

Alert | Immigration & Compliance



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Preparing for the End of the Form I-9 Flexibility Provisions and the Return of Compliance Enforcement

As we all know, COVID-19 changed everything, and the Form I-9 process was no exception. On March 20, 2020, the Department of Homeland Security (DHS) **announced flexibility in I-9 requirements** by ***deferring*** the physical presence requirements associated with completing Section 2 of the Form I-9. DHS allowed employers who were operating remotely because of COVID-19 to review I-9 documents virtually (via email, fax or video link, for example).

Note that DHS *deferred* rather than suspended the in-person I-9 document review requirement. In its March 2020 announcement, DHS mandated that, within three (3) business days of either (1) returning to “normal operations” or (2) the expiration of DHS’s I-9 flexibility provisions, employers had to conduct an in-person review of the I-9 documents they had previously reviewed virtually pursuant to the flexibility provisions.

DHS has extended its I-9 flexibility provisions repeatedly since March 2020, and recently extended them once again until August 31, 2021. However, employers should start planning now for how they will carry out their in-person review of the I-9 documents that they have reviewed virtually over the last year.

This GT Alert provides compliance considerations for employers to prepare for the end of Form I-9 flexibility provisions.

First Things First: Isolate the Virtually Reviewed I-9s

If employers have not already done so, the first step should be to figure out how many Forms I-9 they need to review by pulling all of their virtually reviewed I-9s and putting them in a dedicated place, such as a separate cabinet. This area may end up containing all of the Forms I-9 completed since March 20, 2020, but be careful – Forms I-9 for remote hires may have been completed through in-person review by an authorized representative rather than through virtual review.

Rather than utilize DHS's temporary I-9 flexibility provisions, many remotely operating employers decided to utilize the existing process for remote hiring and had an authorized representative complete the Forms I-9. An authorized representative can be anyone – even a friend or family member of a new hire – who reviews a new hire's Form I-9 documents in-person and signs Section 2 of the Form I-9 on behalf of the employer. Note that when an authorized representative fills out Form I-9 on behalf on the employer, the employer is still liable for any violations in connection with the form or the verification process.

When completing the Form I-9, the authorized representative must physically examine, with the employee being physically present, each document presented to determine if it reasonably appears genuine and relates to the employee presenting it. Therefore, the employer should not review the documents for these Forms I-9 again. However, it is important for employers to review the Forms I-9 completed by authorized representatives for errors and to make any necessary corrections. Consider reviewing these Forms I-9 at the time they are completed.

Design a Process for Conducting In-Person Review

The process employers develop will depend a lot on how many Forms I-9 they need to review. Because DHS is requiring that employers complete in-person review of virtually reviewed Forms I-9 within three business days of either (1) their return to normal operations or (2) the expiration of DHS's I-9 flexibility provisions, it is important to design a process that can be implemented and completed easily and quickly.

Communication about the process is just as important as the process itself. Employers should explain to affected employees that they are being called in to complete the onboarding process, which could not be carried out at the time of their hiring because the company was operating remotely. It should be clear to affected employees that everyone hired while the company was operating remotely is being asked to complete the Form I-9 process. Affected employees should not feel that they are being singled out or treated differently from other employees. Perhaps there are other aspects of their onboarding process, in addition to the Form I-9, that could not be completed remotely. If so, if feasible, employers should organize all of these onboarding events so employees can complete them at the same time.

Employers need not wait until they return to normal operations or DHS ends the I-9 flexibility provisions to begin their in-person review of virtually reviewed Forms I-9. In fact, DHS said in its [March 31, 2021 update](#) that employers may, in their discretion, initiate in-person verification of virtually reviewed Form I-9 documents. Especially if employers have several dozen Forms I-9 to review, they should start as soon as possible. For example, even if employers are still operating remotely, it may be possible to call in some affected employees to complete their onboarding processes. Again, it is important to treat all affected employees equally.

Add I-9 Cleanup to Your Spring-Cleaning List

After completing in-person review of the virtually reviewed Form I-9s, employers should consider continuing with Form I-9 organization and cleanup. A good way for employers to take the temperature of their Forms I-9 is by conducting a random sampling self-audit of 10% of the active employee population. Review these Forms I-9 with immigration compliance counsel and correct any technical and/or substantive errors. The results of the self-audit should be instructive as to whether it makes sense to complete a comprehensive self-audit and/or initiate targeted training sessions with onboarding staff.

Effect of Changing Work Environment on the I-9 Process

Many employers are facing a “new normal” post-COVID-19 with flexible and hybrid working arrangements for different teams and employees. Employers should review and revise their Form I-9 process accordingly. With different working arrangements for different employees, it may make sense to have different Form I-9 processes. However, employers should ensure that their Form I-9 processes are available and accessible to all employees and that everyone is clear on which process applies to them. If an employer maintains different Form I-9 processes, it should be clear that different processes exist for business reasons.

Looking Ahead: The Return of Compliance Enforcement

Employers are not the only ones returning to normal operations – DHS and Immigration and Customs Enforcement (ICE) will soon begin conducting I-9 audits and issuing Notices of Inspection. Employers need to ready their Forms I-9 for inspection and ensure their onboarding processes are compliant.

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