



ALERTS

The Sun Is Setting On Form I-9 Compliance Flexibilities – Are You Ready?

May 11, 2023

Highlights

The exemption allowing virtual examination of new remote hires or continuing remote employees will end on July 31, 2023

Employers have until Aug. 30, 2023, to perform all required physical examinations of identity and employment eligibility documents, as COVID-era flexibilities are expiring

In August 2022, DHS issued a proposed rule to potentially provide a permanent remote I-9 option in certain circumstances but has yet to issue a final rule

More than three years after the start of the COVID-19 pandemic, the U.S. Immigration and Customs Enforcement (ICE) announced a return to normal procedures with respect to the Form I-9. On May 4, ICE [announced](#) it would provide employers with 30 days following the [sunset of the Form I-9 flexibilities](#) to reach compliance.

In its announcement, ICE stated that employers have until Aug. 30, 2023, to perform all required physical examinations of identity and employment eligibility documents for those individuals hired on or after March 20, 2020, who previously only received a virtual or remote examination of

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documents in accordance with the flexibilities previously granted.

ICE relaxed the in-person document review requirement in March 2020 in response to the sudden work-from-home situation imposed by the COVID-19 pandemic. These flexibilities initially only applied to employers with fully remote workforces, reflecting the agency's long-standing resistance to remote I-9 verification but were later expanded. The expansion suggested that positions that were remote, even if other positions at the same employer were not remote, were eligible for remote I-9 verification.

As a result, for the last three years, ICE has granted some discretion in the physical presence requirements associated with Form I-9, allowing employers to inspect documentation remotely, provided "COVID-19" was included in Section 2 on Form I-9. Upon physical examination of the documents, the employers were instructed to add "documents physically examined" with the date of examination to the Section 2, Additional Information field on Form I-9, or in Section 3, as appropriate.

ICE extended these flexibilities multiple times, requiring employers to monitor the Department of Homeland Security (DHS) and ICE websites for updates regarding when the flexibility would be terminated and when "normal operations" would resume. In August 2022, DHS issued a proposed rule to potentially provide a permanent remote I-9 option in certain circumstances. Unfortunately for employers hoping for a clean, non-COVID-19-related transition to these rules, DHS is still reviewing public comments and has yet to issue a final rule.

The exemption allowing virtual examination of new remote hires or continuing remote employees will still end on July 31, 2023. The one-month grace period simply gives employers some time to catch up on the in-person inspection requirements for all I-9s that were completed virtually.

While ICE may be ready to return to normal with respect to Form I-9, it is understandable that some employers may not be, especially after such a long period of leniency. Nevertheless, employers should be aware that this period of relative leniency will soon come to an end.

For more information, please contact the Barnes & Thornburg attorney with whom you work or Tejas Shah at 312-214-5619 or tejas.shah@btlaw.com. This alert was co-authored by Tieranny Cutler, independent contract attorney.

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