

I-9 Documentation Review Amidst the COVID-19 Pandemic

As we approach April 1, 2021, employers should be aware of the ever-changing policies and procedures surrounding their requirements to complete the Employment Eligibility Verification Form I-9 (and E-Verify if they have registered to use it or are required to use it by law) for all new hires. Traditionally, the document inspection requirements of Form I-9 were completed in person when the new hire was going through the onboarding process of a new position, requiring the employee to complete Section 1 on or before the first day of employment, and the employer to inspect the employee's original documents and complete Section 2 within three days of the employee's start date. To accommodate the remote working environment of so many during the COVID-19 Pandemic, Department of Homeland Security (DHS) adapted its practices and requirements in order to accommodate employers and employees.

On March 19, 2020, DHS and U.S. Immigration and Customs Enforcement (ICE) announced a "compliance flexibility policy" to allow certain employers to obtain, remotely inspect, and retain copies of I-9 documents on a temporary basis as a result of the pandemic. The policy only applies to employers and workplaces that are operating remotely and was originally set to expire January 31, 2021. On January 28, 2021, DHS announced that, due to ongoing precautions related to COVID-19, the Form I-9 flexibility policy will be extended for an additional 60 days, and is now set to expire on March 31, 2021.

A few of the key provisions of the policy are as follows:

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.

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. 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.

This 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. However, if newly hired employees or existing employees are subject to COVID-19 quarantine or lockdown protocols, DHS will evaluate this on a case-by-case basis.¹

There have been several attempts by the American Immigration Lawyers Association and various other parties to request additional guidance or insight as to how "normal operations" will be defined by DHS and the requirements surrounding the resumption of normal pre-COVID-19 operations. Responses from the ICE Homeland Security Investigations (HSI) indicate that DHS may interpret the end of the policy as a "hard stop" after which all employers must review original documents within three business days of the policy's expiration. This would mean that employers would need to go through the physical document review process for all remotely completed Form I-9s by April 5, 2021. While this view could change, we recommend that employers make plans now to review original documents in person by an employer or authorized representative and update existing I-9s completed through remote review during the period of March 19, 2020, through March 31, 2021. Further, employers should also be reminded that as employees return to the worksite, it is HSI's expectation that original documents will be reviewed and the I-9s updated according to existing guidance.



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Related Practice Areas

- Immigration Policy & Strategy

Although there is no definite guidance, we urge employers to prepare for the termination of the virtual document review option and the need to conduct in-person review of original documents of all employees hired since March 19, 2020. We will continue to monitor this situation and advise if there is a further extension of the virtual document review policy.

¹ See <https://www.ice.gov/news/releases/dhs-announces-flexibility-requirements-related-form-i-9-compliance>.