- Fail to accurately and fully complete the I-9. Employers can be fined for incomplete or missing I-9s.
- Discriminate against an employee

based on his national origin or citizenship status. Employers face substantial fines for discrimination.

- Demand more or different documents than those presented by the employee and required by List A, B or C of the I-9. Employers can be fined for making excessive document requests. As the warning of the top of the I-9 itself states: "It is illegal to discriminate against work eligible individuals. Employers CANNOT specify which document(s) they will accept from an employee. The refusal to hire an individual because the documents have a future expiration date may also constitute illegal discrimination."

Conclusion

The Form I-9 process appears complicated and requires all employers to follow many detailed steps in order to ensure they are not hiring anyone who is not authorized to work in the U.S. This overview should not replace a discussion with an attorney if you have any questions or concerns about how the I-9 process has been handled prior to today. Please remember that ICE has increased enforcement, and in addition to civil fines per error, has also been arresting offending employers. Besides completing the Form I-9 there are other systems in place that are now being pushed by the federal government to verify eligibility to work (and in Illinois we are being discouraged from using them by the state government). You might have heard about the E-Verify Program or you may have seen a Social Security Administration No-Match Letter. What these are, why the state is in a dispute with the federal agencies, and what to do if you see them, will be discussed in the next issue.

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To access I-9 forms online, go to <http://www.uscis.gov/files/form/i-9.pdf>.

Using a home office and virtual workers: Our firm's experience

By Peter R. Olson, Chicago

What's the worst decision I've made related to my law firm since its founding some three years ago?

Paying rent for a Chicago Loop office I didn't need and hardly ever used.

In April 2005 I made the jump to sole practitioner, leaving the security of law firm life to create my very own legal services business; I hung my shingle. It was an exhilarating decision filled with both excitement and trepidation as I started my first business. I had been a licensed attorney for not quite two-and-one-half years when I made the jump, with a small firm background in suburban Cook County. I started my practice in Chicago's Loop and I practice primarily in the domestic relations, elder, and real estate law fields.

Three Years; Three Office "Types"

I had a hankering to start my own practice dating back to law school but wasn't sure exactly when to make the jump. An advertisement for a "space for services" arrangement in Chicago's Loop wet my interest and this became the launching pad for The Olson Law Firm, LLC. I had my first office in a lawyer suite owned by an older attorney and my "rent" was 30 hours of legal work per month. He had a full practice and I along with a number of younger attorneys assisted him. If I worked more than 30 hours per month for my landlord, I was paid. I strongly endorse this sort of set-up if you can find it. It kept my expenses down and allowed for good learning and mentoring experiences. I had access to office space, conference rooms and support staff. Unfortunately, my landlord closed this office after my having been there only about six months.

At this point I made a grave mistake. I signed a downtown Chicago office lease that had us paying more than \$1,000 per month in rent. In retrospect it was a combination of my own ignorance and just stale thinking.

I thought that a lawyer's office was as much a part of a lawyer's life as court pleadings and legal pads. This was wrong-headed and a costly mistake. Instead of using valuable funds for business development, legal education, and marketing, I was paying for office space that I used for only one to two client meetings per month on average. In my practice with regular court appearances and real estate closings, in-person meetings were rare. Granted, I did often work in the space too, but this in-and-of-itself was not a good reason to acquire office space. In this day and age of simply needing a cell phone, laptop and Wi-Fi to be productive, my home, a local library or coffee shop are just as useful as my old office (and quite a bit cheaper).

After two years in this rent-paying set-up, I transitioned to a home office; it likely saved my business. And from a client perspective there's virtually no difference. While generally working at my home, I'm using a "business identity" program that my former landlord (myofficesuite.com) offers whereby the Firm continues to receive mail at our former office, their receptionist's handle incoming phone calls, and I have access to an office or conference room for client meetings for 20 hours per month. The cost is some 20 percent of our previous monthly rent. This is just one way to slice up these tasks. A P.O. Box and your cell phone is likely the lowest cost option. Personally, I don't think answering your own phone is cost effective. There are also many voicemail or Internet-based options (eVoice.com) for professional telephone answering. Many temporary office options exist throughout larger metropolitan areas. The home office tax deduction is another incentive to this set-up. I suppose it's possible to hold client meetings at your home office or a restaurant or library, however, I'd advise against these options. I think safety's an issue regarding home meetings and an unsuccessful perception belies the other alternatives.

Create a "Virtual" Staff

But what about space for your staff? Even when our Firm had a traditional office space our staff was never onsite. I have one administrative assistant and one law school student clerk.

