

Reverification: When May Employers Check Work Authorization?

NELP

Fact Sheet for Organizers

Advocating for the working poor and the unemployed

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What is reverification?

Sometimes an employer will ask a worker to show his or her authorization to work after the employee has already shown work authorization documents to the employer. This is called "reverification." An employer may ask for documents again if, at the time of hire, the worker presented work authorization documents (except resident alien cards, also known as "green cards") bearing an expiration date. Unfortunately, some employers have used reverification as a pretext for retaliating against certain workers who assert their workplace rights. The process has also been used to intimidate workers who are attempting to organize a union or who are otherwise engaged in a labor dispute. Compelling workers to reverify their employment authorization under such circumstances can be a violation of their rights under antidiscrimination laws.

Why do employers ask workers to show documents that prove they are allowed to work?

In 1986, Congress enacted the Immigration Reform and Control Act of 1986 (IRCA). IRCA made it unlawful for any employer to *knowingly* hire a worker who is not authorized to work in this country. The 1986 law—amended in 1996 by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)—established a procedure that employers must follow to verify that employees are authorized to work in the United States. This authorization is called an employee's "employment eligibility," and one of the documents that workers may show in order to prove employment eligibility is called a "work authorization" card. Workers may also show an unrestricted Social Security card and picture identification.

This procedure is required of all employers, regardless of size. To comply with the law, employers are required to verify the identity and employment eligibility of all employees hired after November 6, 1986, and to complete a special government form—called an Employment Eligibility Verification Form or an "I-9 form" for short—for each new employee hired.

How do employers verify employment eligibility?

For each new employee hired, the employer must complete an I-9 form. The law requires that the employer complete this form for all of its new hires, not only for those the employer believes are noncitizens.

To enable the employer to complete the form, workers must present documents that establish both the worker's *identity* and *eligibility to work*, as explained further below. Workers generally must be allowed three business days from the time of hire to produce documentation, and they may not be required to produce any documents until they have actually been hired for a position, unless all workers are asked to do so at the same point in the hiring process. Many employers agree, in the context of union negotiation or simply beforehand, to permit workers more than 30 days to produce supporting documents. Employers may do this as long as they allow all new hires to produce documents in the same time period.

What if a worker has lost his or her work authorization card?

If a worker has lost a document necessary to establish identity or employment eligibility, an employer must accept a receipt (issued by the appropriate government agency) showing that the worker has applied for a replacement document. For example, if the worker has lost his or her *Employment Authorization Document (EAD or "work permit")*, he or she must apply for a replacement card with the Immigration and Naturalization Service (INS) and provide the employer the INS-issued receipt. The employer must give the worker up to 90 days from the date of hire (or from the date the work authorization expires for reverification purposes) to provide a valid original document.

Does the employer give the documents to INS?

No. However, the employer is required to keep completed I-9 forms on file for a specified period of time and must make them available for inspection, if requested, by the INS, the U.S. Department of Labor (DOL), or the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). Employers are not required to keep copies of the original documents. Employers who fail to complete the forms or who continue to employ workers they know lack valid work authorization are subject to civil, and, in rare cases, criminal penalties.

What is the I-9 form?

The I-9 form, which is issued by the INS, contains three sections, as well as a list of the documents that are acceptable for establishing an employee's identity and employment eligibility.

- **Section 1.** The first section of the I-9 is completed by the worker and requires that he or she sign the form *under penalty of perjury*. The worker must supply his or her name, address, date of birth, and Social Security number. The worker must also check a box indicating whether he or she is a U.S. citizen, a lawful permanent resident, or an alien authorized to work in the United States.

- **Section 2.** The second part of the form requires the employer to list the documents that were produced by the worker to verify his or her identity and employment eligibility. There are three groups of documents that a worker may use for this purpose. *It is the **worker's choice**, not the employer's, as to which of these acceptable documents to use.*

"List A" documents establish both a worker's **identity** (who he or she is) as well as **eligibility to work** (legal work papers). If a worker provides one document from List A, he or she may not be required to provide any

other document to complete the I-9 form. If a worker does not have or chooses not to provide a "List A" document to complete the I-9 form, he or she must choose one document from "List B" and one from "List C" to provide to the employer. "List B" documents establish a worker's **identity**. "List C" documents establish a worker's **employment eligibility**.

• **Section 3.** The third section of the I-9 form is entitled "**Updating and Reverification**." It is used by the employer to reverify the employment eligibility of employees who, *when they first completed the I-9 form*, presented a document showing that their work authorization would expire on a certain date. This section is also used to reverify the eligibility of workers who indicated a work authorization expiration date in section 1 of the I-9 form. When an employee's work authorization expires, the employer must reverify on the I-9 form that the worker is still work-authorized and must do so no later than the expiration date indicated on the employee's work authorization.

It is important for workers and advocates to remember that the **worker**, not the employer, has the right to choose which of the listed documents to show to establish his or her identity and employment eligibility. An employer's request for "more or different documents" than are required, or a refusal to accept certain documents that appear "reasonably genuine" violates the IRCA's antidiscrimination provisions. Such violations are referred to as "**document abuse**." Moreover, the employee still retains the right to choose which documents to present for the reverification process, and can choose to show either a document establishing continued work authorization, such as an unrestricted Social Security card, or a new extension of his or her work authorization. An unrestricted Social Security card only has the person's name and Social Security number, while a restricted card also states "*Valid for Work Only With INS Authorization*" right above the person's name.

