

Virtual Form I-9 Inspection Pilot Program for Non-E-Verify Employers

On August 3, 2023, the Department of Homeland Security (DHS) proposed a new pilot program for virtual Form I-9, Employment Eligibility Verification inspections that would apply to employers not currently enrolled in E-Verify. This proposed new rule will be open for comments for the next 60 days before its planned implementation into the Federal Register.

Under the Proposed Rule, How Can Non-E-Verified Employers Use Remote Verification?

- Non-E-Verify Remote Document Examination Pilot 1 (Pilot) seeks to identify the potential effects of a specific Pilot procedure on the security of the employment verification system.
- U.S. Immigration and Customs Enforcement (ICE) will evaluate a range of potential effects on system integrity, such as error or fraud rates and discrimination, between physical examination of the Form I-9 documents and remote examination pursuant to the Pilot procedure.
- The Pilot procedure would not, however, be available to E-Verify employers because DHS has authorized an alternative procedure involving the use of E-Verify.

Within three business days of an employee's first day of employment, an employer (or an authorized representative acting on such an employer's behalf, such as a third-party vendor) who chooses to participate in Pilot 1 must:

1. Examine copies (front and back, if the document is two-sided) of Form I-9 documents or an acceptable receipt to ensure that the documentation presented reasonably appears to be genuine;
2. Conduct a live video interaction with the individual presenting the document(s) to ensure that the documentation reasonably appears to be genuine and related to the individual. The employee must first transmit a copy of the document(s) to the employer (per Step 1 above) and then present the same document(s) during the live video interaction;
3. Indicate on the Form I-9, by completing the corresponding box, that an alternative procedure was used to examine documentation to complete Section 2 or for reverification, as applicable;
4. Retain, consistent with applicable regulations, a clear and legible copy of the documentation (front and back if the documentation is two-sided); and
5. In the event of a Form I-9 audit or investigation by a relevant federal government official, make available the clear and legible copies of the identity and employment authorization documentation presented by the employee for document examination in connection with the employment eligibility verification process.

How Can Employers Participate?

- The Pilot may be open to most employers but limited to employers below a specified size threshold (e.g., 500 employees).
- This information collection would involve a form to be completed by employers requesting to participate in the Pilot. ICE would request feedback data (e.g., number of new hires, number of employees who requested to have a physical inspection, challenges associated with the Pilot procedure) about twice a year from participating employers.
- Participating employers would be required to examine and retain electronic copies that are clear and legible of all supporting documentation provided by individuals seeking to establish identity and employment authorization for the Form I-9 process. Employers may also be required to undertake fraudulent document detection and anti-discrimination training.
- Employees who work onsite (i.e., at the same physical worksite as a supervisor or the official completing the Form I-9) or in a hybrid capacity, the employer may be prohibited from



Scott Bettridge

**Chair,
Immigration
Practice**

sbettridge@cozen.com
Phone: (305) 704-5953
Fax: (305) 704-5955



Elizabeth A. Olivera

Associate

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

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using the Pilot procedure or provided a timeframe, following the initial remote document inspection, during which to physically examine the employee's Form I-9 documents and compare such documents to the copies on file.

How to Submit Comments and Suggestions

Employers may access the information collection instrument with instructions or additional information by visiting the Federal eRulemaking Portal site at: <https://www.regulations.gov> and entering ICEB-2023-0007 in the search box. All submissions will be posted, without change, to the Federal eRulemaking Portal at <https://www.regulations.gov> and will include any personal information you provide. Therefore, submitting this information makes it public.

Cozen O'Connor Analysis

This Pilot program is a great opportunity for employers who are not enrolled in E-Verify to take advantage of the virtual Form I-9 inspection policies. This may help employers with a remote workforce and employees located around the country. However, our recommendation would be to analyze if this is the best step for your business. The process of changing Form I-9 inspection procedures may take some time and cause uncertainties. It is the best practice to consider if virtual Form I-9 inspections can be done efficiently and effectively for your business.
