

HRW CLIENT ALERT

July 27
2023

MODERNIZED I-9 COMPLIANCE: NEW FORM I-9 AND REMOTE VERIFICATION OPTIONS FOR CERTAIN EMPLOYERS

Under Immigration and Nationality Act employment eligibility verification rules, employers are required to review original identity and employment authorization documents in the physical presence of the employee. Although remote employment eligibility verification was temporarily permitted during the COVID-19 pandemic, that flexibility expires as of July 31, 2023, except under certain limited circumstances described below. On August 1, 2023, the U.S. Citizenship and Immigration Services is set to release a revised Form I-9 that reflects new rulemaking by the Department of Homeland Security aimed at modernizing the employment eligibility verification process. Employers have the option of using the revised Form I-9 through October 31, 2023, and its use becomes mandatory on November 1, 2023.

The new rules permit only employers that are enrolled and in good standing with the web-based E-Verify program to use an “alternative procedure” to remotely examine an employee’s identification and work authorization documents as opposed to completing a physical inspection. The alternative procedure is essentially a physical examination of copies of an employee’s verification documents combined with a live, video interaction with the employee to ensure that the documentation “reasonably appears to be genuine and related to the individual.” This process must still be completed within three business days of the first date of employment. Employers should also note changes to retention requirements for employee documentation—the new rules require that employers retain copies of the front and back of verification documents. Employers that use the alternative procedure should have protocols in place to facilitate the secure electronic transmission of employee information, including copies of verification documents.

Importantly, employers who took advantage of temporary, pandemic-era flexibilities and remotely verified the eligibility of employees hired on or after March 20, 2020, but were not enrolled in the E-Verify program, ***must now physically examine those employees’ Form I-9 documents in the employee’s physical presence no later than August 31, 2023.*** Employers who were enrolled in the E-Verify program during the temporary, pandemic era

flexibilities must also reexamine employee verification documents for any employee previously verified using a remote inspection on or after March 20, 2020, but may do so by using the new, alternative procedure.

Finally, E-Verify qualified employers should be aware that if they choose to offer the alternative procedure to some employees at an E-Verify hiring site, the employer must do so consistently for all employees at that site. However, a qualified employer may choose to offer the alternative procedure for remote hires only but apply physical examination procedures to all employees who work onsite or in a hybrid capacity, so long as the employer does not adopt such a practice for a discriminatory purpose or treat employees differently based on a protected characteristic.

As most employers will readily agree, remote work—in some form or fashion—is here to stay. Given this new reality, ***employers who have not already enrolled in the E-Verify program should consider doing so*** to take advantage of the alternative procedure for verification of employment eligibility, and to avoid the inconvenience of in-person, physical examinations.

If you have any questions regarding this considerable change in the rules and the newly revised Form I-9, please contact your HRW attorney or:

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