



## NOT ALL ELECTRONIC STORAGE IS CREATED EQUALLY

At least not in the view of the United States Immigration and Customs Enforcement ("ICE"). In August 2010, ICE enacted the Electronic Signature and Storage of Form I-9 Verification Rule. This rule allowed for electronic completion and storage of the I-9 Form, provided there was a clear audit trail of actions taken with respect to each form. Two years later, the U.S. Department of Homeland Security issued guidance for its agents and auditors with respect to collecting these forms in an audit or investigation and analyzing the audit trail. [Click here](#) for a copy of the guidance.

What does this mean for you? If you use an electronic storage system and receive a Notice of Inspection, the special agent or investigator will be asking you to provide, at a **minimum**:

1. The name of your Form I-9 software company;
2. All internal company processes and procedures that relate to the creation, use, storage, security, and inspection and quality assurance programs for the electronically generated Form I-9s;
3. What sort of indexing system is used to link the electronic information contained in the Form I-9 and the supporting documents to each employee;
4. Documentation of the system used to capture the electronic signature, including the identity and attestation of the person electronically signing the Form I-9; and
5. At least one printed, completed electronically generated I-9.

Agents and auditors may also ask you to grant them access to the software system to demonstrate how the Form I-9 is generated.

With respect to the audit trail, agents and investigators will look to see whether the trail provides:

1. The date and time of access to the Form I-9;
2. The identity of the person accessing the form; and
3. The action being taken by that person on the form. ICE considers an "action" to be conduct such as the initial login, the initiation of the Form I-9, the employee signature, the employee signature date, the input of the list A or list B & C documents, etc. The "actions" are outlined in a flow chart attached to the guidance.



When you consider using an electronic system for your I-9s, you will need to ensure that the system captures all "actions" because the audit trail is the primary way ICE analyzes the company's compliance with I-9 regulations. You also need to make sure that the individuals in your company tasked with I-9 compliance understand the importance of the audit trails and are familiar with what business practices and protocols you have in place with respect to the electronic completion and storage of the I-9 Form.

Finally, when considering using such a system, don't be fooled by "bells and whistles." Make sure the electronic signature system: (1) captures the essence of the Form I-9 in that it stresses to the employee that he or she is still "signing" a form under penalty of perjury and to the individual verifying the documents that he or she has actually examined them; and (2) that the fields look nearly identical to the hard copy Form I-9 itself.

—*Laurie M. Chess* and *Mary Ellen B. Jordan*



*Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:*

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