



white paper

END OF SECTION 2 REMOTE VERIFICATION FLEXIBILITIES

DHS-ICE Remote Form I-9 Verification Flexibility
Set to End on December 31, 2021

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DHS-ICE REMOTE FORM I-9 VERIFICATION FLEXIBILITY SET TO END ON DECEMBER 31, 2021

The COVID-19 pandemic has fundamentally changed the way many employers handle the onboarding of new employees. The Form I-9 requirement is no exception, however it may be one of the thorniest due to ever-changing guidance from the Department of Homeland Security, Immigration and Customs Enforcement (DHS-ICE). Employers who have availed themselves of DHS-ICE's COVID-19 flexibility must plan now to ensure compliance with DHS-ICE's back-to-work Form I-9 requirements.

We will discuss the general requirement that identity and employment authorization documents be physically

examined in-person, and DHS-ICE's temporary relaxation of that requirement due to the COVID-19 pandemic. We will also provide general recommendations on what steps need to be taken when the flexibility ends, which could be as soon as December 31, 2021.¹

I. WHO MUST COMPLETE A FORM I-9?

A Form I-9 must be completed for any person who provides labor or services in the United States in return for wages or other remuneration which commenced after November 6, 1986.² Section 1 of the Form I-9 must be completed at the time of hire, which means before the end of the first business day of work.³ Section 2 of the Form I-9 must be completed within three business days of the date of hire and can be completed by an employee of the company, an agent of the company, or a third-party authorized representative.⁴ The Form I-9 includes attestations for both the employee and the employer or authorized agent of the employer, and those attestations are subject to the timing requirements described above.⁵



¹ The Society of Human Resources Management (SHRM) recently sent a letter to United States Citizenship and Immigration Services (USCIS) advocating for a reinterpretation of the "physical inspection" requirement which would allow for review of documents and completion of Section 2 of the Form I-9 by video conference. Alternatively, SHRM requested that USCIS extend the flexibility guidance until December 31, 2021 and allow for ninety days to complete the in-person review of documents instead of the three days allowed under the current guidance.

² Form M-274 at § 2.0; 8 C.F.R. § 274.2(b).

³ 8 C.F.R. § 274.2(b)(1)(i)(A)(i). See also *U.S. v. Curran Eng'g Co., Inc.*, 7 OCAHO no. 975, at 17 (1997).

⁴ 8 C.F.R. § 274.2(b)(1)(i)(ii). See also *Curran Eng'g*, 7 OCAHO no. 975, at 17.

⁵ 8 C.F.R. § 274.2(b)(1)(i)(A) (employee must sign or mark the Form I-9 by handwritten or electronic signature); 8 C.F.R. § 274.2(b)(1)(ii)(B) (employer, agent, or anyone acting directly or indirectly in the interest thereof must sign the attestation by handwritten or electronic signature).



II. HOW MUST THE FORM I-9 BE COMPLETED?

Form I-9 may be completed electronically or by hand.⁶ Each employee must submit to the employer, his or her agent, or authorized representative “either an original document which establishes both employment authorization and identity, or an original document which establishes employment authorization and a separate original document which establishes identity.”⁷ These documents must be unexpired.⁸ The employer, his or her agent, or authorized representative must “physically examine the documentation presented by the individual establishing eligibility for employment ... and ensure that the documents presented appear genuine and relate to the individual.”⁹ This examination must be completed in the presence of the employee.¹⁰ If the documents presented do not reasonably appear to be genuine or relate to the person presenting them, an employer must not accept them but must provide the employee with an opportunity to present other documents from the List of Acceptable Documents.¹¹ Employers, agents, and authorized representatives are precluded from “request[ing] ... more or different documents than required ... or refusing to honor documents tendered that on their face appear to be reasonably genuine shall be treated as an unfair employment-related immigration practice” and is subject to fines and penalties.

III. DHS-ICE’S PANDEMIC FLEXIBILITY GUIDELINES

[As we previously discussed](#) on March 20, 2020, DHS-ICE announced a relaxation of the “physical inspection” requirements due to the COVID-19 pandemic.¹² This guidance is set to expire on December 31, 2021 barring a renewal and states that employees hired after April 1, 2021 (and subsequent renewal dates) who “work exclusively in a remote setting due to COVID-19-related precautions, ... are temporarily exempt from the physical inspection requirements ... until they undertake non-remote work on a regular, consistent, or predictable basis, or the extension of flexibilities related to such requirements is terminated, whichever is earlier.”¹³ This exception only applies to employers and workplaces that are operating remotely, meaning that to qualify, all employees must be working

⁶ 8 C.F.R. § 274.2(a)(2) (Form I-9 may be handwritten, in a fillable electronic format, or electronically generated or retained).

⁷ 8 C.F.R. § 274.2(b)(v).

⁸ *Id.*

⁹ 8 C.F.R. § 274a.2(b)(ii)(A).


¹⁰ Form M-274 at § 4.0.

¹¹ Form M-274 at § 13.

¹² U.S. Department of Homeland Security, Immigration and Customs Enforcement, *DHS Announces Flexibility in Requirements Related to Form I-9 Compliance*, Newsroom (March 20, 2020); <https://www.ice.gov/news/releases/dhs-announces-flexibility-requirements-related-form-i-9-compliance>

¹³ *Id.*

remotely.¹⁴ The documents must still be timely inspected by remote means with video, fax, and email listed by DHS-ICE as non-exhaustive examples.¹⁵ Further, the guidance requires employers completing Section 2 in this manner must retain copies of the documents.¹⁶ A compliant Form I-9 completed remotely under this guidance is shown below .