- *For example, if Guillermo was recently hired by "ABC Company" and he presented a work permit with an expiration date of December 31st of this year, his employer must reverify that Guillermo continues to be work authorized before the end of the year. However, upon reverification Guillermo can choose to present his Social Security card as proof of his continued eligibility to work as long as it is an unrestricted Social Security card. The employer cannot require Guillermo to show his work permit. This would be considered document abuse.*
- *If Guillermo has a restricted Social Security card, however, he would need to show an immigration document showing that his work permit has been extended.*

Under what circumstance must an employer reverify a worker's documents?

An employer is required to reverify a worker's employment eligibility only when the information the employee provided on the I-9 form indicates his or her work authorization is about to or has expired. Additionally, an employer who is audited by the INS and informed that there are problems with some of its workers' documents must also reverify those employees' status.

Once a worker has filled out an I-9 form, he or she is considered to be a "continuing employee" and therefore is not required to fill out a new I-9 form or to show his or her documents again, except for those circumstances when reverification is required. While employers sometimes attempt to make technical corrections to the I-9 forms submitted by their employees, an employer cannot single out only those employees who "appear to be foreign or immigrants" for reverification. This could be considered document abuse, as well as possibly national origin or citizenship discrimination, depending on the facts.

When is reverification *not* required?

An employer should not reverify the employment eligibility of lawful permanent residents (LPRs) because work authorization does not expire for LPRs. This is the case even if the LPR presented an "alien registration card" or "permanent resident card" (green card), which is now issued with a 10-year expiration date, when first hired.

Additionally, an employer should not reverify a worker's employment eligibility because of a change in the worker's employment status, if that person is a "continuing employee." A "continuing employee" is anyone who has a "continuing expectation of reemployment at all times." An employer should not reverify an individual's status in the following situations:

- The worker has taken an approved paid or unpaid leave because of study, illness or disability of a family member, illness or pregnancy, maternity or paternity leave, vacation, union business, or other temporary leave approved by the employer;
- The worker is promoted, demoted, or gets a pay raise;
- The worker is temporarily laid off due to lack of work;
- The worker is on strike or involved in a labor dispute;
- The worker is reinstated after disciplinary suspension or wrongful termination, found unjustified by any court, arbitrator, or administrative body, or otherwise resolved through reinstatement or settlement;
- The worker is engaged in seasonal employment;
- The worker transfers from one distinct unit of an employer to another distinct unit of the same employer; or
- The worker continues in his or her job with a related, successor, or reorganized employer, as long as the new employer obtains and maintains the previous employer's records and I-9 forms.

What can workers do to enforce their rights?

If a worker believes an employer has engaged in unlawful reverification, the worker should first contact his or her union (if represented by one) or an advocate for immigrant workers who is familiar with the I-9 process. The union might already have contract language in place protecting immigrant members from unlawful reverification, as well as other related protections for immigrant workers. If the union does not, advocates and unions can obtain [sample model language from NILC's website](#).

If the advocate determines that the worker might be a victim of document abuse, or citizenship or national origin discrimination, the advocate can assist the worker in filing a charge with the **Office of Special Counsel**. The OSC is the special government agency that enforces the antidiscrimination provisions of federal immigration law and protects workers' rights. A part of the U.S. Department of Justice's Civil Rights Division, the OSC has multilingual staff and attorneys ready to assist workers, their unions, or other advocates for employees, along with employers and the general public on matters involving employment discrimination. The OSC is not part of the INS. For information or assistance in filing a charge of discrimination, workers may call the OSC's toll-free hotline at (800) 255-7688 or (800) 362-2735 (TDD for

hearing impaired). There is also an automated employer hotline at (800) 255-8155 or (800) 362-2735 (TDD).

Workers who think they have been discriminated against should contact the OSC or seek other legal help right away. Generally, complaints of discrimination, including the immigration-related unfair employment practices discussed above, must be filed within **180 days** of the time the discrimination occurred. Victims of discrimination may be entitled to back pay and/or reinstatement, and their employers may be subject to additional monetary penalties. However, advocates should know that noncitizens **must be work-authorized** in order to be able to file a charge of document abuse.

If the employer singled out employees of a particular ethnic or racial group for reverification, advocates should consider filing a claim with the Equal Employment Opportunity Commission (EEOC). If reverification demands were directed towards workers who collectively asserted their workplace rights or were involved in union organizing, an unfair labor practice charge may be filed with the National Labor Relations Board (NLRB).

Workers who are represented by unions should notify their union representative, as well as the OSC, if they believe they have been discriminated against. In addition to the rights and protections of federal law, unionized employees may have additional protection from discrimination under their collective bargaining agreements. Deadlines for filing grievances under a labor contract are usually very short so it is important to act quickly to get help. For questions about unfair labor practices, see the blue pages of your local telephone directory to contact the NLRB or visit www.nlr.gov. More importantly, before contacting the NLRB, the worker should check whether he or she is covered by a union contract that contains language protecting immigrant members from unlawful reverification and other discrimination.

Finally, the antidiscrimination protections in federal immigration law, discussed above, supplement the broad prohibitions against discrimination contained in Title VII of the Civil Rights Act of 1964, another federal law. Title VII makes it unlawful for employers to discriminate against workers in employment based on race, national origin, religion, color, and sex. Charges of discrimination in violation of Title VII must be filed with the Equal Employment Opportunity Commission (EEOC). The OSC and the EEOC have an agreement to cooperate when discrimination charges filed with one of the agencies involve issues within the other agency's area of responsibility. For questions about Title VII, contact the EEOC at (800) 669-4000 or (202) 275-7518 (TDD) or www.eeoc.gov.