

DHS and ICE Extend Form I-9 Verification Flexibility through October 31, 2022

On April 25, 2022, the U.S. Department of Homeland Security (DHS) and U.S. Immigration and Customs Enforcement (ICE) announced an extension of the flexibilities relating to the Form I-9 Employment Eligibility Verification Form (Form I-9) until October 31, 2022. The Immigration Reform and Control Act of 1986 (IRCA) requires employers to complete Form I-9 for each new hire. One of the requirements relating to Form I-9 completion is that the employer must physically inspect the new hire's original documentation and complete Section 2 of Form I-9 within three business days of the new employee's date of hire.

These Form I-9 flexibilities were first implemented in March 2020 due to the COVID-19 pandemic. With employees working remotely throughout the United States, employers could not physically inspect the new hire's documentation evidencing their eligibility to work in the United States. DHS addressed this issue by exercising its prosecutorial discretion to defer the physical presence requirements relating to the completion of the Form I-9. However, this policy initially only applied to employers and workplaces that were operating remotely. If employees were physically present at a work location, no exceptions to the in-person verification of identity and employment eligibility documentation for Form I-9 were permitted. As a result, if an employer had a group of employees who needed to be physically present at the worksite on a regular basis while the majority of its employees were working from home, the physical presence requirement applied to all new hires, regardless of whether they worked at the worksite or from home. This created havoc for employers as they tried to find ways to physically inspect the original documentation presented by new hires in the midst of a global pandemic. Employers who were unable to physically inspect and verify the Form I-9 supporting documents in a timely manner were advised to memorialize the reason(s) for this in a memorandum retained with each affected employee's Form I-9. Any such reason(s) were to be evaluated on a case-by-case basis by DHS and ICE in the event of a Form I-9 audit.

On April 1, 2021, DHS amended the Form I-9 identity and employment document inspection requirement to apply only to those employees who physically report to work at a company location on any regular, consistent, or predictable basis. If employees hired on or after April 1, 2021, work exclusively remotely due to COVID-19-related precautions, they are temporarily exempt from the physical inspection requirements until they undertake non-remote employment on a regular, consistent, or predictable basis or until the extension of the flexibilities related to such requirements is terminated, whichever comes first. In this instance, the employer is permitted to conduct a visual inspection of the new hire's identity and work authorization documents through remote means, including via email, fax, or over the internet. Once the employee returns to the worksite or the flexibility policy is terminated, the employer must then physically inspect the documents of each new hire impacted by the flexibility policy in-person.

As noted in DHS and ICE's March 31, 2021, announcement, the Form I-9 flexibilities announced in March 2020 do not preclude employers from commencing, at their discretion, the in-person verification of identity and employment eligibility documentation for employees who were hired on or after March 20, 2020, and who presented such documents for remote inspection in reliance on the flexibilities first announced in March 2020.

As we've suggested in previous alerts, employers who have been inspecting documents virtually should have a plan for physical inspection of each new hire's original documents once the employee returns to work or the flexibility policy is terminated. These employers should now identify those employees who will need their I-9s updated upon returning to work.

Employers should continue to monitor the DHS and ICE websites for additional updates regarding the status of Form I-9 completion flexibilities. We will continue to monitor any changes in Form I-9



Frances Rayer

Member

frayer@cozen.com
Phone: (215) 665-3704
Fax: (215) 665-2013



Elizabeth A. Olivera

Associate

eolivera@cozen.com
Phone: (312) 382-3139
Fax: (612) 260-9080

Related Practice Areas

- Immigration Policy & Strategy
- Labor & Employment

regulations and policies and advise clients accordingly.
