

How To Complete The Form I-9 in The COVID-19 Telework Environment By Tina M. Maiolo, Esq

As these difficult times of COVID-19 are upon us, employers are rightfully concerned about how not only to remain operational but continue to operate in accordance with the law. One particular concern employers have pertains to immigration law requirements, specifically how to complete the Form I-9 in a remote workplace.

For employers operating remotely, the Department of Homeland Security has announced temporary modifications, including greater flexibility, for complying with the Form I-9 requirements. (***“DHS Announces Flexibility in Requirements Related to Form I-9 Compliance”***) These modifications do not apply to employers with employees physically present at a work location and will only be in effect through the earlier of May 20, 2020, or three business days after the termination of the National Emergency Declaration.

DHS has announced that during this temporary period, employers are “not [initially] required to review the employee’s identity and employment authorization documents in the employee’s physical presence. However, employers must inspect the Section 2 documents remotely (e.g., over video link, fax or email, etc.) and obtain, inspect, and retain copies of the documents, within three business days for purposes of completing Section 2.” Employees, therefore, should be required to ensure the employer’s receipt of copies of the documents within three business days of the first date of employment. It is also advised that with the documents, the employee return the executed Form I-9 with section 1 completed. Otherwise, the employee must return the form with section 1 completed upon his or her return to normal work operations. Also, employers must also understand that DHS has only delayed, and not waived, the requirement that the original documents be physically inspected in the presence of the new hire or reverified employee. That physical inspection in the presence of the employee must be conducted within three business days after the employer has resumed normal operations.

DHS has also mandated that in this situation, in which physical examination in the presence of the employee cannot take place until after normal operations resume, employers must enter “COVID-19” in Section 2 Additional Information as the reason for the physical inspection delay. Then, once the documents have been physically inspected in the presence of the employee, after normal operations resume, the employer must also add the phrase “documents physically examined” with the date of inspection to that section, or section 3 (reverification) as appropriate. It is also incumbent upon the employer to provide written documentation of its remote onboarding and telework policy for each employee.

While the temporary change to the employment verification requirements are appreciated, one concern employers have is that the need to physically inspect the documents in the presence of the employee will be overlooked once normal operations resume. To address this concern and avoid the need to inspect at a later date, some employers are appointing someone in the home with the employee to act as the employer's agent for the purpose of inspecting the documentation.

DHS has stated that, "An authorized representative can be any person the employer designates to complete and sign Form I-9 on their behalf." Under the circumstances presented by COVID-19, "any person" includes a family or household member.¹ The obvious concern with this approach is that the employer remains ultimately liable for any false statements made by the "agent." The employer is responsible for violations in connection with the form or the verification process, including any violations committed by the person designated to act on the employer's behalf. Therefore, the employer must ensure that the person designated appreciates the obligation and takes the responsibility seriously. It is imperative that the employer explain the importance of the designation and the ramifications of any false statement to the agent. It is also strongly advised to have the agent acknowledge their understanding in writing. Ultimately, however, even with such acknowledgment, the employer remains responsible for any false statement made by the agent. The statement would simply operate to minimize the appearance to DHS of an actual intent by the employer to violate the law.

For those employers enrolled in E-Verify, DHS has extended the timeframe for employees to resolve E-Verify Tentative Non-Confirmations (TNCs) when the employee is unable to resolve the TNC because of the closure of the Social Security Administration (SSA) or other government or private office to the general public. Employers remain required to create a new employee E-Verify case within three days of hire. If the E-Verify system returns a TNC, employers must notify employees about their TNC results "as soon as possible." Then, after the employee is notified of their TNC and decides whether to take action to resolve the TNC, the employee must indicate the decision on the Further Action Notice. The employer must notify E-Verify of their employee's decision. Employees who choose to take action to resolve a TNC are referred to the SSA and/or DHS. The typical timeframe within which to resolve the matter is three days. This three-day deadline for employees to respond to TNCs is automatically extended until the SSA reopens to the general public.

¹ Employers must check the requirements for their specific jurisdiction, as some states designate who can serve as an employer's agent.

While in this interim case status, employers “may not take any adverse action against an employee because the E-Verify case is in an interim case status, including while the employee’s case is in an extended interim case status.” Instead, if a response to a TNC is delayed because of the COVID-19 National Emergency Declaration, employers should select “Other” from the drop-down list of responses to TNCs and enter “COVID-19” as the reason for the delay.

Ultimately, employers remain responsible to ensure compliance with DHS employment verification requirements. Failure to do so could result in action by ICE resulting in civil or criminal penalties. To avoid such results, employers are advised to seek legal advice as to how to continue to comply with the complex Form I-9 requirements during the days of such uncertainty.