

COVID-19 Update: DHS Announces Flexibility in Requirements Related to Form I-9 Compliance

March 20, 2020

As a result of the COVID-19 global pandemic and national emergency, more and more employers in the U.S. are allowing or encouraging employees to work from home. First and foremost, employers want to maintain a safe workplace and environment which protects the health of employees, customers, and other visitors. At the same time, employers also need to ensure the continuity of their business operations, which includes the onboarding of newly hired employees, and the completion of the Form I-9 as required by law.

The current regulations require employers to physically examine documents **in-person** with the employee and complete the Form I-9 within **three business days** of the employee's start date. On March 20, 2020, the Department of Homeland Security (DHS) announced that it will exercise discretion to defer the physical presence requirements associated with Employment Eligibility Verification (Form I-9) under Section 274A of the Immigration and Nationality Act (INA).

1. What are the temporary measures/changes related to Form I-9 compliance?

Employers with employees taking physical proximity precautions due to COVID-19 will *not* be required to review the employee's identity and employment authorization documents in the employee's physical presence. However, employers must inspect the employee's identity and employment authorization documents **remotely** (e.g., over video link, fax, or email, etc.) and obtain, inspect, and retain **copies** of the documents, within **three business days** for purposes of completing Section 2.

Please note that if a business is closed, then the Form I-9 requirements are tolled because, it is not considered a "business day" for Form I-9 purposes. Again, the employer should note this on the Form I-9 and ideally in an attached memo if it would otherwise appear that the form was not timely completed.

The above provision only applies to employers and workplaces that are operating remotely. If there are employees physically present at a work location, *no exceptions* are being implemented at this time for in-person verification of identity and employment eligibility documentation for Form I-9 compliance. However, if newly hired employees or existing employees are subject to COVID-19 quarantine or lockdown protocols, DHS will evaluate these employees on a case-by-case basis.

Employers who avail themselves of this provision must provide written documentation of their remote onboarding and telework policy for each employee. This burden rests solely with employers.

2. What are the critical dates that the employers should keep in mind when implementing temporary Form I-9 compliance measures?

The DHS announcement of temporary remote I-9 verification may be implemented by employers for **a period of 60 days from March 20, 2020, OR within three business days after the termination of the National Emergency, whichever comes first.**

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In addition, **effective March 19, 2020, any employers who were served Notices of Inspection by DHS during the month of March 2020 and have not already responded will be granted an automatic extension for 60 days from March 19, 2020.** At the end of the 60-day extension period, DHS will determine if an additional extension will be granted.

3. What are the additional actions that the employers need to take after normal operations resume?

Once normal operations resume, all employees who were onboarded using remote verification, must report to their employer within **three business days** for in-person verification of identity and employment eligibility documentation for Form I-9, Employment Eligibility Verification.

Employers should enter "COVID-19" as the reason for the physical inspection delay in the Section 2 additional information field **once physical inspection takes place after normal operations resume.** Once the documents have been physically inspected, the employer should add "*documents physically examined*" with *the date of inspection* to the Section 2 additional information field on the Form I-9, or to section 3 as appropriate.

Any audit of subsequent Forms I-9 would use the "in-person completed date" as a starting point for these employees only.

4. What are the best practices for Form I-9 compliance during this period?

The existing I-9 regulations also allow employers to authorize an agent to act on the employer's behalf to complete Section 2 or re-verify employment authorization. To document that the agent is acting on the employer's behalf, the best practice is to send clear written instructions for the agent performing this service. Many employers will designate someone to be on the phone or present via webinar to observe the Form I-9 process and confirm that the agent is acting appropriately.

In the end, employers should create and attach a file memo to any Form I-9, print or electronic, that was created during this period. This memo should explain the circumstances for the creation of the form that resulted in untimely and/or practices that are outside of an employer's normal Form I-9 creation and retention protocol.

Please contact the authors or your Miller Canfield attorney with further questions.

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