List A Identity and Employment Authorization	OR	List B Identity	AND	List C Employment Authorization
Document Title N/A		Document Title Driver's license issued by state/territory		Document Title Social Security card (unrestricted)
Issuing Authority N/A		Issuing Authority Virginia		Issuing Authority Social Security Administration
Document Number N/A		Document Number 123456		Document Number 123456789
Expiration Date (if any) (mm/dd/yyyy) N/A		Expiration Date (if any) (mm/dd/yyyy) 02/22/2022		Expiration Date (if any) (mm/dd/yyyy) N/A
Document Title N/A		<div>Additional Information</div> <div>Remote inspection completed on 03/30/2020</div> <div> QR Code - Section 2 Do Not Write In This Space  </div>		
Issuing Authority N/A				
Document Number N/A				
Expiration Date (if any) (mm/dd/yyyy) N/A				
Document Title N/A				
Issuing Authority N/A				
Document Number N/A				
Expiration Date (if any) (mm/dd/yyyy) N/A				
Document Title N/A				
Issuing Authority N/A				
Document Number N/A				
Expiration Date (if any) (mm/dd/yyyy) N/A				

Certification: I attest, under penalty of perjury, that (1) I have examined the document(s) presented by the above-named employee, (2) the above-listed document(s) appear to be genuine and to relate to the employee named, and (3) to the best of my knowledge the employee is authorized to work in the United States.

The employee's first day of employment (mm/dd/yyyy): 03/30/2020 (See instructions for exemptions)

Signature of Employer or Authorized Representative <i>Abigail Adams</i>		Today's Date (mm/dd/yyyy) 03/30/2020	Title of Employer or Authorized Representative HR Manager	
Last Name of Employer or Authorized Representative Adams		First Name of Employer or Authorized Representative Abigail	Employer's Business or Organization Name Department of Defense	
Employer's Business or Organization Address (Street Number and Name) 123 Independence Avenue NW		City or Town Washington	State DC	ZIP Code 20210

Figure one. [Form I-9 Examples Related to Temporary COVID-19 Policies | USCIS](#)

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

Employees onboarded using remote verification must submit the physical documents to his or her employer within three days of either returning to the office on a “regular, consistent, or predictable basis” or upon termination of the extension of flexibilities, whichever is sooner.¹⁷ After examining the documents, employers must note that “COVID-19” was the reason for the physical inspection delay and add “documents physically examined” with the date of inspection in the Section 2 Additional Information field. An example of a compliant Form I-9 is shown below.


List A Identity and Employment Authorization	OR	List B Identity	AND	List C Employment Authorization
Document Title N/A		Document Title Driver's license issued by state/territory		Document Title Social Security card (unrestricted)
Issuing Authority N/A		Issuing Authority Virginia		Issuing Authority Social Security Administration
Document Number N/A		Document Number 123456		Document Number 123456789
Expiration Date (if any) (mm/dd/yyyy) N/A		Expiration Date (if any) (mm/dd/yyyy) 02/22/2022		Expiration Date (if any) (mm/dd/yyyy) N/A
Document Title N/A		<div> <div>Additional Information Remote inspection completed on 03/30/2020</div> <div> COVID-19 Documents physically examined on mm/dd/yyyy by AA </div> <div> QR Code - Section 2 Do Not Write In This Space  </div> </div>		
Issuing Authority N/A				
Document Number N/A				
Expiration Date (if any) (mm/dd/yyyy) N/A				
Document Title N/A				
Issuing Authority N/A				
Document Number N/A				
Expiration Date (if any) (mm/dd/yyyy) N/A				
Certification: I attest, under penalty of perjury, that (1) I have examined the document(s) presented by the above-named employee, (2) the above-listed document(s) appear to be genuine and to relate to the employee named, and (3) to the best of my knowledge the employee is authorized to work in the United States. The employee's first day of employment (mm/dd/yyyy): 03/30/2020 (See instructions for exemptions)				
Signature of Employer or Authorized Representative <i>Abigail Adams</i>		Today's Date (mm/dd/yyyy) 03/30/2020		Title of Employer or Authorized Representative HR Manager
Last Name of Employer or Authorized Representative Adams		First Name of Employer or Authorized Representative Abigail		Employer's Business or Organization Name Department of Defense
Employer's Business or Organization Address (Street Number and Name) 123 Independence Avenue NW		City or Town Washington		State DC
				ZIP Code 20210

Figure two. [Form I-9 Examples Related to Temporary COVID-19 Policies | USCIS](#)

¹⁷ Id.

IV. NEXT STEPS AND RECOMMENDATIONS FOR EMPLOYERS

With more employers normalizing operations and the guidance set to expire at the end of the year, employers and their Human Resources staff must begin to plan for the in-person review of original documentation and Form I-9 annotation now. Here are some helpful suggestions to keep in mind:

- Determine how your organization is going to return-to-work. Will all employees report back at once? Will the employees be returning on a staggered basis?
- Which employees require in-person examination of documents and annotation of the Form I-9? Begin preparing a list now, and even begin outreach to affected employees to possibly schedule times to review the documents and annotate the Forms I-9.
- Did you have significant HR turnover? Are all of the members of your HR staff trained on Form

I-9 completion requirements? Should you train additional staff to handle the high volume of physical verifications and annotations upon returning to work or the expiration of the guidance?

- Now may be a time to evaluate the entirety of your Form I-9 and E-Verify program and consider vendors who provide Form I-9 and E-Verify compliance solutions.
- Ensure compliance by performing a self-audit.
- Use the physical examination time (when the employee is sitting in your office) to review Section 1 and make any corrections.

In conclusion, Form I-9 is a critical component of the onboarding process, with ICE expected to continue to enforce employer-related immigration compliance, including compliance with the flexibility rules, we urge all organizations to process the respective Forms I-9 prior to the end of the flexibility rules to avoid any last-minute compliance headaches. ■■■

