

# Just in the Nick of Time: Form I-9 Remote Inspections to Continue

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**On July 21, 2023, the Department of Homeland Security ('DHS') announced a new final rule establishing a remote option for employers to inspect employee documents in compliance with I-9 employment verification requirements (the 'Final Rule').**

Additionally, on the same day, the U.S. Citizenship and Immigration Services ("USCIS") announced that it will publish a revised version of Form I-9, Employment Eligibility Verification. These announcements were made just 10 days before employers were expected to revert to mandatory in-person inspections of documents for new employees, including employees hired during the COVID-19 temporary flexibilities period.

## Background

Under the Immigration Reform and Control Act of 1986, it is unlawful for employers to knowingly hire individuals who are unauthorized to work in the United States. As a result of this law, employers are required to use Form I-9 to verify individuals' identity and employment authorization when hiring an employee in the United States. To complete section 2 of Form I-9, the individual must present their employer with acceptable documents pursuant to DHS and USCIS instructions, and the employer (or an authorized representative) must examine those documents in the employee's presence to determine whether they reasonably appear to be genuine and relate to the employee within three business days of the employee's first day of employment. This has been the rule for employers hiring new employees, whether citizens or noncitizens, to work in the United States since November 6, 1986. Failure to properly complete and retain Form I-9 may subject employers to penalties under federal law.

## Remote Inspections Continue

On March 20, 2020, as a result of the COVID-19 pandemic, employers were allowed to inspect Form I-9 documents remotely (*e.g.*, over video link, fax, or email) within three business days of the employee's first day of employment. These COVID-19 flexibilities were set to expire on July 31, 2023. After July 31, 2023, employers would have been required to physically inspect employees' documents in person if the employer utilized the COVID-19 flexibilities at the time of hire. Under the Final Rule, the DHS will allow remote inspections to continue, and eligible employers will not be required to conduct in-person, physical examination of documents for employees hired during the COVID-19 flexibility period.

To be eligible to participate in remote inspections under the DHS Final Rule, employers must first be enrolled, and participating in good standing, in E-Verify. New E-Verify employers and any users who manage and create E-Verify cases must complete an E-Verify tutorial that includes fraud awareness and anti-discrimination training. After meeting such preliminary requirements, employers may remotely examine documents for new hires within the first three business days of the employee's employment by following this process:

1. Examine copies (front and back, if the document is two-sided) of Form I-9 documents or an acceptable receipt to ensure that the documentation presented reasonably appears to be genuine;
2. Conduct a live video interaction with the individual presenting the document(s) to ensure that the documentation reasonably appears to be genuine and related to the individual. The employee must first transmit a copy of the document(s) to the employer (per Step 1 above) and then present the same document(s) during the live video interaction;
3. Indicate on the Form I-9, by completing the corresponding box, that an alternative procedure was used to examine documentation to complete Section 2 or for reverification, as applicable;
4. Retain, consistent with applicable regulations, a clear and legible copy of the documentation (front and back, if the documentation is two-sided); and
5. In the event of a Form I-9 audit or investigation by a relevant federal government official, make available clear and legible copies of the identity and employment authorization documentation presented by the employee for document examination in connection with the employment eligibility verification process.

Regarding previous remote inspections conducted from March 20, 2020, to July 31, 2023, employers may use the procedure permitted by the Final Rule to satisfy the physical document examination requirement by August 30, 2023, if the employer (1) was participating in E-Verify at the time of the remote examination while using COVID-19 flexibilities and (2) created an E-Verify case for the employee. Employers using this procedure do not need to create a new case in E-Verify. On the other hand, employers who were not enrolled in E-Verify during the COVID-19 flexibilities **must complete an in-person physical examination by Aug. 30, 2023.**

Employers must be sure that any remote inspections are not viewed as unlawful discrimination. If an eligible employer chooses to offer the alternative procedure to new employees at an E-Verify hiring site, that employer must do so consistently for all employees at that site without discrimination. It is permissible for an eligible employer to offer the alternative procedure for remote hires only and continue to apply physical examination procedures to all employees who work onsite or in a hybrid capacity, so long as the employer does not adopt such a practice for a discriminatory purpose or treat employees differently based on a protected characteristic.

### **New Form I-9**

Additionally, the USCIS published a new version of Form I-9 on August 1, 2023, which allows remote review of employee documentation. Of note, the new form will include a checkbox allowing employers to indicate that an employee's documentation was examined remotely. Additionally, the new form will reduce Sections 1 and 2 of Form I-9 to a single-sided sheet and provide fillable spaces for mobile devices. Further, the new form will have separate, standalone supplements for Preparer/Translator Certifications (previously included in Section 1) and Reverification and Rehire (previously Section 3). While the new form will be published in August, employers may continue to use the current Form I-9 through October 31, 2023. However, all employers must use the new Form I-9 starting November 1, 2023.

### **Conclusion**

While the optional alternative allows employers different methods to inspect employees' documentation, employers must still remain vigilant in the process. Employers must ensure that they are eligible to examine documents remotely by first handling the preliminary steps set by the DHS. Further, employers must follow the process correctly to ensure all steps are covered. For guidance on the process, employers should consult with informed legal counsel to avoid any potential errors.

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