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BY MESSENGER

May 28, 2002

Mr. John Morrall
Office of Information and Regulatory Affairs
Office of Management and Budget
NEOB, Room 10235
725 17th Street, N.W.
Washington, DC 20503

RE: OMB Draft Report to Congress on the Costs and Benefits of Federal Regulations, 67 Fed. Reg. 15014 – 15045 (March 28, 2002)

Dear Mr. Morrall:

Thank you for the opportunity to provide comments on the Office of Management and Budget's Draft *Report to Congress on the Costs and Benefits of Federal Regulations,* and particularly for the invitation to nominate problematic regulations and agency guidance documents for review and reform. As explained in more detail below, we commend OMB on some of the agency actions already selected for this process and nominate several new ones.

About EEAC

The Equal Employment Advisory Council (EEAC) is a nationwide organization of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its members include over 340 of the nation's largest private sector corporations. EEAC's directors and officers include many of American industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity. Please note that EEAC already has provided its views to the respective agencies on each of the issues discussed below.

Regulations Already Under Review

EEAC commends OMB for its previous efforts towards regulatory reform, and particularly for its rating of these three regulations as candidates for high priority review:

- Department of Labor: Recordkeeping and Notification Requirements Under the Family and Medical Leave Act

- Department of Labor: Equal Opportunity Survey

- Equal Employment Opportunity Commission: Uniform Guidelines for Employee Selection Procedures

We understand that the agencies involved are considering changes to these regulations as a result of OMB's efforts. We urge OMB to maintain these regulations on its "high priority" list and to follow up with the agencies until all of the appropriate reforms have been made.

Nomination of Problematic Agency Regulations and Guidance Documents For Review

EEAC nominates the following additional agency regulations and guidance documents for review by OMB.

- *U.S. Department of Labor Opinion Letters Stating That a "Cold" Can Be a Serious Health Condition Under the Family and Medical Leave Act (See Appendix A)*

As noted above, we commend OMB for placing the FMLA recordkeeping and notice regulations on its "high priority" list. In our view, wholesale review and revision of the FMLA regulations is appropriate, and we recommend strongly that OMB continue to encourage DOL to do so. Should such revisions occur, many of the DOL interpretations currently in effect can and should be reviewed and revised as well.

At the same time, EEAC believes that one DOL position, articulated in FMLA Opinion Letters # 86 and #87, is particularly egregious. In those letters, DOL states that a "cold" is a "serious health condition" protected by the FMLA if it meets the minimal definition articulated in 29 C.F.R. §825.1 14, rescinding a previous letter (#57) stating that it is not.

- *U.S. Department of Labor Opinion Letters Allowing Indefinite Intermittent or Reduced Schedule Leave (See Appendix B)*

The DOL position allowing "intermittent" leave to convert a full-time position to a part-time one also is extremely problematic for employers.

- *The Equal Employment Opportunity Commission's Anti-Arbitration Guidance (See Appendix C)*

Despite the Supreme Court's longstanding confidence in and endorsement of arbitration as an alternative to litigation for resolving employment disputes, the EEOC continues to oppose it.

- *The U.S. Department of Justice, Immigration and Naturalization Service's Refusal To Authorize Electronic Storage of I-9 Forms (See Appendix D)*

Although businesses are required to keep an "Employment Eligibility Verification Form I-9" on *every* employee, the Immigration and Naturalization Service does not permit employers to store these forms electronically.

- *The Federal Trade Commission's Opinion Letter Applying the Fair Credit Reporting Act Requirements to Third-Party Investigations of Workplace Misconduct Such as Sexual Harassment (See Appendix E)*

The FTC's controversial opinion letter extends a consumer protection law to give workers veto power over an employer's investigation into workplace misconduct.

- *The Equal Employment Opportunity Commission's Regulations Extending the Supreme Court's Invalidation of "Tender Back" Clauses in Releases of ADEA Claims To "Covenants Not To Sue" (See Appendix F)*

The EEOC's regulations make it unlawful for an employer to seek an affirmative promise that would provide a way of recovering its defense costs when an employee who has voluntarily signed a release in exchange for consideration then ignores the release and sues the employer under the Age Discrimination in Employment Act (ADEA).

Thank you for the opportunity to submit these comments. We would be pleased to respond to any further questions you may have.

Very truly yours,

Jeffrey A. Norris
President

Enclosures: Attachments A - F

Appendix A

Regulating Agency: U.S. Department of Labor, Employment Standards Administration, Wage & Hour Division

Citation: 29 C.F.R. § 825.114; FMLA Opinion Letters #86 and #87

Authority: 29 U.S.C. § 2611(11).

Description of Problem:

The Department of Labor's (DOL's) regulations implementing the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 – 2654, provide an overly broad definition of "serious health condition," as illustrated by two opinion letters issued by the Department. The FMLA provides 12 workweeks of federally mandated leave in a 12-month period for a qualifying reason, including the employee's own "serious health condition" or that of the employee's son or daughter, spouse or parent. Thus, the definition of "serious health condition" establishes the parameters of a significant area of the statute's coverage.

The plain language, structure and legislative history of this provision make one point quite clear: Congress intended to provide protected leave only for those who actually suffer from health conditions that are "serious," not for individuals with minor ailments, The words Congress used in the definition of "serious health condition?'prove this point:

> The term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves–
> **(A)** inpatient care in a hospital, hospice, or residential medical care facility; or
> (B) continuing treatment by a health care provider.

29 U.S.C. § 2611(11). The dictionary definition of "serious" is "giving cause for concern; dangerous." Webster's New World Dictionary 1225 (3d College ed. 1991). Black's Law Dictionary likewise defines the term to mean "[i]mportant; weighty; momentous, grave, great . . ." Black's Law Dictionary 1367 (6th ed. 1990). *See also* Burton Legal Thesaurus 465 (1980) (listing consequential, critical, crucial, dangerous, dire, dreadful, fatal, great, grim, important, intense, momentous, pensive, pressing, severe, sober, solemn, stem and weighty as synonyms for the word "serious.")

Other terms in the statutory definition indicate the same degree of gravity. Health conditions that require inpatient care *(i.e.* hospitalization) reflect those conditions traditionally considered grave or "serious," as do those conditions requiring "continuing treatment." The dictionary defines the term "treatment" as: "medical or surgical care, esp[ecially] a *systematic course* of this." Webster's New World Dictionary at 1424 (emphasis added). Likewise, the term "continuing" is defined to mean "enduring." Black's Law Dictionary at 321. Thus, the term "continuing treatment" —*i.e.* an

enduring, systematic course of medical care — likewise connotes only those conditions traditionally considered grave or "serious." Congress would not have chosen these words to describe the common cold, the flu, minor ulcers, or other minor ailments.

If any doubt remained about Congress' intent to limit FMLA leave to only those conditions traditionally considered "serious," it would be removed by the FMLA's legislative history. Both the House and Senate Reports provide a representative list of the kinds of conditions Congress meant to include under the umbrella of a serious health condition. These reports state that:

> The term "serious health condition" is not intended to cover short-term conditions for which treatment and recovery are very brief. It is expected that such conditions will fall within even the most modest sick leave policies. Conditions or medical procedures that would not normally be covered by the legislation include minor illnesses which last only a few days and surgical procedures which typically do not involve hospitalization and require only a brief recovery period.

H. Rep. No. 103-8, at 40 (1993); **S.** Rep. No. 103-3, at 28 (1993). The reports further state that:

> Examples of serious health conditions include but are not limited to heart attacks, heart conditions requiring heart bypass or valve operations, most cancers, back conditions requiring extensive therapy or surgical procedures, strokes, severe respiratory conditions, spinal injuries, appendicitis, pneumonia, emphysema, severe arthritis, severe nervous disorders, injuries caused by serious accidents on or off the job, ongoing pregnancy, miscarriages, complications or illnesses relating to pregnancy, such as severe morning sickness, the need for prenatal care, childbirth, and recovery from childbirth.

H. Rep. No. 103-8, at 40 (1993); S. Rep. No. 103-3, at 29 (1993).

Had Congress meant to cover minor conditions, it would not have set forth a list of serious injuries and illnesses that it intended to cover under the definition of a "serious health condition," much less examples that contain repeated clarifiers such as "serious" and "severe." Rather, it would have left the term to be construed in an open-ended fashion. **As** one court observed, "[a]lthough the legislative history states the above list is not exhaustive, it is clear from the examples provided that Congress intended 'serious health condition' to mean serious illnesses and not minor health conditions." *Boyce v. New York City Mission Soc'y*, 963 F. Supp. 290,299 (S.D.N.Y. 1997).

Even the committee reports do not tell the whole story, however. When the FMLA was brought to the House floor for debate, the definition of "serious health condition" (as expressed by the committee reports) was narrowed even further by floor

amendment. As originally submitted to the full House, the FMLA defined a serious health condition as one that involved either "continuing treatment" or "continuing supervision." As a compromise measure, Congress adopted the Gordon-Hyde Amendment, which scaled down the definition of a "serious health condition" to set an even "higher standard of serious illness." 137 Cong. Rec. H9777 (daily ed. Nov. 13, 1991) (statement of Rep. Goodling).

The final version that Congress passed no longer covers an individual who is merely under the continuing "supervision" of a health care provider. *Id.* at H9725 (statement of Rep. Hyde). The elimination of the phrase "continuing supervision," and other changes made by the amendment, were aimed at easing concerns of the business community:

> The Gordon-Hyde substitute, which the Senate recently passed, is a carefully crafted bipartisan piece of legislation. Since family and medical leave was first introduced, there have been many years of negotiation and compromise. This bill includes strong efforts to address the concerns of the business community.

Id. at H9747 (statement of Rep. Moody). Indeed, Representative Goodling commented that the amendment improved the definition of a serious health condition because 'continuing supervision' by a health care provider is now not enough to qualify as a "serious health condition." *Id.* at H9724. Thus, the final version of the Act sets an even higher standard than the committee reports, which themselves clearly express congressional intent to cover only those health conditions traditionally considered grave or "serious."

Further statements made by advocates of the FMLA during congressional debate fully refute any notion that the term "serious" was superfluous. For example, Congresswoman Roukema, a strong supporter of the FMLA, explained that the Act was needed to provide job security in the case of a medical *crisis:*

> Why is this bill needed? Because the growing number of women in the workforce–they make up fully 50 percent of all workers–has dramatically changed the structure of the family. Childbirth or serious illness in a family can mean the loss of a job which can plunge an entire family into financial uncertainty. This is not merely an abstract theory–it happens day after day all over the country. . . .*And by family medical crisis I don't mean a child with the sniffles or the flu-but an illness serious enough to require hospitalization or extended home convalescence.* I mean a child or employee who has cancer and needs time for chemotherapy treatments. Serious illness means an elderly parent who suffers a broken hip and whose employed child needs time from work to assist their parent with home care. Serious illness means the employee who is in a car accident and requires hospitalization beyond the standard 2 weeks of paid sick

> leave typically given to employees. Serious illness means a newborn child with heart deficiencies that threaten the child's life.

Id. at H9727-9728 (emphasis added). *See also id.* at H9729 (statement of Rep. Klug) (Employees "know in an *emergency* they can take time off—without pay—and have a job waiting for them when the *crisis* passes") (emphasis added); *id.* (statement of Rep. Moran) ("Working Americans . . . deserve greater job security and the opportunity to care for a loved one during a time of personal *crisis.")* (emphasis added); *id.* (statement of Rep. Morella) ("The bill is a modest program of job-guaranteed leave for new parents and for employees who need the time to care for a *seriously ill* parent, child, or for their own *serious illness")* (emphasis added).

Thus, there is no doubt that Congress did not intend the FMLA to protect individuals absent from work due to minor ailments such as the flu, cold, or minor stomach problems. Rather, based on the plain language, structure, and legislative history of the Act, it is clear that Congress intended to cover only those individuals who actually suffer from serious or grave medical conditions.

In contrast, DOL's regulatory definition encompasses, among other things, *any* illness that results in the individual being unable to work for more than three days, provided that he or she visits the doctor at least once and obtains a prescription. 219 C.F.R. § 825.114. At one point, the agency took the common-sense position that despite the breadth of this definition, minor illnesses are not covered by the law. Opinion Letter #57 stated in pertinent part:

> The fact that an employee is incapacitated for more than three days, has been treated by a health care provider on at least one occasion which has resulted in a regimen of continuing treatment prescribed by the health care provider does not convert minor illnesses such as the common cold into serious health conditions in the ordinary case (absent complications).

DOL later reversed Opinion Letter #57, however, and replaced it with Opinion Letters #86 and #87, issued in late 1996. These letters said that a cold (or any other minor illness) ***is*** a "serious health condition" protected by the FMLA provided the minimal requirements of the DOL definition are met.

An overly broad definition of "serious health condition" presents a host of problems for employers. Including minor illnesses confers the entire assortment of protections afforded by the FMLA. It thus increases exponentially not only the burdens of FMLA compliance that the FMLA and implementing regulations impose on employers, but also the cost and administrative burden of having someone else perform the work.

Proposed Solution:

Short-term solution: Rescind Opinion Letters #86 and #87, and replace them with an opinion stating that minor illnesses are not covered by the FMLA, similar to that expressed in Opinion Letter #57.

Long-term solution: Re-open the FMLA regulations for public notice and comment to re-draft the definition of "serious health condition" to more accurately reflect congressional intent.

E t: of Economic Impact

Reining in the DOL's definition of "serious health condition" to the level that Congress intended would have a significant effect on the productivity of covered employers, who currently are finding it extremely difficult to make and enforce attendance programs.

December 12, 1996

This is in reference to our letter to you dated April 7, 1995, in connection with an inquiry you received from ---------- , Human Resources Manager for ---------- , in which we expressed the view that an employee who has been incapacitated for more than three days and treated at least once by a health care provider, which results in a regimen of continuing treatment prescribed by the health care provider, may not have a qualifying "serious health condition" within the meaning of the Family and Medical Leave Act (FMLA). Upon further review of this issue and of the conclusion expressed in our letter, we have determined that our letter expresses an incorrect view, being inconsistent with the Department's established interpretation of qualifying "serious health conditions" under the FMLA regulations, 29 CFR Section 825.114.

As you know, "eligible employees" (those who have worked at least 12 months for their employer, at least 1,250 hours over the previous 12 months, and who work at a location where the employer employs at least 50 employees within 75 miles) may take qualifying leave under the FMLA for, among other reasons, their own serious health conditions that make them unable to perform the essential functions of their job, or to care for immediate family members (i.e., spouse, child, or parent) with serious health conditions. The FMLA defines serious health condition as an illness, injury, impairment, or physical or mental condition that involves either inpatient care in a hospital, hospice, or residential medical care facility, or continuing treatment by a health care provider.

The FMLA regulations, at section 825.114(a)(2)(i), define "serious health conditions" to include a period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

> (A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

A "regimen of continuing treatment" is defined in section 825.114(b) to include, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). But the regulations also clarify that the taking of over-the-countermedications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, a regimen of continuing treatment for purposes of FMLA leave.

The FMLA regulations also provide examples, in section 825.114(c), of conditions that **ordinarily,** unless complications arise, would not meet the regulatory definition of a serious health condition and would not, therefore, qualify for FMLA leave: the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc. Ordinarily, these health conditions would not meet the definition in 825.114(a)(2), as they would not be expected to last for more than three consecutive calendar days and require continuing treatment by a health care provider as defined in the regulations. If, however, any of these conditions met the regulatory criteria for a serious health condition, e.g., an incapacity of more than three consecutive calendar days that also involves qualifying treatment, then the absence would be protected by the FMLA. For example, if an individual with the flu is incapacitated for more than three consecutive calendar days and receives continuing treatment, e.g., a visit to a health care provider followed by a regimen of care such as prescription drugs like antibiotics, the individual has a qualifying "serious health condition" for purposes of FMLA.

Accordingly, our letter to you of April 7, 1995, which stated that conditions meeting the regulatory criteria specified in section 825.114(a)(2)(i) would not "convert minor illnesses * * * into serious health conditions in the ordinary case (absent complications)," is an incorrect construction of the regulations and must, therefore, be withdrawn. Complications, per se, need not be present to qualify as a serious health condition if the regulatory "more than three consecutive calendar days" period of incapacity and "regimen of continuing treatment by a health care provider" tests are otherwise met. The regulations reflect the view that, **ordinarily,** conditions like the common cold and flu (etc.) would not be expected to meet the regulatory tests, not that such conditions could not routinely qualify under FMLA where the tests are, in fact, met in particular cases.

We regret any confusion or misunderstanding our earlier correspondence may have caused. If you have further questions or we may provide additional assistance, please have a member of your staff contact Mr. Howard Ostmann of our FMLA Team, at (202) 219-8412.

Sincerely,

Maria Echaveste
Administrator

December 12,1996

This is in response to two letters from your office asking a number of questions regarding the definition of the term "serious health condition" under the Family and Medical Leave Act of 1993 (FMLA). I regret that, due to the volume of inquiries and other work associated with administering FMLA, we were not able to respond earlier.

Before answering your specific questions, it may be helpful to first examine the pertinent sections of the FMLA and its implementing regulations, 29 CFR Part 825, and explain their underlying rationale. Under FMLA, "eligible employees" may take leave for, among other reasons, their own serious health conditions that make them unable to perform the essential functions of their position, or to care for immediate family members (i.e., spouse, child, or parent) with serious health conditions. Section 101(11) of FMLA defines serious health condition as "an illness, injury, impairment, or physical or mental condition that involves-

(A) inpatient care in a hospital, hospice, or residential medical care facility; or

(B) continuing treatment by a health care provider."

Under the express statutory language, any absence involving inpatient care qualifies as a serious health condition. **A** more difficult task, however, has been to define those illnesses that would qualify as serious health conditions because they involved "continuing treatment by a health care provider."

The legislative history states that the meaning of **serious health condition** "is broad and intended to cover various types of physical **and** mental conditions" and "is intended to cover conditions or illnesses that affect an employee's health to the extent that he or she must be absent from work on a recurring basis or for more than a few days for treatment or recovery." Similar standards apply to a child, spouse, or parent of the employee who is unable to participate in school or in regular daily activities. The legislative history also states that the term "is not intended to cover short-term conditions for which treatment and recovery are very brief' and "minor illnesses which last only a few days and surgical procedures that typically do not involve hospitalization and require only a brief recovery period. Complications arising out of such procedures that develop into 'serious health conditions' will be covered by the act. * * *"

In developing the final regulatory definition of "serious health condition" at section 825.114, the Wage and Hour Division carefully reviewed the statute, the legislative history, the public comments received during rulemaking, and its enforcement experience under the interim regulations. **As** a result of this review, separate definitions were established for: (1) any period of incapacity due to pregnancy and prenatal care (825.114(a)(2)(ii)); (2) a chronic serious health condition (such as asthma, diabetes, etc., section 825.114(a)(2)(iii)); (3) a permanent or long-term condition for which treatment may not be effective (such as Alzheimers, strokes, terminal diseases, etc., section 825.114(a) (2)(iv)); and (4) to receive multiple treatments (including recovery therefrom) either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period
of incapacity of more than three consecutive calendar days in the absence of
medical intervention or treatment (such as dialysis, chemotherapy, etc., section 825.114(a)(2)(v)).

In addition, the "three-day incapacity" rule coupled with "continuing treatment" portion of the definition was clarified at section 825.114(a)(2)(i) to mean --

> A period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:
>
> > (A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or
> >
> > (B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

A "regimen of continuing treatment" is defined in section 825.114(b) to include, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). But the regulations also clarify that the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, a regimen of continuing treatment for purposes of FMLA leave.

The final regulations also provide examples, in section 825.114(c), of conditions that ***ordinarily,*** unless complications arise, would not meet the regulatory definition of a serious health condition and would not, therefore, qualify for FMLA leave: the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc. Ordinarily, these health conditions would not meet the definition in 825.114(a)(2), as they would not be expected to last for more than three consecutive calendar days and require continuing treatment by a health care provider as defined in the regulations. If, however, any of these conditions met the regulatory criteria for a serious health condition, e.g., an incapacity of more than three consecutive calendar days that also involves qualifying treatment, then the absence would be protected by the FMLA. For example, if an individual with the flu is incapacitated for more than three consecutive calendar days and receives continuing treatment, e.g., a visit to a health care provider followed by a regimen of care such as prescription drugs like antibiotics, the individual has a qualifying "serious health condition" for purposes of FMLA.

An employer may, when an employee requests FMLA leave for a serious health condition, request a medical certification by the employee's health care provider to confirm that a serious health condition exists. If the employer has reason to doubt the validity of the certification provided, the employer may require that the employee obtain a second opinion from another health care provider (at the employer's expense). Conflicting opinions are resolved by obtaining a third medical opinion as provided in section 103 of FMLA and sections 825.305 through 825.308 of the regulations.

Turning to your particular questions, we have rephrased and amplified them slightly in the discussion below. These answers should be viewed as general guidance that might not be applicable in a particular situation where other significant factors are present.

Question 1A: People on occasion will go to their doctor if their cold or flu lasts more than three days. The doctor may prescribe an antibiotic (which the patient may or may not fill) in case there is a bacterial infection. The regulations state that, ordinarily, unless complications arise, the common cold and flu are not serious health conditions for purposes of FMLA. Can a cold or the flu ever be a serious health condition for purposes of FMLA?

Answer 1A: Yes, the cold or flu may be a serious health condition for FMLA purposes, if the individual is incapacitated for more than three consecutive calendar days and receives continuing treatment by a health care provider, as defined in the regulations.

Question 1B: What if the employee telephones the doctor but does not actually see the doctor for an examination?

Answer 1B: If an employee who has the flu **only** telephones the doctor but is not seen or examined by the doctor, those circumstances would not qualify as "treatment" under the regulations. Treatment means an examination to determine if a serious health condition exists, evaluations of the condition, and actual treatment by the health care provider to resolve or alleviate the condition. **A** telephone conversation is not **an** examination. An examination or treatment requires a visit to the health care provider to qualify under FMLA.

Question 1C: What if the doctor only prescribes medication "in case your cold turns into something more serious"? What if the employee does not have the prescription filled or does not follow the doctor's orders?

Answer 1C: A prescription that is given "in case your cold develops into something serious" raises the question of whether the existing condition is a serious health condition for purposes of FMLA. In all likelihood, the employee has not yet suffered the "complications" that would qualify the illness as a serious health condition for FMLA leave purposes. **An** employee who does not follow the doctor's instructions is probably not under a "regimen of continuing treatment by or under the supervision of the health care provider" within the meaning of the FMLA regulations.

Question 1D: What if the doctor advises the employee to stay at home, drink plenty of fluids, and stay in bed for **a** few days?

Answer ID: Staying at home, drinking fluids, and staying in bed are activities which can be initiated without a visit to a health care provider and do not constitute "continuing treatment" under the FMLA regulations. See section 825.114(b).

Question 2A: What if the absence is for strep throat or an ear infection, and the employee goes to the doctor and gets a prescription for an antibiotic, is that a serious health condition?

Answer 2A: The circumstances surrounding each illness must be evaluated to see if it meets one of the regulatory definitions of a serious health condition. If either a strep throat or ear infection results in an incapacity of more than three consecutive calendar days and involves continuing treatment by a health care provider (which can include a course of prescription medication like an antibiotic), the illness would be considered a serious health condition for purposes of FMLA.

Question 2B: Is strep throat without complications a "serious health condition" just because an antibiotic was prescribed?

Answer 2B: If an illness such as strep throat incapacitates someone for a period of more than three consecutive calendar days and involves continuing treatment by a health care provider (including a course of prescription medication like an antibiotic), the condition qualifies as a serious health condition for purposes of FMLA.

Question 3A: What if the employee stays out because her child has bronchitis? She goes to the doctor and medication may or may not be prescribed. Does this meet the criteria for a "serious health condition"?

Answer 3A: Bronchitis may itself be a serious health condition if it meets one of the regulatory definitions. Bronchitis ***ordinarily*** may not be a serious health condition because typically it does not involve an incapacity of more than three consecutive calendar days and continuing treatment by a health care provider as defined by
the regulations. In the case where the doctor does not prescribe any course of medication to resolve or alleviate the health condition, it would not qualify as "a regimen of continuing treatment" within the meaning of the regulations.

Question 3B: If bronchitis may qualify as a serious health condition, does section 825.208(d) of the regulations contradict this when it says **"e.g.,** bronchitis that turns into bronchial pneumonia"?

Answer 3B: No. The complications of an illness that is not itself ordinarily a serious health condition, i.e., does not routinely meet FMLA's definition of a serious health condition, may convert a routine illness *into* a serious health condition for FMLA leave purposes (e.g., when bronchitis turns into bronchial pneumonia). In such a situation, it may be difficult to determine when the initial illness became a serious health condition for FMLA leave purposes **as** a result of complications. Any question regarding the onset of a serious health condition may be resolved by obtaining a medical certification from the employee's health care provider and, where there is reason to doubt the validity of the certification provided, a second medical opinion.

Question 4A: Employees occasionally stay home for a week or more with a child who has chicken pox. Assuming there are no complications, is the employee entitled to leave under FMLA?

Answer 4A: Based on the limited information in the situation you describe, there
appears to be no continuing treatment by a health care provider that would qualify the absence for FMLA leave.

Ouestion 4B: What if the employee gets chicken pox unrelated to a pregnancy?

Answer 4B: In the absence of additional information, there appears to be no continuing treatment by a health care provider that would qualify the absence for FMLA leave.

Ouestion 4C: What if a doctor advises the employee to stay home for a week?

Answer 4C: The regimen of care described in your question appears to be treat-ment or activities that can be initiated without a visit to a health care provider. Under those circumstances, without other factors, the situations would not qualify as serious health conditions for FMLA leave purposes.

We are providing the additional information you requested on the FMLA under separate cover. I hope you will find this information responsive to your requests.

Sincerely,

Maria Echaveste
Administrator

April 7, 1995

FMLA - 57

This is in response to your letter of March 14 forwarding a copy of a letter from your constituent, regarding the Family and Medical Leave Act of 1993 (FMLA). expresses two concerns: that the Department's interpretation of the term serious health condition does not reflect the intent of the Act's authors and is being applied inconsistently; and, that FMLA leave absences may not be counted against an employee for purposes of perfect attendance bonuses or other disciplinary actions. The FMLA defines serious health condition to mean either "inpatient care in a hospital, hospice, or residential medical care facility" or "continuing treatment by a health care provider." Regulations, 29 CFR Part 825, published as a Final Rule on January 6, 1995 and effective April 6, 1995, state that, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and therefore do not qualify for FMLA leave. The fact that an employee is incapacitated for more than three days, has been treated by a health care provider on at least one occasion which has resulted in a regimen of continuing treatment prescribed by the health care provider does not convert minor illnesses such as the common cold into serious health conditions in the ordinary case (absent complications.) See §825.114(c) of the final FMLA Regulations, 29 CFR Part 825.

With regard to incentive plans rewarding attendance, an employee may not be disqualified solely for having taken bona fide FMLA leave. The statute states that the taking of leave shall not result in the loss of any employment benefit accrued prior to the date the FMLA leave commences. To the extent an employee had perfect attendance before the FMLA leave begins, the employee is entitled to continue eligibility for perfect attendance upon return from leave and may not be disqualified from the bonus because of taking leave. Illnesses that do not meet the definition of a serious health condition do not enjoy FMLA's protection in this regard.

I hope that the above addresses your constituent's concerns and conveys fully the Department's position with respect to these concerns. I would be glad to address any further questions you or your constituent may have.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosure

§ 825.114 What is a "serious health condition" entitling an employee to FMLA leave?

(a) For purposes of FMLA. "serious health condition" entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves:

(1) ***Inpatient care*** (*i.e.*, an overnight stay) in a hospital, hospice, **or** residential medical care facility, including any period of ***incapacity*** (for purposes of this section, defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom). or any subsequent treatment in connection with such inpatient care: **or**

(2) ***Continuing treatment*** by a health care provider. A serious health condition involving continuing treatment by a health care provider includes any one **or** more of the following:

(i) A period of ***incapacity*** (*i.e.*, inability to work, attend school **or** perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, **or** by a provider of health care services (*e.g.*, **physical therapist) under orders** of, **or** on referral by, a health care provider; or

(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

(ii) Any period of incapacity due to pregnancy, or for prenatal care.

(iii) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(A) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

(B) Continues over an extended period of time (including recurring episodes of a single underlying condition): and

(C) May cause episodic rather than a continuing period of incapacity (*e.g.*, asthma, diabetes, epilepsy. ***etc.).***

(iv) A period of incapacity which is permanent **or** long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages ***of*** a disease.

(v) Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider **or** by a provider of health care services under orders of, **or** on referral by, a health care provider, either for restorative surgery after an accident or other injury, **or** for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy. radiation, ***etc.),*** severe arthritis (physical therapy), kidney disease (dialysis).

(b) Treatment for purposes of paragraph (a) of this section includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations ***of*** the condition. Treatment does not include routine physical examinations, eye examinations, **or dental examinations. Under** paragraph (a)(2)(i)(B), a regimen of continuing treatment includes, for example, a course of prescription medication (*e.g.*, an antibiotic) or therapy requiring special equipment to resolve **or** alleviate the health condition (*e.g.*, oxygen). **A** regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, **or** salves: or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not. by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(c) Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic

surgery) are not "serious health conditions" unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease. *etc.*, are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness resulting from stress or allergies may be serious health conditions, but only if all the conditions of this section are met.

(d) Substance abuse may be a serious health condition if the conditions of this section are met. However. FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

(e) Absences attributable to incapacity under paragraphs (a)(2) (ii) or (iii) qualify for FMLA leave even though the employee or the immediate family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

5825.115 What does it mean that "the employee is unable to perform the functions of the position of the employee'?

An employee is "unable to perform the functions of the position" where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq.*. and the regulations at 29 CFR §1630.2(n). An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment. An employer has the option, in requiring certification from a health care provider, to provide a statement of the essential functions of the employee's position for the health care provider to review. For purposes of FMLA, the essential functions of the employee's position are to be determined with reference to the position the employee held at the time notice is given or leave commenced, whichever is earlier.

§ 825.116 What does it mean that an employee is "needed to care for" a family member?

(a) The medical certification provision that an employee is "needed to care for" *a* family member encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic. or nutritional needs or safety, or is unable to transport himself or herself to the doctor, etc. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or **parent with a serious health condition** who is receiving inpatient or home care.

(b) The term also includes situations where the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home.

(c) An employee's intermittent leave or a reduced leave schedule necessary to care for a family member includes not only a situation where the family member's condition itself is intermittent, but also where the employee is only needed intermittently—such as where other care is normally available, or care responsibilities are shared with another member of the family or a third party.

Appendix B

Regulating Agency: U.S. Department of Labor, Employment Standards Administration, Wage & Hour Division

Citation: 29 C.F.R. § 825.203; FMLA Opinion Letters #29 and #67

Authority: 29 U.S.C. § 2612(b).

Description of Problem:

In the opinion letters #29 and #67, the Department of Labor has taken the position that the 12 weeks of FMLA leave taken as reduced schedule leave can be stretched over an entire year, which would result in a full-time position being converted to a part-time position indefinitely, with group health care benefits that are normally reserved for full-time employees. See 29 U.S.C. Section 2614 (c)(1). Additionally, many employees have sought to avoid overtime indefinitely, or for a particular part of the year, such as during deer hunting season, by using intermittent or reduced schedule leave.

Proposed Solution:

Clarify that employees can not use FMLA leave to convert a full-time job to a part-time job. Allow employers to deny intermittent or reduced schedule leave when working full-time is an essential function of the job, or when the intermittent or reduced schedule leave creates an undue hardship. Limit the continuation of group health care coverage to the first three months of FMLA leave.

Estimate of Economic Impact:

Adopting the suggested solutions would result in a reduction in overtime other employees must work, and the burden other employees must incur, to perform the work that needs to be done due to the employee's **absence.** Other economic benefits would include greater continuity in work, which would otherwise be interrupted by reduced schedule leave.

February 7, 1994

FMLA.29c

We regret the delay in responding to your comments regarding the Family and Medical Leave Act (FMLA) regulations. Your letter was included in our official rulemaking record on the interim final FMLA regulations.

You asked if the intermittent leave provisions of FMLA supersede the Americans With Disabilities Act's (ADA) "essential functions" and "undue hardship" provisions. Initially, we would note that nothing in FMLA modifies or affects any Federal or State law prohibiting discrimination on the basis of disability, including the ADA. See § 825.702 of the FMLA regulations, **29** CFR 825. An employer covered by both statutes (FMLA and ADA) must, therefore, comply with whichever statute provides the greater rights to employees.

