



ICE Extends Virtual Form I-9 Review Until May 31

By Roy Maurer

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An interim policy allowing virtual document-inspection methods for Form I-9 has been extended by U.S. Immigration and Customs Enforcement (ICE) until May 31.

The policy was first issued in March 2020 and has been extended several times.

The provision initially applied only to employers and workplaces that were operating completely remotely because of the public health crisis, but ICE is now offering more flexibility for companies that are bringing employees back to the office, according to Dawn Lurie, senior counsel in the immigration practice group of Seyfarth Shaw's Washington, D.C., office.

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I-9 Compliance (www.shrm.org/ResourcesAndTools/Pages/I-9-Compliance.aspx)

"The government now seems to agree that there is no one-size-fits-all policy or mandate," Lurie said. "The new guidance slightly walks back the notion that companies need to be 100 percent remote to allow for the use of virtual inspection of identity and work eligibility documents. Companies will no longer be forced to complete I-9s in person due to security or IT personnel working onsite. Further, companies that are phasing back in employees will no longer trigger the in-person requirement for all new hires."

Amy Peck, an attorney in the Omaha, Neb., office of Jackson Lewis, explained that with this latest extension, ICE specifically noted that employees hired on or after April 1, 2021, who work remotely exclusively due to COVID-19-related precautions will be exempt from the I-9 physical inspection requirements until they are back at the worksite on a "regular, consistent or predictable basis, or until the flexibility policy is terminated, whichever is earlier."

ICE first announced relaxed rules for physically inspecting new hires' identity and employment eligibility documents last March, when employers were beginning to deal with COVID-19-related orders to shelter in place and work from home. The guidance allows companies to review the I-9 form's Section 2 documents virtually—over video link, by fax or by e-mail, for example—within three business days of the worker's start date.

Once normal business operations resume—a time frame that has never been clearly defined by ICE—it is not clear how much time employers will have to conduct in-person physical verification of identity and employment eligibility documents for all employees who've been onboarded remotely over the past year.

"Sadly, ICE didn't address everything; specifically, we do not know what will happen when ICE ends the virtual policy," Lurie said. She shared two of the most pressing questions for employers right now amid the ambiguity:

- Will ICE require that all virtual Forms I-9 be updated with an in-person physical inspection within three days of ending the policy, or will the agency offer a certain amount of time to meet the requirements to inspect documents in person, update expired List B documents and ensure that all original Forms I-9 are accounted for?
- Will ICE announce in advance when the policy will end so that employers can prepare?

"Specific issues related to I-9 compliance and return to the worksite will need to be resolved on a case-by-case basis, depending on the particular circumstances," Peck said. "The hope is that ICE will provide sufficient notice before ending the policy or will give employers at least 60 days to reverify their employees. Given the uncertainty, advance planning will be important, especially if a large number of employees have been verified virtually."

She advised employers to get in front of any problems:

- Make sure to keep a list of all employees who were verified virtually, when they will be returning to work and the deadline for their in-person verification.
- Determine who will conduct the in-person verifications and how and when they will be reaching out to the affected employees.
- Train staff on how to update I-9 forms after the in-person review.

The ICE guidelines related to virtual review are not mandatory. Employers can still follow standard Form I-9 procedures, including using authorized representatives to complete verification on the employer's behalf.

"While it is likely the virtual verification policy will be extended until the end of 2021, employers should strongly consider another viable option: using authorized representatives for remotely hired and reverified employees," Lurie said. "The authorized-representative method serves as a significant timesaver if correctly crafted and implemented carefully."

She said that all employers should consider using an authorized representative due to the major benefit that verification method offers: It's one and done. "The Form I-9 is completed just one time, documents are verified just that one time, and there's no need for the two-step mandate created by the virtual process, which requires a subsequent in-person verification," Lurie said.

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