

What Does the End of Title 42 and I-9 Flexibility Mean for Employers?

By Jorge Lopez and Elizabeth Whiting on May 15, 2023

U.S. immigration policy and the Biden administration's response to the ongoing migration crisis have been hot topics in the news. We break down potential considerations for employers as the pandemic-era immigration policy ends and border crossings from individuals without documentation in search of asylum are expected to rise sharply.

On Thursday, May 11, the Biden administration dealt with Title 42 expiration. Title 42 is the name of an emergency health authority that began in March 2020 under the Trump administration. As part of COVID-19 restrictions on asylum seekers in the interest in public health, Title 42 allowed border authorities to send back individuals attempting to cross the U.S.-Mexico border quickly. Because the Biden administration announced in January that it would end the national COVID-19 emergencies, the border restrictions were affected.

The expiration of Title 42 will allow undocumented individuals crossing the border to seek asylum, rather than being turned back. However, the route to seeking asylum is a tenuous and lengthy process that first involves passing a "credible fear screening" by asylum officers to determine whether the individual has a legitimate fear of persecution in their home country. If they meet the screening criteria, their case is introduced into the immigration court system to determine if they can stay in the United States.

What should employers keep in mind to ensure compliant U.S. hiring?

From a practical perspective, employment considerations for hiring employees in light of recent immigration news remain essentially the same – when hiring new employees, employers must be I-9 compliant. As always, all individuals, including U.S. citizens or any other individuals, hired to perform labor or services in the United States in return for wages or other remuneration must complete an I-9. In order to do so, individuals must present valid proof of work authorization in the United States.

As a reminder, employers must complete and sign Section 2 of Form I-9, Employment Eligibility Verification, within three business days of the date of hire of their employee. The “date of hire” means the first day of work for pay. Employees must present original documents that show the employee’s identity and employment authorization (including one document from List A or a combination of List B and List C documents).

Are there special work authorization provisions for asylum-seekers?

Individuals who are successfully granted asylum once processed in the United States may receive a Form I-94, Arrival/Departure Record with a qualifying stamp or notation, such as “asylum granted indefinitely” or the appropriate provision of the law to show employment authorization. An asylee can also present a Form I-94 with an admission class showing “AY.” This Form I-94 is an acceptable List C document for Form I-9 purposes. Certain asylum-seekers also receive EADs (Employment Authorization Documents), which are acceptable List A documents. However, not all individuals who cross the border are successfully granted asylum, and they can sometimes wait in the United States for many years while their case is in process.

Furthermore, decisions from immigration judges or the Board of Immigration Appeals granting asylum do not qualify as a List C document – this is because they are not issued by the U.S. Department of Homeland Security (DHS).

Employers should continue to be aware of the necessary documents that qualify as List A, B, or C documents for I-9 purposes, and, when completing Form I-9, should contact counsel with specific questions if they are unfamiliar with the documents that might be presented, with respect to any employee that needs to complete an I-9.

What other I-9 news should employers keep in mind?

In other news, the DHS announced that COVID-19 temporary flexibilities for Form I-9, originally announced on March 20, 2020, will end on July 31, 2023. These flexibilities had allowed certain employers to be exempt from physical inspection requirements associated with completing Form I-9 (such as completing I-9s remotely).

Immigration and Customs Enforcement (ICE) previously announced that employers must complete in-person physical document inspections for employees whose documents were inspected remotely during the temporary flexibilities by August 30, 2023. The announcement is intended to provide employers with further time to complete in-person physical inspection of identity and employment authorization documents and annotate Form I-9 where necessary.

Further, DHS has indicated that it will publish a final rule in the *Federal Register* later this year, potentially providing alternative procedures allowing remote document examination.

Conclusion

Employers should continue to be aware of changes in the immigration landscape. As I-9 enforcement remains an issue, all employers should be sure to follow employment verification guidelines carefully and be aware of the phasing out of certain COVID-19 flexibilities with respect to I-9 requirements. While comprehensive immigration reform under the Biden administration remains an unlikely goal, we continue to monitor potential rulemaking in the Form I-9 context and procedural updates as they arise. Please contact counsel with any specific questions regarding these requirements.

Information contained in this publication is intended for informational purposes only and does not constitute legal advice or opinion, nor is it a substitute for the professional judgment of an attorney.