In your example, a full-time employee is diagnosed with a kidney disease, All health care providers determine that the employee needs dialysis treatments each Monday and Friday afternoon, which cannot be rescheduled. Attending to the dialysis treatments would make the employee unable to perform an essential job function (*e.g.*, serve as security guard; take a machine reading; *etc.)*, which duties also cannot be rescheduled or reassigned. The employer has no alternative job in which to place this employee that would better accommodate the employee's need for intermittent leave. You suggest that if the employee requests FMLA leave every Monday and Friday afternoon for the dialysis treatments and incurs no other need for FMLA-qualifying leave, the employee's right to take job-protected leave under FMLA could last forever because the employee would never use 12 weeks of leave in any 12-month period.

You are correct in your analysis of FMLA's job protections in this case. FMLA entitles eligible employees to take leave because of a "serious health condition," as defined in § 825.114, that makes the employee unable to perform the functions of the employee's job. As discussed in § 825.1**17,** employees who need to take FMLA leave intermittently or on a reduced leave schedule for such purposes must attempt to schedule their leave so as not to disrupt the employer's operations. In addition, an employer may assign an employee to an alternative position with equivalent pay and benefits that better accommodates the employee's need for intermittent leave or leave on a reduced leave schedule. If an employee is temporarily transferred to an alternative position to better accommodate the intermittent leave, the employee cannot be required to take more leave than is medically necessary. The rules for determining the amount of leave used when **an** employee takes leave intermittently or on a reduced leave schedule are discussed in § 825.205.

If the employee in your example is eligible for leave and cannot reschedule the leave because of medical necessity, and the employer has no alternative position available, the employee is entitled to take job-protected leave on an intermittent basis under FMLA until 12 workweeks of leave have been used in a 12-month period. If the employee never uses as much as 12 workweeks of FMLA leave in a 12-month period, the employee would never exhaust his or her statutory entitlement to take FMLA leave. As discussed in § 825.220 of the FMLA regulations, an employer is prohibited from interfering with, restraining, or denying the exercise (or attempts to exercise) any rights provided by FMLA, and from discriminating against employees who use FMLA leave.

We hope that the foregoing information satisfactorily responds to your inquiry. Please note, however, that the FMLA does not diminish any greater family or medical leave rights that apply to employees under the terms of an applicable collective bargaining agreement or employer plan or policy, or applicable State law, nor does FMLA diminish an employer's obligations to comply with applicable Federal or State anti-discrimination laws. The above information is based strictly on our reading of the without regard to the possible applicability of any greater family or medical leave rights or anti-discrimination protections available under other Federal or State laws or employer plans or policies. The FMLA was not intended to discourage employers from adopting policies that provide greater family or medical leave benefits than those provided by the FMLA. To obtain further information on Federal anti-discrimination laws such as the ADA, we would encourage you to contact the nearest office of the U.S. Equal Employment Opportunity Commission.

Sincerely,

J. DEAN SPEER

Director, Division of
Policy and Analysis

July 21, 1995

FMLA - 67

Thank you for your letters about the Family and Medical Leave Act of 1993 (FMLA). In your November 18, 1994, letter, you specifically request guidance on two issues that involve the counting of FMLA leave and job reinstatement rights. In your January 11, 1995, letter, you request copies of opinion letters issued under FMLA. We regret the delay in our response to your letters.

The FMLA allows up to 12 workweeks of unpaid, job-protected leave in any 12-months -- with group health insurance coverage maintained during the leave -- to eligible employees for specified family and medical reasons.

Private sector employers are covered under FMLA if they have employed at least 50 employees during 20 or more calendar workweeks in the current or the preceding calendar year. **All** public-sector employers are covered regardless of the number of employees.

Employees are eligible under FMLA if they have worked for a covered employers for at least 12 months (which need not be consecutive months), have worked at least 1,250 hours during the I2 months preceding the start of leave, and are employed at a worksite where the employer employs at least 50 employees within 75 miles.

Unpaid FMLA leave must be granted to an eligible employee for any of the following reasons: (1) for the birth of a son or daughter, and to care for the newborn child; (2) for placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child; (3) to care for the employee's spouse, son or daughter, or parent, who has a serious health condition; and (4) for a serious health condition that makes the employee unable to perform one or more of the essential functions of his/her job.

Upon return from FMLA leave, the employee is entitled to be restored to the same position that the employee held when leave commenced, or to an equivalent position with equivalent pay, benefits, and other terms and conditions of employment.

Sections 101(11)(A) and (B) of FMLA define serious health condition to mean either "inpatient care in a hospital, hospice, or residential medical care facility" or "continuing treatment by a health care provider." Son or daughter is defined under

Section 101(12) of FMLA and under Regulations, 29 CFR 825.113(c) to be a child who either is under 18 years of age or is "18 years of age or older and incapable of self-care because of a mental or physical disability." For an eligible employee to be entitled to take FMLA leave to care for a son or daughter with a serious health condition, the statute and regulations require that the statutory definition of "son or daughter" be met. A parent may be entitled to FMLA leave to care for an adult child with a serious health condition if the child is incapable of self-care because of a mental or physical disability within the meaning of the Americans with Disability Act (ADA), at 42 U.S.C. 12101, and regulations promulgated by the Equal Employment Opportunity Commission (EEOC), at 29 CFR 1630.

Given the above-mentioned provisions of FMLA, we will assume that the employee in question is eligible and the reason for taking leave is a qualifying event under FMLA.

Issue 1:

Q. Where an employer and employee have agreed that the employee would continue to work out of the office between time spent caring for a seriously ill child, is it proper to include the hours the employee worked when on leave toward the employee's 12 week maximum under the FMLA?

A. No. Only the amount of leave actually taken may be charged as FMLA leave. The amount of time that the employee is "suffered and permitted" to work for the employer, whether requested or not by the employer, must be counted as "hours worked" pursuant to the Fair Labor Standards Act (FLSA) Interpretative Bulletin, section 785.11 of 29 CFR Part 785. This means that the eight hours per day in the hospital and the time at home that the employee was "suffered and permitted to work" for the employer would be considered hours worked under the FLSA (see 29 CFR 785.12 for work performed away from the premises or job site) and this amount of time could not be counted against the employee's 12-week FMLA leave allowance.

Leave taken under FMLA may be taken on an intermittent or on a reduced leave schedule. Because the FMLA leave in question appears to be on a reduced **leave** schedule, anmple of how leave may be counted against the 12-workweek annual allowance may be helpful. Section 825.205(a) of Regulations, 29 CFR Part 825, provides examples of how such leave would be credited against the 12-workweek allowance. If a full-time employee who normally works eight-hour days switched to a half-time (four hours per day) reduced leave schedule, only 1/2 week of FMLA leave could be charged each week. In this example, it would take 24 weeks to exhaust

the employee's 12-workweek FMLA leave allowance if no other FMLA leave was taken during the 12-month period. In another example, if an employee who normally works five days a week takes off one day a week, the employee would use 1/5 a week of FMLA leave. If the employee in this example used no other FMLA leave during the 12-month period, the employee could be on this schedule for 52-weeks in the designated 12-month period without exhausting his or her 12-workweek allowance.

Issue 2:

Q. Under FMLA, does an employee have the right to return to the same or similar job if the total amount of leave exceeds the 12-week maximum where eight weeks of leave was taken by the employee to care for a seriously ill child, and the additional time is being taken for a stress-related disability caused by the employer's harassment of the employee for taking the initial eight weeks of family leave to care for her sick child?

A. No. The FMLA entitles eligible employees to take FMLA leave of up to 12 workweeks in any 12 month period for qualifying medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition. Once the 12-workweek FMLA allowance has been exhausted in the 12-month period, FMLA benefits and protections cease.

Section 105 of FMLA, however, makes it unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided under FMLA, or to discriminate against any employee who uses FMLA leave. Based on this statutory provision, FMLA leave may not be the basis of an employer's disciplinary action. The FMLA Regulations at 29 CFR 825.220(c) provide that employers cannot use the taking of FMLA leave as a negative factor in employment actions; nor can the FMLA leave be counted under any "no fault" attendance policies.

As a special note, Regulations 29 CFR 825.208 provide that an employer may designate the leave of absence of an eligible employee as FMLA leave as soon as the employer has knowledge that the purpose of the leave is for **an FMLA** reason. This section further provides that the designation should be made before the leave is taken or before an extension of leave is granted, unless the employer does not have sufficient information to determine the reason for the leave until after the leave commences. Under no circumstances may the employer with sufficient information prior to the start of leave or at some point during the

leave designate leave as FMLA leave after the leave has been completed. Accordingly, section 825.301(c) under the interim final rule (or 825.301(b) under the final rule which became effective on April 6, 1995) requires the employer to provide a written notice to the employee that details the employee's obligation while on FMLA leave. This notice must also be given to the employee at the time the employer has sufficient information from the employee to know that the leave is for a FMLA-qualifying reason. Failure to provide notice to an employee that the leave is designated as FMLA leave would mean that the leave of absence may not be counted against the employee's 12-workweek FMLA leave allowance, but the employee remains subject to the FMLA's protections. See, in particular, section 825.208(c) of 29 CFR Part 825.

Please be advised that the State of California has its own family and medical leave law. The statute at Section 401(b) and Regulations at section 29 CFR 825.701(a) both state that FMLA shall not supersede any provision of any State or local law that provides greater family or medical leave rights. Should you require assistance interpreting California's law you may contact the Fair Employment and Housing Commission. Contacts at the commission that may assist you are Prudence Poppink, Senior Counsel, telephone number at (415) 557-1344 or Earl Sullaway, Deputy Director, telephone number (916) 227-2878.

I hope this letter has provided enough guidance for you to make a determination as to the employee's entitlement to FMLA leave, the amount of FMLA leave the employee may have taken during the period in question, and whether the employer properly designated the leave and gave written notice under the Federal law. If you require further assistance, you may contact me. As you have requested, enclosed are 60 FMLA opinion letters that have been issued through May 2, 1995.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

Enclosures

Appendix C

Regulating Agency: Equal Employment Opportunity Commission

Citation: Policy Statement on Mandatory Binding Arbitration as a Condition of Employment (July 10, 1997)

Authority: The Commission has enforcement authority over Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e — 2000e—17; the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 – 634; Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111 – 12117; and the Equal Pay Act (EPA), 29 U.S.C. § 206(d).

Description of Problem:

Since the Supreme Court approved mandatory arbitration of employment disputes in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), some employers have adopted — and others are considering — alternative dispute resolution (ADR) programs with a mandatory arbitration component. Early last year, the Court confirmed again its confidence in arbitration as an effective – and perhaps superior – method of resolving workplace disputes. In *Circuit City v. Adams*, 532 U.S. 105 (2001), Justice Kennedy wrote for the Court that "Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts. . ." In so doing, the Court referred favorably to "alternative dispute resolution procedures adopted by many of the Nation's employers."

Despite the Court's ringing endorsement, the Equal Employment Opportunity Commission (EEOC) unwaveringly opposes the enforcement of such agreements, even going so far as to describe them as "inconsistent with the civil rights laws." Policy Statement on Mandatory Binding Arbitration as a Condition of Employment (EEOC, July 10, 1997) at 1. The Court held unequivocally in *Gilmer* that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." 500 U.S. at 26 (emphasis added). Nevertheless, the EEOC continues to maintain that requiring employees to agree to arbitration as a condition of employment deprives them of a statutory right to bring their claims in court.

The Court's recent decision in *EEOC v. Waffle House, Inc.*, 122 S. Ct. 754 (2002), holding that the EEOC is not bound by a charging party's agreement to arbitrate employment-related claims, illustrates that there are roles in employment discrimination law enforcement for both the EEOC and private arbitration agreements. It is time that the EEOC accepted the coexistence of these dual roles.

Proposed Solution:

Rescind the guidance.

Estimate of Economic Impact:

The cost of defending against an unwarranted charge or lawsuit by the EEOC, which has pursued a number of companies for having lawful arbitration programs, can be significant.

EEOC NOTICE
Number 915.002
Date July 10, 1997

1. SUBJECT: Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment

2. PURPOSE: This policy statement sets out the Commission's policy on the mandatory binding arbitration of employment discrimination disputes imposed as a condition of employment.

3. EFFECTIVE DATE: Upon issuance.

4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.

5. ORIGINATOR: Coordination and Guidance Programs, Office *of* Legal Counsel.

6. INSTRUCTIONS: File in Volume II of the EEOC Compliance Manual.

7. SUBJECT MATTER:

The United States Equal Employment Opportunity Commission (EEOC or Commission), the federal agency charged with the interpretation and enforcement *of* this nation's employment discrimination laws, has taken the position that agreements that mandate binding arbitration of discrimination claims as a condition of employment are contrary to the fundamental principles evinced in these laws. EEOC Motions on Alternative Dispute Resolution, Motion 4 (adopted Apr. 25, 1995), 80 Daily Lab. Rep. (BNA) E-1 (Apr. 26, 1995).1 This policy statement sets out in further detail the basis for the Commission's position.

I. Background

An increasing number of employers are requiring as a condition of employment that applicants and employees give up their right **to** pursue employment discrimination claims in court and agree to resolve disputes through binding arbitration. These agreements may be presented in the form of an employment contract or be included in an employee handbook or elsewhere. Some employers have even included such agreements in employment applications. The use of these agreements is not limited

to particular industries, but can be found in various sectors of the workforce, including, for example, the securities industry, retail, restaurant and hotel chains, health care, broadcasting, and security services. Some individuals subject to mandatory arbitration agreements have challenged the enforceability of these agreements by bringing employment discrimination actions in the courts. The Commission is not unmindful of the case law enforcing specific mandatory arbitration agreements, in particular, the Supreme Court's decision in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 33 (1991).2 Nonetheless, for the reasons stated herein, the Commission believes that such agreements are inconsistent with the civil rights laws.

II. The Federal Civil Rights Laws Are Squarely Based In This Nation's History And Constitutional Framework And Are Of A

Singular National Importance

Federal civil rights laws, including the laws prohibiting discrimination in employment, play a unique role in American jurisprudence. They flow directly from core Constitutional principles, and this nation's history testifies to their necessity and profound importance. Any analysis of the mandatory arbitration of rights guaranteed by the employment discrimination laws must, at the outset, be squarely based in an understanding of the history and purpose of these laws.

Title VII of the historic Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., was enacted to ensure equal opportunity in employment, and to secure the fundamental right to equal protection guaranteed by the Fourteenth Amendment to the Constitution.3 Congress considered this national policy against discrimination to be of the "highest priority" (Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968)), and of "paramount importance" (H.R. Rep. No. 88-914, pt. 2 (1963) (separate views of Rep. McCulloch et al.)),4 reprinted in 1964 Leg. Hist. at 2123.5 The Civil Rights Act of 1964, 42 U.S.C. § 2000a et seq., was intended to conform "[t]he practice of American democracy . . . to the spirit which motivated the Founding Fathers of this Nation -- the ideals of freedom, equality, justice, and opportunity." H.R. Rep. No. 88-914, pt. 2 (1963) (separate views of Rep. McCulloch et al.), reprinted in 1964 Leq. Hist. at 2123. President John F. Kennedy, in addressing the nation regarding his intention to introduce a comprehensive civil rights bill, stated the issue as follows:

> We are confronted primarily with a moral issue. It is as old as the Scriptures and it is as clear as the American Constitution.
>
> The heart of the question is whether all Americans are to be afforded equal rights and equal opportunities, whether we are going to treat our fellow Americans as we want to be treated.

President John F. Kennedy's Radio and Television Report to the American People on Civil Rights (June 11, 1963), Pub. Papers 468, 469 (1963).6

Title VII is but one of several federal employment discrimination laws enforced by the Commission which are "part of a wider statutory scheme to protect employees in the workplace nationwide," McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 357 (1995). See the Equal Pay Act of 1963 ("EPA"), 29 U.S.C. § 206(d); the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621 et seq.; and the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101 et seq. The ADEA was enacted "as part of an ongoing congressional effort to eradicate discrimination in the workplace" and "reflects a societal condemnation of invidious bias in employment decisions." McKennon, 513 U.S. at 357. The ADA explicitly provides that its purpose is, in part, to invoke congressional power to enforce the Fourteenth Amendment. 29 U.S.C. § 12101(b)(4). Upon signing the ADA, President George Bush remarked that "the American people have once again given clear expression to our most basic ideals of freedom and equality." President George Bush's Statement on Signing the Americans with Disabilities Act of 1990 (July 26, 1990), Pub. Papers 1070 (1990 Book II).

III. The Federal Government Has The Primary Responsibility For The Enforcement Of The Federal Employment Discrimination Laws

The federal employment discrimination laws implement national values of the utmost importance through the institution

of public and uniform standards of equal opportunity in the workplace. See text and notes supra in Section 11. Congress explicitly entrusted the primary responsibility for the interpretation, administration, and enforcement of these standards, and the public values they embody, to the federal government. It did so in three principal ways. First, it created the Commission, initially giving it authority to investigate and conciliate claims of discrimination and to interpret the law, see §§ 706(b) and 713 of Title VII, 42 U.S.C. §§ 2000e-5(b) and 2000e-12, and subsequently giving it litigation authority in order to bring cases in court that it could not administratively resolve, see § 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1). Second, Congress granted certain enforcement authority to the Department of Justice, principally with regard to the litigation of cases involving state and local governments. See §§ 706(f)(1) and 707 of Title VII, 42 U.S.C. §§ 2000e-5(f)(1) and 2000e-6. Third, it established a private right of action *to* enable aggrieved individuals to bring their claims directly in the federal courts, after first administratively bringing their claims to the Commission. See § 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1).7

While providing the states with an enforcement role, see 42 U.S.C. §§ 2000e-5(c) and (d), as well as recognizing the importance of voluntary compliance by employers, see 42 U.S.C. § 2000e-5(b), Congress emphasized that it is the federal government that has ultimate enforcement responsibility. As Senator Humphrey stated, "[t]he basic rights protected by [Title VII] are rights which accrue to citizens of the United States; the Federal Government has the clear obligation to see that these rights are fully protected." 110 Cong. Rec. 12725 (1964). Cf. General Tel. Co. v. EEOC, 446 U.S. 318, 326 (1980) (in bringing enforcement actions under Title VII, the EEOC "is guided by 'the overriding public interest in equal employment opportunity . . . asserted through direct Federal enforcement'") (quoting 118 Cong. Rec. 4941 (1972)).

The importance of the federal government's role in the enforcement of the civil rights laws was reaffirmed by Congress in the ADA, which explicitly provides that its purposes include "ensur[ing] that the Federal Government plays a central role in enforcing the standards established in [the ADA] on behalf of individuals with disabilities." 42 U.S.C. § 12101(b)(3).

IV. Within This Framework, The Federal Courts Are Charged With The Ultimate Responsibility For Enforcing The Discrimination Laws

While the Commission is the primary federal agency responsible for enforcing the employment discrimination laws, the courts have been vested with the final responsibility for statutory enforcement through the construction and interpretation of the statutes, the adjudication of claims, and the issuance of relief.8 See, e.g., Kremer v. Chemical Constr. Corp., 454 U.S. 461, 479 n.20 (1982) ("federal courts were entrusted with ultimate enforcement responsibility" of Title VII); New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 64 (1980) ("Of course the 'ultimate authority' to secure compliance with Title VII resides in the federal courts").9

A. The Courts Are Responsible For The Development And Interpretation Of The Law

As the Supreme Court emphasized in Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974), "the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with

respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts." This principle applies equally to the other employment discrimination statutes.

While the statutes set out the basic parameters of the law, many of the fundamental legal principles in discrimination jurisprudence have been developed through judicial interpretations and case law precedent. Absent the role of the courts, there might be no discrimination claims today based on, for example, the adverse impact of neutral practices not justified by business necessity, see Griggs v. Duke Power Co., 401 U.S. 424 (1974), or sexual harassment, see Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993); Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986). Yet these two doctrines have proved essential to the effort to free the workplace from unlawful discrimination, and are broadly accepted today as key elements of civil rights law.

B. The Public Nature Of The Judicial Process Enables The Public, Higher Courts, And Congress To Ensure That The Discrimination Laws Are Properly Interpreted And Applied

Through its public nature -- manifested through published decisions -- the exercise of judicial authority is subject to public scrutiny and to system-wide checks and balances designed to ensure uniform expression of and adherence to statutory principles. When courts fail to interpret or apply the antidiscrimination laws in accord with the public values underlying them, they are subject to correction by higher level courts and by Congress.

These safeguards are not merely theoretical, but have enabled both the Supreme Court and Congress to play an active and continuing role in the development of employment discrimination law. Just a few of the more recent Supreme Court decisions overruling lower court errors include: Robinson v. Shell Oil Co., 117 S. Ct. 843 (1997) (former employee may bring a claim for retaliation); O'Connor v. Consolidated Coin Caterers, Corp., 116 S. Ct. 1307 (1996) (comparator in age discrimination case need not be under forty); McKennon, 513 U.S. 352 (employer may not use after-acquired evidence to justify discrimination); and Harris 510 U.S. 17 (no requirement that sexual harassment plaintiffs prove psychological injury *to* state a claim).

Congressional action to correct Supreme Court departures from congressional intent has included, for example, legislative amendments in response to Court rulings that: pregnancy discrimination is not necessarily discrimination based on sex (General Elec. Co. v. Gilbert, 429 U.S. 125 (1978), and Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), overruled by Pregnancy Discrimination Act of 1978); that an employer does not have the burden of persuasion on the business necessity of an employment practice that has a disparate impact (Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), overruled by §§ 104 and 105 of the Civil Rights Act of 1991); that an employer avoids liability by showing that it would have taken the same action absent any discriminatory motive (Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), overruled, in part, by § 107 of the Civil Rights Act *of* 1991); that mandatory retirement pursuant to a benefit plan in effect prior to enactment of the ADEA is not prohibited age discrimination (United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977), overruled by 1978 ADEA amendments); and, that age discrimination in fringe benefits is not unlawful (Public Employees Retirement Sys. of Ohio v. Betts, 492 U.S. 158 (1989), overruled by Older Workers Benefits Protection Act of 1990).

C. The Courts Play A Crucial Role In Preventing And Deterring Discrimination And In Making Discrimination Victims Whole

The courts also play a critical role in preventing and deterring violations of the law, as well as providing remedies for discrimination victims. By establishing precedent, the courts give valuable guidance to persons and entities covered by the laws regarding their rights and responsibilities, enhancing voluntary compliance with the laws. By awarding damages, backpay, and injunctive relief as a matter of public record, the courts not only compensate victims of discrimination, but provide notice to the community, in a very tangible way, of the costs of discrimination. Finally, by issuing public decisions and orders, the courts also provide notice of the identity of violators of the law and their conduct. As has been illustrated time and again, the risks of negative publicity and blemished business reputation can be powerful influences on behavior.

D. The Private Right Of Action With Its Guarantee Of Individual Access To The Courts Is Essential To The Statutory Enforcement Scheme

The private right of access to the judicial forum to adjudicate claims is an essential part of the statutory enforcement scheme. See, e.g., McKennon, 513 U.S. at 358 (granting a right of action to an injured employee is "a vital element" of Title VII, the ADEA, and the EPA). The courts cannot fulfill their enforcement role if individuals do not have access to the judicial forum. The Supreme Court has cautioned that, "courts should ever be mindful that Congress . . . thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum." Gardner-Denver, 415 U.S. at 60 n.21.10

Under the enforcement scheme for the federal employment discrimination laws, individual litigants act as "private attorneys general." In bringing a claim in court, the civil rights plaintiff serves not only her or his private interests, but also serves as "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'" Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 418 (1978) (quoting Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968)). See also McKennon, 513 U.S. at 358 ("[t]he private litigant who seeks redress for his or her injuries vindicates both the deterrence and compensation objectives of the ADEA").

V. Mandatory Arbitration Of Employment Discrimination Disputes "Privatizes" Enforcement Of The Federal Employment Discrimination Laws, Thus Undermining Public Enforcement Of The Laws

The imposition of mandatory arbitration agreements as a condition *of* employment substitutes a private dispute resolution system for the public justice system intended by Congress to govern the enforcement of the employment discrimination laws. The private arbitral system differs in critical ways from the public judicial forum and, when imposed as a condition of employment, it is structurally biased against applicants and employees.

A. Mandatory Arbitration Has Limitations That Are Inherent And Therefore Cannot Be Cured By The Improvement Of Arbitration Systems

That arbitration is substantially different from litigation in the judicial forum is precisely the reason for its use as a

form of ADR. Even the fairest of arbitral mechanisms will differ strikingly from the judicial forum.

1. The Arbitral Process Is Private In Nature And Thus Allows For Little Public Accountability

The nature of the arbitral process allows -- by design -- for minimal, if any, public accountability of arbitrators or arbitral decision-making. Unlike her or his counterparts in the judiciary, the arbitrator answers only to the private parties to the dispute, and not to the public at large. As the Supreme Court has explained:

> A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept.
>
> He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. . . .

United Steelworkers of *Am.* v. Warrior and Gulf Navigation Co., 363 U.S. 574, 581 (1960) (quoting from Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv. L. Rev. 999, 1016 (1955)).

The public plays no role in an arbitrator's selection; s/he is hired by the private parties to a dispute. Similarly, the arbitrator's authority is defined and conferred, not by public law, but by private agreement.11 While the courts are charged with giving force to the public values reflected in the antidiscrimination laws, the arbitrator proceeds from a far narrower perspective: resolution of the immediate dispute. As noted by one commentator, "[a]djudication is more likely to do justice than . . . arbitration . . . precisely because it vests the power of the state in officials who act as trustees for the public, who are highly visible, and who are committed to reason." Owen Fiss, Out of Eden, 94 Yale L.J. 1669, 1673 (1985).

Moreover, because decisions are private, there is little, if any, public accountability even for employers who have been determined to have violated the law. The lack of public disclosure not only weakens deterrence (see discussion supra at 8), but also prevents assessment of whether practices of individual employers or particular industries are in need of reform. "The disclosure through litigation of incidents or practices which violate national policies respecting nondiscrimination in the work force is itself important, for the occurrence of violations may disclose patterns of noncompliance resulting from a misappreciation of [Title VII's] operation or entrenched resistance to its commands, either of which can be of industry-wide significance." McKennon, 513 U.S. at 358-59.

2. Arbitration, By Its Nature, Does Not Allow For The Development Of The Law

Arbitral decisions may not be required to be written or reasoned, and are not made public without the consent of the parties. Judicial review of arbitral decisions is limited to the narrowest of grounds.12 As a result, arbitration affords no opportunity to build a jurisprudence through precedent.13 Moreover, there is virtually no opportunity for meaningful scrutiny of arbitral decision-making. This leaves higher courts and Congress unable to act to correct errors in statutory interpretation. The risks for the vigorous enforcement of the civil rights laws are profound. See discussion supra at section IV. B.

3. Additional Aspects *Of* Arbitration Systems Limit

Claimants' Rights In Important Respects

Arbitration systems, regardless of how fair they may be, limit the rights of injured individuals in other important ways. To begin with, the civil rights litigant often has available the choice to have her or his case heard by a jury of peers, while in the arbitral forum juries are, by definition, unavailable. Discovery is significantly limited compared with that available in court and permitted under the Federal Rules of Civil Procedure. In addition, arbitration systems are not suitable for resolving class or pattern or practice claims of discrimination. They may, in fact, protect systemic discriminators by forcing claims to be adjudicated one at a time, in isolation, without reference to a broader -- and more accurate -- view of an employer's conduct.

B. Mandatory Arbitration Systems Include Structural Biases Against Discrimination Plaintiffs

In addition to the substantial and inevitable differences between the arbitral and judicial forums that have already been discussed, when arbitration of employment disputes is imposed as a condition of employment, bias inheres against the employee.14

First, the employer accrues a valuable structural advantage because it is a "repeat player." The employer is a party to arbitration in all disputes with its employees. In contrast, the employee is a "one-shot player"; s/he is a party to arbitration only in her or his own dispute with the employer. As a result, the employee is generally less able to make an informed selection of arbitrators than the employer, who can better keep track of an arbitrator's record. In addition, results cannot but be influenced by the fact that the employer, and not the employee, is a potential source of future business for the arbitrator.15 A recent study of nonunion employment law cases16 found that the more frequent a user of arbitration an employer is, the better the employer fares in arbitration.17

In addition, unlike voluntary post-dispute arbitration -- which must be fair enough to be attractive to the employee -- the employer imposing mandatory arbitration is free to manipulate the arbitral mechanism to its benefit. The terms of the private agreement defining the arbitrator's authority and the arbitral process are characteristically set by the more powerful party, the very party that the public law seeks to regulate. We are aware of no examples of employees who insist on the mandatory arbitration of future statutory employment disputes as a condition of accepting a job offer -- the very suggestion seems far-fetched. Rather, these agreements are imposed by employers because they believe them to be in their interest, and they are made possible by the employer's superior bargaining power. It is thus not surprising that many employer-mandated arbitration systems fall far short of basic concepts of fairness. Indeed, the Commission has challenged -- by litigation, amicus curiae participation, or Commissioner charge -- particular mandatory arbitration agreements that include provisions flagrantly eviscerating core rights and remedies that are available under the civil rights laws.18

The Commission's conclusions in this regard are consistent with those of other analyses of mandatory arbitration. The Commission on the Future of Worker-Management Relations (the "Dunlop Commission") was appointed by the Secretary of Labor and the Secretary of Commerce to, in part, address alternative means to resolve workplace disputes. In its Report and Recommendations (Dec. 1994) ("Dunlop Report"), the Dunlop Commission found that recent employer experimentation with arbitration has produced a range of programs that include "mechanisms that appear to be of

dubious merit for enforcing the public values embedded in our laws." Dunlop Report at 27. In addition, a report by the U.S. General Accounting Office, surveying private employers' use *of* ADR mechanisms, found that existing employer arbitration systems vary greatly and that "most" do not conform to standards recommended by the Dunlop Commission to ensure fairness. See "Employment Discrimination: Most Private-Sector Employers Use Alternative Dispute Resolution" at 15, HEHS-95-150 (July 1995).

The Dunlop Commission strongly recommended that binding arbitration agreements not be enforceable as a condition of employment:

> The public rights embodied in state and federal employment law -- such as freedom from discrimination in the workplace . . . -- are an important part of the social and economic protections of the nation. Employees required to accept binding arbitration of such disputes would face what for many would be an inappropriate choice: give up your right to go to court, or give up your job.

Dunlop Report at 32. The Brock Commission (see supra n.13) agreed with the Dunlop Commission's opposition to mandatory arbitration of employment disputes and recommended that all employee agreements to arbitrate be voluntary and post-dispute. Brock Report at 81-82. In addition, the National Academy of Arbitrators recently issued a statement opposing mandatory arbitration as a condition of employment "when it requires waiver of direct access to either a judicial or administrative forum for the pursuit *of* statutory rights." See National Academy of Arbitrators' Statement and Guidelines (adopted May 21, 1997), 103 Daily Lab. Rep. (BNA) E-1 (May 29, 1997).

C. Mandatory Arbitration Agreements Will Adversely Affect The Commission's Ability To Enforce The Civil Rights Laws

The trend to impose mandatory arbitration agreements as a condition of employment also poses a significant threat to the EEOC's statutory responsibility to enforce the federal employment discrimination laws. Effective enforcement by the Commission depends in large part on the initiative of individuals to report instances of discrimination to the Commission. Although employers may not lawfully deprive individuals of their statutory right to file employment discrimination charges with the EEOC or otherwise interfere with individuals' protected participation in investigations or proceedings under these laws,19 employees who are bound by mandatory arbitration agreements may be unaware that they nonetheless may file an EEOC charge. Moreover, individuals are likely to be discouraged from coming to the Commission when they know they will be unable to litigate their claims in court.20 These chilling effects on charge filing undermine the Commission's enforcement efforts by decreasing channels of information, limiting the agency's awareness of potential violations *of* law, and impeding its ability to investigate possible unlawful actions and attempt informal resolution.

