

# A STEP TOWARD THE FUTURE? FEDERAL IMMIGRATION AUTHORITIES CONSIDERING REMOTE I-9 DOCUMENT REVIEW PROCEDURES

Insights  
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Employers may soon have a welcome alternative to the long-standing and often-cumbersome process that requires an in-person inspection of I-9 documents at the time a new worker is onboarded. On August 18, the Department of Homeland Security (DHS) [published a proposed Rule](#) that would allow the government to consider possible “alternative options for document examination procedures” for employees, including the option of reviewing employees’ I-9 documents on a remote basis. What do employers need to know about this exciting new development – and when might this brave new future arrive?

## The Established Rule: In-Person Document Review

Since the Form I-9 became a requirement for all U.S. employers hiring new employees, one key rule has remained unchanged: within three days after the employees’ first day of employment, employees’ supporting documents had to be reviewed **in person**. This review can be completed by someone employed by the employer (usually a member of HR, a location manager, or someone else on the employer’s payroll) or by an appointed “authorized representative.”

This in-person review requires the reviewer to certify that the document(s) presented are “genuine” and “relate to” the person providing them. Even if you had an authorized representative complete and sign the form on your behalf, the government warns that you remain liable for any verification violations, including accepting fraudulent documentation.

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In short, employers had two choices when filling out page 2 of the I-9:

- have a company employee view the documents in person, or
- if a company employee was not available, say, because the new hire was located thousands of miles away from the nearest company worksite, ask someone else in the new hire's community – with no connection to the company – to act on the company's behalf.

## Enter the COVID-19 Pandemic

As previously reported, USCIS has relaxed its in-person review rule since the beginning of the COVID-19 pandemic, allowing employers to remotely review — by Zoom, video chat, facetime, fax, or other electronic means — employees' 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 workplaces were temporarily shut down due to the pandemic, or where new hires and employees needing to update temporary work authorizations were subject to quarantine or no-travel orders. Nonetheless, even the "relaxed" rules require eventual in-person review of documents.

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 the end of October, we predicted that DHS and ICE might consider amending the I-9's document review rules to allow for some form of remote document review. Last week's announcement confirms that prediction is very likely to come true.

## How Will DHS Decide on Alternative Remote Document Review Procedures?

The proposed Rule itself – formally entitled "Optional Alternatives to the Physical Document Examination Associated with Employment Eligibility Verification (I-9)" – will not establish new remote document review protocols. Instead, the Rule will allow DHS to create pilot programs to test the efficacy and compliance of potential alternative remote I-9 document examination procedures.

## Service Focus

### Immigration

As noted in last week's release, the proposed Rule would also allow the Secretary to implement remote document review rules "as a temporary measure to address a public health emergency...or a national emergency declared by the President." The Rule would require any proposed alternative document review procedures to have "an equivalent level of security" to the current in-person document review requirements in order to pass muster.

## **What are the Potential Benefits of Remote Document Review?**

The potential benefits to a remote document review procedure are obvious. They may include allowing your human resources staff to examine and verify I-9 documents from a single location or remotely instead of performing the verification at each location or using an authorized representative on your behalf.

If adopted, employers with regional or nationwide operations would be able to assign a dedicated, well-trained team of HR professionals to run I-9 compliance for the entire company from a single location, or even remotely. In our experience, centralization of I-9 compliance is often key to increased compliance and lower potentially costly I-9 error rates.

Additional potential benefits include:

- Newly hired and rehired employees, and employees needing to reverify documents working remotely, will not have to make a special trip to an employer location. This will save both your organization and your employees time and money.
- With permanent remote document review rules in place, you may be more likely to consider a geographically broader pool of candidates for hire. Further, candidates for employment will have a broader scope of potential employers for remote-based jobs.

## **Will There Be a Cost to My Company?**

Eventual alternative remote document review procedures may include "acquisition and set-up costs for any new information technology that may be needed" to comply with the procedure. It is not clear exactly what this means, but it may signal a potential requirement that employers (or their designated contractors) run remotely received documents

through a computer system that has the capability of spotting and flagging potentially fraudulent documents.

In addition to possible IT requirements, DHS *could* condition participation in an alternative remote document review program on various requirements. For example, the agency could require you to sign up for E-Verify to take advantage of the flexible new Rule. DHS might also require you to copy and retain images of all Form I-9 documents presented by employees (whether remotely or in person) or require those charged with I-9 processing and compliance to attend fraudulent document detection and anti-discrimination training." All of these potential requirements would pose additional costs to employers, especially those who do not already participate in E-Verify.

### **Remote I-9 Verification Remains in Place – For Now**

This proposal by federal immigration officials does not affect the current [remote I-9 verification flexibility policy, which is in place to October 31, 2022](#).

Under this temporary policy, employees hired on or after April 1, 2021, who work exclusively in a remote setting **due to COVID-19-related precautions** are temporarily exempt from the I-9's physical inspection requirements until they undertake non-remote employment on a regular, consistent, or predictable basis – or the extension of the flexibilities related to such requirements is terminated by DHS, whichever is earlier. [You can read more about compliance with this rule here](#).

### **What Should I Do Next?**

While this proposed Rule does not establish a new remote document review procedure, it will allow DHS to undertake steps towards determining if such procedures would be feasible and have "equivalent level of security" to the current in-person document review requirements. The proposal will need to go through a standard notice-and-comment period through at least mid-October before being adopted. We anticipate that the new Rule will not take effect until at least the first quarter of 2023 at the earliest, but we will monitor the situation and provide updates as appropriate. Make sure you are signed up for [Fisher Phillips' Insight system](#) to ensure you receive the latest news.

Fisher Phillips will be participating in the public comment process. If you would like to provide your comments to a Fisher Phillips immigration compliance attorney, please reach out to your Fisher Phillips attorney or contact one of the authors of this Insight or any attorney on our [Immigration Team](#). If you wish to submit comment directly to DHS, multiple avenues are listed [in the NPRM for submitting comments](#).