

Form I-9 Updates

July 28, 2023

PIERCE ATWOOD 

Immigration Reform and Control Act of 1986

- Core requirements are:
 - › Verification of employment eligibility
 - › Prohibition against discrimination based upon citizenship or national origin
 - › Prohibition against retaliation
- Verification rules apply at hiring to every employee hired after November 6, 1986
- Every employer is covered, along with certain entities that recruit or refer for fees

Basic Verification Process

- Step 1: Employee completes Section 1
- Step 2: Employee presents documents
- Step 3: Employer completes Section 2
- Step 4: Employer retains Form I-9
- Step 5: ICE may inspect

Key Dates

- November 6, 1986 – Form I-9 is Required
- March 20, 2020 – COVID Remote Temporary Flexibilities Announced. Physical Inspection Deferred
- August 1, 2023 – Permanent Alternate Document Review Option Available
 - › Alternative to in-person document inspection
 - › With conditions deemed equivalent to in-person document review

An Alternative to the “Implementing” Reg

- 8 U.S.C. 1324a(b)(1) requires that any employer who hires, recruits, or refers an individual for employment in the United States make certain attestations about the employee's employment eligibility status “. . .after [the] examination of documentation” that would establish the individual's identity and employment authorization.
- Implementing regulations at 8 CFR 274a.2(b)(1)(ii)(A) require an employer or an authorized representative acting on the employer's behalf to “[p]hysically examine” the documentation offered by the employee to establish identity and employment authorization.
- DHS exercised its regulatory authority through rulemaking to authorize an optional alternative to the in-person physical document examination method employers have followed as part of the Form I-9 process in current regulations.

Why did they do it?

- COVID “lessons learned”
- Executive Order 14058, *Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in Government*, which directs agencies to “reduce administrative hurdles and paperwork burdens to minimize ‘time taxes’” and “redesign compliance-oriented processes to improve customer experience and more directly meet the needs of the people of the United States.
- Public comment: telework, remote hire challenges, accessibility, efficiency, etc.

Alternate Option to Physical In-Person Examination of Documents

- Optional
- Accelerated
- Conditioned
- Confusing?

Terminology

- Electronic I-9
- Remote
- Virtual
- E-Verify
 - › E-Verify-enrolled employers confirm the employment eligibility of their employees by electronically comparing information from an employee's Form I-9 with records available to DHS.
 - › E-Verify confirms identity and employment eligibility for List A documents such as U.S. passports, Permanent Resident Cards, and EADs, and electronically sends the photograph from the official record to the employer to compare with the photo on the document provided by the employee.
 - › E-Verify requires all cases to include the employee's SSN, and E-Verify compares employer-entered data with SSA records.
 - › E-Verify requires that all List B documents presented by employees contain a photo and uses data sources available to DHS to verify the identity information provided on most state-issued identification cards and driver's licenses.

The Alternate Process

- Within three business days of an employee's first day of employment, a qualified employer (or an authorized representative acting on such an employer's behalf, such as a third-party vendor) who chooses to use the alternative procedure must:
 - › 1. Examine copies (front and back, if the document is two-sided) of Form I-9 documents or an acceptable receipt to ensure that the documentation presented reasonably appears to be genuine;
 - › 2. Conduct a live video interaction with the individual presenting the document(s) to ensure that the documentation reasonably appears to be genuine and related to the individual. The employee must first transmit a copy of the document(s) to the employer (per Step 1 above) and then present the same document(s) during the live video interaction;
 - › 3. Indicate on the Form I-9, by completing the corresponding box, that an alternative procedure was used to examine documentation to complete Section 2 or for reverification, as applicable;
 - › 4. Retain, consistent with applicable regulations, a clear and legible copy of the documentation (front and back if the documentation is two-sided); and
 - › 5. In the event of a Form I-9 audit or investigation by a relevant federal government official, make available the clear and legible copies of the identity and employment authorization documentation presented by the employee for document examination in connection with the employment eligibility verification process.

Qualifying Employers

Participants in good standing in E-Verify

- › Enrolled in E-Verify with respect to all hiring sites in the United States that use the alternative procedure;
- › In compliance with all requirements of the E-Verify program, including but not limited to verifying the employment eligibility of newly hired employees in the United States; and
- › Continues to be enrolled and a participant in good standing in E-Verify at any time during which the employer uses the alternative procedure.

Good standing proof is not required but you are ineligible if you lack good standing.

New Form I-9 Version

- May be used 8/1/2023
- Must be used 11/1/2023
- Back to 1 page with Supplements
- Includes new box that is a required step/check if alternate procedure used
- Old version can be used for alternate procedures with annotation in “notes” section

Risk Factors

- 100% non-compliance if not eligible (E-Verify not in good standing)
- Privacy and data breach considerations
- Technology fails us
 - › Live video meeting issues
 - › Check with your electronic vendor
- Discrimination concerns
 - › Strict liability standard with regard to intent
 - › Confusion and misapplication of process
 - › Poorly worded communication and/or SOP
 - › E-Verify data mining

New Form Section 2

If a preparer and/or translator assisted you in completing Section 1, that person **MUST** complete the [Preparer and/or Translator Certification](#) on Page 3.

