



# Arizona State Senate Issue Brief

November 23, 2022

## Note to Reader:

The Senate Research Staff provides nonpartisan, objective legislative research, policy analysis and related assistance to the members of the Arizona State Senate. The *Issue Briefs* series is intended to introduce a reader to various legislatively related issues and provide useful resources to assist the reader in learning more on a given topic. Because of frequent legislative and executive activity, topics may undergo frequent changes. Nothing in the Brief should be used to draw conclusions on the legality of an issue.

## ***DETERMINATION OF EMPLOYMENT ELIGIBILITY BY EMPLOYERS***

### ***INTRODUCTION***

The federal Immigration Reform and Control Act (IRCA) makes all U.S. employers responsible for verifying the identity and work authorization of all individuals hired after November 6, 1986. It prescribes penalties for any employer who knowingly hires an individual who is not authorized to work in the United States (unauthorized person), or who knowingly continues to employ an unauthorized person. An employer who establishes good faith compliance with the verification requirements has established an affirmative defense that the person or entity has not violated the provisions of IRCA relating to knowingly hiring an unauthorized person.

Federal law preempts any state or local law imposing civil or criminal sanctions, other than through licensing and similar laws, upon those who employ unauthorized persons. In 2007, the Arizona Legislature prohibited an employer from knowingly or intentionally employing an unauthorized person and required employers to use the E-Verify System.

### ***FEDERAL LAW***

#### ***I-9 Forms***

To implement IRCA, employers must complete Employment Eligibility Verification forms (I-9 Form) for each employee when hired. I-9 Forms are divided into two sections. The first section must be filled out and signed by the employee. For the second section, the employer is required to personally review the original documents provided by the employee from a list of acceptable documents (the list of acceptable documents follows) establishing the employee's identity and eligibility to work. The employer must accept documents that reasonably appear on their face to be genuine and to relate to the person presenting them. The employer must reject

documents that do not reasonably appear to be genuine and ask the employee for another form of documentation from the list. The employer must then complete the second section, attesting to the document presented. When an employer signs the I-9 Form, the employer attests to the fact that the employer has reviewed the original document and that it reasonably appears, upon reasonable inspection of its features and the information it contains, to be genuine and to relate to the employee who has presented it for employment eligibility verification purposes. Signage by the employer does not attest to the legitimacy of the status of the person presenting the documents. Employers are prohibited from requesting an employee to present more or different documents than required and cannot request specific documents.

I-9 Forms must be retained for three years after the date a person begins work or one year after the person's employment is terminated, whichever is later. Employers are required to make the I-9 Form available for inspection by the Bureau of Immigration and Customs Enforcement, the Department of Labor and the Justice Department's Office of Special Counsel for Immigration Related Unfair Employment Practices. An employer that knowingly hires or continues to employ an unauthorized person or that fails to comply with employment eligibility verification requirements is subject to monetary fines and imprisonment, depending on the severity of the offense.

I-9 Forms are not required for: 1) employees hired before November 6, 1986, and continuously employed by the same employer; 2) individuals performing casual employment who provide domestic service in a private home that is sporadic, irregular or intermittent; 3) independent contractors; and 4) workers provided to employers by individuals or entities providing contract services, such as temporary agencies (the contracting party is the employer for I-9 purposes in this case).<sup>1</sup>

<sup>1</sup> [U.S. CIS: I-9, Employment Eligibility Verification](#)

### *E-Verify*

The U.S. Department of Homeland Security (U.S. DHS), U.S. Citizenship and Immigration Services Verification Division and the Social Security Administration (SSA) administer E-Verify (formerly the Basic Pilot/Employment Verification Program), authorized by the Illegal Immigration Reform and Immigrant Responsibility Act of 1998.<sup>2</sup> E-Verify allows employers to electronically confirm the employment eligibility of all newly hired employees. E-Verify involves verification checks of SSA and U.S. DHS databases by using an automated system to verify employment authorization. The system uses information from the I-9 Form to perform the verification checks. Participating employers may screen photos from Employment Authorization Documents or Permanent Resident Cards against images stored in the DHS database.<sup>3</sup>

Under federal law, use of E-Verify is free and voluntary for most employers. On June 9, 2008, President George W. Bush amended Executive Order 12989 of February 13, 1996, to direct all federal departments and agencies to require federal contractors to use an electronic employment eligibility verification system to verify the employment eligibility of all persons hired during the contract term and all persons performing work on the contract within the United States. The U.S. DHS has designated E-Verify as the system of choice for the required verification; specific requirements are established by federal regulation.<sup>4</sup> Employers can participate in E-Verify by registering and completing a Memorandum of Understanding.

