

EMPLOYMENT LAW UPDATE

CHANGES TO THE FORM I-9 PROCESS AND FORM

Pursuant to the Immigration Reform and Control Act of 1986, employers are required to complete and retain the Employment Eligibility Verification (“Form I-9”), which verifies the identity and work authorization, for every person hired for employment for pay. Prior to the COVID-19 pandemic, employers were required to physically examine each document presented by an employee in connection with the Form I-9 completion, to ensure that each document reasonably appeared to be genuine and to relate to the employee.

On March 20, 2020, as a result of the COVID-19 pandemic, the U.S. Department of Homeland Security (“DHS”) [announced](#) that it would exercise discretion to defer the physical verification of identity and employment authorization documentation associated with the completion of the Form I-9, for employers taking physical proximity precautions due to COVID-19. Instead of reviewing the employee’s identity and work authorization documents in-person within three business days of the employee’s first day of employment, DHS stated that it would permit employers to *delay* in-person inspection and to inspect these documents remotely (“e.g., over video link, fax or email, etc.”), provided the employer retained copies of the documents, entered “[remote inspection](#)” as the reason for the delay in in-person inspection (along with the date of the remote inspection) on the Form I-9, and conducted an in-person reverification of the documents once normal operations resumed.

In October 2022, DHS [announced](#) that the COVID-19 flexibilities related to remote I-9 inspection would end on July 31, 2023. On May 4, 2023, DHS extended this deadline and [announced](#) that employers would “have until Aug. 30, 2023 [] to perform all required physical examination of identity and employment eligibility documents for those individuals hired on or after March 20, 2020, and who have only received a virtual or remote examination under the flexibilities.” To assist employers with this process, DHS published [sample I-9 Forms](#) showing the manner in which employers should annotate the Form I-9 in connection with the in-person reverification.

Last week, DHS announced changes that will allow some employers to breathe a sigh of relief regarding the need to physically examine the Form I-9 identity and employment authorization documents of employees whose documents were remotely verified under the COVID-19 flexibilities.

1. **DHS Implements a Remote Verification Alternative for Certain E-Verify Employers for Newly Hired Employees Effective August 1, 2023.**

DHS [published](#) a Final Rule, effective August 1, 2023, that provides certain employers the option to remotely verify the identity and work authorization documents of newly hired employees in connection with the Form I-9 completion (the “Alternative Procedure”). To be eligible to utilize the Alternative Procedure, the following conditions must be met:

1. The employer must be an enrolled E-Verify participant in good standing; and
2. The employer must complete an E-Verify tutorial created by DHS that includes fraud awareness and anti-discrimination training.

Qualifying employers may choose to utilize the Alternative Procedure at an E-Verifying hiring site for all newly hired employees, so long as it does so consistently.¹ The Final Rule also allows qualifying employers to elect to utilize the Alternative Procedure only for remote employees and continue to require in-person verification for employees who work fully on-site or in a hybrid capacity, so long as it does not do so in a discriminatory manner.

If a qualifying employer elects to utilize the Alternative Procedure for a newly hired employee, it must still complete Section 2 of the Form I-9 within the three-business day period and must undertake the following steps:

1. The employee must provide the employer with clear and legible copies (front and back if the document is two-sided) of documents necessary to establish identity and work authorization;
2. The employer must examine the copies (front and back if two-sided) of the documents presented to ensure they reasonably appear to be genuine;
3. The employer must conduct a live video interaction with the employee, where the employee presents the same documents it provided to the employer for purposes of step 1, to ensure the documents reasonably appear to be genuine and related to the employee;
4. The employer must retain copies (front and back if two-sided) of the documents presented consistent with applicable regulations;

¹ While the Final Rule does not clarify what it means to utilize the Alternative Procedure at an E-Verify hiring site “consistently,” it does clarify that the Alternative Procedure may be used for remote hires even if on-site or hybrid hires are required to provide in-person documentation. This suggests that employers must utilize the Alternative Procedure consistently for employees within the same categories, such as remote, hybrid, or on-site.

5. The employer must indicate on the Form I-9 that it used the Alternative Procedure to examine the employee's documentation; and
 6. The employer must confirm the identity and employment authorization of the employee using E-Verify.
2. **DHS Permits Certain Qualifying Employers to Utilize the Alternative Procedure to Satisfy the In-Person Inspection Requirements for Employees Verified Remotely During the COVID-19 Pandemic.**

The Final Rule also allows employers, who were enrolled in E-Verify during DHS's COVID-19 I-9 flexibilities and who previously utilized such flexibilities to conduct remote inspection and delay in-person inspection, to utilize the Alternative Procedure to satisfy current in-person inspection requirements if the following conditions are met:

1. The employer was enrolled in E-Verify at the time it performed the remote examination of the employee's Form I-9 documents during the pandemic;
 2. The employer created an E-Verify case for the particular employee (except for reverification);² and
 3. The employer conducted the initial remote inspection between March 20, 2020, and July 31, 2023.
3. **DHS Introduces an Updated Form I-9 to Be Published on August 1, 2023**

Lastly, DHS [published](#) a Final Rule introducing a new Form I-9, which became available on August 1, 2023. Employers may continue to use the current Form I-9 (dated 10/21/19) through October 31, 2023, after which they must begin using the new Form I-9 (dated 08/01/23). Employers may download the new Form I-9 from the USCIS website at www.uscis.gov/i-9. After October 31, 2023, the prior version of Form I-9 will no longer be valid, and employers who continue to use the outdated Form I-9 may be subject to penalties.

² For these employees, the employer does not need to create a new case in E-Verify.

***More Questions?
We are here to help.***

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