VI. Voluntary, Post-Dispute Agreements To Arbitrate Appropriately Balance The Legitimate Goals Of Alternate Dispute Resolution And The Need To Preserve The Enforcement Framework Of The Civil Rights Laws

The Commission is on record in strong support of voluntary alternative dispute resolution programs that resolve employment discrimination disputes in a fair and credible manner, and are entered into after a dispute has arisen. We reaffirm that support here. This position is based on the recognition that while even the best arbitral systems do not afford the benefits of the judicial system, well-designed ADR programs, including

binding arbitration, can offer in particular cases other valuable benefits to civil rights claimants, such as relative savings in time and expense.21 Moreover, we recognize that the judicial system is not, itself, without drawbacks. Accordingly, an individual may decide in a particular case to forego the judicial forum and resolve the case through arbitration. This is consistent with civil rights enforcement as long as the individual's decision is freely made after a dispute has arisen.22

VII. Conclusion

The use of unilaterally imposed agreements mandating binding arbitration of employment discrimination disputes as a condition of employment harms both the individual civil rights claimant and the public interest in eradicating discrimination. Those whom the law seeks to regulate should not be permitted to exempt themselves from federal enforcement of civil rights laws. Nor should they be permitted to deprive civil rights claimants of the choice to vindicate their statutory rights in the courts -- an avenue of redress determined by Congress to be essential to enforcement.

Processing Instructions For The Field And Headquarters

1. Charges should be taken and processed in conformity with priority charge processing procedures regardless of whether the charging party has agreed to arbitrate employment disputes. Field offices are instructed to closely scrutinize each charge involving an arbitration agreement to determine whether the agreement was secured under coercive circumstances (e.g., as a condition of employment). The Commission will process a charge and bring suit, in appropriate cases, notwithstanding the charging party's agreement to arbitrate.

2. Pursuant to the statement of priorities in the National Enforcement Plan, see § B(1)(h), the Commission will continue to challenge the legality of specific agreements that mandate binding arbitration of employment discrimination disputes as a condition of employment. See, e.g., Briefs of the EEOC as Amicus Curiae in Seus v. John Nuveen & Co., No. 96-CV-5971 (E.D. **Pa.)** (Br. filed Jan. 11, 1997); Gibson v. Neighborhood Health Clinics, Inc., No. 96-2652 (7th Cir.) (Br. filed Sept. 23, 1996); Johnson v. Hubbard Broadcasting, Inc., No. 4-96-107 (D. Minn.) (Br. Filed May 17, 1996); Great Western Mortgage Corp. v. ***Peacock, No.*** 96-5273 (3d Cir.) (Br. filed July 24, 1996).

/s/

Date

Gilbert F. Casellas
Chairman

1. Although binding arbitration does not, in and of itself, undermine the purposes of the laws enforced by the EEOC, the Commission believes that this is the result when it is imposed as a term or condition of employment.

2. The Gilmer decision is not dispositive of whether employment agreements that mandate binding arbitration of discrimination claims are enforceable. As explicitly noted by the Court, the arbitration agreement at issue in Gilmer was not contained in an employment contract. 500 U.S. at 25 n.2. Even

if Gilmer had involved an agreement with an employer, the issue would remain open given the active role of the legislative branch in shaping the development of employment discrimination law. See discussion infra at section IV. B.

3. See, e.g., H.R. Rep. No. 88-914, pt. 1 (1963), reprinted in United States Equal Employment Opportunity Commission, Legislative History of Title VII and XI of the Civil Rights Act of 1964 ("1964 Leg. Hist.") at 2016 (the Civil Rights Act of 1964 was "designed primarily to protect and provide more effective means to enforce. . . civil rights"); H.R. Rep. No.88-914, pt.2 (1963) (separate views of Rep. McCulloch et al.), reprinted in 1964 Leg. Hist. at 2122 ("[a] key purpose of the bill . . . is to secure to all Americans the equal protection of the laws of the United States and of the several States"); Charles & Barbara Whalen, The Longest Debate: A legislative history of the 1964 Civil Rights Act 104 (1985) (opening statement of Rep. Celler on House debate of H.R. 7152: "The legislation before you seeks only to honor the constitutional guarantees of equality under the law for all. . . . [W]hat it does is to place into balance the scales of justice so that the living force of our Constitution shall apply to all people . . . ."); H.R. Rep. No. 92-238 (1971), reprinted in Senate Committee on Labor and Public Welfare, Subcommittee on Labor, Legislative History of the Equal Employment Opportunity Act of 1972 ("1972 Leg. Hist.") at 63 (1972 amendments to Title VII are a "reaffirmation of our national policy of equal opportunity in employment").

4. William McCulloch (R-Ohio) was the ranking Republican of Subcommittee No. 5 of the House Judiciary Committee, to which the civil rights bill (H.R. 7152) was referred for initial consideration by Congress. McCulloch was among the individuals responsible *for* working out a compromise bill that was ultimately substituted by the full Judiciary Committee for the bill reported out by Subcommittee No. 5. His views, which were joined by six members of Congress, are thus particularly noteworthy.

5. See also Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975) (The Civil Rights Act of 1964 is a "complex legislative design directed at an historic evil of national proportions").

6. Commitment to our national policy to eradicate discrimination continues today to be of the utmost importance. As President Clinton stated in his second inaugural address:

> Our greatest responsibility is to embrace a new spirit of community for a new century . . . . The challenge of our past remains the challenge of our future: Will we be one Nation, one people, with one common destiny, or not? Will we all come together, or come apart?
>
> The divide of race has been America's constant curse. And each new wave of immigrants gives new targets to old prejudices . . . . These forces have nearly destroyed our Nation in the past. They plague us still.

President William J. Clinton's Inaugural Address (Jan. 20, 1997), 33 Weekly Comp. Pres. Doc. 61 (Jan. 27, 1997).

7. Section 107 *of* the ADA specifically incorporates the powers, remedies, and procedures set forth in Title VII with respect to the Commission, the Attorney General, and aggrieved individuals. See 42 U.S.C.§ 12117. Similar enforcement provisions are contained in the ADEA. See 29 U.S.C. §§ 626 and 628.

8. In addition, unlike arbitrators, courts have coercive

authority, such as the contempt power, which they can use to secure compliance.

9. See also H.R. Rep. No. 88-914, pt.2 (1963) (separate views of Rep. McCulloch et al.), reprinted in 1964 Leg. Hist. at 2150 (explaining that EEOC was not given cease-and-desist powers in the final House version of the Civil Rights Act of 1964, H.R. 7152, because it was "preferred that the ultimate determination of discrimination rest with the Federal judiciary").

10. See also 118 Cong. Rec. S7168 (March 6, 1972) (section-by-section analysis of H.R. 1746, the Equal Opportunity Act of 1972, as agreed to by the conference committees of each House; analysis of § 706(f)(1) provides that, while it is hoped that most cases will be handled through the EEOC with recourse to a private lawsuit as the exception, "as the individual's rights to redress are paramount under the provisions of Title VII it is necessary that all avenues be left open for quick and effective relief").

11. Article III of the Constitution provides federal judges with life tenure and salary protection to safeguard the independence of the judiciary. No such safeguards apply to the arbitrator. The importance of these safeguards was stressed in the debates on the 1972 amendments to Title VII. Senator Dominick, in offering an amendment giving the EEOC the right to file a civil action in lieu of cease-and-desist powers, explained that the purpose of the amendment was to "vest adjudicatory power where it belongs -- in impartial judges shielded from political winds by life tenure." 1972 Leg. Hist. at 549. The amendment was later revised in minor respects and adopted by the Senate.

12. Under the Federal Arbitration Act, arbitral awards may be vacated only for procedural impropriety such as corruption, fraud, or misconduct. 9 U.S.C. 5 10. Judicially created standards of review allow an arbitral award to be vacated where it clearly violates a public policy that is explicit, well-defined, "dominant" and ascertainable from the law, see United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 43 (1987), or where it is in "manifest disregard" of the law, see Wilko v. Swan, 346 U.S. 427, 436-37 (1953). The latter standard of review has been described by one commentator as "a virtually insurmountable" hurdle. See Bret F. Randall, The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards, 1992 BYU L. Rev. 759, 767. But cf. Cole v. Burns Int=l Sec. Servs., 105 F.3d 1465, 1486-87 (1997) (in the context of mandatory employment arbitration of statutory disputes, the court interprets judicial review under the "manifest disregard" standard to be sufficiently broad to ensure that the law has been properly interpreted and applied).

13. Congress has recognized the inappropriateness of ADR where "a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent," see Alternative Dispute Resolution Act, 5 U.S.C. § 572(b)(1) (providing for use of ADR by federal administrative agencies where the parties agree); or where "the case involves complex or novel legal issues," see Judicial Improvements and Access to Justice Act, 28 U.S.C. § 652(c)(2) (providing for court-annexed arbitration; §§ 652(b)(1) and (2) also require the parties' consent to arbitrate constitutional or statutory civil rights claims). Similar findings were made by the U.S. Secretary of Labor's Task Force on Excellence in State and Local Government Through Labor-Management Cooperation ("Brock Commission"), which was charged with examining labor-management cooperation in state and local government. The Task Force's report, "Working Together for Public Service" (1996) ("Brock Report"), recommended "Quality

Standards and Key Principles for Effective Alternative Dispute Resolution Systems for Rights Guaranteed by Public Law and for Other Workplace Disputes" which include that "ADR should normally not be used in cases that represent tests of significant legal principles or class action." Brock Report at 82.

14. A survey of employment discrimination arbitration awards in the securities industry, which requires as a condition of employment that all brokers resolve employment disputes through arbitration, found that "employers stand a greater chance of success in arbitration than in court before a jury" and are subjected to "smaller" damage awards. See Stuart H. Bompey & Andrea H. Stempel, Four Years Later: A Look at Compulsory Arbitration of Employment Discrimination Claims After Gilmer v. Interstate/Johnson Lane Corp., 21 Empl. Rel. L.J. 21, 43 (autumn 1995).

15. See, e.g., Julius G. Getman, Labor Arbitration and Dispute Resolution, 88 Yale L.J. 916, 936 (1979) ("an arbitrator could improve his chances of future selection by deciding favorably to institutional defendants: as a group, they are more likely to have knowledge about past decisions and more likely to be regularly involved in the selection process"); Reginald Alleyne, Statutory Discrimination Claims: Rights 'Waived' and Lost in the Arbitration Forum, 13 Hofstra Lab. L.J. 381, 428 (Spring 1996) ("statutory discrimination grievances relegated to . . . arbitration forums are virtually assured employer-favored outcomes," given "the manner of selecting, controlling, and compensating arbitrators, the privacy of the process and how it catalytically arouses an arbitrator's desire to be acceptable to one side").

16. Arbitration of labor disputes pursuant to a collective bargaining agreement is less likely to favor the employer as a repeat-player because the union, as collective bargaining representative, is also a repeat-player.

17. See Lisa Bingham, "Employment Arbitration: The effect of repeat-player status, employee category and gender on arbitration outcomes," (unpublished study on file with the author, an assistant professor at Indiana U. School *of* Public & Environmental Affairs).

18. Challenged agreements have included provisions that: (1) impose filing deadlines Ear shorter than those provided by statute; (2) limit remedies to "out-of-pocket" damages; (3) deny any award of attorney's fees to the civil rights claimant, should s/he prevail; (4) wholly deny or limit punitive and liquidated damages; *(5)* limit back pay to a time period much shorter than that provided by statute; (6) wholly deny or limit front pay to a time period far shorter than that ordered by courts; (7) deny any and all discovery; and (8) allow for payment by each party of one-half of the costs of arbitration and, should the employer prevail, require the claimant, in the arbitrator's discretion, to pay the employer's share of arbitration costs as well.

19. See "Enforcement Guidance on non-waivable employee rights under Equal Employment Opportunity Commission (EEOC) statutes," Vol. III EEOC Compl. Man. (BNA) at N:2329 (Apr. 10, 1997).

20. The Commission remains able to bring suit despite the existence of a mandatory arbitration agreement because it acts "to vindicate the public interest in preventing employment discrimination," General Tel., 446 U.S. at 326. Cf. S.Rep. No. 101-263 (1990), reprinted in, Legislative History of The Older Workers Benefits Protection Act, at 354 (amendment to ADEA § 626(f)(4), which provides that "no waiver agreement may affect

the Commission's rights and responsibilities to enforce [the ADEA]," was intended "as a clear statement of support for the principle that the elimination of age discrimination in the workplace is a matter of public as well as private interest"). As a practical matter, however, the Commission's ability to litigate is limited by its available resources.

21. Despite conventional wisdom to the contrary, the financial costs of arbitration can be significant and may represent no savings over litigation in a judicial forum. These costs may include the arbitrator's fee and expenses; fees charged by the entity providing arbitration services, which may include filing fees and daily administrative fees; space rental fees; and court reporter fees.

22. The Dunlop Commission similarly supported voluntary forms of ADR, but based its opposition to mandatory arbitration on the premise that the avenue of redress for statutory employment rights should be chosen by the individual rather than dictated by the employer. Dunlop Report at 33.

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Appendix D

Regulating Agency: U.S. Department of Justice, Immigration and Naturalization Service

Citation: 8 C.F.R. § 274a.2

Authority: 8 U.S.C. § 1324a

Description of Problem:

INS does not permit electronic storage of Employment Eligibility Verification "I-9" Forms. Under 8 U.S.C. § 1324a(b), INS must create, and employers must use, a form for determining whether an individual is authorized to work in the United States. Employers are required to retain an I-9 form for *each* employee until one year after the date of termination or three years after the date of hire, whichever is *longer*. Current INS regulations provide that the forms must be kept in the original hard copy or on microfilm or microfiche. 8 C.F.R. § 274a.2(b)(2)(ii).

Some time ago, INS sponsored a demonstration project to explore the use of electronic technology to produce and store I-9 forms, with no tangible results. While the agency proposed changes to the agency's 1-9 regulations in 1998, the preamble explained that the agency intentionally omitted proposing to allow electronic storage. 63 Fed. Reg. 5287, 5297 (February 2, 1998). EEAC strongly recommended at that time that the agency permit electronic storage. The regulations have not been finalized.

The INS should reexamine its position with regard to electronic imaging of 1-9 forms, and amend the employer sanctions regulations to give employers the option of retaining and producing for inspection electronically stored 1-9s. We are not suggesting that electronic storage be substituted for paper storage, but rather that it be made an option in lieu of paper storage for companies that have the capacity and technology to go to electronic records.

Electronic storage and transmission of information is now generally accepted as essential to the sound management of information and data in both private business and public administration. The propriety of electronic information management has been recognized in numerous and diverse areas. For example, the Federal Rules of Evidence explicitly provide for the admissibility of electronically stored data and information, specifying that printouts of such information constitute "originals" for evidentiary purposes. Fed. R. Evid. 1001. Similarly, at least four federal circuit courts of appeals now *require* that briefs be filed and served in electronic format. 1st Cir. R. 31.1; 5th Cir. R. 31.1, 7th Cir. R. 31(e), 8th Cir. R. 28A(d).

Electronic Storage of I-9 Forms Is More Efficient, Will Facilitate IRCA Compliance

There are obvious advantages in permitting electronic storage of I-9 forms over paper, microfiche, and microfilm storage — the methods presently permitted by INS regulations.

1. Space

Maintaining sufficient storage space to accommodate I-9 forms (as well as other government-mandated records) has become a significant document management challenge for many companies. Storing 1-9 forms electronically would greatly alleviate, if not eliminate, this burden.

2. Centralized Storage

Electronic storage allows an employer to easily maintain a single I-9 storage system for its various facilities throughout the country. This is particularly important to companies such as those that comprise EEAC's membership which operate multiple work establishments in multiple states. Such a system is accessible from remote locations by computer and, therefore, can eliminate the often practical problem faced by many employers of unearthing and relocating individual forms each time an employee is transferred from one facility to another.

3. Organization

Electronic storage greatly increases the organization of records. Regardless of the degree of care exercised with storing paper documents, inevitably such documents can be misfiled, misplaced, or lost. This likelihood intensifies over time, as physical records are removed from and returned to files, or transferred from file to file. For employers, locating misplaced documents translates to lost productivity, and a failure to locate such records results in potential liability. These dangers are not present with electronically stored records, which never are physically removed from the files, and which can be exhaustively searched almost instantaneously.

4. Retrievability

Electronically stored I-9 forms can be retrieved in a fraction of the time it takes to retrieve paper, microfiche, or microfilm copies, simply by entering the employee's name or identification number into the system.

5. Quality

Existing digital image processing technology generates an image that is of substantially higher quality and clarity than images on microfiche and microfilm.

6. Security

Access to electronically stored records effectively can be restricted to authorized personnel through the use of passwords and access codes as well as through physical security measures such as locks. Access to paper, microfiche, and microfilm records can be restricted only by physical security devices.

7. Enhancing Compliance

In addition to reducing the likelihood that 1-9 forms could become lost in transit, electronic storage helps to facilitate an internal audit by electronically matching the forms to an employee roster. This enables employers to quickly see if they have the required forms for each location and to ensure that they have been completed properly. Electronic storage also reduces the number of employees needed to review, maintain, store and retrieve the forms, thus enabling companies to achieve economies of scale.

Electronic Storage of I-9 Forms Would Benefit INS Enforcement Efforts

The benefits of storing 1-9 forms electronically are not limited to employers. Electronic storage provides significant advantages to INS investigation and enforcement personnel as well.

1. Investigative Efficiency

Electronic storage of 1-9 forms would allow INS investigators to retrieve and examine documents in a fraction of the time it takes to examine paper, microfiche, or microfilm documents. The cumbersome process for examining microfilm documents, detailed in the agency's 1998 proposed rule, amply demonstrates this point.

> The person or entity presenting the microfilm will make available a reader-printer at the examination site for the ready reading, location, and reproduction of any record or records being maintained on microfilm. Reader-printers … shall provide safety features and be in clean condition, properly maintained and in good working order. The reader-printers must have the capacity to display and print a complete page of information.

63 Fed. Reg. 5306 (1998). One can hardly imagine, in light of present-day technology, a more inefficient means of obtaining 1-9 documentation than the above-described method, which requires an investigator to physically view countless reels of film in order to locate and print perhaps hundreds of individual documents.

Needless to say, electronically stored forms, which can be accessed instantaneously, would greatly improve the speed and efficiency of I-9 audits. But electronic storage also offers investigators much more than the ability to conduct

expeditious on-site audits. Electronically stored documents could be downloaded by investigators and taken off-site for examination. Indeed, in some cases, investigators conceivably could access employer 1-9 records directly from their office without physically visiting the employer's facility. This technique would prove especially advantageous in situations where the employer is not located near an INS facility.

2. Document Substantiation

Under existing digital imaging technology, when a document is scanned and stored on computer, the time and date on which the document is entered into the system also is stored in the computer. Moreover, when the document is accessed or altered, time and date information likewise is stored. In many cases, such features could assist INS investigators in determining whether verification requirements are being completed in accordance with the regulatory deadlines.

Although it is true that certain sophisticated and mendacious employers *might* attempt to manipulate time and date information, the large majority of employers either would not elect to, or would be unable to, alter such data. *See, e.g.*, Michael J. Patrick, *An Attorney's Guide to Protecting, Discovering and Producing Electronic Information* 4:8-4:12 (1995) (explaining the complexity associated with destroying electronically stored information). In any event, EEAC does not suggest that employers could rely on this data to prove compliance, only that, in most cases, INS investigators would have access to valuable information not otherwise available.

Form I-9 Signature Requirements Do Not Create a Significant Obstacle With Regard to Electronic Storage

According to the 1998 notice of proposed rulemaking, the agency's principal concern regarding electronic storage of 1-9 forms is the agency's capacity to analyze electronically stored signatures. Specifically, the agency states:

> [D]uring an investigation an unauthorized alien may claim that the employer did not complete a Form I-9 at the time of hire, while the employer presents a Form 1-9 for the employee and claims that the employee lied about his unauthorized status. The determination of whose account is true is central to the question of liability for penalties. Investigations of such cases may require forensic analysis to determine the authenticity of the signatures. Scanned signatures provide adequate detail for such analysis only at a rate of resolution higher than those used for most record scanning systems.

63 Fed. Reg. 5297 (1998).

The Service's concerns in this area are accurate but insignificant. First, in actuality, the INS performs forensic handwriting analysis on Form 1-9 signatures only in

the rarest of cases. According to agency representatives, forensic signature analysis is rarely required in mass forgery cases, where the forged signatures — because of their sheer amount — are easily detected, and because there are numerous employees claiming not to have signed forms. Telephone conversation with Marion Metcalf, Policy Analyst, INS (March 31, 1998). Thus, forensic analysis is required only in isolated instances.

Although INS apparently does not keep statistics on the issue, among the presumably millions of I-9 forms examined by investigators, agency representatives estimate that only approximately 20 1-9 forms have been submitted to the INS laboratory for forensic signature analysis. *Id.* Such numbers simply do not outweigh the benefits that electronic storage would provide to the regulated community.

Furthermore, the proposed rule already permits methods of storage — namely, microfilm and microfiche — that, as a practical matter, make forensic signature analysis ineffective. According to the FBI crime laboratory, microfilm and microfiche records rarely yield the necessary clarity for satisfactory handwriting analysis. (Telephone conversation with Federal Bureau of Investigation, Laboratory Division, Questions and Documents Section, March 30, 1998). The legibility and readability requirements of the INS proposed rule do not appear to mitigate this difficulty. 63 Fed. Reg. 5305 (1998) (Defining legibility as enabling "the observer to positively and quickly identify [a letter or numeral] to the exclusion of all other letters or numerals." Defining readability as the "quality of a group of letters or numerals being recognizable as words or whole numbers.")

Moreover, microfilm and microfiche storage do not provide the investigative efficiencies associated with electronic storage. On the contrary, from an enforcement perspective these "permissible" methods of storage are quite inefficient. Consequently, the Service's present policy, which permits microfilm and microfiche storage but not electronic storage, does not make a lot of sense.

At best, the signature issue is a question of secondary importance. In the rare instances where forensic analysis is used, the Service already has uncovered unauthorized employment and already has evidence of forgery (*i.e.*, the testimony of the employees). The agency estimates that forensic analysis of 1-9 signatures has been used in only 20 cases, further illustrating that the technique is less than important in the Service's enforcement scheme.

For the foregoing reasons, EEAC strongly recommends that the INS be encouraged to revise its proposed rules to permit electronic storage of 1-9 forms. Of course, EEAC would support reasonable requirements regarding the use of this method that also would serve to mitigate the Service's concerns, such as requiring employers who use electronic storage to notify the Service that they are exercising this option or requiring employers who elect the electronic option to store images of the verification documents as well.

EEAC believes that electronic storage of 1-9 forms will ultimately benefit both employers and the agency and that **INS** should use this rulemaking as an opportunity to provide regulations permitting its use.

Proposed Solution:

Amend existing regulations to allow for electronic storage of 1-9 forms.

Estimate of Economic Impact:

The costs of hard copy storage, organization and retrieval are significant.

(i) Fails to complete or improperly completes the Employment Eligibility Verification Form, I–9;

(ii) Has information available to it that would indicate that the alien is not authorized to work, such as Labor Certification and/or an Application for Prospective Employer; or

(iii) Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf.

(2) Knowledge that an employee is unauthorized may not be inferred from an employee's foreign appearance or accent. Nothing in this definition should be interpreted as permitting an employer to request more or different documents than are required under section 274(b) of the Act or to refuse to honor documents tendered that on their face reasonably appear to be genuine and to relate to the individual.

[52 FR 16221, May 1, 1987. as amended at 53 FR 8612, Mar. 16, 1988; 55 FR 25931, June 25, 1990; 56 FR 41783. Aug. 23, 19913

§ 274a.2 Verification of employment eligibility.

(a) General. This section states the requirements and procedures persons or entities must comply with when hiring, or when recruiting or referring for a fee, or when continuing to employ individuals in the United States. For purposes of complying with section 274A(b) of the Act and this section, all references to recruiters and referrers for a fee are limited to a person or entity who is either an agricultural association, agricultural employer, or farm labor contractor (as defined in section 3 of the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1802). The Form I–9, Employment Eligibility Verification Form, has been designated by the Service as the form to be used in complying with the requirements of this section. The Form I–9 may be obtained in limited quantities at INS District Offices, or ordered from the Superintendent of Documents, Washington, DC 20402. Employers may electronically generate blank Forms I–9, provided that: the resulting form is legible; there is no change to the name, content, or sequence of the data elements and instructions; no additional data elements or language are inserted; and the paper used meets the standards for retention and production for inspection specified under § 274a.2(b). When copying or printing the Form I–9, the text of the two-sided form may be reproduced by making either double-sided or single-sided copies. Employers need only complete the Form I–9 for individuals who are hired after November 6, 1986 'and continue to be employed after May 31, 1987. Employers shall have until September 1, 1987 to complete the Form I–9 for individuals hired from November 7, 1986 through May 31, 1987. Recruiters and referrers for a fee need complete the Form I–9 only for those individuals who are recruited or referred and hired after May 31, 1987. In conjunction with completing the Form I–9, an employer or recruiter or referrer for a fee must examine documents that evidence the identity and employment eligibility of the individual. The employer or recruiter or referrer for a fee and the individual must each complete an attestation on the Form I–9 under penalty of perjury.

(b) Employment verification *requirements*—(1) Examination of documents and completion *of Form I-9.* (i) A person or entity that hires or recruits or refers for a fee an individual for employment must ensure that the individual properly:

(A) Complete section 1—"Employee Information and Verification"—on the Form I–9 at the time of hire; or if an individual is unable to complete the Form I–9 or needs it translated, someone may assist him or her. The preparer or translator must read the Form to the individual, assist him or her in completing Section 1—"Employee Information and Verification," and have the individual sign or mark the Form in the appropriate place. The preparer or translator must then complete the "Preparer/Translator Certification" portion of the Form I–9; and

(B) Present to the employer or the recruiter or referrer for a fee documentation as set forth in paragraph (b)(1)(v) of this section establishing his or her identity and employment eligibility within the time limits set forth in paragraphs (b)(1)(ii) through (b)(1)(v) of this section.

(ii) Except as provided in paragraph (b)(1)(viii) of this section, an employer, his or her agent, or anyone acting directly or indirectly in the interest thereof, must within three business days of the hire:

(A) Physically examine the documentation presented by the individual establishing identity and employment eligibility as set forth in paragraph (b)(1)(v) of this section and ensure that the documents presented appear to be genuine and to relate to the individual: and

(B) Complete section 2—"Employer Review and Verification"—of the Form I–9.

(iii) An employer who hires an individual for employment for a duration of less than three business days must comply with paragraphs (b)(1)(ii)(A) and (b)(1)(ii)(B) of this section at the time of the hire. An employer may not accept a receipt, as described in paragraph (b)(1)(vi) of this section, in lieu of the required document if the employment is for less than three business days.

(iv) A recruiter or referrer for a fee for employment must comply with paragraphs (b)(1)(ii)(A) and (b)(1)(ii)(B) of this section within three business days of the date the referred individual is hired by the employer. Recruiters and referrers may designate agents to complete the employment verification procedures on their behalf including but not limited to notaries, national associations, or employers. If a recruiter or referrer designates an employer to complete the employment verification procedures, the employer need only provide the recruiter or referrer with a photocopy of the Form I–9.

(v) The individual may present either an original document which establishes both employment authorization and identity, or an original document which establishes employment authorization and a separate original document which establishes identity. The identification number and expiration date (if any) of all documents must be noted in the appropriate space provided on the Form I–9.

(A) The following documents, so long as they appear to relate to the individual presenting the document, are acceptable to evidence both identity and employment eligibility:

(1) United States passport (unexpired or expired);

(2) Alien Registration Receipt Card or Permanent Resident Card, Form I–551:

(3) An unexpired foreign passport that contains a temporary 1–551 stamp:

(4) An unexpired Employment Authorization Document issued by the Immigration And Naturalization Service which contains a photograph, Form I–766; Form I–688, Form I–688A, or Form I–688B;

(5) In the case of a nonimmigrant alien authorized to **work** for a specific employer incident to status, an unexpired foreign passport with an Arrival-Departure Record, Form 1–94, bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, so 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 I–94.

(B) The following documents are acceptable to establish identity only:

(1) For individuals 16 years of age or older:

[i] A driver's license or identification card containing a photograph, issued by a state (as defined in section 101(a)(36) of the Act) or an outlying possession of the United States (as defined by section 101(a)(29) of the Act). If the driver's license or identification **card** does not contain a photograph, identifying information shall be included such as: name, date of birth, sex, height, color of eyes, and address:

(*ii*) School identification card with a photograph;

(*iii*) Voter's registration card;

(*vi*) U.S. military card or draft record:

(*v*) Identification card issued by federal, state, or local government agencies or entities. If the identification card does not contain a photograph, identifying information shall be included such as: name, date of birth, sex, height, color of eyes, and address:

(*vi*) Military dependent's identification card;

(*vii*) Native American tribal documents:

(*viii*) United States Coast Guard Merchant Mariner Card;

(*ix*) Driver's license issued by a Canadian government authority;

(*2*) For individuals under age 18 who are unable to produce a document listed in paragraph (b)(1)(v)(B)(*1*) of this section, the following documents are acceptable to establish identity only:

(*i*) School record or report card;

(*ii*) Clinic doctor or hospital record;

(*iii*) Daycare or nursery school record.

(*3*) Minors under the age of 18 who are unable to produce one of the identity documents listed in paragraph (b)(1)(v)(B) (*1*) or (*2*) of this section are exempt from producing one of the enumerated identity documents if:

(*i*) The minor's parent or legal guardian completes on the Form I-9 Section 1—"Employee Information and Verification" and in the space for the minor's signature, the parent or legal guardian writes the words, "minor under age 18."

(*ii*) The minor's parent or legal guardian completes on the Form I-9 the "Preparer/Translator certification."

(*iii*) The employer or the recruiter or referrer for a fee writes in Section 2—"Employer Review and Verification" under List B in the space after the words "Document Identification #" the words, "minor under age 18."

(*4*) Individuals with handicaps, who are unable to produce one of the identity documents listed in **paragraph** (b)(1)(v)(B) *(1)* or **(2)** of this section, who are being placed into employment by a nonprofit organization, association or as part of **a** rehabilitation program, may follow the procedures for establishing identity provided in this section for minors under the age of 18, substituting where appropriate, the term "special placement" for "minor under age 18", and permitting, in addition to a parent or legal guardian, a representative from the nonprofit organization, association or rehabilitation program placing the individual into a position of employment, to fill out and sign in the appropriate section, the Form I-9. For purposes of this section the term *individual with handicaps* means any person who

(*i*) Has a physical or mental impairment which substantially limits one or more of such person's major life activities,

(*ii*) Has a record of such impairment, or

(*iii*) Is regarded as having such impairment.

(C) The following are acceptable documents to establish employment authorization only:

(1) A social security number card other than one which has printed on its face "not valid for employment purposes";

(2) A Certification of Birth Abroad issued by the Department of State, Form FS-545;

(3) A Certification of Birth Abroad issued by the Department of State, Form DS-1350;

(4) An 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;

(5) Native American tribal document;

(6) United States Citizen Identification Card, INS Form I-197;

(*7*) Identification card for use of resident citizen in the United States, INS Form I-179;

(*8*) An unexpired employment authorization document issued by the Immigration and Naturalization Service.

(vi) *Special rules* for *receipts.* Except as provided in paragraph (b)(1)(iii) of this section, unless the individual indicates or the employer or recruiter or referrer for a fee has actual or constructive knowledge that the individual is not authorized to work, an employer or recruiter or referrer for a fee must accept a receipt for the application for a replacement document or a document described in paragraphs (b)(1)(vi)(B)(*1*) and (b)(1)(vi)(C)(*1*) of this section in lieu of the required document in order to comply with any requirement to examine documentation imposed by this section, in the following circumstances:

(A) *Application for a replacement document.* The individual:

(1) Is unable to provide the required document within the time specified in this section because the document was lost, stolen, or damaged;

(2) Presents a receipt for the application for the replacement document within the time specified in this section; and

(3) Presents the replacement document within 90 days of the hire or, in the case of reverification, the date employment authorization expires; or

(B) ***Form 1–94 indicating temporary evidence of permanent resident status.*** The individual indicates in section 1 of the Form I–9 that he or she is a lawful permanent resident and the individual:

(I) Presents the arrival portion of Form 1–94 containing an unexpired "Temporary I–551" stamp and photograph of the individual, which is designated for purposes of this section as a receipt for Form 1–551; and

(2) Presents the Form I–551 by the expiration date of the "Temporary I–551" stamp or, if the stamp has no expiration date, within 1 year from the issuance date of the arrival portion of Form I–94; or

(C) *Form 1–94 indicating refugee status.* The individual indicates in section 1 of the Form I–9 that he or she is an alien authorized to work and the individual:

(1) Presents the departure portion of Form 1–94 containing an unexpired refugee admission stamp, which is designated for purposes of this section as a receipt for the Form I–766, Form I–688B, or a social security account number card that contains no employment restrictions; and

(2) Presents, within 90 days of the hire or, in the case of reverification, the date employment authorization expires, either an unexpired Form 1–766 or Form I–688B, or a social security account number card that contains no employment restrictions, and a document described under paragraph (b)(1)(v)(B) of this section.