The following states require E-Verify for some or all employers: Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Carolina, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia and West Virginia.<sup>5</sup>

<sup>2</sup> [P.L. 104-208, 104th Congress 1998](#)

<sup>3</sup> [U.S. DHS: About E-Verify](#)

<sup>4</sup> [U.S. DHS: Supplemental Guide for Federal Contractors](#)

<sup>5</sup> [U.S. DHS: E-Verify History and Milestones](#)

## LEGAL ARIZONA WORKERS ACT

In 2007, the Arizona Legislature passed and Governor Janet Napolitano signed Legal Arizona Workers Act (LAWA), which prohibits employers from knowingly or intentionally employing unauthorized persons and establishes penalties for employers in violation of the law beginning January 1, 2008.<sup>6</sup> In 2008, the Legislature limited this prohibition to employees hired after December 31, 2007. Penalties for a violation include requiring the employer to terminate the employment of all unauthorized persons in Arizona, a probationary period during which the employer must file reports with the county attorney regarding new employees, and possible license suspension for a first violation and permanent license revocation for a second violation. Good faith compliance with the federal requirements pertaining to I-9 Forms establishes an affirmative defense that an employer did not knowingly or intentionally employ an unauthorized person.<sup>7</sup> In 2011, the Supreme Court of the United States upheld LAWA by ruling that state governments may mandate the use of E-Verify and penalize employers that hire undocumented workers.<sup>8</sup>

LAWA requires all Arizona employers to use E-Verify to verify the employment eligibility of new hires. Proof of verifying the employment authorization of an employee through E-Verify creates a rebuttable presumption that an employer did not intentionally or knowingly employ an unauthorized person.<sup>9</sup> The 2008 amendments prohibit a government entity from awarding a contract to any contractor or subcontractor that fails to use E-Verify and require an employer to provide proof of registration with and participation in E-Verify to receive an economic development incentive. The 2008 legislation further required the Arizona Attorney General to establish the Voluntary Employer Enhanced

Compliance Program, which requires participants to verify the employment eligibility of employees through E-Verify or the federal Social Security Number Verification Service; a participant that was in compliance with program requirements did not commit a violation of knowingly or intentionally employing an unauthorized person. The Voluntary Employer Enhanced Compliance Program terminated on July 1, 2018.<sup>10</sup>

## ADDITIONAL RESOURCES

- U.S. Citizenship and Immigration Services [I-9 Information Page Handbook for Employers M-274](#)
- U.S. Department of Homeland Security [E-Verify System E-Verify Enrollment Process](#)
- U.S. Department of Labor [Employment Law Guide Work Authorization for Non-U.S. Citizens](#)
- Arizona Attorney General's Office [Legal Arizona Workers Act: For Employers](#)

<sup>6</sup> [Laws 2007, Ch.279](#)

<sup>7</sup> [Laws 2008, Ch. 152; A.R.S. Title 32, Ch. 2, Art. 2](#)

<sup>8</sup> [Chamber of Commerce of the United States of America v. Whiting, 563 U.S. 582 \(2011\)](#)

<sup>9</sup> [A.R.S. Title 32, Ch. 2, Art. 2](#)

<sup>10</sup> [Laws 2008, Ch. 152](#)

**LISTS OF ACCEPTABLE UNEXPIRED DOCUMENTS**

<i>LIST A</i>	<i>OR</i>	<i>LIST B</i>	<i>AND</i>	<i>LIST C</i>
<b>Documents that Establish Both Identity and Employment Eligibility</b>		<b>Documents that Establish Identity</b>		<b>Documents that Establish Employment Eligibility</b>
1. U.S. Passport or U.S. Passport Card		1. Driver's license or ID card issued by a state or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, gender, height, eye color and address		1. U.S. Social Security card issued by the Social Security Administration (other than a card stating it is not valid for employment, valid only with INS authorization or U.S. DHS authorization)
2. Permanent Resident Card or Alien Registration Receipt Card (Form I-551)		2. ID card issued by federal, state or local government agencies or entities, provided it contains a photograph or information such as name, date of birth, gender, height, eye color and address		2. Certification of Birth Abroad issued by the U.S. Department of State (Form FS-545)
3. Foreign passport with a temporary I-551 stamp or temporary I-551 printed notation on a machine-readable immigrant visa (MRIV)		3. School ID card with a photograph		3. Original or certified copy of a birth certificate issued by a state, county, municipal authority or outlying possession of the United States bearing an official seal
4. Employment Authorization Document that contains a photograph (Form I-766)		4. Voter's registration card		4. Native American tribal document
		5. U.S. military card or draft record		5. U.S. Citizen ID Card (Form I-197)
		6. Military dependent's ID card		6. ID Card for use of Resident Citizen in the United States (Form I-179)
5. In the case of a nonimmigrant alien authorized to work for a specific employer incident to status, a foreign passport with Form I-94 or Form I-94A bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, as long as the period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the form		7. U.S. Coast Guard Merchant Mariner Card		7. Employment authorization document issued by the U.S. DHS
		8. Native American tribal document		
		9. Driver's license issued by a Canadian government authority		
		<b>For persons under age 18 who are unable to present a document listed above:</b> 10. School record or report card		
6. Passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI		11. Clinic, doctor or hospital record		
		12. Day-care or nursery school record		

*U.S. CIS Handbook for Employers M-274*