

## In-Person Inspection of I-9 Documentation to Resume Following End of COVID-19 State of Emergency

By **Julie Levinson Werner** and **Jessica I. Kriegsfeld**

For many years, employers have been required to review documentation of new hires in person to confirm they are legally authorized to work in the United States. During the COVID-19 pandemic, this requirement was put on hold, further facilitating the evolution of a remote workforce. Now, with the end of the COVID-19 state of emergency, the ability of employers to review Form I-9 documentation remotely will expire on July 31, 2023.

- For employees who begin work after July 31, 2023, employers must physically inspect Form I-9 employment eligibility documentation.
- For employees whose documents were inspected remotely at the time of hire, employers must physically inspect Form I-9 documentation by August 30, 2023.

### Background

Form I-9 requires employers to review *in person* documentation evidencing employees' eligibility to work in the United States.

In March 2020, the U.S. Immigration and Customs Enforcement (ICE) announced that it would *defer* employers' responsibility to physically examine Form I-9 employment eligibility documents. Instead, the March 2020 policy allowed employers to remotely inspect Form I-9 documents and obtain a copy of the Form I-9 documents within three business days of the employee's start date. This allowed employers to inspect Form I-9 verification through email, fax, Zoom, or other electronic means. The March 2020 policy only applied to employers and workplaces operating remotely. If employees were "physically present at a work location," employers were still required to inspect Form I-9 documentation in person.

On April 1, 2021, ICE curtailed the Form I-9 remote flexibilities. ICE announced that employers must physically inspect Form I-9 documentation from employees who report to an in-person location on

a "regular, consistent, or predictable" basis. Further, employers were required to physically reinspect Form I-9 documents for employees who subsequently began in-person work after starting remotely and had their Form I-9 documentation inspected remotely. Only employees who were exclusively remote and remained completely remote were *temporarily* exempted from physical examination requirements.

### In-Person Inspection Required

Now, with the conclusion of the COVID-19 state of emergency, all COVID-19 accommodations for Form I-9 employment eligibility verification will expire on July 31, 2023. Beginning August 1, 2023, employers must inspect Form I-9 documents in person from all new employees, regardless of whether the employees physically report to a work location.

Employers who have been relying on the temporary remote verification policies will have until August 30, 2023, to physically inspect Form I-9 documents for all employees whose documents were inspected remotely at the time of hire. Employers will also have to update Form I-9 Section 2 or Section 3, as applicable, to indicate that the documents were physically inspected.

### What Should Employers Do Now?

- Physically inspect I-9 employment eligibility documents for all employees whose documents were reviewed remotely.
- Update Form I-9 for each employee whose documents were originally inspected remotely. In the "additional information" field in Section 2, add:
  - The language "documents physically inspected"
  - The date the documents were physically inspected
  - The date the documents were reviewed remotely

- The initials of the authorized representative who completed the physical document inspection
- Draft a memo to the company's Form I-9 file for any employee whose physical documents cannot be inspected by August 30, 2023, and for any employee whose documents were not properly inspected remotely. The memo should be brief, but should explain:
  - Inspect I-9 employment eligibility verification in person for all newly hired employees starting August 1, 2023, or later.
  - The circumstances of the remote inspection, such as the employee and employer's remote work status at the time of hire
  - The process the company followed when reviewing the documents remotely
  - Any changes in the documents between the remote inspection and physical inspection
  - Why the documents could not be timely inspected
- Inspect I-9 employment eligibility verification in person for all newly hired employees starting August 1, 2023, or later.

### Special Considerations for Employers

#### *What if employees work fully remotely?*

Many employers have hired fully remote employees since March 2020, some of whom live far away from the employer and make it impracticable for the employer to review the employee's Form I-9 documentation in person. Employers can use an "authorized representative" to complete in-person Form I-9 verification on the employer's behalf. Employers have broad authority to designate an authorized representative, including a member of the employee's household, a notary, or a third-party agent hired by the employer.

Even if employers designate an authorized representative, employers will still be responsible for any error that the authorized representative makes and for updating the Form I-9 to indicate physical inspection has been completed. Employers should conduct or arrange physical inspections as soon as possible to ensure that all inspections are proper and all Form I-9s are updated before the August 30 deadline.

#### *What if the employer remotely inspected I-9 verification and the employee no longer works for the employer?*

The employer should write a memo to the company's Form I-9 file explaining the employee's remote work status at the time of hire, when and how the employer remotely verified the employee's employment eligibility, and any other relevant circumstances surrounding the document verification process. Obviously, the employer will not need to review documents in person for any individual no longer employed by the company.