(vii) If an individual's employment authorization expires, the employer, recruiter or referrer for a fee must reverify on the Form 1–9 to reflect that the individual is still authorized to work in the United States; otherwise the individual may no longer be employed, recruited, or referred. Reverification on the Form I–9 must occur not later than the date work authorization expires. In order to reverify on the Form I–9, the employee or referred individual must present a document that either shows continuing employment eligibility or is a new grant of work authorization. The employer or the recruiter or referrer for a fee must review this document, and if it appears to be genuine and to relate to the individual, reverify by noting the document's identification number and expiration date on the Form I–9.

(viii) **An** employer will not be deemed to have hired an individual for employment if the individual is continuing in his or her employment and has a reasonable expectation of employment at all times.

(A) An individual is continuing in his or her employment in one of the following situations:

(1) **An** individual takes approved paid or unpaid leave on account 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;

(2) An individual is promoted, demoted, or gets a pay raise:

(3) **An** individual is temporarily laid off for lack of work;

(4) **An** individual is on strike or in a labor dispute;

(5) **An** individual is reinstated after disciplinary suspension for wrongful termination, found unjustified by any court, arbitrator, or administrative body, or otherwise resolved through reinstatement or settlement;

(6) **An** individual transfers from one distinct unit *of* an employer to another distinct unit of the same employer: the employer may transfer the individual's Form I–9 to the receiving unit;

(7) **An** individual continues his or her employment with a related, successor, or reorganized employer, provided that the employer obtains and maintains from the previous employer records and Forms I–9 where applicable. For this purpose, a related, successor, or reorganized employer includes:

(i) The same employer at another location:

(ii) **An** employer who continues to employ some or all of a previous employer's workforce in cases involving a corporate reorganization, merger, or sale of stock or assets;

(iii) An employer who continues to employ any employee of another employer's workforce where both employers belong to the same multi-employer association and the employee continues to work in the same bargaining unit under the same collective bargaining agreement. For purposes of this subsection, any agent designated to complete and maintain the Form I–9 must record the employee's date of hire and/or termination each time the employee is hired and/or terminated by an employer of the multi-employer association: or

(8) An individual is engaged in seasonal employment.

(B) The employer who is claiming that an individual is continuing in his or her employment must also establish that the individual expected to resume employment at all times and that the individual's expectation is reasonable. Whether an individual's expectation is reasonable will be determined on a case-by-case basis taking into consideration several factors. Factors which would indicate that an individual has a reasonable expectation of employment include, but are not limited to, the following:

(1) The individual in question was employed by the employer on a regular and substantial basis. A determination of **a** regular and substantial basis is established by a comparison of other workers who are similarly employed by the employer:

(2) **The** individual in question complied with the employer's established and published policy regarding his or her absence;

(3) The employer's past history of recalling absent employees for employment indicates a likelihood that the individual in question will resume employment with the employer within a reasonable time in the future:

(4) The former position held by the individual in question has not been taken permanently by another worker:

(5) The individual in question has not sought or obtained benefits during his or her absence from employment with the employer that are inconsistent with an expectation of resuming employment with the employer within a reasonable time in the future. Such benefits include, but are not limited to, severance and retirement benefits;

(6) The financial condition of the employer indicates the ability of the employer to permit the individual in question to resume employment within a reasonable time in the future; or

(7) The oral and/or written communication between employer, the employer's supervisory employees and the individual in question indicates that it is reasonably likely that the individual in question will resume employment with the employer within a reasonable time in the future.

(2) Retention and Inspection of *Form I–*9. (i) Form I–9 must be retained by an employer or a recruiter or referrer for a fee for the following time periods:

(A) In the case of an employer, three years after the date of the hire or one year after the date the individual's employment is terminated, whichever is later: or

(B) In the case of a recruiter *or* referrer for a fee, three years after the date of the hire.

(ii) Any person or entity required to retain Forms I–9 in accordance with this section shall be provided with at least three days notice prior to an inspection of the Forms **1-9** by officers of the Service, the Special Counsel for Immigration-Related Unfair Employment Practices, or the Departmet of Labor. At the time of inspection, Forms I–9 must be made available in their original form or on microfilm or microfiche at the location where the request for production **was** made. If Forms I–9 are kept at another location, the person or entity must inform the officer of the Service, the Special Counsel for Immigration-Related **Un**fair Employment Practices, or the Department of Labor of the location where the forms are kept and make arrangements for the inspection. Inspections may be performed at an **INS** office. **A** recruiter or referrer for a fee who has designated an employer to complete the employment verification procedures may present a photocopy of the Form I–9 in lieu of presenting the Form **1-9** in its original form or on microfilm or microfiche, as set forth in paragraph (b)(1)(iv) of this section. Any refusal or delay in presentation of the Forms I–9 for inspection is a violation

of the retention requirements as set forth in section 274A(b) (3) of the Act. No Subpoena or warrant shall be required for such inspection, but the use of such enforcement tools is not precluded. In addition, if the person or entity has not complied with a request to present the Forms I–9, any Service officer listed in § 287.4 of this chapter may compel production of the Forms I–9 and any other relevant documents by issuing a subpoena. Nothing in this section is intended to limit the Service's subpoena power under section 235(a) of the Act.

(iii) The following standards shall apply to Forms I–9 presented on microfilm or microfiche submitted to an officer of the Service, the Special Counsel for Immigration-Related Unfair Employment Practices, or the Department of Labor: Microfilm, when displayed on a microfilm reader (viewer) or reproduced on paper must exhibit a high degree of legibility and readability. For this purpose, legibility is defined as the quality of a letter or numeral which enables the observer to positively and quickly identify it to the exclusion of all other letters or numerals. Readability is defined as the quality of a group of letters or numerals being recognizable as words or whole numbers. A detailed index of all microfilmed data shall be maintained and arranged in such a manner as to permit the immediate location of any particular record. It is the responsibility of the employer, recruiter or referrer for a fee:

(A) To provide for the processing, storage and maintenace of all microfilm, and

(B) To be able to make the contents thereof available as required by law. The person or entity presenting the microfilm will make available a reader-printer at the examination site for the ready reading, location and reproduction of any record or records being maintained on microfilm. Reader-printers made available to an officer of the Service, the Special Counsel for Immigration-Related Unfair Employment Practices, or the Department of Labor shall provide safety features and be in clean condition, properly maintained and in *good* working order. The reader-printers must have the capacity to display and print a complete page of information. A person or entity who is determined to have failed to comply with the criteria established by this regulation for the presentation of microfilm or microfiche to the Service, the Special Counsel for Immigration-Related Unfair Employment Practices, or the Department of Labor, and at the time of the inspection does not present a properly completed Form I–9 for the employee, is in violation of section 274A(a)(1)(B) of the Act and § 274a.2(b)(2).

(3) *Copying of documentation.* An employer, or a recruiter or referrer for a fee may, but is not required to, copy a document presented by an individual solely for the purpose of complying with the verification requirements of this section. If such a copy is made, it must be retained with the Form I–9. The retention requirements in paragraph (b)(2) of this section do not apply to the photocopies. The copying of any such document and retention of the copy does not relieve the employer from the requirement to fully complete section 2 of the Form I–9. An employer, recruiter or referrer for a fee should not, however, copy the documents only of individuals of certain national origins or citizenship statuses. To do so may violate section 274B of the Act.

(4) *Limitation on use of Form I–9.* Any information contained in or appended to the Form I–9, including copies of documents listed in paragraph (c) of this section used to verify an individual's identity **or** employment eligibility, may be used only for enforcement of the Act and sections 1001, 1028, 1546, *or* 1621 of title 18, United States Code.

(c) *Employment verification requirements in the* ***case*** *of hiring an individual* ***who*** was *previously employed.* (1) When an employer hires an individual whom that person or entity has previously employed, if the employer has previously completed the Form 1-9 and complied with the verification requirements set forth in paragraph (b) of this section with regard to the individual, the employer may (in lieu of completing a new Form I–9) inspect the previously completed Form I–9 and:

(i) If upon inspection of the Form I–9, the employer determines that the

Form I–9 relates to the individual and that the individual is still eligible to work, that previously executed Form I–9 is sufficient for purposes of section 274A(b) of the Act if the individual is hired within three years of the date of the initial execution of the Form 1–9 and the employer updates the Form I–9 to reflect the date of rehire; or

(ii) If upon inspection of the Form I–9, the employer determines that the individual's employment authorization has expired, the employer must reverify on the Form I–9 in accordance with paragraph (b)(1)(vii); otherwise the individual may no longer be employed.

(2) For purposes of retention of the Form 1–9 by an employer for a previously employed individual hired pursuant to paragraph (c)(1) of this section, the employer shall retain the Form I–9 for a period of three years commencing from the date of the initial execution of the Form I–9 or one year after the individual's employment is terminated, whichever is later.

(d) *Employment verification requirements in the case of recruiting or referring for a fee an individual who was previously recruited or referred.* (1) When a recruiter or referrer for a fee refers an individual for whom that recruiter or referrer for a fee has previously completed a Form I–9 and complied with the verification requirements set forth in paragraph (b) of this section with regard to the individual, the recruiter or referrer may (in lieu of completing a new Form **I–9) inspect the previously** completed Form *I–9* and:

(i) If upon inspection of the Form I–9, the recruiter or referrer for a fee determines that the Form I–9 relates to the individual and that the individual is still eligible to work, that previously executed Form I–9 is sufficient for purposes of section 274A(b) of the Act if the individual is referred within three years of the date of the initial execution of the Form 1–9 and the recruiter or referrer for a fee updates the Form I–9 to reflect the date of rehire; or

(ii) If upon inspection of the Form I–9, the recruiter or referrer determines that the individual's employment authorization has expired, the recruiter or referrer for a fee must reverify on the Form I–9 in accordance with paragraph (b)(1)(vii) of this section; otherwise the individual may no longer be recruited or referred.

(2) For purposes of retention of the Form I–9 by a recruiter or referrer for a previously recruited or referred individual pursuant to paragraph (d)(1) of this section, the recruiter or referrer shall retain the Form I–9 for a period of three years from the date of the rehire.

[52 FR 16221, May 1, 1987, as amended at 53 FR 8612, Mar. 16, 1988: 55 FR 25932, June 25, 1990; 56 FR 41784–41786, Aug. 23, 1991; 58 FR 48780, Sept. 20, 1993; 61 FR 46537, Sept. 4, 1996; 61 FR 52236, Oct. 7, 1996; 62 FR 51005. Sept. 30, 1997; 64 FR 6189, Feb. 9, 1999: 64 FR 11533, Mar. 9, 19991

§ 274a.3 Continuing employment of unauthorized aliens.

An employer who continues the employment of an employee hired after November 6, 1986, knowing that the employee is or has become **an** unauthorized alien with respect to that employment, is in violation of section 274A(a)(2) of the Act.

[52 FR 16221, May 1, 1987. as amended at 53 FR 8613, Mar. 16, 19881

§ 274a.4 Good faith defense.

An employer or a recruiter or referrer for a fee for employment who shows good faith compliance with the employment verification requirements of **§ 274a.2(b) of** this part shall have established a rebuttable affirmative defense that the person or entity has not violated section 274A(a)(1)(A) of the Act with respect to such hiring, recruiting, or referral.

§ 274a.5 Use of labor through contract.

Any person or entity who uses a contract, subcontract, or exchange entered into, renegotiated, or extended after November 6, 1986, to obtain the labor or services of an alien in the United States knowing that the alien is an unauthorized alien with respect to performing such labor or services, shall be considered to have hired the alien for employment in the United States in violation of section 274A(a)(1)(A) of the Act.

[55 FR 25934, June 25, 19901

Comments are requested concerning the proposed establishment of the national marketing quotas for the subject tobaccos at the following levels:

(1) Fire-Cured (Type *21)* Tobacco. The 1998-crop national marketing quota for fire-cured (type 21) tobacco will range from 2.4 to 3.0 million pounds. This range reflects the assumption that the national acreage factor will range from 1.0 to 1.2.

(2) Fire-Cured *(Types 22-23)* Tobacco. The 1998-crop national marketing quota for fire-cured (types 22–23) tobacco will range from 43.0 to 47.0 million pounds. This range reflects the assumption that the national acreage factor will range from 1.0 to 1.1.

(3) Dark Air-Cured (Types *35–36)* Tobacco. The 1998-crop national marketing quota for dark air-cured (types 35–36) tobacco will range from 10.0 to 11.0 million pounds. This range reflects the assumption that the national acreage factor will range from 1.0 to 1.1.

(4) Virginia Sun-Cured (Type *37)* Tobacco. The 1998-crop national marketing quota for Virginia sun-cured (type 37) tobacco will range from 150,000 to 165,000 pounds. This range reflects the assumption that the national acreage factor will range from 1.0 to 1.1.

(5) Cigar-Filler and Binder (Types *42–44* and *53–55)* Tobacco. The 1998-crop national marketing quota for cigar-filler and binder (types 42–44 and 53–55) tobaccos will range from 8.0 to 8.8 million pounds. This range reflects the assumption that the national acreage factor will range from 1.0 to 1.1.

(6) Maryland (Type *32)* Tobacco. The national acreage factor for the 1998 MY will be 1.0 and the national marketing quota will be approximately 6.0 million pounds.

(7) Pennsylvania Filler (Type 41) Tobacco. The national acreage factor for the 1998 MY will be 1.0 and the national marketing quota will be approximately 1.4 million pounds.

(8) Cigar-Binder (Types *51-52)* Tobacco. The national acreage factor for the 1998 MY will be 1.0 and the national marketing quota will be approximately 700,000 pounds.

Accordingly, comments are requested with respect to the foregoing issues.

List of Subjects in 7 CFR part 723

Acreage allotments, Marketing quotas, Penalties, Reporting and recordkeeping requirements, Tobacco.

Accordingly, it is proposed that 7 CFR part 723 be amended as folllows:

PART 723—TOBACCO

1. The authority citation for 7 CFR part 723 continues to read as follows:

Authority: 7 U.S.C. 1301, 1311–1314, 1314–1, 1314b, 1314b–1, 1314b–2, 1314c, 1314d, 1314e, 1314f, 1314i, 1315, 1316, 1362 1363, 1372–75, 1421, 1445–1, and 1445–2.

2. Section 723.113 is amended by adding paragraph (f) to read as follows:

§ 723.113 Fire-cured (type 21) tobacco.

* * * * *

(f) The 1998-crop national marketing quota will range from 2.4 million pounds to 3.0 million pounds.

3. Section 723.114 is amended by adding paragraph (f) to read as follows:

§ 723.114 Fire-cured (types 22–23) tobacco.

* * * * *

(f) The 1998-crop national marketing quota will range from 43.0 million pounds to 47.0 million pounds.

4. Section 723.115 is amended by adding paragraph (f) to read as follows:

5723.115 Dark air-cured (types 35–36) tobacco.

* * * * *

(f) The 1998-crop national marketing quota will range from 10.0 million pounds to 11.0 million pounds.

5. Section 723.116 is amended by adding paragraph (f) to read as follows:

* * * * *

§ 723.116 Sun-cured (type 37) tobacco.

* * * * *

(f) The 1998-crop national marketing quota will range from 150.000 to 165,000 pounds.

6. Section 723.117 is amended by adding paragraph (f) to read as follows:

5723.117 Cigar-filler and binder (types 42–44 and 53–55) tobacco.

* * * * *

(f) The 1998-crop national marketing quota will range from 8.0 million pounds to 8.8 million pounds.

7. Section 723.119 is added (a) to read as follows:

5723.119 Maryland (type 32) tobacco.

(a) The 1998-crop national marketing quota will range between 5.0 million pounds to 7.0 million pounds.

(b) [Reserved]

8. Section 723.120 is added (a) to read as follows:

9723.120 Pennsylvania filler (type 41) tobacco.

(a) The 1998-crop national marketing quota will range between 1.3 million pounds to 1.5 million pounds.

(b) [Reserved]

9. Section 723.121 is added (a) to read as follows:

5723.121 Cigar binder (type 51–52) tobacco.

(a) The 1998-crop national marketing quota will range from 600.000 pounds to 1.0 million pounds.

(b) [Reserved]

Signed at Washington, DC on January 28, 1998.

Keith Kelly.

Administrator, Farm Service Agency.

[FR Doc. 98–2578 Filed 1–29–98; 11:52 am]

BILLING CODE 3410–05–P

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Parts 274a and 299

[INS No. 1890–97]

RIN 1115–AE94

Reduction in the Number of Acceptable Documents and Other Changes to Employment Verification Requirements

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Proposed rule.

SUMMARY: The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) amended existing law by eliminating certain documents currently used in the employment eligibility verification (Form I–9) process. This rule proposes to shorten the list of documents acceptable for verification. Currently, newly hired individuals may choose from among 29 documents to establish their identity and eligibility to work in the United States. The proposed rule cuts that number approximately in half. In addition, the proposed rule clarifies and expands the receipt rule, under which individuals may present a receipt instead of a required document in certain circumstances. It also explains that employers may complete the Form I–9 before the time of hire or at the time of hire, so long as they have made a commitment to hire and provided that the employer completes the Form I–9 at the same point in the employment process for all employees. The proposed rule also details reverification requirements and includes a proposal for a new employment eligibility reverification form (Form I–9A), adds the Federal Government to the definition of "entity," and clarifies the Immigration and Naturalization Service's (Service or INS) subpoena authority. In addition to making those changes, the Service proposes to restructure the rule to make it easier to

understand, use, and cite. A copy of the draft Form I-9, which includes the proposed Form I-9A and an expanded instruction sheet, is being published as an attachment to this rule. This rule is intended to simplify and clarify the verification requirements.

DATES: Written comments must be submitted on or before April 3, 1998. Comments received after this date will be considered if it is practical to do so. but the Service is able to ensure consideration only for comments received on or before this date.

ADDRESSES: Written comments: Please submit written comments, one original and two copies, to the Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 I Street, NW., Room 5307, Washington, DC 20536. To ensure proper handling, please reference INS No. 1890–97 on your correspondence. Comments are available for public inspection at the above address by calling (202) 514–3048 to arrange for an appointment.

To assist reviewers, where possible, comments should reference the specific section or paragraph which the comment addresses. Although this is not required, it would assist reviewers if, in addition to the requested copies, a copy of the comments is provided on a floppy disk in plain text or WordPerfect 5.1 format. Written comments should be specific. should be confined to issues pertinent to the rule, and should explain the reason for any recommended change.

Electronic comments: With this proposed rule, the Service is testing for the first time the possibility of accepting comments electronically. Comments may be sent using electronic mail (email) to: I9INFO@usdoj.gov. The need to submit copies of the comments is waived for comments submitted by email. Electronically filed comments that conform to the guidelines of this paragraph will be considered part of the record and accorded the same treatment as comments submitted on paper. Comments should reference INS No. 1890–97 in the subject line and the body of the message. The comments should appear either in the body of the message or in a WordPerfect 5.1 attachment. The Service cannot guarantee consideration of attachments submitted in other formats. Comments submitted electronically must also contain the sender's name, address, and telephone number for possible Verification.

FOR FURTHER INFORMATION CONTACT Marion Metcalf, Policy Analyst, HQIRT, 425 I Street NW., Washington, DC, 20536; (202) 514–2764: or email at metcalfm@justice.usdoj.gov. Please note that the email address is for further information only and may not be used for the submission of comments.

SUPPLEMENTARY INFORMATION

Why is the Service Proposing These Changes?

The Service is proposing these changes in response to recent legislation, IIRIRA, and as a result of an ongoing review which was triggered by the rule's having been in effect for 10 years. Many of the proposed changes represent the culmination of a long-term effort to reduce the number of documents acceptable for employment verification.

Which IIRIRA Provisions Does This Rule Implement?

IIRIRA. enacted on September 30, 1996. makes several amendments to the employer sanctions provisions of section 274A of the Act. This rule proposes to implement the amendments in:

(1) Section 412(a) of IIRIRA. which requires a reduction in the number of documents that may be accepted in the employment verification process;

(2) Section 412(d) of IIRIRA. which clarifies the applicability of section 274A of the Act to the Federal Government: and

(3) Section 416 of IIRIRA. which clarifies the Service's authority to compel by subpoena the appearance of witnesses and the production of evidence prior to the filing of a complaint.

What About the Other *Employment*-Related IIRIRA Amendments?

This is one of four rules the Service is proposing to implement IIRIRA amendments to section 274A of the Act. In addition to this rule, the Service is developing and will publish proposed rules to:

(1) Implement changes to the application process for obtaining employment authorization from the Service. The proposed rule will include a revision to the Application for Employment Authorization, Form I–765, revisions to Subpart B of Part 274a, and employment verification requirements for F–1 students authorized to work on campus:

(2) Implement section 411(a) of IIRIRA, which allows employers who have made a good faith attempt to comply with a particular employment verification requirement to correct technical or procedural failures before such failures are deemed to be violations of the Act;

(3) Implement section 412(b) of IIRIRA. which applies to employers that are members of an association of two or more employers. For an individual who is a member of a collective bargaining unit and is employed under a collective bargaining agreement between one or more employee organizations and the multi-employer association, the employer can use a Form I–9 completed by a prior employer that is a member of the same association, within 3 years (or, if less, the period of time that the individual is authorized to work in the United States).

What is the Ten-Year Review the Service Is Conducting?

Section 610 of the Regulatory Flexibility Act (RFA) requires agencies to review rules which have a significant economic impact on a substantial number of small entities every 10 years. Service regulations at 8 CFR 274a, Subpart A—Employer Requirements. fall under this review requirement.

Section 610 of the RCA requires a review of regulations "to minimize any significant economic impact of the rule on a substantial number of small entities in a matter consistent with the stated objectives of applicable statutes." The RFA requires consideration of five factors: (1) Continued need for the rule; (2) nature of complaints or comments received from the public: (3) complexity of the rule: (4) extent to which the rule overlaps, duplicates, or conflicts with other Federal rules and, to the extent feasible, with State and local governmental rules: and (5) length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

The Service concluded that it would be in the public interest to conduct the required review in conjunction with implementing the IIRIRA amendments. By coordinating the publication of this notice with the publication of a proposed rule, the Service can give the public a clearer indication of the kinds of changes under consideration and provide an opportunity to submit a single set of comments. The Service began by conducting an internal review of the regulations at 8 CFR part 274a. The Service reviewed past public comment, questions asked of the Service's Office of Business Liaison, issues surfaced by field offices, and similar sources. Through this process, the Service identified areas in the regulations for reconsideration. The results of that internal review are reflected in the proposed rule. This proposed rule, therefore, reflects a

comprehensive reinvention effort, including a restructuring and other changes intended to address concerns raised by the public during the 10 years that these requirements have been in effect.

How Does This Rule Relate to the Service's Earlier Document Reduction Proposals?

The Immigration Reform and Control Act (IRCA), enacted in 1986, amended the Act to require persons or entities to hire only persons who are eligible to work in the United States. The Act, as amended, requires persons or entities to verify the work-eligibility and identity of all new hires. The Employment Eligibility Verification form, Form I-9, was designated for that purpose. Newly hired individuals must attest to the status that makes them eligible to work and present documents that establish their identity and eligibility to work. Employers, and recruiters or referrers for a fee (as defined in section 274A(a)(1)(B)(ii) of the Act and 8 CFR 274a.2(a)), must examine the documents and attest that they appear to be genuine and to relate to the individual. They may not specify a document or combination of documents that the individual must present. To do so may violate section 274B of the Act.

The statutory framework, currently implemented by regulation at 8 CFR 274a.2, provides for three lists of documents: documents that establish both identity and employment eligibility (List A documents), documents that establish identity only (List B documents), and documents that establish work eligibility only (List C documents).

When the law was new, a consensus emerged that a long, inclusive list of documents would ensure that all **persons** who are eligible to work could easily meet the requirements. When the Service first published implementing regulations in 1987, the Supplementary Information noted that List B, in particular, had been expanded in response to public comment. As early as 1990, however, there was evidence that some employers found the list confusing. In its third review of the implementation of employer sanctions, the General Accounting Office (GAO) reported that employer confusion over the "multiplicity" of acceptable documents contributed to discrimination against authorized workers. See Immigration Reform: Employer Sanctions and the Question of Discrimination, March 29, 1990, General Accounting Office (GAO/GGD-90-62.

The first step the Service took to correct this problem was to ensure that the complete list of documents appeared on the Form I-9 when the form was revised in 1991. In 1993, the Service published a proposed rule to reduce the number of documents acceptable for verification. That proposed rule eliminated numerous identity documents from List B and two employment eligibility documents from List C. Response to the proposed rule among the approximately 35 comments was mixed. Some commenters expressed support for the changes. Others questioned the need to reduce the lists, suggesting that confusion over the lists had been addressed by listing all the documents on the Form I-9.

In 1995, the Service published a supplement to the proposed rule. The supplement proposed a few additional changes to the lists of documents and responded to public comments concerning updating and reverification procedures for the Form I-9. The supplement received only five public comments.

The legislative history for IIRIRA indicates that Congress believed that the changes proposed in the proposed rule and supplement did not go far enough, stating:

> The number of permissible documents has long been subject to criticism. The INS published a proposed regulation in **1993** (with a supplement published on June **22, 1995)** to reduce the number of documents from **29** to 16. This proposal, however, does not reflect the consensus of opinion that documents should be reduced even further, and that documents that are easily counterfeited should be eliminated entirely. (*See* H.R. Rep. No. **104-469,** at **404-05 (1996).**)

Congress recognized that the Service's ability to reduce the list of documents further was constrained by the number of documents listed in the law. In IIRIRA. Congress eliminated several documents while giving the Attorney General discretion to amend the list by regulation. These changes are discussed in more detail in the sections pertaining to the proposed lists of acceptable documents.

On September 4. 1996, the Service published a partial final rule at 61 FR 46534 which added the Employment Authorization Document, Form 1-766 (the 1-766 EAD). a new, counterfeit-resistant card, to List A. The Service began to issue the 1-766 EAD in February 1997. The final rule did not provide sunset dates for any existing List A documents. It did, however, reinstate a provision at 8 CFR 274a.14, which had been stayed and suspended, and that terminated miscellaneous employment authorization documentation issued by the Service prior to June 1, 1987. The latter step was necessary because in the years prior to IRCA, some of the temporary, non-standard employment authorization documents issued by the Service did not bear an expiration date. Although the Service believes that few, if any, individuals were still in 1996 relying upon pre-1987 temporary documents. this action ensures that such documents are no longer valid.

Comments in response to both the 1993 and 1995 proposals asked the Service to delay publication of a final rule, citing the potential for congressional action. This proposed rule implements section 412(a) of IIRIRA and is separate from the 1993 proposed rule and 1995 supplement. The 1993 proposed rule and 1995 supplement will not be finalized.

On September 30. an interim rule was published in the Federal Register at 62 FR 5100. The interim rule was a stopgap measure, required by the effective date provision for section 412(a) of IIRIRA. The amendments to the list of documents were to take effect "with respect to hiring (or recruitment or referral) occurring on or after such date (not later than 12 months after the date of enactment of [IIRIRA] as the Attorney General shall designate." Because 12 months after the date of enactment of IIRIRA was September 30, 1997. the interim rule designated September 30, 1997, as the effective date for the amendments. The goal of the interim rule was to maintain the status quo to the extent possible under the IIRIRA document provision. On October 6, 1997, President Clinton signed legislation) Pub. L. 105-54) extending the deadline for the designation of the effective date from 12 months to 18 months. Congress and the administration took this action in the interest of minimizing disruption and confusion in the business community. The Service considered withdrawing the interim rule. It decided, however, that the goal of minimizing confusion was better served by leaving the interim rule in place. The Service is withholding enforcement of violations related to the changes while the interim rule is in place.

What Changes are Made by This Proposed Rule?

This proposed rule contains provisions to implement three IIRIRA sections and other amendments to subpart A of part 274a. It also proposes to restructure the regulation to make it easier to use and cite. The Provisions currently contained in subpart A are proposed to be reorganized into the following sections.

Section 274a.1 Definitions.
Section 274a.2 Why is employment verification required and what does it involve?
Section 274a.3 What documents are acceptable for employment verification?
Section 274a.4 How long are employers and recruiters or referrers required to retain the Form I–9 and what must be retained with it?
Section 274a.5 Under what circumstances may employers and recruiters or referrers rely on a Form I–9 that an individual previously completed?
Section 274a.6 What happens when the Government asks to inspect Forms I–9?
Section 274a.7 What is the prohibition on hiring or contracting with unauthorized aliens and what defense can be claimed?
Section 274a.8 what are the requirements of state employment agencies that choose to verify the identity and employment eligibility of individuals referred for employment by the agency?
Section 274a.9 Can a person or entity require an individual to provide a financial guarantee or indemnity against potential liability related to the hiring, recruiting, or referring of the individual?
Section 274a.10 How are investigations initiated and employers notified of violations?
Section 274a.11 What penalties may be imposed for violations?

This reorganization is intended to make the regulation easier to use, understand, and cite. For example, the paragraph that explains that a parent or guardian may attest to the identity minor under 18 who cannot present an identity document is currently found at 8 CFR 274a.2(b)(1)(v)(B)(3). The citation for this paragraph becomes 8 CFR 274a.3(b)(2) in the proposed reorganization, a much shorter citation. A table providing a cross-reference from the new to the old sections appears at the end of this supplementary information section for ease of reference,

The Service welcomes comment on this restructuring and suggestions for other ways to make the regulation easier to use and understand. The Service recognizes the widespread impact of this regulation and is committed to making the requirements as straightforward as possible. The public is invited to submit alternative outlines for consideration or to suggest other ways to approach the restructuring.

The Service has taken several steps to adopt a "plain English" approach to this regulation. This effort was focused more intensely on the verification provisions currently at § 274a.2 than on the remainder of the regulation, and the Service is open to comments concerning whether additional changes would be helpful. In addition, the public is encouraged to comment on the practice of using question-and-answer format in the regulation. The proposed rule states the section headings in question form. The Service seeks comments on whether this practice is useful to persons who use the regulation and whether it should be extended to subheadings.

In addition, this proposal encompasses substantive changes intended to:

(1) Include the Federal Government in the definition of "entity;"

(2) Clarify the definition of "recruit for a fee;"

(3) Clarify the timing permitted for completion of the Form I–9;

(4) Specify reverification requirements, in response to public comment received on the 1993 proposed document reduction rule and 1995 supplement:

(5) Clarify and expand the receipt rule, under which work-eligible individuals who are unable to present a required document may present a receipt under certain circumstances:

(6) Shorten the list of documents acceptable for verification:

(7) Require the attachment and retention of copied documentation to the Form I–9; and

(8) Add a reference to the Service's authority to compel by subpoena the attendance of witnesses and production of evidence prior to the filing of a complaint.

The remainder of this supplementary information describes the changes in the order in which they appear in the proposed rule.

Section 274a.1—Definitions

Entity

The employer sanctions provisions apply to persons and entities. Section 412(d) of IIRIRA includes any branch of the Federal Government in the term "entity." Accordingly, this proposed rule amends the definition of "entity" currently in the regulations at 8 CFR 274a.1(b) to include the Federal Government.

Recruit for a Fee

The proposed rule amends the definition of the term "recruit for a fee" at 8 CFR 274a.1(e) to remove overlap between the definitions of "recruit for a fee" and "refer for a fee." Currently, the definition of "recruit for a fee" includes the act of soliciting a person, as well as the act of referring a person, with the intent of obtaining employment for that person. Thus, for a person or entity to be deemed to be recruiting, the person or entity must both solicit a person and refer that person. This overlap clouds the distinction between the two terms that is carefully maintained in the Act. The amendment eliminates the overlap by limiting the definition of "recruit for a fee" to the act of soliciting a person for a fee with the intent of obtaining employment for that person.

Recruiter or Referrer for a Fee

The proposed rule adds to 8 CFR 274a.1 a definition for the term "recruiter or referrer for a fee." This language is being moved from 8 CFR 274a.2(a) and does not represent a substantive change.

Employer

The definition of "employer" at 8 CFR 274a.1(g) remains unchanged. However, language from this definition pertaining to an agent or anyone acting directly or indirectly in the interest of the employer is currently repeated in § 274a.2 in certain instances where the term "employer" is used. This rule eliminates such language because it is already a part of the definition of employer and, therefore, unnecessary to repeat.

Section *274a.2—Why* is *Employment Verification* Required and *What Does It* Involve?

This section now contains a discussion of why verification must be completed on Form I–9, an overview of the verification process, specifications of the time for completing the Form I–9, and reverification requirements.

