

5 KEY 2022 UPDATES TO FORM I-9 COMPLIANCE AS EMPLOYERS HEAD INTO 2023

Insights
Dec 9, 2022

As we say goodbye to 2022 and set course for 2023, it's a good time to reflect on changes that have occurred in the past year – and changes we expect to occur in the new year. This is especially true when it comes to the field of workplace immigration documentation, an area that has seen dramatic developments over the past 12 months and is likely to see further significant evolution in the year ahead. Here are the top five I-9 and E-Verify updates from the past year that employers should know about as we move forward into the new year, and a glimpse into what you can expect in 2023.

1. Fines for I-9 Violations Increased in 2022

The first and most significant update is that I-9 compliance is more important than ever – because the consequences of noncompliance are now costlier than ever. Earlier this year, the Department of Homeland Security (DHS) announced an increase in fines for substantive and uncorrected technical errors. **The penalties now range from \$252 to \$2,507** (previously \$237 to \$2,360) for the first offense for substantive violations or uncorrected technical errors. The range is now \$1,161 to \$2,322 for second and subsequent paperwork offenses. Recruiting, referral, and hiring unauthorized noncitizens penalties also increased:

- The penalty for the first offense has increased from \$590 - \$4,722 to \$627 - \$5,016
- The penalty for the second offense has increased from \$4,722 - \$11,803 to \$5,016 - \$12,537

Related People



David S. Jones

Regional Managing Partner

901.526.0431

Service Focus

Immigration

- The penalty for the third offense has increased from \$7,082 - \$23,607 to \$7,523 - \$25,076

Fines for I-9 errors are based on the percentage of an employer's I-9s containing substantive and uncorrected technical errors. DHS no longer publishes a chart showing the breakdown of penalties based on percentages (e.g., 0-10%, 11-20%, etc.), but an error rate of 50% or more will draw a proposed maximum penalty of \$2,507 per I-9 containing one or more error.

For example, the proposed fine for an employer with 1,000 I-9s that is found to have 501 I-9s with substantive errors would face a potential fine of over \$1.2 million (501 x \$2,507 = \$1,256,007).

Now, more than ever, the potential exposure to big monetary fines should spur you into taking action to ensure you are in compliance. Your first step is probably an internal I-9 audit, which you can conduct with the guidance of immigration counsel.

2. DHS Updated its I-9 Inspection Flow Chart

In addition to increasing fines, DHS updated its I-9 Inspection Process flowchart in 2022 ([which you can find here](#)). The new flowchart provides details regarding Notices of Suspect Documents and Notices of Discrepancies. For the first time, it also includes reference to a "Notice of Technical Procedures/Failures," indicating that employers will be given the opportunity to correct technical issues before they turn into substantive errors subject to fines. You should use this new chart for reference and for I-9 compliance training moving forward.

3. The Current Form I-9 Expired But Is Still Acceptable – the New One Will Likely Look Very Different

The current Form I-9 expired on October 31. United States Citizenship and Immigration Services (USCIS) has directed employers to continue to use the most recent form (dated 10/21/2019) until further notice. The updated Form I-9 is expected to come out sometime in early 2023.

USCIS has [proposed major overhauls](#) to the Form I-9, including putting Section 1 and Section 2 on a single page. Veteran I-9 users will remember that Form I-9 was only one page prior to 2013.

USCIS claims that this reversion to a one-page document is intended to reduce paper use, which it no doubt will. But a single-page I-9 will also streamline scanning the Form through artificial intelligence systems, and reduce errors caused by missing, misplaced, or improperly scanned page 2s.

Section 3, which is used only occasionally, likely will become a supplement, to be used only as needed for rehires, name changes, and updating of expiring work authorization documents.

The Form I-9 instructions are also set to be reduced from the current 15 pages down to seven. And the tedious requirement for employers to write "N/A" in every empty box is likely to be dropped.

4. Remote Document Inspection Rules Under Covid Remain "Flexible," and Might Change for the Better Altogether

As we previously reported, the government has repeatedly issued "relaxed" temporary rules since the beginning of the pandemic allowing employers to review documents remotely where COVID restrictions are in place. This has allowed employers to use Zoom, video chat, FaceTime, fax, or other electronic means to accomplish this task. But these "relaxed" rules have applied *only* in the following situations:

- When workplaces are temporarily shut down due to the pandemic; or
- When new hires and employees who need to update temporary work authorizations are subject to quarantine or "no travel" orders.

Under these rules, employers must eventually inspect the relevant documents in person, but only if an employee stops working remotely and begins to report to the employer's physical location on a regular, consistent, or predictable basis. The "relaxed" rules remain in place until July 31, 2023.

As we also reported this summer, the Department of Homeland Security (DHS) published a proposed Rule on August 18 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 permanently**. 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.

If the new protocol goes into effect, 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 for in-person inspection. This will save both employers and employees time and money.

With permanent remote document review rules in place, employers 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.

We do not yet know if DHS will be successful in ultimately passing new remote-review rules, and what strings might be attached. For example, the government might require employers seeking to take advantage of remote-review rules to sign up for E-Verify. DHS plans to create a trial program to test out possible remote review protocols and related technology (including artificial intelligence review of I-9s) soon, so stay tuned.

5. ICE is Seeking to Hire More Investigators

Finally, the increase in fines discussed above is just one sign the government continues to view I-9 inspections not only as an important source of revenue, but as a key immigration law enforcement tool. In its Fiscal Year 2023 ["Congressional Justification,"](#) ICE asked Congress for money to hire around 700 new positions in 2023, adding to the current headcount of 22,358 ICE employees.

The more money ICE receives in fines for I-9 noncompliance, the more investigators and other personnel the agency can justify hiring. Even now, \$1 million plus fines for failure to comply with I-9 requirements are not unheard of. A new, streamlined one-page I-9 will make ICE audits more efficient and investigations of larger employers are likely to become more prevalent.

What Should Employers Do Now?

It is looking like 2023 is likely to bring some major changes to the area of I-9 compliance, including possibly a streamlined one-page Form I-9 and possible new remote document review rules. Increased ICE I-9 audits are also expected. Diligent employers should conduct regular internal audits of their I-9s as soon as possible with the help of immigration counsel – and should also conduct detailed I-9 training for employees charged with making sure I-9s are filled out correctly.

If you have any questions about these developments or how they may affect your business, or if you wish to discuss an internal I-9 audit and training, contact your Fisher Phillips attorney, the authors of this Insight, or any member of our [Immigration Practice Group](#). We will continue to monitor the latest developments related to this area and provide updates as warranted, so you should ensure you are subscribed to [Fisher Phillips' Insight system](#) to gather the most up-to-date information directly to your inbox.