

THOUGHT LEADERSHIP

LEGAL UPDATES

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The End of COVID-19 Form I-9 Flexibilities for Employers

On May 4, 2023, the U.S. Department of Homeland Security (DHS) and U.S. Immigration and Customs Enforcement (ICE) announced the COVID-19 flexibilities for physically inspecting Form I-9 documentation are expiring on July 31, 2023. Employers will have a 30-day grace period until August 30, 2023 to physically examine the Form I-9 documents presented by employees hired on or after March 20, 2020 that have only been virtually or remotely inspected under the COVID-19 flexibilities.

Overview of employment verification

The United States federal immigration laws require that every employer who recruits, refers for a fee, or hires an individual for employment in the U.S. complete a Form I-9, Employment Eligibility Verification. The Form I-9 has three sections. Section 1 is completed by the employee on, or before, the first day of employment. Section 2 is completed by the employer within three days of the first day of employment. Section 3 is completed only as necessary to reverify the employee's employment authorization.

Employers must physically inspect the employee's identity and employment authorization documents in person. Also, employers must maintain the completed Form I-9 for the duration of the employee's employment, and for a defined period after termination.

Form I-9 flexibilities during COVID-19

Initially announced in March 2020 and subsequently extended through the COVID-19 pandemic, DHS permitted some employers with employees taking physical proximity precautions due to COVID-19 to defer the physical presence requirements associated with the Form I-9. Employers were temporarily not required to review original employee identity and employment authorization

documents in the employee's physical presence. Instead, employers were required to examine the employee's Form I-9 documentation remotely and obtain, examine, and retain copies of the documents.

The Form I-9 flexibilities only applied to employers and workplaces that were operating remotely. If employees were physically reporting to a company location on a regular, consistent, or predictable basis, the employer was required to physically verify the Form I-9 documentation for their employees.

Employers should act now

Employers who used the Form I-9 flexibilities will need to be proactive to ensure they remain compliant with the Form I-9 regulations. As such, employers can start identifying the Forms I-9 where the employee's identity and employment authorization documents were solely reviewed remotely. Employers may consider concentrating their efforts on employees hired on or after March 20, 2020 because the COVID-19 flexibilities were not implemented by DHS until March 20, 2020.

Notably, the employer cannot dictate to the employee the identity or employment authorization documents they must present. Instead, the employee can present their choice of a List A document OR List B document plus a List C document, even if the documents presented are not the same documents that were initially provided.

Under the Form I-9 flexibilities, employers were instructed by DHS to enter "COVID-19" as the reason for the physical inspection delay of the employee's documents in Section 2. Employers are now instructed by DHS to add "documents physically examined" and the date of examination to Section 2. This comment should be added in the Additional Information field, or in Section 3, as appropriate, when the employer physically examines the employee's documentation.

Employers may also take this as an opportunity to conduct a voluntary, internal review of their Forms I-9 with Husch Blackwell's assistance.

Future of physically inspecting Form I-9 documentation

DHS and ICE issued a proposed rule on August 18, 2022 that would allow for alternative procedures for the physical inspection of identity and employment authorization documents for Form I-9 purposes. The DHS is currently reviewing the proposed rule and plans to issue a final rule later this year.

Contact us

Our attorneys are closely monitoring the Form I-9 policy and regulatory changes. Please contact Christine Fabin, Edgar Ceniceros-Herrada, or your Husch Blackwell attorney if you have any questions or would like assistance conducting an internal review of your Form I-9 program.