#### *What if the documents used in the remote verification were valid when remotely verified but have since expired?*

For employees who used a U.S. driver's licenses or passport as Form I-9 documentation, the employer can physically inspect the expired document so long as it was not expired during the remote inspection. The employer should update Section 2 of the Form I-9, confirming physical inspection.

For United States Citizenship and Immigration Services (USCIS) immigration status documents, the employer should physically inspect the expired documents and must conduct a reverification of the employee's current USCIS documents. The employer should update Section 2 and Section 3 of the Form I-9.

#### *What if the documents used in the remote inspection are now unavailable for physical inspection?*

ICE recommends completing Section 2 on a new Form I-9 and attaching it to the prior Form I-9 that was initially used for remote inspection.

Alternatively, employers can provide the document title, document number, issuing authority, and expiration date (if any) of the new document in the "additional information" field of Section 2 in the employee's existing Form I-9.

#### *What if the employee's immigration status has changed since the documents were verified remotely?*

Employers should physically inspect the prior-status documents, reverify new USCIS documents, and either update the current Form I-9 or complete Section 2 on a new Form I-9 and attach it to the prior form.

#### *What if the I-9 verification was improperly completed remotely?*

Employers who improperly completed remote Form I-9 verification should properly complete in-person verification now. Employers can either update the "additional information" field in Section 2 of the existing Form I-9 or draft Section 2 on a new Form I-9 and attach it to the previous form.

#### *What if an employer uses E-Verify?*

E-Verify is a federal online system that allows an employer to compare information that it receives from the employee with records from the Department of Homeland Security and the Social Security Administration to confirm employment eligibility.

As with the Form I-9 rules, employers who use E-Verify must complete the process within three business days of hire. However, an employer can submit E-Verify information for employees whose Form I-9 documentation was physically inspected more than three business days after the date of hire

due to COVID-19 precautions. In this instance, the employer should select "Other" from the drop-down list of reasons for the delay and write "COVID-19" as the reason.

A growing number of states require private employers to use E-Verify. Currently, four states, Alabama, Arizona, Mississippi, and South Carolina, require all private employers to use E-Verify for employees working in the state. Other states require private employers to use E-Verify if they employ a certain number of employees or meet other state-imposed criteria. A new bill passed in Florida will require Florida employers with 25 or more employees to use E-Verify for all new hires. Employers should check their state law to confirm if E-Verify is mandatory.

### The Future of Remote Form I-9 Verification

In August 2022, ICE **proposed a rule** to allow potential modifications for employers to review Form I-9 documentation remotely. The proposed rule would not unequivocally authorize remote Form I-9 verification or memorialize the remote authorization procedures allowed during COVID-19. Instead, the proposed rule would establish a framework under which the Department of Homeland Security could pilot alternative verification procedures and create flexibilities in the verification process.

Some alternative procedures contemplated in the proposed rule are:

- Making changes to the I-9 form, including a box to select the procedure used to inspect documents
- Revising the Form I-9 document retention policy to require that employers retain copies of all verification documents presented remotely
- Imposing mandatory antidiscrimination testing and fraudulent document detection testing for authorized representatives who review I-9 documentation

While it is possible that remote inspection alternatives may be available in the future, employers must still complete in-person Form I-9 verification for all employees by August 30, 2023.

If you have any questions about complying with Form I-9 employment eligibility verification, please contact Lowenstein Sandler's Employment Counseling & Litigation practice group.

## Contacts

Please contact the listed attorneys for further information on the matters discussed herein.

### **JULIE LEVINSON WERNER**

Partner

**T: 212.419.5864 / 973.597.2550**

[jwerner@lowenstein.com](mailto:jwerner@lowenstein.com)

### **JESSICA I. KRIEGSFELD**

Associate

**T: 212.419.6068**

[jkriegsfeld@lowenstein.com](mailto:jkriegsfeld@lowenstein.com)

NEW YORK

PALO ALTO

NEW JERSEY

UTAH

WASHINGTON, D.C.

This Alert has been prepared by Lowenstein Sandler LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship. Lowenstein Sandler assumes no responsibility to update the Alert based upon events subsequent to the date of its publication, such as new legislation, regulations and judicial decisions. You should consult with counsel to determine applicable legal requirements in a specific fact situation. Attorney Advertising.