

Top Ten Employment Eligibility Verification Compliance Tips

Kevin Paul
Range Pc
LAW + POLICY FOR THE MOUNTAIN WEST

ROCKY MOUNTAIN EMPLOYERS
IMMIGRATION ALLIANCE
Farm Labor Team

It's not like you don't have enough to worry about already just milking cows.

Nevertheless, the federal government requires that, as an employer, you take the lead in assuring that every person you hire is authorized to work in the United States. It's a job you probably didn't ask for, but one that's very important you do, and do right.

So here's our list of top ten compliance tips to help you along:

NUMBER 1: You need to have an original, completed, and signed I-9 Form for **every** current employee who was hired after November 6, 1986. That means **every** person who receives a W-2 that lists the wages you paid them for working on your farm. It doesn't matter if they're a relative, if they only worked a few days, or if they work for somebody else, too. You need to have an I-9 for every employee. If you need to find an I-9 form, go to this address on the internet: https://www.uscis.gov/system/files_force/files/form/i-9-paper-version.pdf. You can keep paper versions of your I-9s, or you can use an electronic version that you can find here: <https://www.uscis.gov/i-9>.

NUMBER 2: Don't wait. You should go over the I-9 form with new employees the first day they report for work. Ask new employees to bring their identification and work eligibility documents with them. It's up to the employee which documents she or he presents for you to look at. You **can't** require that employees only bring a driver's license and a social security card. If the employee presents another acceptable document, you're good to go. The lists of acceptable I-9 documents are here: <https://www.uscis.gov/i-9-central/acceptable-documents>. Remember, you only have to "**physically examine**" the documents and give them back to the employee; you are **not** required to photocopy them. You also don't have to be a document expert. The part of the I-9 form that you will sign states that the documents "appear to be genuine and to relate to the employee." Unless a document appears fake, or you know that it is fake, you can accept it.

If you accidentally overlooked completing an I-9 for an employee, do it now. **Do not backdate the form.** Use the employee's actual start date and the date that you and the employee actually complete the form. Remember, you're signing this form under penalty of perjury, so it has to be accurate.

NUMBER 3: Keep your I-9a as long as you have to, but no longer. Here's the formula:

Keep each employee's I-9 – the original signed version – for as long as the employee works for you.

When the employee leaves your employment, keep her or his I-9:

For **three** years after her or his hire date, or

For **one** year after the termination date,

Whichever is Longer.

When an employee leaves employment, figure out which of these two dates is later and write it at the top of the I-9. When that date hits, shred the I-9. You don't get extra points for keeping forms longer than required.

NUMBER 4: If you receive a Department of Homeland Security "Notice of Inspection" or "Immigration Enforcement Subpoena," call an immigration attorney for help. You will need to provide your I-9s, and possibly other documents to the government and you will probably only have three days to do so. There are things an attorney who is familiar with I-9 audits can do to help make sure your I-9s are completed correctly so that you don't have to pay penalties. You'll want to keep your completed I-9 forms separate from other payroll and employment records so you can find them quickly and so that they don't get lost among other documents. If you keep paper versions, put them all in one, clearly labeled notebook.

NUMBER 5: You **don't** have to complete I-9 forms for **independent contractors**. But be **very** careful about treating someone who regularly works on your farm as an independent contractor. There are specific rules that govern who must be treated as an employee and most farm workers fall within the definition of an "employee." Do **not** treat workers as independent contractors just so that you don't have to complete I-9s for them.

NUMBER 6: As of now, four states – Alabama, Arizona, Mississippi, and South Carolina – require all employers to use the E-Verify system. Another sixteen states require some employers to use E-Verify. Don't take our word for it. Check the web site for your home state's department of labor and employment to see whether you're required to enroll in E-Verify.

Remember that E-Verify is intended to confirm that a worker is authorized to work in the United States. **E-Verify is not a replacement for a completed I-9.** If you use E-Verify, you still have to complete, and keep, an I-9 for each employee.

NUMBER 7: Talk to your employees about dealing with law enforcement officers. These days, agents from Immigration and Customs Enforcement are stopping people because of their appearance and requiring that they provide identification documents and, in some cases, immigration status documents. Many United States citizens have been detained because they could not prove to the satisfaction of ICE or the U.S. Border Patrol that they were lawfully present in the United States. Even when employees run simple errands, they should carry identification with them. They should also be very careful about driving within posted speed limits and observing traffic laws, and about tail lights, headlights, and license plates.

NUMBER 8: Make sure you pay attention to other employment related compliance requirements. For example, make sure you know if your farm falls within either the federal, or your state's,

minimum wage obligation, which may mean that you have to keep particular wage and hour records. You'll also want to make sure you know your state's overtime rules; not every state exempts agricultural employers from the requirement to pay overtime. It's important that you keep accurate payroll records in case you receive an audit notice from the Internal Revenue Service.

Likewise, you'll want to make sure you understand OSHA workplace safety requirements, particularly if you have young adolescents, including members of your family, working on your farm.

And if you provide worker housing on your farm, make sure you check the local city or county ordinances that relate to rental units. You should also consider having a simple lease agreement with workers who occupy your housing units, just in case things go poorly and you need to terminate a worker's employment and use of your housing.

The point is to make sure that government agencies don't have any need to devote more time than necessary to auditing or inspecting your farm, and don't find it necessary to invite other agencies to "take a look around."

NUMBER 9: Have a plan for how you, and at least one other person from your workforce, will handle a visit from law enforcement or other government officials. You'll want to pick someone who seems calm under pressure and who is not easily intimidated or rattled. Go over what law enforcement can, and cannot, do when they come onto your farm. You might even want to give them talking points or a script for what to say. Keep in mind that government agents may not know much about how a dairy farm operates. Whoever interacts with them may need to teach them about how cows can suffer if milking operations don't continue on schedule. And make sure the worker or workers you train have a phone list that's accurate and easy to find so they can get in touch with the right people if the government pays a visit while you're attending the Western Dairy Management Conference.

NUMBER 10: If you learn that an employee is not actually eligible for employment, you must terminate that employee. There really isn't a choice to be made. Employing people you know are not in the country lawfully can put you at risk of serious, criminal penalties. You can still try to help a worker obtain work authorization or straighten out whatever problem they might have. You just can't continue to employ them while you do so.

As of now, the federal Deferred Action for Childhood Arrivals – or "DACA" – program is still permitting people who meet the program's requirements to hold valid employment authorization documents and to work, even though they entered the country unlawfully as children. We don't know what the current administration, or the U.S. Supreme Court, will ultimately do with DACA.

Kevin Paul
Attorney
Range PC
600 Grant Street, Suite 650
Denver, CO 80203
(303) 376-3704
kevinpaul@range.law