Section 2. Employer Review and Verification: Employers or their authorized representative must complete and sign **Section 2** within three business days after the employee's first day of employment, and must physically examine, or examine consistent with an alternative procedure authorized by the Secretary of DHS, documentation from List A OR a combination of documentation from List B and List C. Enter any additional documentation in the Additional Information box; see Instructions.

	List A	OR	List B	AND	List C
Document Title 1					
Issuing Authority					
Document Number (if any)					
Expiration Date (if any)					
Document Title 2 (if any)	Additional Information				
Issuing Authority					
Document Number (if any)					
Expiration Date (if any)					
Document Title 3 (if any)					
Issuing Authority					
Document Number (if any)					
Expiration Date (if any)					
					<input type="checkbox"/> Check here if you used an alternative procedure authorized by DHS to examine documents.
Certification: I attest, under penalty of perjury, that (1) I have examined the documentation presented by the above-named employee, (2) the above-listed documentation appears 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.					First Day of Employment (mm/dd/yyyy): _____
Last Name, First Name and Title of Employer or Authorized Representative			Signature of Employer or Authorized Representative		Today's Date (mm/dd/yyyy)
Employer's Business or Organization Name			Employer's Business or Organization Address, City or Town, State, ZIP Code		

For reverification or rehire, complete [Supplement B, Reverification and Rehire](#) on Page 4.

Overall – this is great!

- Verification for remote hires was difficult even before the pandemic.
- Authorized rep use is challenging and carries risk.
- Conditions are reasonable.

The COVID Forms

- Forms completed during COVID using the temporary flexibilities still need a 2nd touch
- A difficult period
 - › Extensions persisted
 - › Return to office plans were delayed
 - › Employees left
 - › Guidance is vague and geared towards paper forms

Who was eligible?

- Since March 2020, the Department of Homeland Security (DHS) issued a series of announcements extending the temporary virtual I-9 option.
- A notable change was announced in March 31, 2021 when DHS guidance shifted the focus in assessing whether virtual I-9 review is permissible relating to whether an employer was taking physical proximity precautions under COVID to whether the employee was temporarily working remotely as a result of COVID in a position that was not intended to be a fully virtual role.
- This guidance, issued about a year into the pandemic, was clear that the temporary virtual option was not available as of that date for any employee hired (or re-verified) after April 1, 2021, where the position is a fully remote role with no expectation of the employee returning to an employer worksite on a regular consistent basis.

Temporary Flexibilities END

- DHS instructed during the temporary remote period that employers must have physical I-9 document review completed:
 - › Where the employer is no longer taking COVID precautions;
 - › The employee is a fully remote worker hired after April 2021 (not working remotely only on a temporary basis as a result of COVID); orThe employee(s) are back in the office on a regular and consistent basis.
- DHS announced that there is no longer a temporary virtual review option for any employers as of July 31, 2023 and employers must complete the required physical inspection for all I-9s created under the temporary policy no later than August 30, 2023.

More positive updates

- DHS has communicated via press release: "If an employer is otherwise compliant with the law and regulation – and had followed the COVID-19 flexibility guidance – U.S. Immigration and Customs Enforcement (ICE) will generally not focus its limited enforcement resources on Form I-9 verification violations for failing to complete physical document examination by August 30, 2023, particularly where the employer can show that it has taken timely steps to complete physical document examination within a reasonable period of time." <https://www.dhs.gov/news/2023/07/21/dhs-provides-employers-certainty-and-new-flexible-option-employment-eligibility>
- This may be able to be done via a video meeting.

A limited exception in the final rule

- If they have not already done so, employers that used the temporary virtual option, must complete I-9 document inspection under the terms and timelines provided by DHS under its temporary flexible remote review directives.
- Employers must complete in-person document review, unless eligible under a new limited exception provided in the final rule where certain E-Verify employers that completed the Form I-9 between March 20, 2020 and July 31, 2023, in compliance with the temporary COVID flexibilities and E-Verify case creation requirements, may use the alternate video document inspection process, as conditioned and outlined in the final rule.

There's no need to start Tuesday.

- Employers need to assess (as a start):
 - › E-Verify compliance under the Memorandum of Understanding?
 - › In “good standing”?
 - › Hiring sites enrolled
 - › Hiring sites used
 - › Employer E-Verify users and training completed
 - › Logistics
 - Video options
 - All or some hiring sites?
 - All new hires or just remote workers?
 - › Method of secure document transfer
 - › Communications
 - › Compliance with specific regulatory requirements for electronic I-9 creation and storage



Presenters

Katie Minervino

kminervino@pierceatwood.com

Merrill's Wharf
254 Commercial Street
Portland, ME 04101

207-291-1198