This rule proposes to amend the general discussion in 8 CFR 274a.2(a) introducing the employment verification requirements in several respects. As proposed, the rule:

(1) Adds references to a form proposed for reverification, the Employment Eligibility Reverification form. Form I–9A. This proposal is discussed in further detail in the reverification discussion:

(2) Adds the information that the Form I–9 may now be downloaded from the Service World Wide Web site: and

(3) Updates the discussion of the beginning date for the verification requirements in 1987.

Section 274a.2(b) previously covered all of the verification process. It now contains only an overview of the process and sets forth the basic requirements for completing Form I–9. It contains language reinforcing that the employee has the choice of which of the acceptable documents to present.

What Are the Requirements for Preparers and Translators?

The rule proposes to simplify the requirements for preparers and translators who assist employees in completing section 1 of the Form I–9.

Current regulations provide that preparers or translators must read the Form I–9 to the individual. The rule proposes to amend the current regulations by providing that the preparer or translator must provide such assistance as is necessary for the individual to understand and complete the form. This change provides needed flexibility for preparers and translators to adequately assist individuals completing section 1 of the Form I–9.

What Are the General Requirements for Documents That May Be Presented in the Verification Process?

The proposed rule includes the statement that only original, unexpired documents that appear on their face to be genuine and to relate to the individual presenting the documents can be accepted by employers and recruiters or referrers for a fee. These requirements apply to all three lists of documents, as well as to acceptable receipts. Currently, the regulations permit use of expired United States passports and expired identity documents. The proposed rule will require any document presented to be unexpired.

Why Is the Service Proposing To Permit Only Unexpired Documents in All Cases?

The Service notes that many states have taken steps to improve the integrity of their document-issuance procedures and the fraud-resistance of the documents they issue. The United States Department of State has taken similar steps with respect to passport issuance. If individuals are allowed to present expired documents. the verification process gains no benefit from those measures. The Service believes that the integrity of the verification process will be improved by a requirement that employees present only unexpired documents.

The Service recognizes that the requirement that individuals present unexpired documents may impose a cost on persons seeking employment. The Service anticipates and encourages public comment on this point. The Service is especially interested in the views of employers and recruiters or referrers for a fee concerning whether such a requirement simplifies verification for them, and of persons involved in assisting welfare recipients in transitioning to work concerning the burden imposed by the requirement. To that end, what follows is some of the analysis underlying our decision.

Replacing an expired United States passport is expensive ($55, plus an additional $30 for expedited service). Because a passport remains valid for 10 years, however, some employers have questioned whether an expired passport is a reliable identification document. They note that a person's appearance can change a great deal in 10 years. In addition, the Service does not believe that continuing to permit employees to present expired passports would be of help to most low income individuals, those for whom the cost of replacement documents would be the most serious issue, because they would be unlikely to have obtained a passport in the first place. Finally, the Service believes that most employers would prefer a simple requirement that documents be unexpired to a list that included exceptions to the rule.

The Service also researched the cost of obtaining an identity document in 10 states representing a wide range geographically and in population size. The cost of an identification card was the primary focus, because an individual who needs to drive must have an unexpired driver's license for that purpose, and otherwise an individual would not need to obtain a driver's license solely for verification purposes. In all but one of the states contacted, the cost of an identification card is lower than the cost of a driver's license. The charge for the card in those states ranges from $4 to $15 and averages around $10. In four states, the identification card does not expire, so it represents a one-time cost and the requirement that documents be unexpired would not be an issue.

§ 274a.2(c)—Time for Completing Form *I–9*

This section states when the Form I–9 must be completed, with separate paragraphs discussing employers, hires for duration of less than 3 days, recruiters and referrers. and receipts.

May an Employer Require Completion of Form I–9 Before an Employee Starts To Work? Must an Employer Always Give Employees 3 Days To Present Documentation?

This section contains one addition pertaining to when the Form I–9 must be completed. The regulations require section 1 of the Form I–9 to be completed by the individual at the time of hire and section 2 of the Form 1–9 to be completed by the employer, or recruiter or referrer for a fee, within 3 business days of the date of hire (unless the duration of employment is less than 3 business days).

Current regulations are silent as to whether an employer, or recruiter or referrer for a fee, may complete the Form I–9 prior to the date that the individual is hired. in the past, employers have asked if they are permitted to require individuals to present the necessary documentation at the time of hire rather than within 3 business days of the hire. Service policy has been stated in the *Handbook for* Employers, the M–274. The *Handbook for* Employers states that an employer may complete the Form I–9 before the day that an individual starts work, but after the individual has been offered employment and has accepted the job, provided that the employer completes the Form I–9 at the same point in the employment process for all employees. The proposed rule incorporates in the regulations this longstanding Service interpretation of the employment verification requirements. The proposed rule permits the employer, or recruiter or referrer for a fee, to complete the Form I–9 prior to the date that an individual begins work, so long as the Form I–9 is completed after the hiring commitment is made and this practice is uniformly applied to all employees.

Section *274a.2(d)—Reverification* of Employment Eligibility When Employment Authorization Expires

Current regulations require employers and recruiters or referrers for a fee to reverify on the Form I–9 if an individual's employment authorization expires. Reverification on the Form I–9 must occur no later than the date work authorization expires. The Service receives numerous questions from the public concerning this requirement. In response to questions and comments, the Service is attempting to clarify the reverification requirements in this proposed rule.

What Is the Form I–9A?

The Service proposes creation of the Form I–9A as a supplement to the Form I–9 which may be used for reverification. Form I–9A is structured similarly to the Form I–9, in that it has a section to be completed by the employee, a preparer/translator block, and a section to be completed by the employer. Form I–9A is shorter, however, containing only the information needed for reverification. The form provides blocks for two reverifications and may be duplicated as needed.

Why Is the Service Proposing Creation of Form I–9A?

The Service does not seek to impose an increased burden on the public by proposing this supplemental form. Rather, the Service is attempting to respond to earlier comments from employers. Currently, the updating and

reverification section on the Form I-9 contains an attestation for the employer only. In response to the 1993 proposed rule, several employers expressed the belief that the employee also should be required to attest to his or her continuing eligibility to be employed. This suggestion was incorporated in the Service's 1995 supplement. Adding an employee attestation to the updating and reverification section. however, also made it necessary to add a preparer/translator block. The result was a form that was crowded and difficult to complete. The Service considered simply requiring employers to complete a new Form I-9 when they reverified. Before doing so, however, the Service wished to obtain suggestions from employers concerning whether a reverification form would be more convenient. It seemed possible that a reverification form would help employers better understand when reverification is—and is not—required. For example, some employers apparently reverify identity documents when they expire. even though this is not required. Form I-9A provides no space for entering information about identity documents, which helps to reinforce that they need not be reverified.

Although Form I-9A is intended to simplify reverification. the Service seeks comment on whether employers would prefer to use the Form I-9 for reverification as well as verification at the time of hire. The proposed rule makes it clear that employers may elect to either use Form I-9A or complete a new Form 1-9 for verification. The Service would appreciate comment on whether employers have a preference. If the comments reveal a strong and clear preference to use Form I-9 for reverification, and against creation of an additional form, the Service will not promulgate Form I-9A.

Who Is Exempt From Reverification?

The proposed rule also makes it clear that reverification does not apply to United States citizens or nationals or to lawful permanent residents. There is one exception: lawful permanent residents who present a foreign passport with a temporary 1-551 stamp must present the actual Form 1-551 when the stamp expires. However, under no other circumstance is reverification necessary for lawful permanent residents, even if their Alien Registration Receipt Card or Permanent Resident Card. Form I-551 expires or they naturalize.

How Does an Employer Know When Work Authorization Expires?

The proposed rule also states that an expiration date for work authorization, triggering the reverification requirement, may appear in either section 1 or section 2 of the Form I-9 or Form I-9A. Some employers have expressed uncertainty about whether they are responsible for information in both sections of the form.

Section 274a.3—What Documents Are Acceptable for Employment Verification?

To implement section 412(a) of IIRIRA, and meet the Service's longstanding document-reduction objectives, this rule proposes to amend the current regulations governing the lists of documents acceptable in the employment verification process.

Section 274a.3(a)—Documents That Establish Both Identity and Employment Authorization (List A)

How Does IIRRA Affect List A Documents?

Section 412(a) of IIRIRA amends section 274A(b)(1)(B) of the Act, which governs the documents that individuals may present to establish both identity and employment eligibility (List A). Section 412(a) of IIRIRA eliminates three documents from the statutory list: (1) Certificate of United States citizenship: (2) certificate of naturalization: and (3) an unexpired foreign passport with an endorsement that indicates eligibility for employment. The documents remaining on the list by statute are: a United States passport, resident alien card, alien registration card, or other document designated by the Attorney General.

What Conditions Must a Document Meet To Be Added to List A?

IIRIRA restricts the Attorney General's authority to add documents to List A. Each document designated by the Attorney General must meet three conditions. The document must:

(1) Bear a photograph and personal identification information;

(2) Constitute evidence of employment authorization, and

(3) Contain "security features to make it resistant to tampering, counterfeiting, and fraudulent use."

What Documents Will Be on List A Under the Proposed Rule?

The Service proposes to amend the current regulations to limit the documents that establish both identity and employment authorization to the following documents. Documents preceded by an asterisk are proposed to be added by regulation. The other documents are listed in the law, as amended by IIRIRA. Documents proposed for List A are:

(1) A United States passport:

(2) An Alien Registration Receipt Card or Permanent Resident Card, Form I-551;

(3) A foreign passport with a Temporary I-551 stamp;

*(4) An employment authorization document issued by the Service which contains a photograph (Form 1-766, For I-688, For I-688A, or Form I-688B); and,

*(5) In the case of a nonimmigrant alien authorized to work only for a specific employer. a foreign passport with an Arrival-Departure Record,—Form 1-94, bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status and the name of the approved employer with whom employment is authorized, so 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 I-94.

What is the Service's Basis for including INS-Issued Employment Authorization Documents?

This proposed rule designates an employment authorization document, Forms I-766, I-688, I-688A, and I-688B, as an acceptable List A document. Forms I-766, I-688, I-688A, and I-688B meet the three statutory conditions that limit the Attorney General's authority to designate additional List A documents. First, these Service-issued forms all contain a photograph and additional identifying information of the bearer, including a fingerprint of the bearer and the bearer's date of birth. Second, the forms are evidence that the Service has granted employment authorization to the bearer. Third, the Service has designed each of the forms to contain security features that make them resistant to tampering, counterfeiting, and fraudulent use.

What Is the Service's Basis for Including Foreign Passports?

The Service proposes in this rule to designate foreign passports as acceptable evidence of identity and employment authorization, but limited to two instances. The first relates to aliens lawfully admitted for permanent residence under section 101(a)(20) of the Act. Persons newly admitted for or adjusted to lawful permanent residence may receive evidence of that status through a stamp in their passports. The stamp serves as temporary evidence of

permanent resident status until the individual receives Form I–551 from the Service. If the stamped endorsement includes an expiration date, the document must be reverified

In the newest versions of the Form I–551, the cards also bear an expiration date but need not be reverified when the card expires, Only the stamp must be reverified when expired. (See the discussion of the receipt rule, below. for discussion of the temporary I–551 stamp when it is placed on Form 1–94 instead of a foreign passport.)

The second instance in which a foreign passport is designated as a List A document is when it is presented with Form 1–94 indicating authorization to work for a specific employer. This will be an acceptable document only for persons whose employment is incident to status and authorized with a specific employer, and may be accepted only by the employer for whom the individual is authorized to work.

Aliens in classes identified in § 274a.12(b) are authorized employment incident to status with a specific employer. The Service does not currently require aliens in these classes to obtain a List A employment authorization document—i.e., an I–688B or 1–766 EAD. and does not plan to implement such a requirement at this time. The proposed rule specifies the documentation the Service will issue to nonimmigrant alien classes that will not be issued an 1–766 EAD. This documentation will be the Form I–94, with an endorsement that specifies the employer with which work is authorized. The Service will modify its procedures for endorsing the departure portion of nonimmigrants' Form I–94, so that the name of the approved employer will appear on the document. The employer's name will also be noted on the **arrival** portion of the Form 1–94 and entered into Service databases for verification and record-keeping purposes.

The IIRIRA provides that the Attorney General "may prohibit or place conditions on" a specific document if the Attorney General finds that the document "does not reliably establish [employment] authorization of identity or is being used fraudulently to an unacceptable degree." The Service finds that documentation issued to or used by nonimmigrants in these classes does not reliably establish work eligibility except for employment with a specific employer. The proposed rule, therefore, restricts the foreign passport with an I–94 bearing employer-specific work authorization, stipulating that it may be used only for purposes of establishing eligibility to work for the approved employer. This restriction does not relieve employers of the requirement to abide by any terms or conditions specified on any documentation issued by the Service. Similarly. the restrictions do not permit employers to require individuals to present a specific document. The restrictions do mean that a Form 1–94 endorsed to permit employment with a specific employer may not be accepted as evidence of eligibility to work for other employers.

The Service finds that, in those two instances, foreign passports meet the three conditions that authorize the Attorney General to add documents to List A. First, foreign passports bear a photograph and identifying information (such as the birthdate and physical characteristics of the bearer). Second, they are evidence of employment authorization when they bear a temporary I–551 stamp or are presented with a Form 1–94 endorsed to authorize employment with a specific employer. Finally, foreign passports contain security features to make them resistant to tampering, counterfeiting, and fraudulent use. Temporary I–551 stamps are made with secure ink and meet internal Service standards. An 1–94 is acceptable with a foreign passport only in employer-specific situations in which the employer examining the 1–94 for employment verification purposes is the same employer named on the 1–94. The Service also notes that, in both these instances, the employers are required to reverify the individual's eligibility to work when the stamped authorization bears an expiration.

The proposed restrictions on Form I–94 pose special issues for two categories of nonimmigrants. students (F–1) and exchange visitors (J–1). Documentation for those categories will be addressed further in the forthcoming proposed amendments to Part 274a, Subpart B.

If the Service Has a New Employment Authorization Document, Why Are the Older Ones Still on This list?

The Service has been planning for several years to phase out use of three documents: (1) Temporary Resident Card. Form I–688; **(2)** Employment Authorization Card, Form I–688A; and **(3)** Employment Authorization Document, Form I–688B. As noted, on September 4, 1996, the Service published a final rule adding Form I–766 to List **A** and began to issue the I–766 EAD in February 1997. Through forthcoming proposed amendments to 8 CFR 274a, Subpart B, the Service will discuss its plans to consolidate card production. This consolidation will allow the Service to replace Forms I–688. I–688A, and I–688B with the 1–766 EAD **as** the earlier documents expire. The Service anticipates phasing out these documents through the normal card replacement process. No document recall is planned. Based upon comments received in response to the 1993 proposed rule and 1995 supplement, the Service is not proposing a termination date for the validity of those documents at this time. The documents remain on List A in this proposed rule. At the appropriate time in the future, the Service will remove these documents from List A through rulemaking and update the Form I–9.

What Documents Are Being Removed From List A and Why?

The proposed rule does not designate the certificate of United States citizenship, certificate of naturalization, re-entry permit, and refugee travel document as acceptable List A documents, These documents were removed by the interim rule. The Service does not believe that these documents meet the three conditions required for the Attorney General to designate them as List A documents. Holders of these documents can easily obtain other acceptable documents which are more readily recognized by employers. Naturalized citizens are eligible for the same documents **as** other United States citizens, such as a passport and unrestricted social security card. Lawful permanent residents and refugees are eligible for an unrestricted social security card and, respectively, Form 1–551 and Form I–688A or Form 1–766.

What Happened to the Earliest Versions of the "Green Card," Form I–151?

The Service phased out Form I–151, Alien Registration Receipt Card, as evidence of status as a lawful permanent resident effective March 20, 1996. Currently, Form I–551 is the only valid evidence of lawful permanent resident status. Employers are not required to reverify employees who were hired prior to March 20, 1996, and who presented Form I–151. However, employers and recruiters or referrers for a fee should not have accepted Form I–151 from employees hired after that date.

Section *274a.3(b)—Documents* That Establish Identity Only (List *B)*

Does IIRIRA Affect List B Documents?

The IIRIRA made no statutory changes to List B documents.

Section 274A(b)(1)(D) of the Act specifies the following documents as acceptable documents for establishing identity:

(1) A driver's license or similar identification document issued by a state that contains a photograph or other identifying information, or

(2) For individuals under the age of 16 or in a state that does not issue an appropriate identification document, documentation of personal identity found by the Attorney General to be reliable.

Despite this limited list, current regulations permit a wide range of acceptable documents. List B currently is the longest of the three lists, and many of the documents either are unfamiliar to many employers or vary widely in appearance and the features they contain. In this proposed rule, the Service is retaining documents previously added to List B by regulation only in instances where there is an identifiable class for which elimination of the document could leave the class without an acceptable document to establish identity.

What Documents Will Be on List B Under the Proposed Rule?

The Service proposes to amend the regulations by reducing the list to the following documents:

(1) A state-issued driver's license or identification card:

(2) A Native American tribal document; and

(3) In the case of a Canadian nonimmigrant authorized to work incident to status with a specific employer, a Canadian driver's license or provincial identification card.

What Documents Are Begin Retained on List B by Regulation and Why?

The Service identified two documents previously added to List B by regulation for which there is an identifiable class that could be left without an acceptable document to establish identity if the document were removed from the list. The documents are: **(1)** A Native American tribal document and **(2)** a Canadian driver's license or provincial identification card.

Why Are Native American Tribal Documents Included on List B?

The proposed rule retains Native American tribal documents on both List B and List C (documents evidencing work authorization only). The removal of Native American tribal documents from the list of acceptable documents would pose a particular problem for Canadian-born American Indians who continue to reside in Canada, but who enter the United States temporarily for employment purposes under the terms of section 289 of the Act. These individuals are not required to present a passport for admission to the United States and would not necessarily have other identification documents acceptable for employment verification requirements.

Over the years, the Service has received many inquiries concerning why these documents appear on both List B and List C instead of List A. Until the enactment of IIRIRA. the Attorney General lacked the authority to designate List A documents beyond those specifically listed in the Act. Section 412(a) of IIRIRA extends this authority to the Attorney General. However, as noted, documents added to List A must meet three conditions, including that the document must contain security features. The number of authorities issuing tribal documents is too numerous, and the documentation too varied, for the Service to make a finding that tribal documents, as a class, meet all three conditions. Therefore, the Service is continuing the existing practice of including those documents on both List B and List C.

Why are Canadian Driver's Licenses and Identification Documents Included on List B?

The proposed rule includes on List B a driver's license or identification card issued by a Canadian Government authority. This rule proposes to make such documents acceptable only in the case of a Canadian nonimmigrant authorized to work incident to status with a specific employer. Through reciprocal international agreements and under Service regulations at 8 CFR 212.1(a), a visa generally is not required of Canadian nationals and aliens having a common nationality with nationals of Canada, and a passport is required of these aliens only when traveling from outside the Western Hemisphere. However. the Service controls and documents the arrival of Canadian nationals and aliens having a common nationality with nationals of Canada who establish admissibility in a nonimmigrant classification which entitles them to work with a specific employer (for example, as a professional under the North American Free Trade Agreement [TN], or as an intracompany transferee [L-1], or as a temporary worker [H-2B].) The Service issues the Form 1–94 to these aliens as a record of lawful admission and as evidence of authorization to work in the United States with a specific employer. The Service also issues the Form 1–94 to nationals of all other countries to document and control admission of nonimmigrants. The Form 1–94 is generally placed in the passport of the nonimrnigrant alien.

Because aliens of Canadian nationality are not required to present a passport for admission to the United States except when traveling from outside the Western Hemisphere, the Service is retaining on List B identity documents issued by Canadian authorities. However, to avoid confusion about the eligibility of Canadian nationals to engage in employment in the United States, the Service is adding language to make it clear that Canadian identification documents may be used only in the limited instance of a Canadian national admitted as a nonimmigrant who is authorized to work incident to nonimmigrant status with a specific employer. In other situations, authorized Canadian nationals would have other acceptable documentation. For instance, Canadian nationals who are lawful permanent residents would have been issued a Form 1–551.

Over the years, the Service has received many inquiries concerning why Mexican driver's licenses are not included on List B. No reciprocal agreements exist between the United States and Mexico which would permit the use of Mexican driver's licenses or identification cards as List B documents.

What Documents Are Being Removed From List B and Why?

The Service proposes to remove the following documents from List B:

(1) An identification card issued by Federal or local authorities:

(2) A school identification card with a photograph:

(3) A voter's registration card:

(4) A United States military card or draft record:

(5) A military dependent's identification card:

(6) A United States Coast Guard Merchant Mariner Card: and

(7) For individuals under age 18 who are unable to produce an identity document, a school record or report card, clinic doctor or hospital record, and daycare or nursery school record.

When the Service published the 1993 proposed rule and 1995 supplement, several comments expressed concern about the elimination of specific documents and the special list for minors. Current regulations, however, were developed when not all states issued a non-driver's identification card. At present, all states do so. Therefore, this justification for an expanded list no longer exists. The Service believes that the proposed list will greatly reduce confusion for employers while enabling all work-eligible individuals to establish their identity for verification purposes.

Will It Still Be Possible for Someone Else To Attest to the Identity of a Minor or Person With a Disability if They Cannot Present an Acceptable Identity Document?

Yes. Current regulations permit employers, and recruiters or referrers for a fee, to accept an attestation concerning the identity of minors under the age of 18 and persons with disabilities who are unable to produce one of the acceptable identity documents. The Service is proposing no substantive changes to these provisions. Because the provision for persons with disabilities was developed prior to passage of the Americans with Disabilities Act (ADA), however, the proposed rule replaces terminology that pre-dates the ADA with the terms and definition used in the ADA.

Section *274a.3(c)—Documents* That Establish Employment Authorization *Only (List C)*

How Does IIRIRA Affect List C Documents?

Section 412(a) of IIRIRA amends section 274A(b)(1)(C) of the Act by removing the certificate of birth in the United States (or other certificate found acceptable by the Attorney General as establishing United States nationality at birth) from the list of acceptable documents that may be used to establish employment authorization for compliance with the employment verification requirements. Acceptable List C documents are: a social security account number card (other than one which specifies on its face that the issuance of the card does not authorize employment in the United States) or other documentation found acceptable by the Attorney General that evidences employment authorization.

What Documents Will Be on List C Under the Proposed Rule?

The Service proposes to limit acceptable List C documents to the following:

(1) A social security account number care (other than such a card which specifies on the face that the issuance of the card does not authorize employment in the United States);

(2) A Native American tribal document: and

(3) In the case of a nonimmigrant alien authorized to work only for a specific employer, an Arrival-Departure Record, Form 1–94. containing an endorsement of the alien's nonimmigrant status and the name of the approved employer with whom employment is authorized, so 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 1–94.

Why Is the Service Changing the Language Describing an Acceptable Social Security Card?

Current regulations designate the "social security number card other than one which has printed on its face 'not valid for employment purposes'" as an acceptable List C document. In accordance with section 412(a) of IIRIRA this proposed rule retains the social security account number card on List C. The proposed rule, however, amends the language in the regulations *so* that it mirrors the statutory language. The proposed rule changes the term, "social security number card," to "social security account number card," as is stated in the Act and IIRIRA. In addition, the proposed rule replaces the phrase, "other than one which has printed on its face 'not valid for employment purposes."' with the statutory language, "(other than such a card which specifies on the face that the issuance of the card does not authorize employment in the United States)."

The Social Security Administration (SSA) issues cards with the legend stated in the regulations, "not valid for employment purposes," to individuals from other countries who are lawfully admitted to the United States without work authorization, but who need a number because of a Federal, state, or local law requiring a social security number to get a benefit or service. In 1992. SSA began issuing cards that bear the legend "valid for work only with INS authorization" to people who are admitted to the United States on a temporary basis with authorization to work. This proposed rule amends the language in the regulations to mirror the language in the Act and IIRIRA and to clarify that cards bearing either restrictive legend are not acceptable List C documents.

What Documents Are Being Added to List C by Regulation and Why?

Under section 274A(b)(1)(C)(ii) of the Act, as amended, it is within the Attorney General's authority to designate "other documentation evidencing authorization of employment in the United States which the Attorney General finds, by regulation, to be acceptable for purposes of this section." Exercising that authority, the Service finds that the Native American tribal document and Form 1–94 with endorsement of employment authorization are acceptable List C documents. As noted in the discussion of Native American tribal documents under List B, elimination of the documents from List C could leave certain Native Americans without an acceptable document to establish their eligibility to work. As noted in the discussion of Form 1–94 under List A. Form 1–94 will be the document issued to nonimmigrant aliens who are authorized to work only for a specific employer. Only the employer for whom the work is authorized will be permitted to accept the document.

What Documents Are Being Removed From List C and Why?

The Service proposes to eliminate the following documents as acceptable for establishing employment authorization:

(1) A Certification of Birth Abroad issued by the Department of State, Form FS–545;

(2) A Certification of Birth Abroad issued by the Department of State, Form DS–1350;

(3) A birth certificate issued by a State, county, municipal authority or outlaying possession of the United States bearing an official seal:

(4) A United States citizen Identification Card, INS Form 1–197:

(5) An Identification card for use of a resident citizen in the United States, INS Form I–179: and

(6) An unexpired employment authorization document issued by the Service.

The IIRIRA provides for additions to List C by regulation of "other documentation found acceptable by the Attorney General that evidences employment authorization." The Service recognizes that elimination of the birth certificate, in particular, may generate public comment.

The Service notes, however, that Congress specifically eliminated this document from the list, based on its concern that, "Birth certificates, even if issued by lawful authority, may be fraudulent in that they do not belong to the person who has requested that one be issued. This problem is exacerbated by the large number of authorities—numbering in the thousands—that issued birth certificates." (See H.R. Rep. No. 104–469, at 404–05 (1996).)

In addition to believing that eliminating the birth certificate is consistent with Congressional intent, the Service has additional reasons for taking this action. Service officers have expressed concern by the lack of uniform controls among the states over the issuance of replacement birth certificates.

Officers are encountering situations in which unauthorized aliens have used fraudulently obtained birth certificates

to falsely claim United States citizenship and gain employment.

The other documents proposed for removal also pose burdens to employers because it can be difficult for employers to assess whether they appear genuine on their face. The certifications of birth abroad, issued by the State Department, are not commonly recognized documents with which the general public is familiar. The Service no longer issues the citizen identification cards which were on the list. Legitimate holders of the documents being removed are all eligible for an unrestricted social security card, which allows them to establish their eligibility to work in the United States. The Service believes that employers will find a shorter list of documents easier to work with.

In this proposed rule, the existing general category of documents characterized as "employment authorization documents issued by the Service" is no longer designated as an acceptable List C document. This general category was included in the current regulations while the Service was taking steps to standardize the employment authorization documents that it issues. The Service has taken several steps to issue uniform documentation. The Service introduced the I–688B EAD in 1989. The 1–766 EAD, introduced in February of 1997, represents further improvement because the centralized process is more secure and efficient. These documents are List A documents which establish both identity and eligibility to work. Moreover, with his proposed rule, the Service announces additional steps, such as the endorsement of Form 1–94 when it is issued to a nonimmigrant who is authorized to work for a specific employer. The Service believes that a **general category** for **Service-issued** employment authorization documents is no longer necessary.

Section *274a.3(d)—Receipts*

Current regulations permit individuals to present a receipt showing that they have applied for a replacement document if the individual is unable to provide a required document or documents at the time of hire. This provision provides flexibility in situations where, for example. an individual has lost a document. The Service has received numerous questions about the applicability of this provision to various situations. The proposed rule attempt to clarify the circumstances in which a receipt may be accepted.

The interim rule amended the receipt rule to designate three instances in which receipts are acceptable and extended the receipt rule to reverification. The proposed rule restructures the receipt rule and moves this provision to the section of the regulations containing the lists of acceptable documents.

Employers have asked whether they must accept a receipt if an employee presents one. In the new structure, receipts are discussed in the same section as Lists A. B, and C to emphazie that the same standards that apply to List A, B, and C documents also apply to receipts. Further, the rule indicates that an employee has the choice of which documents to present. Just as with List A, B, and C documents, if the receipt appears to be genuine and to relate to the individual presenting it, the employer cannot ask for more or different documents and must accept the receipt. Otherwise, the employer may be engaging in an unfair immigration-related employment practice in violation of section 274B of the Act. The receipt presented, however, is only acceptable if it is one that is listed in the regulations.

Like the interim rule, the proposed rule also extends the receipt rule to reverification and identifies circumstances where a receipt is not acceptable.

In What Circumstances are Receipts Acceptable?

The proposed rule permits the use of receipts in three instances:

(1) a receipt for an application for a replacement document,

(2) **A** temporary **1–55**1 stamp on a Form I–94, and

(3) A refugee admission stamp on a Form I–94.

Receipt for Application for a Replacement Document

The first instance in which a receipt is acceptable is when the individual presents a receipt for the application for a replacement document. An application for an initial or extension List A or C document, however, is not acceptable, except for nonimmigrants as provided under 8 CFR 274a.12(b)(20). The latter provision permits continued employment for a temporary period of certain nonimmigrants authorized to work for a specific employer incident to status, in situations where a timely application has been filed with the Service and has not been timely adjudicated.

Temporary Evidence of Permanent Resident Status on Form 1–94

The second instance is the use of Form 1–94 as temporary evidence of permanent resident status. If an alien is not in possession of his or her passport, and requires evidence of lawful permanent resident status, the Service may issue the alien the arrival portion of a Form 1–94 with a temporary I–551 stamp and the alien's picture affixed. Although this document provides temporary evidence of permanent resident status, it does not contain security features and, therefore, does not meet the statutory requirements for inclusion on List A. The Services, therefore, proposes to designate Form I–94 with a temporary I–551 stamp as a receipt for Form I–551 for 180 days.

Special Rule for Refugees

The third instance is when the departure portion of Form 1–94 contains a refugee admission stamp. The Service recognizes the importance of newly admitted refugees being able to seek employment promptly upon arrival in the United States. The Service has been working with SSA to ensure prompt issuance to refugees of social security cards which carry no employment restrictions. In most instances, the Service believes that refugees will receive social security cards timely and will be able to present them to employers. The Service also intends to give refugees the option of obtaining an 1–766 EAD. but recognizes that in most instances refugees will be able to obtain a social security card faster. Refugees may wish to obtain an 1–766 EAD so that they will have a Service-issued document with a photograph. In order to ensure that refugees are still able to work if they encounter delays in obtaining cards from either SSA or the Service, the Service proposes a special receipt rule. Under this rule, a Form I–94 with a refugee admission stamp will be a receipt evidencing eligibility to work **valid for 90 days** from **the date** *of* hire. It will not be a receipt for a specific document. The refugees will be permitted to present either an unrestricted social security card or an I–766 EAD at the end of the 90-day receipt period. If the refugee presents a social security card, the refugee will also need to present a List B document. If the refugee presents an 1–766 EAD, he or she does not need to present another document.

Are There Circumstances Where a Receipt is not Acceptable?

The proposed rule notes two exceptions in which the special rules for receipts do not apply. These are if:

(1) The individual indicates or the employer. or recruiter or referrer for **a** fee, has actual or constructive

knowledge that the individual is not authorized to work; or

(2) The employment is for a duration of less than 3 business days.

The Services considered changing the term "receipt" in light of the expanded definition contained in this proposed rule. The Service's impression, however, is that employers are familiar with this term as it is used in the verification context. The Service seeks comment on whether other terminology would be clearer or the current term is preferred.

Section 274a.4 How long are Employers and Recruiters or Referrers Required to Retain the Form I-9 and What Must be Retained With it?

The proposed rule breaks what was formerly § 274a.2 into two sections, pertaining to retention (§ 274a.4) and inspection (§ 274a.6). The retention section addresses general requirements for employers and recruiters or referrers for a fee, reverification. copying of documentation, and limitations on the use of the Form I-9. Most of these provisions remain unchanged in content with the current rule. One change is to specify that a form used for reverification must be attached to the initial Form I-9 relating to the individual.

Another change relates to photocopies of documents. Employers and recruiters or referrers for a fee may, but are not required to, copy a document presented by an individual solely for the purpose of complying with the verification requirements. Current regulations state both that employers and recruiters or referrers for a fee should retain the copies with the Form I-9 and that the retention requirements do not apply to copies. The proposed rule removes this apparent inconsistency by providing that employers and recruiters or referrers for a fee who elect to photocopy documentation must attach the photocopies to the I-9 and I-9A form and present them with the forms upon inspection. This change is necessary to clarify the retention requirements for photocopies of documentation in response to investigation issues that have confronted the Service and the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC).