My administrative assistant simply works from her home computer and she has a cell phone so that our landlord's receptionist can forward calls to her. All faxes are sent to both of our e-mail addresses. Currently we're small enough so that when she's working we in essence share a computer's hard drive. I have two computers networked together. I'll work on one computer while my assistant connects to the other computer via Gotomypc.com. There are many alternatives for remote computer access. Logmein.com is another free remote access option. We have increasingly been using [Basecamp \(basecamphq.com\)](http://Basecamp(basecamphq.com)) for project collaboration in our practice. Basecamp allows multiple persons to collaborate on contracts, legal memoranda, and real estate closing logs through a Web-based extranet. I also send digital dictation audio files for transcription to my assistant via e-mail. Larger firms might consider a virtual private network, essentially like your typical office network only the server's housed offsite, typically with an IT company. This allows for much greater storage capacity and convenience than my current "computer sharing" set-up. Frankly I'm surprised more law firms don't go virtual. Other than perhaps lawyer salaries, what's a larger expense than office rent? And what's your return on that investment? All the large consulting firms are "virtual," working from temporary offices as their consultants travel the globe. And they're in the same service sector business we're in, selling professional advice.

Any downside? Sure, I have to open a "hard file" occasionally since my assistant isn't in the next office over.

The above options may not be for everybody or every law firm. My bigger point is to encourage readers to run

great, lean, legal service businesses. There are many ways to do this thing called practicing law. Learn from my mistakes.

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Navigating an unemployment claim

By Melissa Schroeder* and Lisa Collins**

The purpose of this article is to provide the general practitioner with a primer on procedures pertaining to the Illinois Department of Employment Security, unemployment hearings and the issues that surround them when terminating an employee.

Most clients are concerned about the termination process (or they should be). This article is not going to cover any of the issues pertaining to a cause of action for wrongful termination or a violation of any statutes designed to protect employees. Additionally, this article is not going to cover any workers under a collective bargaining agreement. Rather, the scope of this article is somewhat limited. It is limited to those at-will employees that a client terminates due to performance issues, a violation of a handbook provision, or other misconduct by the employee. The focus is then going to be upon the unemployment process, what the employee does to collect unemployment and what actions the employer may take and the issue surrounding those actions.

A starting point for all practitioners should be the Department of Employment Security Web site. There is a wealth of information contained on it. <<http://www.ides.state.il.us/>>.

It is necessary to understand some of the fact patterns that give rise to hearings. One situation involves a business/economic need to terminate staff and then that staff person makes a claim with the Department of Employment Security. This situation is simple and relatively straightforward. There is nothing that an employer can do to protest such a claim. The claim will be allowed.

The fact pattern that causes the most challenge for the general practitioner

is the one where the employee has not been very effective in his or her job. There is the employee who has caused dissention within the office. There is the employee who has been very high maintenance and takes up a great deal of management's time. There is the employee who has repeatedly violated the same company policy. These are the employees that we are going to focus on in terms of how to fight the unemployment claim.

In order to understand how to discipline and then terminate an employee, you need to understand the law behind unemployment claims. Again, go to the Department's Web site: <<http://www.ides.state.il.us/publications/default.asp>>, then go to the Digest of Adjudication precedents.

The Department's site explains the procedural issues involved in protesting a claim and attending a hearing with a Referee. It also explains what action can be taken to appeal the Referee's decision to the Board of Review and a subsequent administrative appeal to the Circuit Court. There is a video you can watch to understand how the hearing before the Referee is handled. We would strongly encourage any lawyer representing his/her client to become familiar with this process before handling such a matter.

We would also encourage your client to review this information. <<http://www.ides.state.il.us/employer/general/1appeal.asp>>.

The above procedural hearings and appeals happen only after the claimant files for unemployment. The appeal and hearings process could come into play as a result of the denial or granting of benefits. We would like to begin our

discussion just prior to the application for benefits and just prior to the termination of the employee.

The actions that an employer takes prior to the termination of the employee will provide the basis for the granting or denial of the claim. It is important that you take a look at the Board of Review's Web site to ascertain the legal issues involved in winning a claim to determine how you will go about terminating an employee.

As stated earlier in this article, downsizing due to a lack of business is not a basis for disputing a claim, because as all of us well know, Illinois is an at-will state. Thus, if your client has an employee that the client wishes to terminate, and the client has not done progressive counseling or disciplining with him, be prepared to be charged with the unemployment claim.

