

FORM I-9 UPDATE WITH FLEXIBLE OPTION FOR EMPLOYMENT ELIGIBILITY VERIFICATION

U.S. Citizenship and Immigration Services ("USCIS") has announced a new version of Form I-9, Employment Eligibility Verification, that is available for use beginning August 1, 2023. The prior version of Form I-9 continues to be effective through October 31, 2023. Additionally, USCIS has announced the authorization of an optional alternative procedure to the in-person physical examination of the documentation presented by individuals seeking to establish identity and employment authorization for the purpose of completing Form I-9.

BACKGROUND

During the COVID-19 pandemic, the Department of Homeland Security ("DHS") announced that it would exercise discretion to defer the physical presence requirements associated with Form I-9 completion. Employers with employees taking physical proximity precautions due to COVID-19 were not required to review the employee's identity and employment authorization documents in the employee's physical presence. However, employers were required to inspect the Section 2 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. Indeed, if employees hired on or after April 1, 2021, worked exclusively in a remote setting due to COVID-19-related precautions, they were temporarily exempt from the physical inspection requirements associated with Form I-9 until they assumed non-remote employment on a regular, consistent or predictable basis, or the extension of the flexibilities related to such requirements is terminated, whichever is earlier.

COVID-19 FORM I-9 FLEXIBILITIES TERMINATED

DHS recently announced that the COVID-19 temporary flexibilities related to completion of Form I-9 would end on July 31, 2023. As such, USCIS announced that employers must complete physical document reviews for all employees that were previously inspected remotely **by August 30, 2023**.

FINAL RULE ON ALTERNATIVE VERIFICATION PROCEDURES

On July 21, 2023, DHS announced a final rule in the Federal Register that recognizes the end of temporary COVID-19 flexibilities as of July 31 and provides DHS with the authority to authorize optional alternatives to examine Form I-9 documentation. At the same time, DHS also published an accompanying document in the Federal Register describing and authorizing employers enrolled in E-Verify to remotely examine their employees' identity and employment authorization documents under a DHS-authorized alternative procedure.

Specifically, the alternative procedure is available only to qualified employers, meaning those employers who are participating in good standing, in E-Verify. The alternative process for qualified employers includes: 1) examining *copies* of documents submitted for Form I-9 completion to ensure that the document presented reasonably appears to be genuine; 2) conducting a live video interaction with the individual presenting the document to ensure the documentation reasonably appears to be genuine and related to the individual; 3) indicating on Form I-9 that the alternative procedure was used to examine documentation to complete Section 2 or for reverification, by completing the corresponding box; and 4) retaining a clear and legible copy of the documentation. The use of the alternative procedure is entirely optional but must be used consistently.

PRACTICAL TAKEAWAYS

Going forward, employers should work to update their Form I-9 as soon as possible to meet the upcoming deadline. Qualified employers that were enrolled in E-Verify at the time they performed a remote examination of an employee's Form I-9 documentation for Section 2 or reverification while using the COVID-19 flexibilities *and* created an E-Verify case for that employee *and* performed the remote inspection between March 20, 2020, and July 31, 2023, can use the alternative procedure to satisfy the required physical examination of the employee's documents for that Form I-9 (by August 30).

Employers who were not enrolled in E-Verify at the time they initially performed a remote examination of an employee's documents under the COVID-19 flexibilities between March 20, 2020, and July 31, 2023, are required to physically examine the employee's Form I-9 documents in the employee's presence. As mentioned above, such examination must be completed no later than August 30, 2023.

Employers who do not qualify to use the new alternative procedure may face challenges with completing physical document reviews because much of their workforce is hybrid or remote, or they have a high volume of employees requiring the updates. Employers could use authorized representatives, where a third party completes Section 2 or 3 of Form I-9 on the employer's behalf, to lighten the burden. Nevertheless, employers are still liable for the representative's mistakes and should be careful to establish checks, such as post-verification completion audits and document copying mandates, to ensure that forms are completed accurately and in compliance with applicable regulatory requirements.

If employers have questions about Form I-9 completion or whether they qualify to utilize the new alternative procedure, please contact your Hall Render Immigration Team:

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