Section 274a.5 Under What Circumstances may Employers and Recruiters or Referrers Rely on a Form I-9 That an Individual Previously Completed?

This section addresses requirements in the cases of continuing employment (formerly § 274a.2(b)(1)(viii)), hiring an individual who was previously employed (formerly § 274a.2(c)), and recruiting or referring for a fee an individual who was previously recruited or referred (formerly § 274a.2(d)). The only substantive change the Service proposes is to eliminate language that could be construed as requiring recruiters and referrers to reverify all referred individuals whose work authorization expires. The proposed rule requires reverification only in the instance of an individual who was previously recruited or referred.

Section 274a.6 What Happens When the Government Asks to Inspect Forms I-9?

This section addresses the 3-day notice of inspection, the obligation to make records available, standards for microfilm and microfiche, and the consequences of failure to comply with an inspection. Most of these paragraphs were previously contained in § 274a.2(b)(2).

What Changes are Made in the Proposed Rule?

Section 416 of IIRIRA clarifies the Service's subpoena authority by stating that, "immigration officers designated by the Commissioner may compel by subpoena the attendance of witnesses and the production of evidence at any designated place prior to the filing of a complaint * * *." The current regulations at § 274a.2(b)(2)(ii) include a reference to the Service's subpoena authority, but they refer to the production of documents rather than the production of evidence and do not include a reference to the attendance of witnesses. This rule proposes to amend the current regulations to include a reference to the attendance of witnesses, replace the phrase, "production of documents," with the phrase, "production of evidence," and include a reference to the exercise of the subpoena authority prior to the filing of a complaint with the Office of the Chief Administrative Hearing Officer based upon a request for a hearing made by the employer, or recruiter or referrer for a fee, following service of the Notice of Intent to Fine. The proposed rule also simplifies the statement in the regulations regarding the Service's subpoena authority so that it is clear that the Service has the authority to compel by subpoena: Forms I-9 that a person or entity refuses to produce upon inspection: Forms I-9 that are the subject of an inspection whether or not the person or entity refuses to produce them: the production of any evidence: and the attendance of witnesses.

Will the Service Allow Electronic Storage of the Form I-9?

In the last several years, the Service has been in dialogue with the public over changes in information technology and their possible applicability to the Form I-9. One result of these discussions was the interim rule, published October 7, 1996. permitting electronic generation of a blank Form I-9. Following publication of this rule, the Service began to make the Form I-9 available for downloading from its world wide web site on the Internet (www.ins.usdoj.gov).

Employers have also expressed interest in electronic storage of the Form I-9. The Service is currently preparing to conduct a demonstration project to assess electronic storage of Forms I-9. In reviewing this technology, the Service is aware that many employers now scan and/or electronically store many of their personnel records.

The Form I-9, however, raises special issues because it requires two signatures. Fraudulent preparation of the form is a common issue in the Service's investigations. For example, during an investigation an unauthorized alien may claim that the employer did not complete a Form I-9 at the time of hire, while the employer presents a Form I-9 for the employee and claims that the employee lied about his unauthorized status. The determination of whose account is true is central to the question of liability for penalties. Investigations of such cases may require forensic analysis to determine the authenticity of the signatures. Scanned signatures provide adequate detail for such analysis only at a rate of resolution higher than those used for most records scanning systems. The Service is continuing to monitor developments in scanning and other technology. At present. however. the Service is considering scanned records for purposes of I-9 retention only in the context of the demonstration project.

§ 274a.7 What is the Prohibition on Hiring or Contracting With Unauthorized Aliens and What Defense can be Claimed?

This section contains the following three provisions pertaining to hiring or contracting and unauthorized aliens:

(1) Prohibition on the hiring and continuing employment of unauthorized aliens, currently at 8 CFR 274a.3;

(2) Use of labor through contract, currently at 8 CFR 274a.5: and

(3) Good faith defense to charge of knowingly hiring an unauthorized alien, currently at 8 CFR 274a.4.

The proposed rule amends the paragraph currently at 8 CFR 274a.3 by

adding a reference to the prohibition on the hiring of unauthorized aliens provided by section 274A(a) (1) (A) of the Act. It also clarifies that an employer's "knowledge" that an employee is unauthorized can be either actual or constructive for the provision prohibiting the hiring or continued employment of an unauthorized alien to be violated. Cross-references to the verification sections are amended to reflect the changes proposed by the rule No other substantive changes were made.

Section 274a.8 What are the Requirements of State Employment Agencies that Choose to Verify the Identity and Employment Eligibility of Individuals Referred *for* Employment by the Agency?

This section contains the state agency certification requirements currently contained at 8 CFR 274.6. The Service proposes no changes to the contents of this section, in part because the Service is not aware of any state agencies currently issuing certifications under this provision. Under the Act, an employer may rely upon a state agency certification instead of completing Form I-9. The requirements in this section were developed during the first years that the verification requirements were in effect. In light of recent welfare reform efforts, the Service is prepared to revisit the requirements if there is new interest among state agencies in performing verifications for employers. The Service invites comment from state agencies concerning changes to the regulations that would facilitate their ability to provide this service.

Section 274a.9 Can a Person *or* Entity Require an Individual to Provide a Financial Guarantee *or* Indemnity Against Potential Liability Related to the Hiring, Recruiting, *or* Referring of the Individual?

This section contains the prohibition against indemnity bonds currently found at 8 CFR 274.8. No substantive changes have been made to this section.

Section *274a.* 10 How are Investigations Initiated and Employers Notified of Violations?

This section contains the paragraphs discussing the filing of complaints, investigations, notification of violations, and the procedures for requesting a hearing, which are currently found at 8 CFR 274a.9. No substantive changes have been made to this section.

Section *274a.* 1I What Penalties may be Imposed for Violations?

This section contains the penalty provisions currently found at 8 CFR *274a.* 10. It also contains the pre-enactment provision, which exempts employers from penalties for individuals hired prior to November 7, 1987. currently found at 8 CFR 274a.7. Minor language changes have been made to the latter for purposes of clarity. The substance in this section remains unchanged.

How can the Service Best Inform the Public of Changes to the Requirements?

Over the years, the Service has attempted to inform the public of new forms and requirements by mailing information. Mailings were conducted in 1987 to introduce the Form I–9; in 1989 to introduce the Form I–688B Employment Authorization Document (EAD); in 1991 to introduce the revised Form I–9; and in 1997 to introduce the new Form 1–766 **EAD.**

Employers and trade associations have, from time to time, questioned the effectiveness of such mailings. Three of the mailings were conducted with the assistance of the Internal Revenue Service (IRS). Some of the feedback the Service received following those mailings suggested that many employers have IRS mail directed to attorneys or accountants, which meant that the Form I–9 information did not reach its intended audience. For the 1997 mailing, the Service used a commercial data base and indicated on the front that the material should go to the human resources department. In talking to employers who have called INS for information related to the Form I–9, the Service has identified few instances where the people responsible for Forms I–9 received the mailing.

The Service recognizes the impact that the Form I–9 has on the business community and wants to ensure that the public has ready access to the information it needs. The Service is developing a fax-back capability for employer information and is making increased use of its internet site. All materials related to changes in the requirements will be made available through these channels as they become available. The Service will also work through trade and professional associations and similar organizations to inform the public.

The Service seeks suggestions from the public concerning the most cost-effective means to reach and inform those affected by this rule. Similarly. suggestions concerning the preferred format for instructional materials, such as the M–274 Handbook for Employers or suggested alternatives, would be welcome.

Cross-reference table

The following cross-reference table is provided to assist the public in understanding how the **Service** proposes to restructure 8 CFR 274a, Subpart A.

CROSS-REFERENCE — PROPOSED RESTRUCTURING OF 8 CFR 274A—SUBPART A

Proposed	Current
274a.1 Definitions. Definition of recruiters and referrers moved to this section.	274a.1 and 274a.2(a)
274a.2 Why is employment verification required and what does it involve?	
(a) Why employment verification is required	274a.2(a)
(1) Designation of Form 1-9 and Form I–9A	274a.2(a)
(2) Obtaining and duplicating Form I–9 and Form I–9A	274a.2(a)
(3) Limitation on use of Form 1-9 and attachments	274a.2(b)(4)
(4) Beginning date for verification requirements	274a.2(a)
(b) How to complete the Form I–9	274a.2(b)
(1) Employee information and documentation	274a.2(a)(b)(1)(i)(A)—responsibility to complete section 1 of Form 1-9
(2) Document review and verification	274a.2(b)(1)(i)(B)—responsibility to present documentation 274a.2(b)(1)(ii)(A)—responsibility to review documentation
(3) Recruiters or referrers	274a.2(b)(1)(ii)(B)—responsibility to complete section 2 of Form 1-9 274a.2(b)(1)(iv)—recruiter/referrer responsibility to complete Form 1-9

CROSS-REFERENCE—PROPOSED RESTRUCTURING OF 8 CFR 274A—SUBPART A—Continued

Proposed	Current
(c) Time for completing Form 1-9 (new heading)	274a.2(b)
(1) Section 1 of the Form 1-9	274a.2(b)(1)(i)(A)—timing to complete section 1
(2) Section 2 of the Form 1-9	
(i) Hires for a duration of 3 or more business days	274a.2(b)(1)(ii)—timing to complete section 2 274a.2(b)(1)(iv)—timing for recruiters/referrers
(ii) Hires for a duration of less than 3 business days	274a.2(b)(1)(iii)—timing if hire is for less than 3 business days
(3) Receipts (new)	
(d) Reverification of employment eligibility when employment authorization expires.	274a.2(b)(1)(vii)
(1) Procedures	
(2) Continuing obligation (new)	
(3) Exception to reverification requirement (new)	
274a.3 What documents are acceptable for employment verification?	
(a) Documents that establish both identity and employment authorization (List A).	274a.2(b)(1)(v)(A)
(b) Documents that establish identity only (List B)	274a.2(b)(1)(v)(B)
(1) Acceptable List B documents	274a.2(b)(1)(v)(B)
(2) Special rule for minors	274a.2(b)(1)(v)(B)(3)
(3) Special rule for individuals with disabilities	274a.2(b)(1)(v)(B)(4)
(c) Documents that establish employment authorization only (List C).	274a.2(b)(1)(v)(C)
(d) Receipts	274a.2(b)(1)(vi)
(1) Acceptable receipts and their validity periods (includes new content).	274a.2(b)(1)(vi)
(2) Exceptions (includes new content)	274a.2(b)(1)(iii)—prohibition on receipts if hire is for less than 3 business days
274a.4 How long are employers and recruiters or referrers required to retain the Form 1-9 and what must be retained with it?.	274a.2(b)(2)—retention of Form 1-9
(a) Retention of Form 1-9	
(1) Employers	274a.2(b)(2)(i)(A)
(2) Recruiters or referrers	274a.2(b)(2)(i)(B)
(b) Retention of attachments (new)	
(i) Reverification forms (new)	
(ii) Copies of documentation	274a.2(b)(3)
274a.5 Under what circumstances may employers and recruiters or referrers rely on a Form 1-9 that an individual previously completed?	
(a) Continuing employment	274a.2(b)(1)(viii)
(b) Employment verification requirements in the case of an individual who was previously employed.	274a.2(c)
(c) Employment verification requirements in the case of recruiting or referring for a fee an individual who was previously recruited or referred.	274a.2(d)
274a.6 What happens when the Government asks to inspect Forms I-9?.	274a.2(b)(2)—Inspection
(a) Notice of inspection	274a.2(b)(2)(ii)
(b) Obligation to make records available	274a.2(b)(2)(ii)
(1) In general	
(2) Standards for submitting microfilm or microfiche	274a.2(b)(2)(iii)
(3) Recruiters or referrers	274a.2(b)(2)(ii)
(c) Compliance with inspection	274a.2(b)(2)(ii)
(d) Use of subpoena authority	274a.2(b)(2)(ii)
274a.7 What is the prohibition on hiring or contracting with unauthorized aliens and what defense can be claimed?	
(a) Prohibition on the hiring and continuing employment of unauthorized aliens.	174a.3
(b) Use of labor through contract	274a.5
(c) Good faith defense to charge of knowingly hiring an unauthorized alien.	274a.4
274a.8 What are the requirements of state employment agencies that choose to verify the identity and employment eligibility of individuals referred for employment by the agency?.	274a.6
274a.9 Can a person or entity provide a financial guarantee or indemnity against potential liability related to the hiring, recruiting, or referring of the individual?.	274a.8
274a.10 How are investigations initiated and employers notified of violations?.	274a.9
274a.11 What penalties may be imposed for violations?	
(a) Criminal penalties	274a.10(a)
(b) Civil penalties	274a.10(b)
(c) Enjoining pattern or practice violations	274a.10(c)

CROSS-REFERENCE — PROPOSED RESTRUCTURING OF 8 CFR 274A—SUBPART A — Continued

Proposed	Current
(d) Pre-enactment provisions *for* employees hired prior *to* November **7, 1986.**	274a.7

Regulatory Flexibility Act

The Service has examined the impact of this proposed rule in light of Executive Order 12866 and the Regulatory Flexibility Act (RFA) (5 U.S.C. 603, et seq.) and has drafted the rule to minimize its economic impact on small businesses while meeting its intended objectives. The obligations of employment verification have been imposed by Congress since 1987 and for the most part remain unchanged after amendment by IIRIRA. This rule is intended to reduce the burden on small entities by simplifying the procedures for verifying employees' eligibility to work in the United States.

What Are the Reasons for This *Regulatory* Action?

This rule is necessary to implement certain provisions of IIRIRA, specifically provisions which: (1) Eliminate certain documents currently used in the employment eligibility verification process: (2) include any branch of the Federal Government in the definition of "entity" for employer sanctions purposes: and **(3)** clarify the Service's authority to compel by subpoena the appearance of witnesses and production of evidence when investigating possible violations of section 274A of the Act. In conjunction with revising the regulations to implement IIRIRA. the Service initiated a comprehensive review of the rule to minimize its impact on small businesses. Through that review, required by the RFA, the Service identified additional changes which are intended to simplify and clarify the requirements.

What Are the Objectives and Legal Basis ***for*** the Rule?

The legal basis for the rule is section 274A of the Act. The major objectives of the rule, with respect to its impact on small businesses, include:

(1) Clarifying the timing permitted for completion of the Form I–9. These changes respond to frequent questions from employers concerning their authority to perform verification before an employee actually starts to work, and whether employees must be given 3 days to present documentation in all circumstances:

(2) Specify reverification requirements. These changes respond to concerns expressed by employers and to their expressed preference that both the employee and the employer should be required to complete an attestation as part of reverification:

(3) Clarify and expand the receipt rule. under which work-eligible individuals who are unable to present a required document may present a receipt under certain circumstances. These changes respond to frequent questions from employers. In addition to revising the receipt rule itself, the Service has moved the discussion of receipts to the section that identifies acceptable documents. The changes are intended to retain the flexibility of the receipt rule, which helps to ensure that work-eligible employees are not prevented from working because their documents have been lost or stolen, while making the rule easier for employers to understand;

(4) Shorten the list of documents acceptable for verification. This is one of the most significant changes for small businesses. A shorter list will mean that employers have to be familiar with fewer documents. The Service has made a particular effort to limit the circumstances in which employers will need to examine a Service-issued "paper" document (e.g., a Form 1–94 with a stamped endorsement), because those documents have been the subject of employer confusion; and

(5) Require the attachment to and retention with the Form I–9 of copied documentation, if employers elect to photocopy the documents presented. This **is** an area that **is** unclear in the current regulations.

In addition, the proposed rule proposes to restructure the regulation to make it easier to use and cite. This should reduce the need for small entities to rely on outside assistance to understand the basic requirements of the law.

How Many and What Kind ***of*** Small Entities Will *Be* Affected by the Proposed Rule?

The essential requirements in the proposed rule, which have been in place for 10 years, apply to all entities which hire individuals to perform services or labor in return for remuneration. The requirements also apply to recruiters or referrers for a fee which are an agricultural association, agricultural employer, or farm labor contractor (as

Size *of* business (number *of* employees)	Number of employers
< 5	3,614,800
5 to 9	1,200,800
10 **to 49**	**1,248,100**
50 to 499	**293,700**
500 or more	**14.700**
Total	**6,372,100**

employer must reverify the employee's eligibility to work on Form I–9 or Form I–9A and attach the reverification form to and retain it with the Form I–9. Reverification is not a new requirement, but the proposed rule seeks to clarify what is required.

Because employers are already completing and retaining Forms I–9 and conducting reverifications when employees' authorization expires, the rule is not expected to impose significant new costs on small entities.

There will be some cost, however, associated with becoming familiar with the new requirements, obtaining new forms, and retraining employees who are familiar with the existing requirements.

Once the transition to the new forms and requirements is complete, the Service anticipates that the costs of compliance for most businesses will be lower than under the existing rule and Form I–9. Based on informal discussions with a limited number of employers, the Service believes that the smaller number of documents, simplified design of the Form I–9, and more comprehensive instruction sheet provided with the form, all make the verification process faster and easier than it is now.

Additional information on the estimated paperwork burden for the Form I–9 is provided under the discussion of the Paperwork Reduction Act.

Are There Any Federal Rules That May Duplicate, Overlap, or Conflict With the Rule?

The Service is not aware of overlap, duplication, or conflict with other Federal rules. The requirement for employers to verify the identity and eligibility to work is unique to section 274A of the Act and its implementing regulations.

The Service has heard complaints on occasion from employers to the effect that section 274A of the Act and its implementing regulations at subpart A conflict with section 274B of the Act and its implementing regulations at 28 CFR part 44, by on the one hand requiring employers to verify their employees' identity and work eligibility by examining documents, while on the other hand subjecting them to penalties for inquiring into the validity of those documents, particularly in light of the proliferation of false documentation. The Service firmly supports section 274B of the Act and its enforcement, and does not view it as conflicting with section 274A. The Service's proposed rule includes changes intended to clarify how employers may comply with 274A while avoiding practices prohibited by 274B. The Service invites the public to suggest other ways that the regulations could minimize any perceived inconsistency between these two provisions of law.

Are There Any Significant Alternatives That Would Accomplish the Objectives of the Rule and Minimize its Economic Impact?

In enacting the Immigration Reform and Control Act of 1986, Congress considered exempting employers with three or fewer employees from the requirements of the law. Congress did not do so, however, because of evidence that a significant number of unauthorized aliens are employed by small businesses. The Service believes that having a uniform set of requirements for all businesses, regardless of size, is consistent with congressional intent. What the Service has attempted to do is to take into account the needs of a wide variety of businesses in formulating the proposed rule.

Executive Order 12866

This rule is considered by the Department of Justice, Immigration and Naturalization Service, to be a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, it has been reviewed by the Office of Management and Budget.

Executive Order 12612

The regulation adopted herein will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988 Civil Justice Reform

This proposed rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of E.O. 12988.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any 1 year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

The impact of this rule on small businesses is discussed under the Regulatory Flexibility Act. This preliminary analysis is the basis for the Service's finding that this is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of $100 million or more: a major increase in costs or prices: or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Paperwork Reduction Act of 1995

This proposed rule contains a revision to an information collection (Form I–9, Employment Eligibility Verification/ Form I–9A, Employment Eligibility Reverification) which is subject to review by OMB under the Paperwork Reductions Act of 1995 (Pub. L. 104–13). Therefore, the agency solicits public comments on the revised information collection requirements for 30 days in order to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility: (2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information. including the validity of the methodology and assumptions used: (3) enhance the quality, utility, and clarity of the information to be collected: and (4) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

The Service estimates a total annual reporting burden of 13,153,500 hours. This figure is based on the number of I–9 and I–9A respondents (78,890,000) x 9 minutes per response (.15) for the reporting requirements; of the 78,890,000 respondents, 20,000,000 are involved in record-keeping activities associated with the I–9 and I–9A process. The computation of the annual burden estimate for record-keeping activities is based on 20,000,000 x 4 minutes per response (0.66) equating to 1,320,000.

As rewired bv section 3507(d) of the Paperwdrk Reduction Act of 1995, the Service has submitted a copy of this proposed rule to OMB for its review of the revised information collection requirements. Other organizations and individuals interested in submitting comments regarding this burden estimate or any aspect of these information collection requirements, including suggestions for reducing the burden, should direct them to: Office of Information and Regulatory Affairs

(OMB). 725 17th Street. NW, Washington, DC 20503, Attn: DOJ/INS Desk Officer, Room 10235. The comments or suggestions should be submitted within 30 days of publication of this rulemaking.

List of Subjects

8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment. Penalties, Reporting and recordkeeping requirements.

8 *CFR* Part 299

Immigration, Reporting and recordkeeping requirements.

Accordingly, chapter I of title 8 of the Code of Federal Regulations is proposed to be amended as follows:

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

1. The authority citation for part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1324a; 8 CFR part 2.

2. Section 274a.1 is amended by revising paragraphs (b) and (e), and by adding a new paragraph (m), to read as follows:

§ 274a.1 Definitions.

* * * * *

(b) The term entity means any legal entity including, but not limited to, a corporation, partnership, joint venture, governmental body, agency, proprietorship, or association. For purposes of this part, the term entity includes an entity in any branch of the Federal Government:

* * * * *

(e) The term recruit for a fee means the act of soliciting a person, directly or indirectly. with the intent of obtaining employment for that person, for remuneration whether on a retainer or contingency basis: however, this term does not include union hiring halls that recruit union members. or non-union individuals who pay membership dues:

* * * * *

(m) The term recruiter *or* referrer *for* a fee means a person or entity who is either an agricultural association, agricultural employer, or farm labor contractor (as defined in section 3 of the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1802).

3. Section 274a.2 is revised to read as follows:

§ 274a.2 Why is employment verification required and what does it involve?

(a) Why employment verification *is* required. It is unlawful for a person or entity to hire or to recruit or refer for a fee an individual for employment in the United States without complying with section 274A of the Act and §§ 274a.2 through 274a.5. The Act requires the person or entity to verify on a designated form that the individual is not an unauthorized alien.

(1) Designation *of Form I–9* and Form *I–9A*. The Employment Eligibility Verification form, Form I–9, has been designated by the Service as the form to be used in complying with the employment verification requirements. The Employment Eligibility Reverification form, Form I–9A, is an optional supplement to the Form I–9 which may be used instead of Form I–9 when a person *or* entity must reverify an individual's eligibility to work under paragraph (d) of this section.

(2) Obtaining and duplicating *Form I–9* and *Form* I–9A. Forms I–9 and I–9A may be obtained in limited quantities from the Service forms centers or district offices, downloaded from the Service World Wide Web site, or ordered from the Superintendent of Documents, Washington, DC 20402. Employers, or recruiters or referrers for a fee, may electronically generate blank Forms I–9 or I–9A, provided that: the resulting form is legible: there is no change to the name, content, or sequence of the data elements and instructions: no additional data elements or language are inserted; and the paper used meets the standards for retention and production for inspection specified under §§ 274a.4 through 274a.6. When copying or printing Form I–9, Form I–9A, or the instruction sheet, the text may be reproduced by making either double-sided or single-sided copies.

(3) *Limitation on* use *of Form I–9* and attachments. Any information contained in the Form I–9, and on any attachments, described in § 274a.4(b), may be used only for enforcement of the Act and 18 U.S.C. 1001, 1028, 1546, or 1621.

(4) Beginning date for verification requirements. Employers need to complete a Form I–9 only for individuals hired after November 6, 1986, who continue to be employed after May 31, 1987. Recruiters or referrers for a fee need to complete a Form I–9 only for individuals recruited or referred and hired after May 31, 1987.

(b) How to complete the *Form I–9*—(1) Employee information and documentation. A person or entity that hires, or recruits or refers for a fee, an individual for employment must ensure that the individual properly:

(i) Completes section 1 on the Form I–9. If an individual is unable to complete the Form I–9 or needs it translated, someone may assist him or her. The preparer or translator must provide the assistance necessary for the individual to understand the Form I–9 and complete section 1 and have the individual initial and sign or mark the Form in the appropriate places. The preparer or translator must them complete the "Preparer/Translator" portion of the Form I–9; and

(ii) Presents to the employer, or recruiter or referrer for a fee, documentation, described in this paragraph, that establishes the individual's identity and eligibility to work. An individual has the choice of which document(s) to present. Acceptable documentation is:

(A) An original unexpired document that establishes both identity and employment authorization (List A document described in § 274a.3(a)); or

(B) An original unexpired document that establishes identity (List B document described in § 274a.3(b)) and a separate original unexpired document which establishes employment authorization (List c document described in § 274a.3(C)); or

(C) If an individual is unable to present a document listed in §§ 274a.3(a), (b), or (c) and is hired for a duration of 3 or more business days, an acceptable receipt (listed in § 274a.3(d)) instead of the required document. A receipt is valid for a temporary period, specified under § 274a.3(d). The individual must present the required document at the end of such period.

(2) Document review and verification. An employer, or recruiter or referrer for a fee, must:

(i) Physically examine the documentation presented by the individual establishing identity and employment eligibility as set forth in § 274a.3 and ensure that the document(s) presented appear to be genuine and to relate to the individual. Employers and recruiters or referrers for a fee may not specify which document or documents an individual is to present. To do so may violate section 274B of the Act: and

(ii) Complete section 2 of the Form I–9.

(3) Recruiters *or referrers*. Recruiters or referrers for a fee may designate agents to complete the employment verification procedures on their behalf, including but not limited to notaries, national associations, or employers. If a recruiter or referrer designates an employer to complete the employment verification procedures, the employer need only provide the recruiter or

referrer with a photocopy of the Form I–9 and any attachments.

(c) Time for completing Form *I-9* — (1) Section *1 of* the Form *I-9.* An employer, or recruiter or referrer for a fee, must ensure that the individual properly completes section 1 of the Form I–9 at the time of hire.

(2) Section *2* of the Form *I–9* —(i) Hires for a duration of 3 or more business days. An employer, or recruiter or referrer for a fee, must examine the documentation presented by the individual and complete section 2 of the Form I–9 within 3 business day of the hire. An employer, or recruiter or referrer for a fee, may require an individual to present documentation listed § 274a.3 at the time of hire or before the time of hire, so long as the commitment to hire the individual has been made and provided that this requirement is applied uniformly to all individuals.

(ii) Hires for a duration of less than *3* business days. An employer, or recruiter or referrer for a fee, must examine the documentation presented by the individual and complete section 2 of the Form I–9 at the time of the hire.

(3) Receipts. If an individual presents a receipt, as provided in § 274.3(d), for purposes for verification or reverification. the employer must update the Form I–9 (or Form I–9A, if applicable) within the time limits specified in that section.

(d) Reverification of employment eligibility when employment authorization expires—(1) Procedures. Except as provided in paragraph (d)(3) of this section, if section 1 or 2 of the Form I–9 indicates that the individual's employment authorization expires, the employer must reverify the individual's employment authorization. The employer must, not later than the date that work authorization expires, ensure proper completion of sections 1 and 2 of new Form I–9 or a Form I–9A by:

(i) Ensuring that the individual properly completes section 1 and attests that he or she is authorized to work indefinitely or until a specified date and signs and dates the attestation:

(ii) Examining and unexpired, original document presented by the individual establishing employment eligibility as set forth in § 274a.3(a), (c),or (d).and ensuring that it appears to be genuine and to relate to the individual. An employer should not reverify List B documents;

(iii) Completing section 2: and

(iv) Attaching the new Form I–9 or Form I–9A to the previously-completed Form I–9.

(2) Continuing obligation. Except as provided in paragraph (d)(3) of this section, for as long as the Form I–9 or Form I–9A used for reverification indicates that the individual is not a United States citizen or national, or a lawful permanent resident, and that the individual's employment authorization expires, the employer must reverify the individual's employment authorization as provided in paragraph (d)(1) of this section, no later than the date that employment authorization expires.

(3) Exception to reverification requirement. An employer shall not reverify the employment authorization of an individual who attests in section 1 of the Form I–9 or Form I–9A that he or she is a citizen or national of the United States. An employer shall not reverify the employment authorization of an individual who attests in section 1 of the Form I–9 or Form I–9A that he or she is a lawful permanent resident, unless the individual presents a foreign passport that contains a temporary I–551 stamp, provided in § 274a.3(a)(3).

4. Section 274a.3 is revised to read as follows:

§ 274a.3 What documents are acceptable for employment verification?

(a) Documents that establish both identity and employment authorization (List A).

(1) A United States passport;

(2) An Alien Registration Receipt Card or Permanent Resident Card, Form I–551'

(3)A foreign passport that contains a temporary I–551 stamp:

(4) An employment authorization document issued by the Service which contains a photograph, Form I–766, Form 1–688 (Temporary Resident Card), Form I–688A, or Form I–688B; or

(5) In the case of a nonimmigrant alien authorized to work only for a specific employer, a foreign passport with an Arrival-Departure Record, Form 1–94, bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status and the name of the approved employer with whom employment is authorized, *so* 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 1–94.

(b) Documents that establish identify only (List *B).*

(1) Acceptable List *B* documents.

(i) A driver's license or identification card issued by a state (as defined in section 101(a)(36) of the Act) or an outlying possession of the United States (as defined by section 101(a)(29) of the Act), provided that the document contains a photograph or the following identifying information: name, date of birth, sex, height, color of eyes, and address:

(ii) A Native American tribal document; or

(iii) In the case of a Canadian nonimmigrant alien or alien with common nationality with Canada who is authorized to work only for a specific employer, a driver's license issued by a Canadian Government authority or a Canadian federal or provincial identification card.

(2) Special rule for minors. Minors under the age of 18 who are unable to produce one of the identity documents listed in paragraph (b)(1) of this section are exempt from producing one of the specified identity documents if:

(i) The minor's parent or legal guardian completes section 1 of the Form I–9 and in the space for the minor's signature, the parent or legal guardian writes the words, "minor under age 18";

(ii)The minor's parent or legal guardian completes on the Form I–9 the "Preparer/Translator certification": and

(iii) The employer or the recruiter or referrer for a fee writes in section 2 under List B in the space after the words "Document Identification #" the words, "minor under age 18".

(3) Special rule *for* individuals with diasbilities—(i)Procedures. Individuals with disabilities, who are unable to produce one of the identity documents listed in paragraph (b)(1) of this section, and who are being placed into employment by a nonprofit organization or association, or as part of a rehabilitation program, are exempt from producing one of the specified identify documents if:

(A) The individual's parent or legal guardian, or a representative from the nonprofit organization, association, or rehabilitation program placing the individual into a position of employment completes section 1 of the Form I–9 and in the space for the individual's signature, writes the words, "special placement":

(B) The individual's parent or legal guardian, or the program representative, completes on the Form I–9 the "Preparer/Translator certification"; and

(C) The employer or the recruiter or referrer for a fee writes in section 2 under List B in the space after the words "Document Identification #" the words, "special placement".

(ii) Applicability. For purposes of this section the term disability means, with respect to an individual:

(A) A physical or mental impairment that substantially limits one or more of the major life activities of such individual:

(B) A record of such impairment; or

(C) Being regarded as having such an impairment.

(c) Documents that establish employment authorization only (List C).

(1) A social security account number card (other than such a card which specifies on the face that the issuance of the card does not authorize employment in the United States):

(2) A Native American tribal document: or

(3) In the case of a nonimmigrant alien authorized to work only for a specific employer, an Arrival-Departure Record, Form I–94, containing an endorsement of the alien's nonimmigrant status and the name of the approved employer with whom employment is authorized, so 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 1–94.

(d) Receipts—(1) Acceptable receipts and their validityperiods. (i) A receipt for an application to replace a document described in paragraph (a), (b). or (c) of this section because the document was lost, stolen, or damaged. Documentation acknowledging receipt of an application for an initial grant or extension of a document described in paragraph (a) or (c) of this section is not a receipt for this purpose, except for a receipt for the application of a timely filed application for an extension of nonimmigrant stay as provided in § 274a.12(b)(2). The individual must present the replacement document within 90 days of the hire or, in the case of reverification under § 274a.2(d) or § 274a.5(b), within 90 days of the date employment authorization expires or the date of rehire.

(ii) The arrival portion of Form 1–94 marked with an unexpired Temporary 1–551 stamp and affixed with a **photograph** of the individual. The individual must present the Form I–551 within 180 days of the hire or, in the case of reverification under § 274a.2(d) or § 274a.5(b), within 180 days of the date employment authorization expires or the date of rehire.

(iii) The departure portion of Form I–94 marked with an unexpired refugee admission stamp. The individual must present either an unexpired Employment Authorization Document (Form 1–766 or Form I–688B) or a social security account number card that does not contain employment restrictions and an identity document described in paragraph (b) of this section within 90 days of the hire or. in the case of reverification under § 274a.2(d) or § 274a.5(b), within 90 days of the date employment authorization expires or the date of rehire.