How do you advise a client who wishes to terminate due to performance issues, or due to a violation of a rule in the workplace or due to some other misconduct, other than downsizing? As stated above, you need to review the law pertaining to the decisions of the Board of Review. (See above Digest of Adjudication precedents). The Digest will assist you in understanding the appropriate circumstances under which your client may terminate an employee without being charged for unemployment. Please review the below case for the three requirements of misconduct.

"An employee's action constitutes misconduct only if three requirements are fulfilled. The employee must have (1) engaged in deliberate and willful conduct, (2) in violation of a reasonable rule or policy regulating the performance of the employee's work, that

(3) either (a) harmed the employer or fellow employee or (b) was repeated in the face of an explicit warning or instruction to the contrary." *Garner v. Department of Employment Sec.*, 269 Ill.App.3d 370 (2nd Dist. 1995).

In addition to understanding the law, we are going to suggest that you have your clients incorporate the above three elements from the *Garner* case into their disciplinary proceedings. It becomes much more effective at a hearing if you are able to specifically point to specific instances of past conduct that you addressed with the employee or that the employee's conduct did in fact harm the employer or fellow employees. The disciplinary write up or the notes from any meetings will set forth the actions of the employee, what was discussed and what efforts could be made to correct this conduct. Then, when the employee files for unemployment, you are able to show that this is a continuing problem and that the termination was "for cause," due to the employee's misconduct, and not capricious or due to any downsizing.

The employee will, once terminated, file a claim for benefits. As part of the claim, the employee will be required to state why she was terminated. The claim will be sent to your client and your client will have an opportunity to protest the claim. If this was a downsizing or the termination was not due to misconduct, then no objection would be filed and the Department would grant benefits.

However, if the client believes that there was cause for terminating the employee, the employer must respond to (or protest) the claim. This is the first chance that the employer has to be able to begin to make the record. We would urge you to advise your clients that anything that is stated in response to the claim will be used later at any further hearings. Thus, it is important to be specific about the reason(s) for termination. In the event that progressive discipline or counseling was conducted, you should detail the actions taken and the lack of improvement. It is also important to attach any documentation or evidence to your claim protest/response as it will be hard to prove later in the process that the additional evidence should be allowed. The claim protest/response and any documents attached to the protest are reviewed by a staff person at the Department of Employment Security. It is your hope that the protest/response

will be such that the staff person will deny the claim.

Both parties will be informed of the unemployment decision and either side can appeal the decision to a Hearing Referee (Administrative Law Judge). This hearing is recorded and this recording is the basis for any subsequent appeal to the Board of Review. The hearing is conducted telephonically. You should have all parties who have knowledge of the situation present to testify. You want to establish any procedures for your client's business and establish that these procedures are necessary and important to the business. You want to establish the fact that the employee was aware of the policies or procedures and chose not to follow them. You should also establish that the employee knew that they were violating the policies or procedures and continued on with those actions. You should establish what harm, if any, came to your client due to the employee's misconduct. Your witnesses will then testify as to the termination. I again refer you to the Decisions page of the Web site for the law pertaining to the Department.

It is important that you submit all written evidence to the Referee prior to the hearing. This can be done as part of your claim protest/response or separately, but a copy of it needs to be sent to the opposing party. As part of the testimony, if the client has written procedures/policies, you will want to have the employer testify as to those rules, much like you would do in a civil action. The rules of evidence do not apply in the hearings. However, you would do well to prepare for this type of hearing as if it were a trial.

You will have the opportunity to cross examine the employee as she will of any of your witnesses. Thus, it is important to prepare them ahead of time for this type of questioning. The Hearing Referee is an attorney, so he or she does understand the legal issues and what you are attempting to do however, as in small claims civil cases, the other party is usually not represented by counsel so great latitude is given to questioning and documents.

Once the hearing is concluded, the Hearing Referee will mail a notice of decision to all parties indicating what the decision is and why that decision was made. Either party may then appeal to the Board of Appeals. Again, the Web site of the Department is very helpful in this regard: <<http://www.ides.state.il.us/>

[employer/general/1appeal.asp](http://www.ides.state.il.us/employer/general/1appeal.asp)>.

If your client chooses to appeal the Referee's decision, you will need to file your notice of appeal with the Board of Review within 30 days from the date of mailing of the Hearing Referee's decision. The notice of appeal should include a written statement describing what parts of the Referee's decision you disagree with and it must also be signed and dated. You may either mail or fax the notice of appeal to the Board of Review. If you choose, that is all that is necessary to appeal the Referee's decision. We would suggest, however, that you obtain a copy of the transcript and prepare a written argument as well.

