

FLEXIBLE I-9 RULES FOR REMOTE WORKERS EXTENDED THROUGH OCTOBER

Insights
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In a surprise move, federal immigration officials recently **announced** that they will permit remote review of new hires' I-9 documentation for those who work exclusively in a remote setting due to COVID-19 related precautions through October 31. According to the April 25 announcement, U.S. Immigration and Customs Enforcement (ICE) has said that the requirement that employers inspect employees' Form I-9 identity and employment eligibility documentation in-person applies only to those employees who physically report to work at a company location on any regular, consistent, or predictable basis for at least the next six months. Could this continued flexibility be a welcome sign of things to come?

What's Happening?

It appears that ICE officials have acknowledged that some workers remain sensitive to COVID-19 risks, even as their employers return to business-as-usual. Where an employer has returned to normal operations, ICE will continue to allow for exceptions to the in-person document review rule, on a case-by-case basis, for remote inspection of acceptable I-9 documentation of employees.

As previously reported, since the beginning of the COVID-19 pandemic, USCIS has allowed employers to remotely review — by Zoom, video chat, facetime, fax, or other electronic means — the identity and work-authorization documents that are necessary for workers' Forms I-9, during the hiring and reverification process. These "relaxed" rules have applied where (i) workplaces were temporarily shut down due to the pandemic, or, (ii) where new hires and employees

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needing to update temporary work authorizations were subject to quarantine or no-travel orders.

Many observers expected the temporary rules to end in early 2022. But with the most recent announcement by ICE extending the flexibility through at least October, it is now more likely that the changes will remain permanent.

Memorialize the Reasons for Remote Document Inspection

As with the prior rule, you should document, in a memorandum, the specific reason(s) why in-person inspection of an employee's documents is not possible. You can use the "Additional Information" section on the Form I-9 for this purpose, or can attach a separate memorandum to the Form I-9.

ICE has promised a "case by case" assessment of remote document review in the event of an I-9 audit. Therefore, you should take notes pertaining to individual employees' unique needs into consideration in the event of a later government review.

Eventual In-Person Review

If a remote employee ceases remote work and begins to report to your physical location on a regular, consistent, or predictable basis, you must physically inspect acceptable I-9 documentation and record the specifics of the in-person review. If a remote employee leaves your employment before an in-person inspection of documents is possible, you should record this in a memorandum and attach it to the employee's Form I-9.

The following rules still apply to subsequent in-person review:

- If the original employer representative who examined a worker's documents through an electronic means is no longer employed or otherwise unavailable to conduct the subsequent, in-person inspection, the new employer representative conducting the in-person inspection should indicate in the Additional Information box their name, title and date that they conducted the physical examination.
- If one or more of the documents has expired since the original remote I-9 process was undertaken, and provided the document was valid at the time the original Form I-9

was executed, the expired document remains acceptable for in-person review.

- If a document was previously reviewed remotely, and has since become lost or is otherwise unavailable for in-person inspection, the employee should complete a new Section 1 of Form I-9, and present any qualifying document from List A, or combination of documents from Lists B and C. The employer's representative should indicate the same hire date on the new Form I-9, as was shown on the original, and attach the new I-9 to the original. The employer's representative should indicate in the "Additional Information" field that the new I-9 was necessary because the employee's original documents were unavailable.

Electronic Document Review: A Sign of Things to Come?

As mentioned, this new approach applies only where the employee works remotely "due to COVID-19 related precautions." However, ICE might be considering the establishment of permanent rules which would allow employers to regularly conduct remote document review for employees hired to work in locales that are hundreds or even thousands of miles away for the employer's nearest physical premises.

Under current rules, employers wishing to hire remote employees, where no company offices or operations are nearby, must secure an "Authorized Representative" to conduct in-person document review, in the employer's stead. This process can itself be questionable, as often the person who is designated as the employer's lawfully acceptable Authorized Representative can — and often is — a prospective employee's friend, neighbor or relative, with no affiliation whatsoever with the employer, and only a casual understanding of the purpose and proper completion of Form I-9. The likelihood of a substantive, uncorrectable error occurring due to the inexperience of an Authorized Representative is therefore extremely high. Worse, employers are fully liable for errors made by Authorized Representatives.

By allowing for long-term flexibility for properly trained HR professionals to conduct the process through an electronic review, ICE will have better ensured the accuracy of the employment verification process, and completeness of documents.

Authorized Representatives: Mitigating Liability

Employers hiring employees to work remotely for reasons other than COVID-19-related precautions have options other than relying on local, inexperienced individuals. National law firms like Fisher Phillips have offices strategically situated across the country and can assist with in-person inspection of I-9 documents.

Alternatively, and at the very least, HR professionals should remotely oversee the inspection of documents by an Authorized Representative, using tools like Zoom and Facetime. They should ensure that the Authorized Representative has properly inspected the documents presented by an employee, and correctly completed Section 2 of the Form I-9 on behalf of the employer. In pursuing such a strategy, you will have satisfied the in-person review requirement, via the Authorized Representative, while also ensuring that the process receives the proper level of expert attention by the HR professional.

Conclusion

With these constantly evolving rules, employers who have conducted remote document inspection during the pandemic may be at a higher risk for expensive monetary fines, potentially running in the thousands of dollars. Now is a good time to review your I-9 files and process to ensure continued compliance.

Fisher Phillips will continue to monitor developments will provide additional guidance as it becomes available. Make sure you are subscribed to [Fisher Phillips' Insight system](#) to get the most up-to-date information. If you have further questions, contact your Fisher Phillips attorney, the author of this Insight, or any attorney on our [Immigration Practice Group](#).