(2) Exceptions. A receipt described in paragraph (d)(1) of this section is not an acceptable document if:

(i) The individual indicates or the employer, or recruiter or referrer for a fee, has actual or constructive knowledge that the individual is not authorized to work: or

(ii) The employment is for *a* duration of less than **3** business days.

5. Section 274a.4 is revised to read as follows:

§ 274a.4 How long are employers and recruiters or referrers required to retain the Form I-9 and what must be retained with it?

(a) Retention *of Form I–9*—(1) Employers. An employer must retain the Form I–9 for **3** years after the date of hire or 1 year after the date the individual's employment is terminated, whichever is later.

(2) Recruiters or referrers. A recruiter or referrer for a fee must retain the Form I–9 for **3** years after the date of hire.

(b) Retention of attachments—(1) *Reverification* forms. The employer, or recruiter or referrer for a fee, must attach Forms 1–9 or I–9A used for reverification. as described in § 274a.2(d), to the initial Form I–9 relating to the individual and retain them with the initial Form I–9.

(2) Copies *of* documentation—(i) Option to *photocopy.* An employer, or recruiter or referrer for a fee, may, but is not required to, copy a document presented by an individual solely for the purpose of complying with the verification requirements described in § 274a.2. If such a copy **is** made, it must be attached to and retained with the Form I–9 (or Form I–9A if applicable).

(ii) Obligation to complete Form 1–9. The copying and retention of any such document does not relieve the employer, or recruiter or referrer for a fee, from the requirement to fully complete section **2** of the Form I–9 or Form I–9A.

(iii) Discrimination prohibited. An employer, or recruiter or referrer for a fee, should not copy the documents only of individuals or certain classes of individuals based on national origin or citizenship status. To do so may violate section 274B of the Act.

6. Section 274a.5 is revised to read as follows:

§ 274a.5 Under what circumstances may employers and recruiters or referrers rely on a Form I-9 that an individual previously completed?

(a) Continuing employment. An employer will not be deemed to have hired for employment an individual who is continuing in his or her employment and has a reasonable expectation of employment at all times. Therefore, no verification is necessary for such individuals.

(1) An individual is continuing in his or her employment in one of the following situations:

(i) An individual takes approved paid or unpaid leave on account 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:

(ii) An individual is promoted, demoted, or gets a pay raise:

(iii) An individual is temporarily laid off for lack of work:

(iv) An individual is on strike or in a labor dispute:

(v) An individual is reinstated after disciplinary suspension for wrongful termination, found unjustified by any court, arbitrator, or administrative body, or otherwise resolved through reinstatement or settlement:

(vi) An individual transfers from one distinct unit of an employer to another distinct unit of the same employer: the employer may transfer the individual's Form 1–9 (and attachments if applicable) to the receiving unit:

(viii) An individual continues his or her employment with a related, successor, or reorganized employer, provided that the employer obtains and maintains from the previous employer records and Forms I–9, and attachments, where applicable. For this purpose, a related, successor, or reorganized employer includes:

(A) The same employer at another location;

(B) An employer who continues to employ some or all of a previous employer's workforce in cases involving a corporate reorganization, merger, or sale of stock or assets:

(C) An employer who continues to employ any employee of another employer's workforce where both employers belong to the same multi-employer association and the employee continues to work in the same bargaining unit under the same collective bargaining agreement. For purposes of this section, any agent designated to complete and maintain the Form 1–9 and attachments must record the employee's date of hire and/or termination each time the employee is hired and/or terminated by an employer of the multi-employer association: or

(D) An individual is engaged in seasonal employment.

(2) The employer who is claiming that an individual is continuing in his or her employment must also establish that the individual is expected to resume employment at all times and that the

individual's expectation is reasonable. Whether an individual's expectation is reasonable will be determined on a case-by-case basis taking into consideration several factors. Factors which would indicate that an individual has a reasonable expectation of employment include, but are not limited to, the following:

(i) The individual in question was employed by the employer on a regular and substantial basis. A determination of a regular and substantial basis is established by a comparison of other workers who are similarly employed by the employer:

(ii) The individual in question complied with the employer's established and published policy regarding his or her absence:

(iii) The employer's past history of recalling absent employees for employment indicates a likelihood that the individual in question will resume employment with the employer within a reasonable time in the future:

(iv) The former position held by the individual in question has not been taken permanently by another worker:

(v) The individual in question has not sought or obtained benefits during his or her absence from employment with the employer that are inconsistent with an expectation of resuming employment with the employer within a reasonable time in the future. Such benefits include, but are not limited to, severance and retirement benefits;

(vi) The financial condition of the employer indicates the ability of the employer to permit the individual in question to resume employment within a reasonable time in the future: or

(vii) The oral and/or written communication between the employer, the employer's supervisory employees and the individual in question indicates that it is reasonably likely that the individual in question will resume employment with the employer within a reasonable time in the future.

(b) Employment verification requirements in the case of an individual who was previously employed—(1) Hired within *3* years *from* the date of the previously completed Form *I–9*. An employer that hires an individual previously employed by the employer within 3 years of the date of the initial execution of a previously completed Form I–9 relating to the individual which meets the requirements set forth in §§ 274a.2 through 274a.4 may (instead of completing a new Form I–9) inspect the previously completed Form I–9 and all attachments (described in § 274a.4(b)).

(i) If the Form I–9 and attachments relate to the individual, and the individual continues to be authorized for employment, the previously completed Form I–9 is sufficient for purposes of section 274A(b) of the Act.

(ii) If the previously completed Form I–9 indicates that the individual is no longer authorized for employment, the employer must reverify in accordance with § 274a.2(d); otherwise, the individual may no longer be employed.

(iii) The employer must retain the previously completed Form I–9 and attachments for a period of **3** years commencing from the date of the initial execution of the Form I–9 or **1** year after the individual's employment is terminated, whichever is later.

(2) Hired more than *3 years* after the date of the previously executed Form I–*9*. **An** employer that hires an individual previously employed by the employer more than 3 years after the date of the initial execution of a previously completed Form I–9 relating to the individual must complete a new Form I–9 in compliance with the requirements of §§ 274a.2 through 274a.4.

(c) Employment verification requirements in the case of recruiting ***or*** referring *for* a fee an individual who was previously recruited ***or*** referred—(1) Recruited *or* referred within *3* years from the date of the previously completed Form *I–9*. A recruiter or referrer for a fee that recruits or refers an individual previously recruited or referred by the recruiter or referrer for a fee within 3 years of the date of the initial execution of the Form I–9 relating to the individual which meets the requirements set forth in §§ 274a.2 through 274a.4 may (instead of completing a new Form I–9 inspect the previously completed Form I–9 and all attachments (described in § 274a.4(b)).

(i) If the Form I–9 and attachments relate to the individual, and the individual continues to be authorized for employment, the previously completed Form I–9 is sufficient for purposes of section 274a(b) of the Act.

(ii) If the previously completed Form I–9 indicates that the individual's employment authorization has expired, the recruiter or referrer for a fee must reverify in accordance with § 274a.2(d); otherwise the individual may no longer be recruited or referred.

(iii) The recruiter or referrer for a fee must retain the previously completed Form I–9 and attachments for a period of 3 years from the date of the rehire.

(iv) The reverification requirements in § 274a.2(d) do not apply to recruiters or referrers for a fee except as provided in paragraph (c)(1)(ii) of this section.

(2) Recruited *or* referred more than 3 years after the date of the previously executed Form *I–9*. A recruiter or referrer for a fee that recruits or refers an individual previously recruited or referred by the recruiter or referrer for a fee more than **3** years after the date of the initial execution of a previously completed Form I–9 relating to the individual must complete a new Form I–9 in compliance with the requirements of §§ 274a.2 through 274a.4.

7. Section 274a.6 is revised to read as follows:

§ 274a.6 What happens when the Government asks to inspect Forms I–9?

(a) Notice *of* inspection. Officers of the Service, the Office of Special Counsel for Immigration-Related Unfair Employment Practices, or the Department of Labor may inspect the Forms I–9, and all attachments described in § 274a.4(b), after providing at least 3 days' notice to any person or entity required to retain Forms I–9.

(b) Obligation to make records available—(I) *In* general. At the time of inspection, the Forms I–9 and all attachments must be made available in their original form or on microfilm or microfiche at the location where the request for production was made. If the Forms I–9 and attachments are kept at another location, the person or entity must inform the officer of the Service, the Special Counsel for Immigration-Related Unfair Employment Practices, or the Department of Labor of the location where the forms are kept and make arrangements for the inspection. Inspections may be performed at a Service office.

(2) Standards *for* submitting microfilm *or* microfiche. The following standards shall apply to Forms I–9 and attachments presented on microfilm or microfiche submitted to an officer of the Service, the Special Counsel for Immigration-Related Unfair Employment Practices, or the Department of Labor: Microfilm when displayed on a microfilm reader (viewer) or reproduced on paper must exhibit a high degree of legibility and readability. For this purpose, legibility **is** defined as the quality of a letter or numeral which enables the observer to positively and quickly identify it to the exclusion of all other letters or numerals. Readability is defined as the quality of a group of letters or numerals being recognizable as words or whole numbers. A detailed index of all microfilmed data shall be maintained and arranged in such a manner as to permit the immediate location of any particular record. It is the responsibility of the employer, or recruiter or referrer for **a** fee:

(i) To provide for the processing, storage, and maintenance of all microfilm, and

(ii) To be able to make the contents thereof available as required by law. The person or entity presenting the microfilm will make available a reader-printer at the examination site for the ready reading, location, and reproduction of any record or records being maintained on microfilm. Reader-printers made available to an officer of the Service, the Special Counsel for Immigration-Related Unfair Employment Practices, or the Department of Labor shall provide safety features and be in clean condition. properly maintained, and in good working order. The reader-printers must have the capacity to display and print a complete page of information. A person or entity who is determined to have failed to comply with the criteria established by this regulation for the presentation of microfilm or microfiche to the Service, the Special Counsel for Immigration-Related Unfair Employment Practices, or the Department of Labor, and, at the time of the inspection, does not present a properly completed Form I–9 with attachments for the employee, is in violation of section 274A(a)(1)(B) of the Act and §§ 274a.2 through 274a.6.

(3) *Recruiters or referrers.* A recruiter or referrer for a fee who has designated an employer to complete the employment verification procedures may present a photocopy of the Form I–9 and attachments instead of presenting the Form I–9 and attachments in its original form or on microfiche, as set forth in § 274a.2(b)(3).

(c) *Compliance with inspection.* Any refusal or delay in presentation of the Form I–9 and attachments for inspection is a violation of the retention requirements as set forth in section 274A(b)(3) of the Act.

(d) *Use of subpoena authority.* No subpoena or warrant shall be required for an inspection under this section, but the use of such enforcement tools is not precluded. Any Service officer listed in § 287.4 of this chapter may compel production of the Forms I–9 and attachments by issuing a subpoena if the person or entity has not complied with a request to present the Forms I–9 and attachments. Prior to the filing of a complaint under 28 CFR part 68, any Service officer listed in § 287.4 of this chapter may compel by subpoena the attendance of witnesses and production of any evidence, including but not limited to Forms I–9 and attachments. Nothing in this section is intended to limit the Service's subpoena power under sections 235(d)(4) or 274A(e)(2)(C) of the Act.

8. Section 274a.7 is revised to read as follows:

§ 274a.7 What is the prohibition on hiring or contracting with unauthorized aliens and what defense can be claimed?

(a) *Prohibition on the hiring and continuing employment of unauthorized aliens.* A person or entity who hires, or recruits or refers for a fee, an individual after November 6, 1986, and who has actual or constructive knowledge that the individual is unauthorized to work, is in violation of section 274A(a)(1)(A) of the Act. A person or entity who continues to employ an individual hired after November 6, 1986, and who has actual or constructive knowledge that the individual is or has become unauthorized, is in violation of section 274A(a)(2) of the Act.

(b) *Use of labor through contract.* Any person or entity who uses a contract, subcontract, or exchange entered into, renegotiated, or extended after November 6, 1986. to obtain the labor or services of an alien in the United States who has actual or constructive knowledge that the alien is an unauthorized .alien with respect to performing such labor or services, shall be considered to have hired the alien for employment in the United States in violation of section 274A(a)(1)(A) of the Act.

(c) *Good faith defense to charge of knowingly hiring an unauthorized alien.* A person or entity who shows good faith compliance with the employment verification requirements of §§ 274a.2 through 274a.6 shall have established a rebuttable affirmative defense that the person or entity has not violated section 274A(a)(1)(A) of the Act with respect to such hiring, recruiting, or referral.

9. Section 274a.8 is revised to read as follows:

§ 274a.8 What are the requirements of state employment agencies that choose to verify the identify and employment eligibility of individuals referred for employment by the agency?

(a) *General.* Under sections 274A(a)(5) and 274A(b) of the Act, a state employment agency as defined in § 274a.1 may, but is not required to, verify identity and employment eligibility of individual referred for employment by the agency. However, should a state employment agency choose to do so. it must:

(1) Complete the verification process in accordance with the requirements of §§ 274a.2 through 274a.6 *provided* that the individual may not present receipts, as set forth in § 274a.3(d), in lieu of documents in order to complete the verification process: and

(2) Complete the verification process prior to referral for all individuals for whom a certification is required to be issued under paragraph (c) of this section.

(b) *Compliance with the provisions of section 274A of the Act.* A state employment agency which chooses to verify employment eligibility of individuals according to §§ 274a.2 through 274a.6 shall comply with all provisions of section 274A of the Act and the regulations issued thereunder.

(c) *State employment agency certification.—(I)* A state employment agency which chooses to verify employment eligibility according to paragraph (a) of this section shall issue to an employer who hires an individual referred for employment by the agency, a certification as set forth in paragraph (d) of this section. The certification shall be transmitted by the state employment agency directly to the employer, personally by an agency official, or by mail, so that it will be received by the employer within 21 business days of the date that the referred individual is hired. In no case shall the certification be transmitted to the employer from the state employment agency by the individual referred. During this period:

(i) The job order or other appropriate referral form issued by the state employment agency to the employer, on behalf of the individual who is referred and hired, shall serve as evidence, with respect to that individual, of the employer's compliance with the provisions of section 274A(a)(1)(B) of the Act and the regulations issued thereunder.

(ii) In the case of a telephonically authorized job referral by the state employment agency to the employer, an appropriate annotation by the employer shall be made and shall serve as evidence of the job order. The employer should retain the document containing the annotation where the employer retains Forms I–9.

(2) Job orders or other referrals, including telephonic authorizations, which are used as evidence of compliance under paragraph (c)(1)(i) of this section shall contain:

(i) The name of the referred individual;

(ii) The date of the referral:

(iii) The job order number or other applicable identifying number relating to the referral:

(iv) The name and title of the referring state employment agency official: and

(v) The telephone number and address of the state employment agency.

(3) A state employment agency shall not be required to verify employment eligibility or to issue a certification to an employer to whom the agency referred an individual if the individual is hired for a period of employment not to exceed 3 days in duration. Should a state agency choose to verify employment eligibility and to issue a certification to an employer relating to an individual who is hired for a period of employment not to exceed 3 days in duration, it must verify employment eligibility and issue certifications relating to *all* such individuals. Should a state employment agency choose not to verify employment eligibility or issue certifications to employers who hire, for a period not to exceed **3** days in duration, agency-referred individuals, the agency shall notify employers that, as a matter of policy, it does not perform verifications for individuals hired for that length of time, and that the employers must complete the identify and employment eligibility requirements under §§ 274a.2 through 274a.6. Such notification may be incorporated into the job order or other referral form utilized by the state employment agency as appropriate.

(4) An employer to whom a state employment agency issues a certification relating to an individual referred by the agency and hired by the employer, shall be deemed to have complied with the verification requirements of §§ 274a.2 through 274a.6 provided that the employer:

(i) Reviews the identifying information contained in the certification to ensure that it pertains to the individual hired:

(ii) Observes the signing of the certification by the individual at the time of its receipt by the employer as provided for in paragraph (d)(1**3**) of this section:

(iii) Complies with the provisions of § 274a.2(d) by either:

(A) Updating the state employment agency certification in Iieu of Form I–9, upon expiration of the employment authorization date, if any. which was noted on the certification issued by the state employment agency under paragraph (d)(11) of this section: or

(B) By no longer employing an individual upon expiration of his or her employment authorization date noted on the certification:

(iv) Retains the certification in the same manner prescribed for Form I–9 and attachments in § 274a.4, to wit, 3 years after the date of the hire or 1 year after the date the individual's employment is terminated, whichever is later: and

(v) Makes it available for inspection to officers of the Service or the Department of Labor, according to the provisions of section 274A(b)(3) of the Act, and § 274a.6.

(5) Failure by an employer to comply with the provisions of paragraph (c)(4)(iii) of this section shall constitute a violation of section 274(a)(2) of the Act and shall subject the employer to the penalties contained in section 274A(e)(4) of the Act, and § 274a. 11.

(d) *Standards for state employment agency certifications.* All certifications issued by a state employment agency under paragraph (c) of this section shall conform to the following standards. They must:

(1) Be issued on official agency letterhead:

(2) Be signed by an appropriately designated official of the agency:

(3) Bear **a** date of issuance:

(4) Contain the employer's name and address:

(5) State the name and date of birth of the individual referred:

(6) Identify the position or type of employment for which the individual is referred:

(7) Bear a job order number relating to the position or type of employment for which the individual is referred;

(8) Identify the document or documents presented by the individual to the state employment agency for the purposes of identity and employment eligibility verification:

(9) State the identifying number of numbers of the document or documents described in paragraph (d)(8) of this section:

(10) Certify that the agency has complied with the requirements of section 274A(b) of the Act concerning verification of the identify and employment eligibility of the individual referred, and has determined that, to the best of the agency's knowledge, the individual is authorized to work in the United States;

(11) Clearly state any restrictions, conditions, expiration dates. or other limitations which relate to the individual's employment eligibility in the United States, or contain an affirmative statement that the employment authorization of the referred individual is not restricted:

(12) State that the employer is not required to verify the individual's identity or employment eligibility, but must retain the certification in lieu of Form I–9;

(13) Contain a space or a line for the signature of the referred individual, requiring the individual under penalty of perjury to sign his or her name before the employer at the time of receipt of the certification by the employer: and

(14) State that counterfeiting, falsification, unauthorized issuance, or alteration of the certification constitutes a violation of Federal law under 18 U.S.C. 1546.

(e) *Retention of Form I–9 by state employment agencies.* A Form I–9 utilized by a state employment agency in verifying the identity and employment eligibility of an individual under §§ 274a.2 through 274a.6 must be retained by a state employment agency for a period of 3 years from the date that the individual was last referred by the agency and hired by an employer. A state employment agency may retain a Form I–9 either in its original form, or on microfilm or microfiche.

(f) *Retention of state employment agency certifications.* A certification issued by a state employment agency under this section shall be retained:

(1) By a state employment agency, for a period of **3** years from the date that the individual was last referred by the agency and hired by an employer, and in a manner to be determined by the agency which will enable the prompt retrieval of the information contained on the original certification for comparison with the relating Form I–9;

(2) By the employer, in the original form, and in the same manner and location as the employer has designated for retention of Forms I–9, and for the period of time provided in paragraph (c)(4)(iv) of this section.

(g) *State employment agency verification requirements in the case of an individual who was previously referred and certified.* When a state employment agency refers an individual for whom the verification requirements have been previously complied with and a Form I–9 completed, the agency shall inspect the previously completed Form I–9:

(1) If, upon inspection of the Form, the agency determines that the Form I–9 pertains to the individual and that the individual remains authorized to be employed in the United States, no additional verification need be conducted and no new Form I–9 need be completed prior to issuance of a new certification *provided* that the individual is referred by the agency within 3 years of the execution of the initial Form I–9.

(2) If, upon inspection of the Form. the agency determines that the Form I–9 pertains to the individual but that the individual does not appear to be authorized to be employed in the United States based on restrictions, expiration dates, or other conditions annotated on the Form I–9. the agency shall not issue

a certification unless the agency follows the updating procedures under § 274a.2(d) of this part: otherwise the individual may no longer be referred for employment by the state employment agency.

(3) For the purposes of retention of the Form I–9 by a state employment agency under paragraph (e) of this section, for an individual previously referred and certified, the state employment agency shall retain the Form for a period of 3 years from the date that the individual is last referred and hired.

(h) Employer verification requirements in the case of an individual who was previously referred and certified. When an employer rehires an individual for whom the verification and certification requirements have been previously complied with by a state employment agency, the employer shall inspect the previously issued certification.

(1) If. upon inspection of the certification, the employer determines that the certification pertains to the individual and that the individual remains authorized to be employed in the United States, no additional verification need be conducted and no new Form I–9 or certification need be completed provided that the individual is rehired by the employer within 3 years of the issuance of the initial certification, and that the employer follows the same procedures for the certification which pertain to Form I–9, as specified in § 274a.5(b)(1)(i).

(2) If, upon inspection of the certification, the employer determines that the certification pertains to the individual but that the certification reflects restrictions, expiration dates, or other conditions which indicate that the individual no longer appears authorized to be employed in the United States, the employer shall verify that the individual remains authorized to be employed and shall follow the updating procedures for the certification which pertain to Form I–9, as specified in § 274a.5(b)(1)(ii).

(3) For the purposes of retention of the certification by an employer under this paragraph for an individual previously referred and certified by a state employment agency and rehired by the employer, the employer shall retain the certification for a period of 3 years after the date that the individual is last hired, or 1 year after the date the individual's employment is terminated, whichever is later.

10. Section 274a.9 is revised to read as follows:

§ 274a.9 Can a person or entity require an individual to provide a financial guarantee or indemnity against potential liability related to the hiring, recruiting, or referring of the individual?

(a) General. It is unlawful for a person or other entity, in hiring or recruiting or referring for a fee for employment of an individual, to require the individual to post a bond or security, to pay or agree to pay an amount, or otherwise to provide a financial guarantee or indemnity, against any potential liability arising under this part relating to such hiring, recruiting, or referring of the individual. However, this prohibition does not apply to performance clauses which are stipulated by agreement between contracting parties.

(b) Penalty. Any person or other entity who requires any individual to post a bond or security as stated in this section shall, after notice and opportunity for an administrative hearing in accordance with section 274A(e)(3)(B) of the Act, be subject to a civil fine of $1,000 for each violation and to an administrative order requiring the return to the individual of any amounts received in violation of this section or. if the individual cannot be located, to the general fund of the Treasury.

11. Section 274a.10 is revised to read as follows:

§ 274a.10 How are investigations initiated and employers notified of violations?

(a) Procedures for the filing of complaints. Any person or entity having knowledge of a violation or potential violation of section 274A of the Act may submit a signed, written complaint in person or by mail to the Service office having jurisdiction over the business or residence of the potential violator. The signed, written complaint must contain sufficient information to identify both the complainant and the potential violator, including their names and addresses. The complaint should also contain detailed factual allegations relating to the potential violation including the date, time, and place of the alleged violation and the specific act or conduct alleged to constitute a violation of the Act. Written complaints may be delivered either by mail to the appropriate Service office or by personally appearing before any immigration officer at a Service office.

(b) Investigation. The Service may conduct investigations for violations on its own initiative and without having received a written complaint. When the Service receives a complaint from a third party, it shall investigate only those complaints that have a reasonable probability of validity. If it is determined after investigation that the person or entity has violated section 274A of the Act, the Service may issue and serve a Notice of Intent to Fine or a Warning Notice upon the alleged violator. Service officers shall have reasonable access to examine any relevant evidence of any person or entity being investigated.

(c) Warning notice. The Service and/or the Department of Labor may in their discretion issue a Warning Notice to a person or entity alleged to have violated section 274A of the Act. This Warning Notice will contain a statement of the basis for the violations and the statutory provisions alleged to have been violated.

(d) Notice of Intent to Fine. The proceeding to assess administrative penalties under section 274A of the Act is commenced when the Service issues a Notice of Intent to Fine on Form I–763. Service of this Notice shall be accomplished according to 8 CFR Part 103. The person or entity identified in the Notice of Intent to Fine shall be known as the respondent. The Notice of Intent to Fine may be issued by an officer defined in § 239.1(a) of this chapter with concurrence of a Service attorney.

(1) Contents of the Notice *of Intent* to *Fine.* (i) The Notice of Intent to Fine will contain the basis for the charge(s) against the respondent, the statutory provisions alleged to have been violated, and the penalty that will be imposed.

(ii) The Notice of Intent to Fine will provide the following advisals to the respondent:

(A) That the person or entity has the right to representation by counsel of his or her own choice at no expense to the Government:

(B) That any statement given may be used against the person or entity:

(C) That the person or entity has the right to request a hearing before an administrative law judge under 5 U.S.C. 554–557, and that such request must be made within 30 days from the service of the Notice of Intent to Fine:

(D) That the Service will issue a final order in 45 days if a written request for a hearing is not timely received and that there will be no appeal of the final order.

(e) Request *for* hearing before an administrative law judge. If a respondent contests the issuance of a Notice of Intent to Fine, the respondent must file with the Service, within 30 days of the service of the Notice of Intent to Fine, a written request for a hearing before an administrative law judge. Any written request for a hearing submitted in a foreign language must be

accompanied by an English language translation. A request for a hearing is not deemed to be filed until received by the Service office designated in the Notice of Intent to Fine. In computing the 30-day period prescribed by this section, the day of service of the Notice of Intent to Fine shall not be included. If the Notice of Intent to Fine was served by ordinary mail, 5 days shall be added to the prescribed 30-day period. In the request for a hearing, the respondent may, but is not required to, respond to each allegation listed in the Notice of Intent to Fine.

(f) Failure *to* file a request *for* hearing. If the respondent does not file a request for a hearing in writing within 30 days of the day of service of the Notice of Intent to Fine (35 days if served by ordinary mail), the Service shall issue a final order from which there is no appeal.

12. Section 274a.11 is added to read:

§ 274a.11 What penalties may be imposed for violations?

(a) Criminal penalties. Any person or entity which engages in a pattern or practice of violations of section 274A(a)(1)(A) or (a)(2) of the Act shall be fined not more than $3,000 for each unauthorized alien. imprisoned for not more than 6 months for the entire pattern or practice, or both, notwithstanding the provisions of any other Federal law relating to fine levels.

(b) Civil penalties. A person or entity may face civil penalties for a violation of section 274A of the Act. Civil penalties may be imposed by the Service or an administrative law judge for violations under section 274A of the Act. In determining the level of the penalties that will be imposed, a finding of more than one violation in the course of a single proceeding or determination will be counted as a single offense. However, a single offense will include penalties for each unauthorized alien who is determined to have been knowingly hired or recruited or referred for a fee.

(1) A respondent found by the Service or an administrative law judge to have knowingly hired, or to have knowingly recruited or referred for a fee, an unauthorized alien for employment in the United States or to have knowingly continued to employ an unauthorized alien in the United States, shall be subject to the following order:

(i) To cease and desist from such behavior:

(ii) To pay a civil fine according to the following schedule:

(A) First offense—not less than $250 and not more than $2,000 for each unauthorized alien. or

(B) Second offense—not less than $2,000 and not more than $5,000 for each unauthorized alien; or

(C) More than two offenses—not less than $3,000 and not more than $10,000 for each unauthorized alien: and

(iii) To comply with the requirements of § 274a.2(b), and to take such other remedial action as appropriate.

(2) A respondent determined by the Service (if a respondent fails to request a hearing) or by an administrative law judge to have failed to comply with the employment verification requirements as set forth in §§ 274a.2 through 274a.6, shall be subject to a civil penalty in an amount of not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred. In determining the amount of the penalty. consideration shall be given to:

(i) The size of the business of the employer being charged:

(ii) The good faith of the employer;

(iii) The seriousness of the violation:

(iv) Whether or not the individual was an unauthorized alien: and

(v) The history of previous violations of the employer.

(3) Where an order is issued with respect to a respondent composed of distinct, physically separate subdivisions which do their own hiring, or their own recruiting or referring for a fee for employment (without reference to the practices of, and under the control of, or common control with another subdivision) the subdivision shall be considered a separate person or entity.

(c) Enjoining pattern or practice violations. If the Attorney General has reasonable cause to believe that a person or entity is engaged in a pattern or practice of employment, recruitment, or referral in violation of section 274A(a)(1) (A) or (B) of the Act, the Attorney General may bring civil action in the appropriate United States District Court requesting relief, including a permanent or temporary injunction, restraining order, or other order against the person or entity, as the Attorney General deems necessary.

(d) Pre-enactment provisions *for* employees hired *prior to* November 7, 1986. The penalty provisions set forth in section 274A (e) and (f) of the Act for violations of sections 274A(a)(1)(B) and 274A(a)(2) of the Act shall not apply to employees who were hired prior to November 7, 1986, and who are continuing in their employment and have a reasonable expectation of employment and have a reasonable expectation of employment at all times (as set forth in § 274a.5(a)), except those individuals described in §§ 274a.5(a)(vii) and (a)(1)(vii) and (a)(1)(viii)). For purposes of this section, an employee who are hired prior to November 7, 1986. shall lose his or hers pre-enactment status if the employee:

(1) Quits:.

(2) Is terminated by the employer; the term termination shall include, but is not limited to, situations in which an employee is subject to seasonal employment.

(3) Is excluded or deported from the United States or departs the United States under a grant of voluntary departure: or

(4) Is no longer continuing his or her employment (or does not have a reasonable expectation of employment at all times) as set forth in § 274a.5(a).

PART 299—IMMIGRATION FORMS

13. Section 299.1 is amended by adding to the listing of forms, in proper numerical sequence, the entry for Form "I–9A" to read as follows:

§ 299.1 Prescribed forms.

* * * * *

Form No.	Edition date	Title
I–9A	xxxxx	Employment Eligibility Reverification.

14. Section 299.5 is amended by adding to the listing of forms, in proper numerical sequence, the entry for form "I–9A" to read as follows:

§ 299.5 Display of control numbers.

* * * * *

INS form No.	INS form title	Currently assigned OMB control No.
I–9A	Employment Eligibility Reverification	1115–

Dated: January 22, 1998.

Doris Meissner,

Commissioner, Immigration* and Naturalization *Service.

Note: The Form I–9 and Form I–9A will not **appear** in **the Code** of **Federal Regulations.**

BILLING CODE 4410–10–M

U.S. Department of Justice
Immigration and Naturalization Service

OMB No. xxxx-xxxx

Employment Eligibility Verification

INSTRUCTION SHEET - FORM I-9 AND FORM I-9A

PLEASE READ CAREFULLY BEFORE COMPLETING THIS FORM.

THIS INSTRUCTION SHEET MUST BE AVAILABLE TO PERSONS COMPLETING THIS FORM.

Employers are responsible for ensuring that the Employment Eligibility Verification form, Form I-9, is properly completed for all employees, citizens and noncitizens, hired after November 6,1986. Federal law prohibits empbyers from knowingly hiring or continuing to employ aliens who are not authorized lo work in the United Slates. Federal law provides for avil money penalties for failure to properly complete or maintain this form.

This version of the Form 1-9 replaces earlier versions of the f m . Starting xx-xx-xx, this is the only version of the form that may be used. The documents listed in Section 2 of the form are the only documents that employers may accept as evidence of identity and eligibility to work. Either Form 1-9 or I-9A may be used if an employee's eligibility to work expires and must be reverified.

Discrimination prohibited: It is illegd to discriminate against any individual, other than an alien not authorized to work in the U.S., in hiring, discharging, or recruiting or referring for a fee because of that individual's national origin or citizenship status. Employers cannot specify which document(s) they will accept from an employee. The refusal to hire an individual because of a future expiration date may also constitute illegal discrimination.

Form I-9

Section 1 must be completed at the time employment begins. Section 2 must be completed within three business days of the date employment begins. If the person is being hired for less than three business days, both Section 1 and Section 2 must be completed at the time employment begins. After making the commitment to hire, an employer may require employees to complete the Form 1-9 at or before the time employment begins. provided that the employer applies this requirement uniformly.

Employee Instructions

(1) Read all the instructions and information on this page and on the Form I-9. (2) Complete the information block in Section 1. (3) Read the attestation. Initial the block indicating the status that makes you eligible to work in the United Slates.

I attest, under penalty of perjury, that I am *(Initial one of the following):*

CMJ A citizen or national of me United States

If you are a Lawful Permanent Resident or other work-authorized alien, provide your A number or admission number in the space indicated.

