



## **The Department of Homeland Security (DHS) Terminates the Remote I-9 Flexibility Option After 3 Years! Employers Must Be Compliant by August 30, 2023!**

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### **Final DHS Deadline for the I-9 Flexibility Remote Option! Employers Have Until August 30, 2023, To Review Documents!**

On May 4th, 2023, U.S. Immigration and Customs Enforcement (ICE) has announced that employers will have 30 days to comply with Form I-9 employment eligibility verification physical document examination requirements when COVID-19 flexibility end on July 31, 2023.

There will be no more extensions! Employers will have 30 days to review all the documents used during the Covid Pandemic flexibility decision March 20, 2020.



While the emergency COVID-19-related I-9 flexibility is ending, DHS is still considering alternative procedures for examining I-9 documents. On August 18, 2022, DHS issued a proposed rule on this topic and is reviewing all the comments it received.

This answers two pressing questions employers and attorneys have been asking:

Will the temporary I-9 flexibility be extended again beyond July 31, 2023?

The answer is "no"

Will employers have more than three business days to conduct physical examination of documents that were examined remotely when temporary flexibility ends?

The answer is "yes" – employers will have 30 days until August 30, 2023

For at least a year, DHS and immigration attorneys have been encouraging employers who have been using the temporary flexibility to prepare for the end of that program. On May 1, 2023, the White House announced that the COVID-19 Public Health Emergency would end on May 11, 2023, thus means that DHS has considered Normal Operations are resumed. Now, with less than three months to go, all Employers must prepare for compliance.



## Ways To Prepare for the New Requirements

- Prepare a list of all employees who were verified virtually
- Determine who will be conducting the in-person verifications and how the company will be reaching out to the affected employees.
- Train staff on how to update I-9 forms after the in-person review. The virtually completed I-9s should have been annotated in the Additional Information field with "COVID-19" as the reason for the delayed in-person inspection. This must be updated by annotating "documents physically examined" with the accurate date and the name of the person who conducted the review in Section 2 of the I-9 or in Section 3 (for reverification), as appropriate.
- Make sure staff are aware of the special rules regarding I-9s for individuals who are eligible for automatic extensions of work authorization or who have work authorization based upon their status.
- Consider whether the company will use authorized agents to conduct some of the necessary document examinations and how the company will implement that process.

A screenshot of the Form I-9 document. At the top, it says "Section 2. Employer or Authorized Representative Review and Verification". It includes instructions: "Employers or their authorized representative must complete and sign Section 2 within 3 business days of the employee's first day of employment. You must physically examine one document from List A OR a combination of one document from List B and one document from List C as listed on the 'List of Acceptable Documents'." The form is divided into three columns: "Employee Info from Section 1" (Last Name (Family Name), First Name (Given Name), M.I., Citizenship/Immigration Status), "List A Identity and Employment Authorization" (Document Title, U.S. Passport, Issuing Authority, U.S. Department of State, Document Number, 1234567, Expiration Date (if any)), and "List B AND List C Employment Authorization" (Document Title, Issuing Authority, Document Number, N/A, Expiration Date (if any)). The "Additional Information" field at the bottom contains "COVID-19". A note on the right says "QR Code - Sections 2 & 3 Do Not Write In This Space".

As noted in the March 2020 announcement, under the flexibilities, employers with employees taking physical proximity precautions due to the COVID-19 pandemic were allowed to temporarily defer physical examination of employees' identity and employment authorization documents.

Instead, employers could examine the employees' documents remotely (e.g., over video link, fax, or email) and enter "COVID-19" as the reason for the physical examination delay in the Section 2 Additional Information field when physical examination took place in the future. Once the employees' documents were physically examined, the employer would add "documents physically examined" with the date of examination to Section 2 Additional Information field on the Form I-9, or in Section 3, as appropriate.

## **Potential Flexibility Options By DHS**

On Aug. 18, 2022, DHS issued a proposed rule that would allow alternative procedures for the examination of identity and employment eligibility documents. The public comment period closed on Oct. 17, 2022. DHS is currently reviewing public comments and plans to issue a final rule later this year.

### **DHS is proposing to allow for alternative procedures for documents required by the Form I-9**

#### **Notice of proposed rulemaking (NPRM)**

We did hear that DHS wanted to propose other types of flexibility for remote employees, but they did not confirm making the I-9 Remote Flexibility Option. Moreover, many HR Associations, Employment Law Firms, Employers, and other individuals who responded to the Public Comments under the Notice of proposed rulemaking (NPRM).

This proposed rule would create a framework under which the Secretary of Homeland Security (the Secretary) could authorize alternative options for document examination procedures with respect to some or all employers. Such procedures could be implemented as part of a pilot program, or upon the Secretary's determination that such procedures offer an equivalent level of security, or as a temporary measure to address a public health emergency declared by the Secretary of Health and Human Services pursuant to Section 319 of the Public Health Service Act, or a national emergency declared by the President pursuant to Sections 201 and 301 of the National Emergencies Act. This proposed rule would allow employers (or agents acting on an employer's behalf) optional alternatives for examining the documentation presented by individuals seeking to establish identity and employment authorization for purposes of completing the Form I-9,

### **What is the Next Step for Employers and Their Representatives While They Wait for the DHS Options?**

- Conduct an Internal I-9 Form Audit before the August 30, 2023 deadline.
- Employers and their representatives need to establish a process to review all documents that they reviewed virtually.
- Employers need to remember the requirements established by the DHS to review all documents due to the Covid-19 Pandemic.
- Review other valid options to take the place of the terminated Flexibility I-9 Remote Option.
  - For example, Use an I-9 Form System that includes remote review,

- Develop a cover sheet with minimal criteria for Employer Representatives (which DHS has expanded the flexibility of who can be an Employer Representative) so they can be clear what they need to do
- Use Notaries (except in California where they consider the I-9 Form a federal document and mandate other requirements). There are Notary Associations that are familiar with completing the I-9 Forms but be aware that there may be a cost. Remember, notaries are not to use their seal on the I-9 Form. They are the Employer Representative not a notary.
- You can be creative. Like collaborating with other HR professionals in like Linked in and reciprocating or reach out to colleagues in other states.

Ensure you create a timeline to come into compliance by August 30, 2023.

## Links

<https://www.ice.gov/news/releases/ice-updates-form-i-9-requirement-flexibility-grant-employers-more-time-comply>

<https://www.federalregister.gov/documents/2022/08/18/2022-17737/optional-alternatives-to-the-physical-document-examination-associated-with-employment-eligibility>

<https://www.nationalnotary.org/>

<https://www.asnnotary.org/>

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