

I-9 REMOTE VERIFICATION EXTENDED - BUT ONLY FOR SOME

By Jonathan Wong

Every employer should know that all new hires must complete USCIS Form I-9 and provide documentary proof of identity and of authorization to work as part of the onboarding process. The law requires that employers physically inspect the documents presented, either through use of an employee or an agent authorized for that purpose, in the employee's physical presence.

During the COVID-19 pandemic, the Department of Homeland Security temporarily relaxed the requirement that employers physically inspect documents. Employers were allowed to accept copies transmitted by e-mail or other electronic means, and directed to annotate Form I-9. These were temporary measures designed to address workplace shutdowns caused by the pandemic. They were not intended to be permanent, and by their own terms did not apply if the employer resumed "normal workplace operations" with employees reporting to work.

The temporary rules were extended several times, but they are now set to expire on July 31. Employers who took advantage of the temporary rules and did not physically verify documents in the presence of the employee now have until August 30 to complete in-person physical verification.

Today, DHS released a new rule that offers some relief from in-person physical inspection. Under the new rule, employers may satisfy the I-9 document inspection requirements by first receiving the required documents from the new hire (either a valid List A document or a valid List

B plus List C document), then inspecting the actual documents via a live video connection in which the employee is present and displays the original documents, and, if the documents appear genuine and to relate to the employee, by retaining the documents inspected.

Along with this new rule, DHS also updated Form I-9. The new Form I-9, which will be officially released on August 1, is a one page form, combining both the employee section (Part 1) and the employer section (Part 2) onto a single page. The reverification portion, which used to be Part 3, is now a separate page that can be attached where needed, as is the interpreter and translator certificate. Checkboxes have been added to the form to indicate whether the employer has used the new remote verification procedure.

The new Form I-9 becomes mandatory for use on November 1. Until then, employers who use the new remote verification procedure may annotate current Form I-9 with the words "Alternative Procedure" in the Additional Information box on page 1.

While this new rule will simplify remote document verification for employers, there is a big catch: only employers who are enrolled in e-Verify, the DHS web-based system for secondary verification of employment, are eligible to use this method. Employers who are not contractually required to enroll in e-Verify, or who have chosen not to enroll, may not use this system and must still physically examine documents in the presence of the new hire,

either using an employee or an authorized agent. This restriction limits the usefulness of the procedure for those employers who are not enrolled in e-Verify and do not wish to enroll.

For these employers, there is still hope. The new rule enacted today is part of a larger regulatory framework giving the Secretary of Homeland Security discretion to develop additional remote verification protocols and to authorize additional alternative document examination methods. In its rulemaking announcement, the agency took note of federal and other studies finding that nearly 1 in 4 people (22.7%) of people employed in February 2021 teleworked or worked from home because of the pandemic; that of workers polled who believed their jobs could be performed remotely but had never teleworked prior to the pandemic, 71% were now actually teleworking all or most of the time; and that 61% of workers polled who now work all or partly from home say they would prefer to continue working from home after the pandemic subsides. In light of these realities, the agency has stated it is investigating other means by which remote workers can be document-verified without the use of third party agents but with secure and reliable results. Employers should continue to watch for developments.



Jonathan Wong
Of Counsel
jmwong@donahue.com

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