If you are the appellant, you must request the transcript within 30 days of filing your appeal. If you are the respondent, you have 20 days from the mailing of the Notice of Appeal to request the transcript.

We would suggest you call the Board first to determine what the cost is for the transcript and then send your request to the Board in writing along with your check to cover the fee. Once the transcript is mailed to your office, you will have 20 days from the date of mailing to file your written argument with the Board of Review.

If you choose not to request the transcript and want to prepare a written argument and you are the appellant, you will have 30 days from the date the appeal was filed to file your written argument with the Board. If you are the respondent, then you will have 20 days from the mailing date of the Notice of Appeal to file your written argument.

When preparing your written argument, make sure that you tie the record into your argument referencing both the transcript and the claim protest/response. The more support you have from the record, the more likely you are to succeed. Be as specific as possible in regards to the violations and the facts supporting your reason(s) for termination. Again, you will essentially need to prove the following:

"An employee's action constitutes misconduct only if three requirements are fulfilled. The employee must have (1) engaged in deliberate and willful conduct, (2) in violation of a reasonable rule or policy regulating the performance of the employee's work, that (3) either (a) harmed the employer or fellow employee or (b) was repeated in the face of an explicit warning or instruction to the contrary." *Garner v.*

Department of Employment Sec., 269 Ill.App.3d 370 (2nd Dist. 1995).

You should lay out each of the three requirements to prove misconduct and how the record supports the fact that the employee did in fact meet all three requirements of misconduct. You should probably look at the Digest of Adjudication Precedents again to acquire additional case law to support your arguments.

Once your written argument is complete, you will need to attach the transcript and/or claim protest/response to your written argument and prepare a certificate of service certifying that you sent a copy of the written argument to the opposing party. Again, you can visit the Department's Web site for sample language for your certificate of service. The written argument must be filed via mail with the Board of Review, so you will need to make sure that you allow time for the written argument to make it to the Board for filing. We would suggest you send the written argument via certified mail or other carrier that has return receipt.

As part of the appeals process, you may also submit a request to present additional evidence and/or request an oral argument. In order to succeed in your request to present additional evidence you will need to provide sufficient information showing that for reasons that were not your fault or outside of your control you were unable to introduce the evidence at the Referee's hearing. So, if you want to include anything as evidence in the claims process, you should submit it as early as possible. Your request to present additional evidence is due 20 days after filing the appeal (or 20 days after the mailing date on the Notice of Appeal if you are the respondent) if you have not requested the transcript. If you have requested the transcript, your request to present additional evidence will be due 20 days from the mailing date of the transcript whether you are the appellant or respondent.

Again, you may also choose to request an oral argument, however, per our experience these are rarely granted. If you do choose to file a request for an oral argument, you must file this with your notice of appeal. If you are the respondent, you must file the request within 10 days of the mailing date on the Notice of Appeal.

Once the written argument and addi-

tional evidence are submitted, the Board will review the matter and make a written decision within 120 days.

Once you receive the Board's decision, if you are still not happy with the results, you may file an Action for Administrative Review in the Circuit Court within 35 days from the date of mailing of the Board's decision as laid out on the final page of the Board's decision.

So, the key to winning your case in regards to an unemployment claim begins with the disciplinary actions taken prior to the termination of the employee and the documentation supporting those actions. You must make sure that your clients keep excellent records in regards to the disciplinary actions taken against the employee and clear notes of what exactly was said when the employee was terminated. Next, make sure that the claim protest/response provides sufficient detail and support giving reasons for termination and how those reasons fulfill the three requirements of proving misconduct. Again, you will need to attach as much written documentation to the claim protest/response as possible (i.e. write-ups, copies of the client's policies/procedures or any other documentation to support your protest.) It is very important that you document the employees file as thoroughly as possible as this will provide you with the information needed to support your response and hopefully, lead to a denial of benefits. You want to make sure that you have a rock solid case before your client terminates the employee so when she files a claim for unemployment you are easily able to defeat it.

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Editor's Note: This article was written by Melissa Schroeder, the Human Resources Director, and Lisa Collins, a paralegal and law student, under the direction and supervision of Steven C. Lindberg, Esq. of Freedman Anselmo Lindberg & Rappe LLC of Naperville, Illinois. It is intended for the readers' informational purposes only and is not to be taken or utilized as legal advice. Readers are, of course, reminded that they should seek their own legal counsel as to any of the issues raised in this article.

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