MJB A Lawful Permanent Resident (A# A00001111)

If you are not a US. citizen or natiid. or a Lawful Permanent Resident, and your work authorization has an expiration date, put that date in the space indicated. (Some aliens. such as refugees, are not permanent residents but have work authorization that does not expire.) (4) Sign and dale the Employee signature block. (5) Show your employer one document from List A or one document each from List B and List C in Section 2. You may choose which documents you wish to present from the lists of acceptable documents in Section 2. Also see the 'receipts for documents' section on the second page of these instructions. An employer cannot prefer one document over others. If an employer refuses to accept the documents you choose to show, call the Office of Special Counsel for Immigration-Relaled Unfair Employment Practices at 1-800-255-7688 to ask about your rights.

Warning: Federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form. In addition, aliens who are found to have committed such acts may be subject to removal proceedings.

Preparer/Translator instructions

If the employee needs assistance in completing Section 1, or needs the form translated, someone may assist him or her. The employee must still initial and sign Section 1 personally. If the employee is a minor under age 18 or a person with a disability who is unable to produce one of the identity documents listed, a parent or responsible person may attest to the person's identity. After providing the needed assistance, the preparer or translator must read the attestation, sign and date the Preparer/Translator signature block, and fill in the requested information. See pub. M-274 for detailed information.

Employer Instructions

(1) Read all the instructions and information on this page and on the Form I-9. (2) Review Section 1 to ensure that it is properly completed. If the date of hire (first day of work) is not known when the form is being completed. that date should be entered on *the* form when it is known, and the change initialed and dated. Slate employment agencies completing the form may omit the date of hire. (3) Examine the document(s) presented by the employee. The employee may choose which documents lo present from the lists of acceptable documents in Section 2. You must accept any document or combination of documents from Section 2 w h i i reasonably appear on their face to be genuine and to relale lo the person presenting them. Also see the 'receipts for documents' section on the second page of these instructions. You may not prefer one document over others or ask to see a specific document To do so could constitute discrimination. For more information on how to comply with employment eligibility verification without discriminating. call the Office of Special Counsel for Immigration-Related Unfair Employment Practices at 1-800-255-8155. Employers may, but are not required to, photocopy the document(s) presented. If they do this, they must still complete the Form I-9. The photocopies must be attached to and retained with the form. The copies may be used only for the verifiition process. (4) Complete Section 2. Fill in the information requested for the document(s) presented. (Two information blocks are provided on the form for List A for use if the employee presents a foreign passport with a stamp or Form 1-94.) The example below shows how the blocks would be completed for a driver's license. Other examples are shown in pub. M-274.

☒ Driver's License issued by a Slate or outlying possession
state: Virginia
Document # 123-45-6789
Expiration date 12/13/99

(5) Read the attestation. (6) Sign and date the Employer or Authorized Representative signature block, and fill in the requested information.

Note: For the *purpose of completing this form, the term "employer" includes those recruiters and referrers for a fee who* are *agricultural associations, agricultural* employers, or *farm labor contractors.*

For more information see pub. M-274, Handbook for Employers. This publication contains detailed instructions, examples of properly completed forms, and pictures of the documents that may be presented when completing the Form I-9.

Form I-5 d Fc m 1 ( )

Receipts for documents

A person who is eligible to work, but who is unable to provide a required document, may present a receipt. The person must have attested in Section 1 that he or she is eligible for employment. An employer may **not** accept a receipt if the person indicates or the employer has actual or constructive knowledge that the person is not authorized to work. There are three kinds of acceptable receipts: (1) A person may present a receipt showing that they have applied for a replacement document. The person must present the required document within 90 days of the hire. (2) Immigration and Naturalization Service (INS) Arrival-Departure Record (Form I-94) may be treated as a receipt if it bears a Temporary I-551 stamp or a refugee admission stamp. The temporary I-551 stamp may be accepted as a receipt for the Permanent Resident Card (Form I-551). The person must present Form 1551 within 180 days of the hire. (3) An INS Form I-94 bearing a refugee admission stamp may be accepted as a receipt for either an Employment Authorization Document (Form I-766 or I-688B) or an unrestricted Social Security card. The person must present the required document within 90 days of the hire.

Noh: Employees hired for less than three business days must present the actual document(s) at the time of hire

Reverification (Form I-9A)

Employers are responsible for reverifying the work authorization for a person if Section 1 or 2 of the Form I-9 indicates that the individual's employment authorization expires. Employers may either complete a new Form I-9 or use Form I-9A for reverification. Whichever form is used, reverification must be completed no later than the date employment authorization expires. If the form used for reverification indicates in Section 1 or 2 that the individual's employment authorization expires, employers must again reverify no later than the expiration date. Employees may present a receipt for reverification, as described above. Noh: List B documents never need to be reverified. Documents presented by U.S. citizens and nationals and Lawful Permanent Residents are not subject to the reverification requirement, except in the case of Lawful Permanent Residents who present a foreign passport with a temporary I-551 stamp.

Employer Instructions for Form I-9A: (1) Read all the instructions and information on this page and on the form I-9A. (2) Complete the information block in Section 1. (3) Read the attestation. Initial the block indicating the status that makes you eligible to work in the United States. If you are not a Lawful Permanent Resident and your work authorization has an expiration date, put that date in the space indicated. (4) Sign and date the Employee signature block. (5) Show your employer one document from List A or one document from List C in Section 2 of the Form I-9.

Preparer/Translator Instructions for Form I-9A: If someone assists the employee in completing Section 1, or translates the form, that person must read the attestation, sign and date the Preparer/Translator signature block, and fill in the requested information.

Employer Instructions for Form I-9A: (1) Read all the instructions and information on this page and on the form I-9A. (2) Review Section 1 to ensure that it is properly completed. (3) Examine the document(s) presented by the employee. Documents should appear to be genuine and to relate to the person presenting them. (4) Fill in the information requested for the document(s) presented. The example below shows how the blocks would be completed for an I-766 employment authorization document. Other examples are shown in pub. M-274.

Document Title: I-766 Employment Auth. Document

Document #: A12345678 Expiration Date (if any): 2/26/99

(5) Read the attestation. (6) Sign and date the Employer or Authorized Representative signature block, and fill in the requested information.

Note: For as long as the Form I-9 or Form I-9A used for reverification indicates that the individual is not a United States citizen or national, or a lawful permanent resident, and that the individual's employment authorization expires, the employer must reverify the individual's employment authorization, no later than the date that employment authorization expires.

Retaining Forms

Employers must maintain completed Forms I-9 for three years after the date the form begins work or one year after the date employment is terminated, whichever is later. Forms used for reverification (Form I-9 or I-9A) must be attached to and retained with the original Form I-9. Employers who elect to photocopy documents presented must attach the photocopies to and retain them with the Form I-9.

Obtaining and Duplicating Forms

The Form I-9 and the form I-9A may be obtained in limited quantities at INS District Offices, or ordered from the INS at 800-870-3676 or the Superintendent of Documents, Washington, DC 20402. They are also available for downloading from the Internet at http://www.usdoj.gov/ins/. Employers may electronically generate blank forms, provided that: the resulting form is legible; there is no change to the name, content, or sequence of the data elements and instructions; no additional data elements or language are inserted, and the paper used meets the standards for retention and production for inspection specified under 8 CFR 274a.2(b). When copying or printing the Form I-9, Form I-9A, or this Instruction Sheet, the text may be reproduced by making either double-sided or single-sided copies. The instruction sheet must be available to all persons completing this form.

Privacy Act Notice. The authority for collecting this information is the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986, Pub. L. 99-603 (8 U.S.C. 1324a). This information is for employers to verify the eligibility of persons for employment to preclude the unlawful hiring, or recruiting or referring for a fee, of aliens who are not authorized to work in the U.S. This information will be used by employers as a record of their basis for determining eligibility of an employee to work in the U.S. The form will be kept by the employer and made available for inspection by officials of the U.S. Immigration and Naturalization Service, the Department of Labor, and the Office of Special Counsel for Immigration-Related Unfair Employment Practices.

Submission of the information required in this form is voluntary. However, a person may not begin employment unless this form is completed within the time required by regulation since employers are subject to civil or criminal penalties if they do not comply with the Act. Under the Privacy Act, a person may complete Section 1 without providing the Social Security number.

Reporting Burden. A person is not required to respond to a collection of information unless it displays a currently valid OMB control number. We try to create forms and instructions that are accurate, can be easily understood, and which impose the least possible burden on you to provide us with information. Often this is difficult because the immigration laws are very complex. Accordingly, the reporting burden for this collection of information is computed as follows. For the Form I-9: 1) learning about this form, 4 minutes; 2) completing the form, 4 minutes; and 3) assembling and filing (record keeping) the form, 4 minutes, for an average of 12 minutes per response. For the Form I-9A: 1) learning about this form, 3 minutes; 2) completing the form, 2 minutes; and 3) assembling and filing (record keeping) the form, 4 minutes, for an average of 9 minutes per response. If you have comments regarding the accuracy of this burden estimate, or suggestions for making this form simpler, you can write to the Immigration and Naturalization Service, 425 I Street, N.W., Room 5307, Washington, D.C., 20536. Do not mail completed Forms I-9 to this address.

For more information see pub. M-274, Handbook for Employers. This publication contains detailed instructions, examples of properly completed forms, and pictures of the documents that may be presented when completing the Form I-9.

U.S. Department of Justice
Immigration and Naturalization Service

OMB No. xxxx-xxxx

Employment Eligibility Verification

*The **instruction sheet** must be available to persons completing this form. Please read it carefully before you begin.*
For detailed information, see Pub. M-274, Handbook for Employers.
***Anti-discrimination notice:** It is illegal to discriminate against work eligible individuals. Employers cannot specify which document(s) they will accept from an employee. The refusal to hire an individual because of a future expiration date may also constitute illegal discrimination.*

Date of hire: *(first day of work)* _____ *(month/day/year)*

***Section 1.** To be completed at the time employment begins. **Employee** must provide the information requested, initial the space showing the status that makes him or her eligible to work in the US, and sign and date the attestation.*
***Employer** must review to ensure Section 1 is properly completed.*

Federal law provides for imprisonment and/or fines for false statements or use of false documents when completing the Form I-9.

Print Name *(Last, First, Middle Initial)* | Maiden Name

Address **Street** Number and Name, Apt. # | City | State | ZIP Code

Date of Birth *(month/day/year)* | Social Security # (optional)

I attest. under penalty of perjury, that I am (initial *one* of *the following):*

_____ A citizen or national of the United States

_____ A Lawful Permanent Resident (A# _____)

_____ An alien authorized to work (A# or Admission # _____)
until *(expiration* date, *if applicable • month/day/year)* _____

✘ _____
Employee's Signature | Date *(month/day/year)*

Preparer/Translator: Complete *and sign this section if you assisted in the completion of Section* 1
I attest, under penalty of perjury, that I have assisted in the completion of this form and that, to the best of my knowledge. the information is true and correct.

✘ _____
Preparer's/Translator's Signature | Date *(month/day/year)*

Print Name | Address *(Street Name and Number, City, State, Zip Code)*

***Section 2.** To be completed within three business days of the time employment begins. **Employee** must choose one document from List A or one document from List B and one from List C and present the document(s) to the employer. Documents must be unexpired. **Employer** must check the block next to the document(s), fill in the requested information, including the document number and expiration date (if any), and sign and date the attestation.*

List A	OR	List B	AND	List C
❑ United States Passport ❑ Permanent Resident Card *or* Resident alien card (I-551) O Foreign Passport with temporary 1-551 stamp ***Country:*** _____ O Temporary resident card (I-688) Employment authorization document ❑ 1-766 ❑ I-688B ❑ I-688A ❑ (For *aliens authorized* to *work* only *for a specific* employer) Foreign Passport with Form 1-94 authorizing employment with this employer Country: _____ ***Document #*** _____ ***Expiration*** date _____ ***Doc. #*** _____ ***Exp.*** _____		❑ Driver's License issued by a State or outlying possession stare: _____ ❑ ID card issued by a State or outlying possession state: _____ ❑ Native American Tribal Document ***Issued by:*** _____ ❑ *(For* Canadian aliens authorized *to* work *only for* a *specific employer)* Canadian Driver's License or ID *card* with a photograph Document # _____ ***Expiration date*** _____		O Social Security Account number card without employment restrictions ❑ Native American Tribal Document ***Issued by:*** _____ O (For aliens *authorized to work only for* a ***specific*** employer) Form 1-94 authorizing employment with this employer ***Document #*** _____ ***Expiration*** *date* _____

I attest, under penalty of perjury. that I have examined the document(s) presented by the employee, that the document(s) appear to be genuine and to relate to the employee named, and that, to the **best** of my knowledge. the employee is eligible to work in the United States.

✘ _____
Signature of Employer or Authorized Representative | Date *(month/day/year)*

Form I-9 (rev xx-xx-xxxx)

U.S. Department of Justice
Immigration and Naturalization Service

OMB No. xxxx-xxxx

Employment Eligibility Reverificatior

This form is for reverification only.

Do not use if the employee has not previously completed a Form I-9. Do not use if the employee previously completed a Form I-9 and was verified as a US citizen or national or a Lawful Permanent Resident *(except for a Lawful Permanent Resident who presented an unexpired foreign passport with a temporary I-551 stamp).* ***The instruction sheet*** *and lists A and C must be available to persons completing this form. For details, see Pub. M-274, Handbook for Employers.*

Anti-discrimination notice: It is illegal to discriminate against work eligible individuals. *Employers cannot specify which document(s) they will accept from an employee. The refusal to continue to employ an individual because of a future expiration date may also constitute illegal discrimination.*

Federal law provides for imprisonment and/or fines for false statements or use of false documents when completing the Form I-9A.

Reverification Dated _____ *(month/day/year)*

Section 1. *Employee must complete and sign no later than the date employment authorization expires. Employer must review to ensure Section 1 is properly completed.*

Print Name *(Last, First, Middle Initial)* | Maiden Name

I attest, under penalty of perjury. that I am ***(initial*** one ***of the following):***

____ A Lawful Permanent Resident (A# _____)

____ An alien authomed to work **(A#** or Admission **#** _____)
until ***(expiration date. if applicable*** - *month/day/****year)*** ____/____/____

✘ Employee's Signature — Date *(month/day/year)*

Preparer/Translator: *Complete and* ***sign this section if*** you *assisted in the completion of Section* 1. I attest, under penalty of perjury, that I have assisted In the completion of this form and that, to the best of my knowledge, the information is true and correct.

✘ Preparer's/Translator's Signature — Date *(month/day/year)*

Print Name | Address *(Street Name and Number, City, State, Zip Code)*

Section 2. *To be completed and signed no later than the expiration date indicated for the employee's employment authorization on either Section 1 or Section 2 (List A or C) of the Form I-9.* ***Employee*** *must present one document from List A or List C on the Form I-9.* ***Employer*** *must fill in the requested information and sign and date the attestation.*

Document Title: _____ _____ ***Document #:*** _____ ***Expiation Date (if any):*** /. I

I attest. under penalty of perjury, that I have examined the document presented by the employee, that the document appears to be genuine and to relate to the employee named, and that. to the best of my knowledge. the employee is eligible to work in the United States.

✘ Signature of Employer or Authorized Representative — Date *(month/day/year)*

Print Name | Company Name and Address ***(Street Name and Number, City, State, ZIP code)***

Section 1. **Reverification Dated** _____ *(month/day/year)*

I attest, under penalty of perjury, that I am ***(initial*** one ***of the following):***

____ A Lawful Permanent Resident (A# _____)

____ An alien authorized to work (A# or Admission # _____)
until ***(expiration date,*** *if applicable* - ***month/day/year)*** ____/____/____

✘ Employee's signature — Date *(month/day/year)*

Preparer/Translator: I attest. under penalty of perjury, that I have assisted in the completion of this form and that, to the best of my knowledge, the information is true and correct.

2.

Document Title: _____ ***Document #:*** _____ ***Expiration Date (if any):*** I /.

I attest, under penalty of perjury. that I have examined the document presented by the employee, that the document appears to be genuine and to relate to the employee named. and that. to the best of my knowledge, the employee is eligible to work in the United States.

✘ **Signature** of Employer or Authorized Representative — **Date** *(month/day/year)*

Print Name

Form I-9A (xx-xx-xx)

[FR Doc. **98–2124 Filed 1–30–98; 8:45 am]**
BILLING CODE **4410–10–C**

Regulating Agency: Federal Trade Commission

Citation: http://www.ftc.gov/os/statutes/fcra/vaiI.htm

Authority: § 603(e), 603(f), 603(k)(1)(B)(ii), and § 604(b)(3)(A) of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681a and 1681b

Description of Problem:

In April 1999, the Federal Trade Commission (FTC) surprised employers by issuing an opinion letter (the "Vail" opinion letter) concluding that the report of an independent investigator hired by a company to look into alleged workplace misconduct is an "investigative consumer report" subject to the requirements of the Fair Credit Reporting Act (FCRA). This interpretation means that an employer must give *notice* to and obtain *consent* from an employee accused of sexual harassment or other misconduct on the job *before* the employer can use an outside investigator to find out what the facts are. Moreover, it means that before an employer can take an adverse action against an employee based on an outside investigator's findings, it must give a full copy of the investigator's report to the employee.

The FTC's conclusion complicates the use of proven, effective methods by employers to combat workplace harassment and other misconduct. In many instances, advance notice and full disclosure to the persons under suspicion will thwart the purpose of an investigation. In addition, having to provide notice to the alleged actor can have a chilling effect on both complainants and potential witnesses.

Proposed Solution:

We understand and appreciate that the FTC staff has concluded that FCRA's statutory language requires the interpretation contained within the Vail letter, that this interpretation was rendered only because an opinion was requested, and that it is the responsibility of Congress, not the FTC staff, to change the law. Accordingly, we are not now asking that the agency staff issue a new letter or other interpretation that contradicts the "Vail" letter.

Rather, we recommend that the letter simply be rescinded. In addition to the information that EEAC and other members of the employer community have submitted to the FTC as to the Vail letter's counterproductive impact on effective workplace misconduct investigations, there is also additional legal authority to support the conclusion that, at the very least, reasonable minds can differ as to the correct interpretation of the FCRA as applied in this context.

For example, we are aware of at Ieast three federal district courts that have declined to follow the Vail letter. *See Johnson v. Federal* ***Express Corp.,*** 147 F. **Supp.** 2d

1272, 1272 (M.D. Ala. 2001); *Hartman v. Lisle Park District*, 158 F. Supp. 2d 869, 875-76 (N.D. Ill. 2001); and *Robinson v. Time Warner, Inc.*, 187 F.R.D. 144, 148 n2 (S.D.N.Y 1999).[1]

We submit that these cases, together with the well documented significant negative consequences of imposing a prior notice and consent requirement on workplace misconduct investigations, present a persuasive case for the FTC now to consider laying aside its controversial, public position on this issue as contained in the Vail letter. Accordingly, EEAC respectfully requests that the FTC withdraw the "Vail" opinion letter, together with subsequent opinion letters reiterating that conclusion, and that the agency *not* address the issue in its forthcoming revisions to 16 C.F.R. Part 600.

Estimate of Economic Impact:

The economic impact of such an impediment to investigations of workplace conduct can be significant, since it affects the company's ability to prevent further injury, and ultimately its options for limiting liability for the misconduct.

[1] *See also Comment: The Absurdity of the FTCS Interpretation of the Fair Credit Reporting Acts Application to Workplace Investigations: Why Courts Should Look Instead to the Legislative History,* 96 Nw. U. L. Rev. 339 (Fall 2001); Heather L. MacDougall, *Fair Credit Reporting Act: Unintended Employment Consequences of a Consumer Protection Law, 27* Employee Relations L. J. (Winter 2001) at 69.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Division *of* Financial Practices

April 5, 1999

Judi **A.** Vail, Esq.
1111 Main Street, Suite 604
Vancouver, Washington 98660

Re: Sexual Harassment Investigations and the Fair Credit Reporting Act; Sections 603(e), 603(f), 603(k)(1)(B)(ii), and 604(b)(3)(A) of the Fair Credit Reporting Act.

Dear Ms. Vail:

This is in response to your letter posing two questions concerning the application of the Fair Credit Reporting Act (FCRA) to sexual harassment investigations. You note, by way of context for your inquiries, that the Civil Rights Act of 1964 (Title VII) prohibits discrimination in employment on the basis of race, color, religion, sex or national origin, and that under Title VII an employer has specific obligations, including the obligation to investigate allegations of sexual harassment in the workplace. If harassment is found to have occurred, appropriate corrective or disciplinary action may be taken. We agree with your assessment that such action could reasonably be defined as an adverse employment decision under Section 603(k)(1)(B)(ii) of the FCRA. That section provides that "adverse action" means "a denial of employment or any other decision for employment purposes that adversely affects any current . . . employee."

1. Application of Section 603(f) or 606 to outside organizations that regularly engage in assisting employers with investigations for a fee if the scope of their investigation does not exceed the employer's workforce or company documents. (Would investigatory information compiled solely from employees and documents within the workplace ***be*** *defined as a consumer report or investigative consumer report?)*

The relevant inquiry here is not whether the scope of the investigation goes beyond the employer's workforce or internal documents. Section 603(f) of the FCRA defines a consumer reporting agency (CRA) as any person which, for monetary fees, "assembles or evaluates" credit information or other information on consumers for the purpose of regularly furnishing "consumer reports" to third parties using any means or facility of interstate commerce. A "consumer report" is, in turn, defined in Section 603(d)(1) as a report containing information bearing on an individual's "character, general reputation, personal characteristics, or mode of living" that is used or expected to be used for the purpose of serving as a factor in establishing the consumer's eligibility for, among other things, employment. From the information in your letter, it seems reasonably clear that the outside organizations utilized by employers to assist in their investigations of harassment claims "assemble or evaluate" information. See the fuller discussion of this issue under point one in the enclosed staff opinion letter *(LeBlanc,* 6/9/98).

Thus, once an employer turns to an outside organization for assistance in investigation of harassment claims in the manner outlined in your letter, the assisting entity is a CRA because it furnishes "consumer reports" to a "third party" (the employer). For purposes of

determining whether the entity is a CRA, the FCRA does not distinguish whether the information on consumers is obtained from "internal" records or from outside the employer's workplace. The source and scope of information *does* enter into a determination of whether the information is a "consumer report" or an "investigative consumer report."

An "investigative consumer report" is defined in Section 603(e) of the FCRA as "a consumer report . . . in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information." I have enclosed a staff letter (*Hinkle*, 7/9/98) that discusses the considerations involved in analyzing the application of this section. From the limited facts outlined in your letter, it would appear that the reports prepared by outside organizations performing harassment investigations for employers are most likely "investigative consumer reports" within the meaning of the FCRA. As your letter recognizes, employers who utilize consumer reports or investigative consumer reports have certain obligations under the FCRA to notify employees and/or supply a copy of the report to the employee. (See generally *Hawkey*, 12/18/97; copy attached.)

2. When a consumer or investigative consumer report is released pursuant to Sections 604 (b)(3), 615(a) or 606(a)(1)(B) by the employer or consumer reporting agency, to what degree may the information be redacted?

Information cannot be redacted in those instances in which the FCRA requires that the consumer be provided a copy of a consumer report (Section 604(b)(3)(A)). I enclose a copy of a prior staff opinion letter (*Hahn*, 7/8/98) which explicates this requirement more fully. I also note that the staff has taken the position that an employer who uses investigative consumer reports must comply fully with the provision of the FCRA that apply generally to "consumer reports" (such as Sections 604(b) and 615(a)),[1] as well as the provisions that apply specifically to investigative consumer reports (Section 606). (*Beaudette*, 6/9/98; copy attached.)

I hope that this information is helpful to you. The views expressed herein are the views of the Commission staff and are advisory in nature. They do not necessarily reflect the views of the Commission or of any particular Commissioner.

Very truly yours,

Christopher W. Keller
Attorney

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1. You refer to a staff letter (*Weisberg*, **6/27/97),** that responded affirmatively to an inquiry as to whether an employer would comply with the requirement in Section 604(b)(3) that it make certain disclosures to the consumer "before" taking any adverse action, if it waited five days to take the action. That letter specifically stated that "the facts of any particular employment situation" controls the appropriate waiting period, which would likely be much shorter in the case of an employer who was taking required action to remedy sexual harassment.

Appendix F

Regulating Agency: Equal Employment Opportunity Commission

Citation: 29 C.F.R. § 1625.23

Authority: 29 U.S.C. § 626(f)

Description of Problem:

The Supreme Court held in *Oubre v. Entergy Operations,* 522 U.S. 422 (1998), that an individual who accepts consideration in exchange for a release of claims cannot be required to return or "tender back" the consideration as a condition precedent to bringing suit under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.* The EEOC regulations interpreting the *Oubre* decision, however, go well beyond that. The regulations not only make "tender back" agreements unenforceable, but also outlaw any conditions subsequent, such as a "covenant not to sue," that would give an employer a way of recovering its defense costs in ADEA cases in which the employer paid for a release that an employee voluntarily signed but then chose to violate.

Proposed Solution:

Revise 29 C.F.R. § 1625.23 to omit the words "covenant not to sue."

Estimate of Economic Impact:

The regulation causes employers to question seriously whether or not offering valuable consideration in exchange for minimally effective waivers is a sound business decision. If the consideration buys little of value, employers may well decide that their money is better spent elsewhere, particularly if they are confident that the related employment actions were free from discrimination.

Many employers who are faced with the necessity of workforce reductions offer special severance benefits to ease the impact of lost employment. The benefits provided by these programs often are quite substantial and far in excess of any to which the employees otherwise would be entitled. Some employers, depending upon financial circumstances and other considerations, also offer early retirement incentives and other voluntary terminations in lieu of layoffs. Other employers may accelerate unvested stock options, offer large separation payments, extend health care benefits, supplement existing retirement programs, and provide valuable outplacement arrangements. The EEOC previously has estimated that more than 13,700 employers a year offer programs involving benefits in exchange for waivers. Waivers of Rights and Claims Under the Age Discrimination in Employment Act, 62 Fed. Reg. 10787 (March 10, 1997). Of course, employees cannot be forced to sign waivers against their will, but those who do sign receive substantial benefits to which they would not otherwise be entitled.

The Commission's regulation creates a substantial disincentive for employers to offer these programs. Even for those employers that continue to do so, the Commission's devaluation of their part of the bargain is likely to reduce substantially the amount they are willing to pay.

The Commission should not have taken such a regrettable approach without first considering the deleterious impact on workers, including older workers, who look forward to — and jump at the chance to obtain — a "golden parachute" with no intention of filing a discrimination lawsuit. Nondiscriminatory force reductions are legal, and are a fact of life for businesses from time to time. Employees, including older workers, who are affected by lawful reductions in force face an uncertain future due to the loss of employment. For most of these individuals, the employer's voluntary choice to offer incentives or severance pay in exchange for a waiver and covenant not to sue constitutes, in effect, an unanticipated and welcome windfall, since, not having been the victims of unlawful discrimination, they have no hope of recovering damages. It is these individuals who have been hurt by the Commission's unwarranted approach.

(3) The standards set out in paragraph (f) of this section for complying with the provisions of section 7(f)(1)(A)–(E) of the ADEA also will apply for purposes of complying with the provisions of section 7(f)(2)(A) of the ADEA.

(4) The term "reasonable time within which to consider the settlement agreement" means reasonable under all the circumstances, including whether the individual is represented by counsel or has the assistance of counsel.

(5) However, while the time periods under section 7(f)(1) of the ADEA do not apply to subsection 7(f)(2) of the ADEA, a waiver agreement under this subsection that provides an employee the time periods specified in section 7(f)(1) of the ADEA will be considered "reasonable" for purposes of section 7(f)(2)(B) of the ADEA.

(6) A waiver agreement in compliance with this section that is in settlement of an EEOC charge does not require the participation or supervision of EEOC.

(h) *Burden of proof.* In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in section 7(f) of the ADEA, subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2) of section 7(f) of the ADEA.

(i) *EEOC's enforcement powers.* (1) Section 7(f)(4) of the ADEA states:

> No waiver agreement may affect the Commission's rights and responsibilities to enforce [the ADEA]. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

(2) No waiver agreement may include any provision prohibiting any individual from:

(i) Filing a charge or complaint, including a challenge to the validity of the waiver agreement, with EEOC, or

(ii) Participating in any investigation or proceeding conducted by EEOC.

(3) No waiver agreement may include any provision imposing any condition precedent, any penalty, or any other limitation adversely affecting any individual's right to:

(i) File a charge or complaint, including a challenge to the validity of the waiver agreement, with EEOC, or

(ii) Participate in any investigation or proceeding conducted by EEOC.

(j) *Effective date of this section.* (1) This section is effective July 6, 1998.

(2) This section applies to waivers offered by employers on or after the effective date specified in paragraph (j)(1) of this section.

(3) No inference is to be drawn from this section regarding the validity of waivers offered prior to the effective date.

(k) *Statutory authority.* The regulations in this section are legislative regulations issued pursuant to section 9 of the ADEA and Title II of OWBPA.

[63 FR 30628, June 5, 1998]

§ 1625.23 Waivers of rights and claims: Tender back of consideration.

(a) An individual alleging that a waiver agreement, covenant not to sue, or other equivalent arrangement was not knowing and voluntary under the ADEA is not required to tender back the consideration given for that agreement before filing either a lawsuit or a charge of discrimination with EEOC or any state or local fair employment practices agency acting as an EEOC referral agency for purposes of filing the charge with EEOC. Retention of consideration does not foreclose a challenge to any waiver agreement, covenant not to sue, or other equivalent arrangement; nor does the retention constitute the ratification of any waiver agreement, covenant not to sue, or other equivalent arrangement.

(b) No ADEA waiver agreement, covenant not to sue, or other equivalent arrangement may impose any condition precedent, any penalty, or any other limitation adversely affecting any individual's right to challenge the agreement. This prohibition includes, but is not limited to, provisions requiring employees to tender back consideration received, and provisions allowing employers to recover attorneys' fees and/or damages because of the filing of an ADEA suit. This rule is not intended to preclude employers from recovering

attorneys' fees or costs specifically authorized under federal law.

(c) *Restitution, recoupment, or setoff. (1)* Where an employee successfully challenges a waiver agreement, covenant not to sue, or other equivalent arrangement, and prevails on the merits of an ADEA claim, courts have the discretion to determine whether an employer is entitled to restitution, recoupment or setoff (hereinafter, "reduction") against the employee's monetary award. A reduction never can exceed the amount recovered by the employee, or the consideration the employee received for signing the waiver agreement, covenant not to sue, or other equivalent arrangement, whichever is less.

(2) In a case involving more than one plaintiff, any reduction must be applied on a plaintiff-by-plaintiff basis. No individual's award can be reduced based on the consideration received by any other person.

(d) No employer may abrogate its duties to any signatory under a waiver agreement, covenant not to sue, or other equivalent arrangement, even if one or more of the signatories or the EEOC successfully challenges the validity of that agreement under the ADEA.

[65 FR 77446, Dec. 11, 2000]

PART 1626—PROCEDURESAGE DISCRIMINATION IN EMPLOYMENT ACT

Sec.

AUTHORITY: Sec. 9, 81 Stat. 605, 29 U.S.C. 628; sec. 2, Reorg. Plan No. 1 of 1978, 3 CFR. 1978 Comp., p. 321.

SOURCE: 48 FR 140. Jan. 3, 1983, unless otherwise noted.

§ 1626.1 Purpose.

The regulations set forth in this part contain the procedures established by the Equal Employment Opportunity Commission for carrying out its responsibilities in the administration and enforcement of the Age Discrimination in Employment Act of 1967, as amended.

§ 1626.2 Terms defined in the Age Discrimination in Employment Act of 1967, as amended.

The terms *person, employer, employment agency, labor organization, employee, commerce, industry affecting commerce,* and *State* as used herein shall have the meanings set forth in section 11 of the Age Discrimination in Employment Act, as amended.

§ 1626.3 Other definitions.

For purpose of this part, the term *the Act* shall mean the Age Discrimination in Employment Act of 1967, as amended; the *Commission* shall mean the Equal Employment Opportunity Commission or any of its designated representatives; *charge* shall mean a statement filed with the Commission by or on behalf of an aggrieved person which alleges that the named prospective defendant has engaged in or is about to engage in actions in violation of the Act: *complaint* shall mean information received from any source, that is not a charge, which alleges that a named prospective defendant has engaged in or is about to engage in actions in violation of the Act: *charging party* means the person filing a charge; *complainant* means the person filing a complaint; and *respondent* means the person named as a prospective defendant in a charge or complaint, or as a result of a Commission-initiated investigation.