

ICE Extends Relaxed Requirements for Form I-9 to Sept. 19

By Roy Maurer

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Employers with entirely remote workforces as a result of the COVID-19 pandemic have until Sept. 19 to take advantage of relaxed document inspection requirements for Form I-9 when onboarding new hires.

U.S. Immigration and Customs Enforcement (ICE) announced that it was extending its interim policy allowing virtual inspection methods for another 30 days. The policy was initially issued March 20 (www.shrm.org/ResourcesAndTools/hr-topics/talent-acquisition/Pages/DHS-Relaxes-Form-I9-Review-Requirements-COVID-coronavirus.aspx) and extended twice previously, in May and June. The most recent extension was due to end Aug 19.

"ICE originally announced the relaxation of the requirement to physically inspect all new hires' identity and employment eligibility documentation as employers were beginning to grapple with COVID-19 work-from-home and shelter-in-place orders," said Dawn Lurie, senior counsel in the immigration practice group of Seyfarth Shaw's Washington, D.C., office. "The initial guidance allowed companies to review the form's Section 2 documents remotely—over video link, fax or e-mail, for example—within three business days of the worker's start date."

Amy Peck, an attorney in the Omaha, Neb., office of Jackson Lewis, reminded employers using the temporary procedures that they must maintain written documentation of their remote onboarding and telework policy. Also, employers must verify the documents in person when the employee eventually reports to the worksite, even if that's before Sept. 19. "Once the employer's normal operations resume, all employees who were onboarded remotely must report to their employer within three business days for in-person verification," she said.

The accommodation does not apply to organizations where some employees still physically report to a work location, a stipulation that has caused confusion and concern for HR.

"This rigid interpretation lacks understanding of the complexity of the current workforce, such as when HR professionals are not onsite [to check documents]," Peck said. "However, without offering any specific guidance, ICE also said that it would evaluate this on a case-by-case basis where newly hired employees are subject to quarantine or lockdown protocols."

Virtual document inspection is not mandatory, and employers may continue to follow standard Form I-9 procedures for remote hires (www.shrm.org/ResourcesAndTools/hr-topics/talent-acquisition/pages/how-to-comply-i9-requirements-remote-workers.aspx), including designating authorized representatives to act on their behalf and review documents in person.

"Due to the complicated and time-consuming nature of the virtual process, many employers opted to use the authorized representative method, allowing friends and family members of the employee to complete the section on their behalf," Lurie said. "The friends-and-family process was also implemented by companies that had new hires onsite but absent or scaled-down HR teams. Implementing the process should not be taken lightly, however; it should be carefully planned, executed and, most importantly, audited."

Lurie added that expired List B documents are still allowed (www.shrm.org/ResourcesAndTools/hr-topics/talent-acquisition/Pages/Employers-May-Accept-Expired-ListB-Documents-Form-I9.aspx). "However, within 90 days after this temporary policy is terminated, the employee will be required to present a valid, unexpired document to replace the expired one presented when they were initially hired," she said. "The employee may also choose to present a different document."

[SHRM members-only toolkit: *Complying with I-9 and E-Verify Requirements in the United States* (www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/complying-with-i9-and-everify-requirements-in-the-united-states.aspx)]

Returning to Normal

Virtual review is not expected to continue indefinitely, nor does ICE intend to waive the in-person review requirement once businesses return to the worksite, Lurie said.

Peck at Jackson Lewis added that ICE may significantly increase worksite audits as soon as employers start reopening. "It is important to have a plan for reinstating normal I-9 processes and making a good-faith effort to comply," she said.

She recommended the following:

- Ensure that there is an accurate list of all employees whose I-9 verification or reverification was conducted remotely.
- Notify all those employees to bring their documents to the appropriate staff member within three business days of their return to the office. "Be careful not to discriminate or engage in document abuse by requesting specific documents," Peck said.
- Train staff on how to accurately annotate the I-9s. Employers should enter "COVID-19" as the reason for the physical inspection delay in the Section 2 "additional information" field once physical inspection takes place. After inspection, the employer should add to the field "documents physically examined" with the date of inspection.
- Create a return-to-work I-9 policy that describes what was done and when. "This policy will be a defense against an ICE claim that the company could have completed physical inspections sooner or faster than it did," Peck said.

Will ICE Issue Clarifying Guidance?

There are still many unanswered questions about how to annotate the forms once employees return to the worksite. "For example, the scenario where the person performing the required physical inspection is different than the original I-9 completer," Lurie said. "Here, [the agency] simply advised that the person who performs the physical inspection should indicate the date they physically examined the documents, as well as their full name and title in the additional information field. Or the scenario of recording a different set of documents during physical inspection. Remember, the employee is not bound to bring in what he or she originally presented."

In both situations, Lurie recommends completing an entirely new Section 2 and attaching it to the original form. "This suggestion is rooted in the belief that ICE will want to ensure that the certification is completed by the person who physically viewed the original documents. In fact, it is very much in line with the stance ICE has taken from day one—the agency has been reminding the public that the critical portion of the relaxed policy is the actual physical inspection."

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