



Current Report

Division of Agricultural Sciences and Natural Resources • Oklahoma State University

Migrant Labor

Shannon Ferrell
Extension Assistant

Mike Hardin
Extension Tax Specialist

Chris Petermann
Extension Associate

Damona Doye
Extension Economist

Note: *This publication is intended to provide general information about legal issues. It should not be cited or relied upon as legal authority. State laws vary and no attempt is made to discuss laws of states other than Oklahoma. For advice on how these issues might apply to your individual situation, consult an attorney.*

How do I know if someone can legally work in the United States?

Before you hire someone, it is important to determine if they are eligible to work in the United States. It is your responsibility to determine their eligibility. You may face civil and criminal penalties for knowingly employing individuals who are not authorized to work in the United States.

The Immigration and Naturalization Service (INS) provides the Employment Eligibility Verification form, referred to as the I-9 form. You should fill out the form for all employees (even employees who are born in the United States or who otherwise hold U.S. citizenship). You can get an I-9 by calling the INS at (800) 870-3676. It can also be downloaded from the INS internet site at <http://www.usdoj.gov/ins/>.

It is important that you read and follow the instructions for completing the I-9 form very carefully. Following the prescribed procedures may protect you if a worker falsifies information and is actually ineligible for work.

You must complete the I-9 form within three days of the date of hiring. If the employee will work for less than three days, you must have it completed before the end of the employee's first working day. It is not necessary to submit the form to the INS; you should retain it for your own records. You must retain the I-9 for three years, or for a year after the end of employment, whichever is later.

There are some employees who do not need to have a I-9 on file. They are:

- employees hired before November 7, 1986,
- employees hired for domestic work in a private home on an intermittent or sporadic basis,

- employees who provide labor to you who are employed by a contractor providing contract services, or
- persons who are independent contractors.

The INS also provides two other important publications to help you determine an individual's eligibility to work: publication M-274, *Handbook for Employers*, and *Employment Eligibility Verification Guide*.

In addition to completing the I-9 form, documents in the following lists must be examined. You must examine one document from List A, OR a document from List B AND a document from List C.

List A (Identity and Employment Eligibility)

- United States passport (unexpired or expired)
- Unexpired foreign passport with *I-551 stamp*
- Alien Registration Receipt card or Permanent Resident card (*INS Form I-551*)
- Unexpired Temporary Resident card (*INS Form I-688*)
- Unexpired Employment Authorization card (*INS Form I-688A*)
- Unexpired Employment Authorization document issued by the INS which contains a photograph (*INS Form I-766 or I-688B*)
- *For aliens authorized by the INS to work only for a specific employer:* an unexpired foreign passport with Form I-94 containing an endorsement of the alien's nonimmigrant status

List B (Identity Only)

- Driver's license or ID card issued by a state or outlying possession of the United States, if it contains a photograph or information such as name, date of birth, sex, height, eye color, and address
- ID card issued by federal, state, or local government agencies or entities, if it contains a photograph or information such as name, date of birth, sex, height, eye color, and address
- School ID card with a photograph

- Voter's registration card
- U.S. Military card or draft record
- Military Dependent's ID card
- U.S. Coast Guard Merchant Mariner card
- Native American tribal document
- Driver's license issued by a Canadian government authority
- *For persons under age 18:* school record or report card; clinic, doctor, or hospital record; day care or nursery school record

List C (Employment Eligibility Only)

- U.S. Social Security card issued by the Social Security Administration (*other than such a card which specifies on the face that the issuance of the card does not authorize employment in the United States*)
- Certification of Birth Abroad issued by the Department of State (*Form FS-545 or Form DS-1350*)
- Original or certified copy of a birth certificate issued by a state, county, municipal authority, or outlying possession of the U.S. bearing an official seal
- Native American tribal document
- U.S. Citizen ID card (*INS Form I-197*)
- I.D. card for use of Resident Citizen in the United States (*INS Form I-179*)
- Unexpired employment authorization document issued by the INS (*other than those listed under List A*)

You cannot require an employee to provide a specific document, it just has to be one of the documents from the above lists. You should receive the document(s), or a receipt saying that he/she has applied for that document, within three days of hiring the employee. The actual document(s) should be shown to you within 21 days of the date of hiring.

If it appears that the potential employee's document(s) are false in any way, or if it seems that the information on his/her application is false, you should not offer them employment. Use reasonable care in examining the evidence of employability. For example, any Social Security number starting with the digit "9" is invalid. It is illegal for you to make an assumption of false documents based on a person's appearance, speech, or name.

What happens if I complete the process properly and the INS discovers that one of my employees is not actually eligible to work?

Unless the government can show that you had knowledge of the illegal status of the employee, you will have an

affirmative defense against government penalties as long as you took all of the following precautions:

- 1) You had employees fill out their portion of the I-9 when they started work.
- 2) You checked the required documents, and they appeared to be authentic and related to the person who presented them.
- 3) You properly completed the I-9.
- 4) You retained the I-9 for the specified time.
- 5) You presented the I-9 upon request to an INS or Department of Labor officer.

A warning about discrimination:

It is important to remember that the Civil Rights Act of 1964 (which applies to employers with 15 or more employees) makes it illegal to discriminate in any aspect of employment on the basis of a person's national origin. The Immigration Reform and Control Act of 1986 (which applies to an employer with four or more employees) also makes it illegal to discriminate in any aspect of employment on the basis of a person's citizenship status. That means that you may not discriminate against someone because they have not completed the naturalization (citizenship) process.

How do I handle income tax withholding for non-resident aliens?

In general, if you pay wages to non-resident aliens, you must withhold Social Security, Medicare, and income taxes, unless excepted by regulations (see IRS publication 515 for details). To avoid under-withholding of income taxes, you should require non-resident aliens to do the following when completing their W-4 form:

- Do not claim any exemption from withholding.
- Request withholding as though they are single, regardless of their actual marital status.
- Claim only one allowance (unless they are from Canada, Mexico, Japan, or Korea).
- Request an additional income tax withholding of \$4.00 per week.

Legal References:

Immigration and Naturalization Service publication M-274, *Handbook for Employers*
 Immigration and Naturalization Service Employer Information Bulletin 97-14
 Immigration Reform and Control Act –8 USC § 1101
 Civil Rights Act of 1964 – 42 USC § 2000
 Internal Revenue Service Publication 51, Circular A – *Agricultural Employer's Tax Guide*

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