

Form I-9 Flexibility Expiring July 31; DHS Announces Remote Inspection Option for Certain Employers

August 1, 2023

On July 21, 2023, the Department of Homeland Security ("DHS") announced a new, alternative procedure that will allow certain employers to virtually inspect the identity and employment authorization documents presented by an employee for purposes of completing Form I-9. This alternative procedure goes into effect on August 1, 2023, along with a new version of Form I-9.

Historically, under I-9 regulations, employers were required to physically inspect the documents an employee presents for purposes of completing Form I-9, as part of the requirement to verify an employee's identity and employment authorization. Due to the COVID-19 pandemic, **DHS offered temporary relief from this requirement**, allowing employers to inspect an employee's identity and employment authorization documents virtually when completing Form I-9. **However, this temporary policy expires on July 31, 2023.**

Employers should take steps to review any Form I-9 completed during COVID-19 under these flexibilities. With this temporary policy sunsetting on July 31, 2023, the new alternative option allows a qualifying E-Verify employer to take the following steps to complete the Form I-9 document inspection process:

- Examine copies of the identity and employment authorization documents presented by the employee;
- Conduct a live video interaction with the employee presenting the documents, to ensure that the documentation reasonably appears to be genuine and related to the individual. The employee must first transmit a copy of the documents to the employer and then present the same documents during the live video interaction;
- Complete the corresponding box on the new Form I-9, indicating that the alternative procedure was used to examine the documentation;
- Retain clear and legible copies of the documentation, which includes the front and back of the documentation if two-sided; and
- In the event of an audit, make available these copies of the documents to government officials.

It is important to note that this new, alternative procedure is ONLY available to employers enrolled in E-Verify in good standing. Employers not enrolled in E-Verify must return to physical inspection of an employee's identity and employment authorization documents once the temporary flexibilities expire on July 31, 2023.

Further, employers who were enrolled in E-Verify and previously took advantage of COVID-19 temporary rules may avail themselves of this new, alternative procedure to satisfy the requirement to "physically" examine the employee's documentation. To do so, the following criteria must be met:

- The employer was enrolled in E-Verify at the time the remote inspection of an employee's I-9 documentation was performed;
- The employer created an E-Verify case for that employee; and
- The employer performed the remote inspection under the COVID-19 temporary flexibilities between March 20, 2020 and July 31, 2023.

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This alternative procedure is optional, and an employer may still elect to use the traditional physical inspection process. However, a qualified employer that chooses to offer the alternative procedure to some employees at an E-Verify hiring site must do so consistently for all employees at that site. An employer may choose to offer the alternative procedure for remote hires only but continue to apply the physical examination procedure to onsite or hybrid employees, provided there is no practice of discrimination based on a protected characteristic.

Accordingly, by August 30, 2023, an E-Verify employer who previously reviewed an employee's I-9 documentation virtually under the COVID-19 flexibilities must take steps to "physically" examine an employee's I-9 documentation, under either the new alternative procedure or under the traditional physical inspection procedure. Employers can begin in-person verification of these documents at any time and should not wait for this deadline. If an employer becomes the subject of an I-9 audit and is found to be out of compliance, fines can add up very quickly, ranging from \$272 to \$2,701 per individual.

Further, for new employees hired after July 31, 2023, E-Verify employers must begin inspecting the new hire's documents under the new, alternative procedure or through traditional physical inspection procedure, as the COVID-19 temporary flexibilities expire on this date.

Employers may continue to use the prior version of Form I-9 (edition date 10/21/2019) through October 31, 2023. If an employer elects to use the prior version of Form I-9 for the new, alternative procedure, the employer must indicate their use of the alternative procedure by writing "alternative procedure" in the additional information field in Section 2 of the Form I-9. As indicated above, employers who use the new version of the Form I-9 must complete the required box if using the new, alternative procedure.

Return of In-Person, Physical Inspection for Non-Verify Employers

By August 30, 2023, employers not enrolled in E-Verify (or who were not enrolled in E-Verify at the time of the virtual inspection) must meet with all employees who were onboarded using the remote verification process to complete in-person verification of their Form I-9 documents. To properly complete Section 2 of Form I-9, employers must inspect the physical documents and should note "COVID-19. Documents physically examined on MM/DD/YYYY by INITIALS" in the Additional Information Section. If the person who inspected the employee documents remotely is NOT the same person who performs the in-person, physical inspection, the employer must note "COVID-19 - Documents physically examined on MM/DD/YYYY by [FULL NAME, TITLE]."

Employers should start now to determine which employees were onboarded on or after March 20, 2020 using remote verification in order to ensure Form I-9 is properly completed. Employers should also **seek counsel** regarding their current I-9 processes, given the complicated guidance provided by ICE and DHS for completing Form I-9 during COVID-19.

Please contact the authors to further discuss how this impending change affects you.

This information is based on the facts and guidance available at the time of publication and may change.