

Compliance in the Time of COVID-19: Government Defers I-9 Physical Inspection Requirements

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As we reported in this alert, USCIS deferred the physical inspection requirements for completing forms I-9 extended again through November 19.

On August 18, the USCIS announced it will extend that deferral for another 60 days. See the government's announcement [here](#).

Maintaining a robust I-9 Employment Eligibility Verification process is a critical part of any business' human resources function. As most HR professionals know, Form I-9 is used to verify the eligibility of workers to accept employment in the United States. The new employee completes Section 1 of the form, and the employer inspects furnished identification documents and completes Section 2 of the form. The completed form is then retained in the company's records.

One of the core requirements of the I-9 process is that the employer (or its agent) must **physically inspect** the identification documents furnished by the employee to prove he or she is authorized to work in the United States.

This requirement for physical inspection poses a serious problem for employers that have transitioned to remote or work-from-home status because of the ongoing COVID-19 pandemic. Fortunately, on March 20, 2020, Immigration and Customs Enforcement (ICE) – the agency charged with I-9 enforcement – announced certain relaxations to this strict physical inspection requirement.

The new ICE policy permits deferral of the physical inspection requirement for 60 days, or until 3 days after the termination of the current National Emergency declaration, whichever ends first. The 60 day period ends on May 19, 2020.

Under the new inspection deferral policy, employers may remain compliant with the I-9 identification verification rules by following these steps:

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1. No later than the first day of employment (but not before accepting the job offer), the new employee completes and signs Section 1 of the I-9 and returns the form to the employer.
2. No later than 3 days after the new employee's first day of work, the employer will, through remote means:
 - a. "Inspect" identification documents furnished by the new employee; and
 - b. "Obtain, inspect, and retain" copies of the furnished documents; and
 - c. Complete and sign Section 2 of the I-9.
3. Once normal operations resume at the workplace, the new employee must report within 3 business days and present the identification documents for inspection. The employer must physically inspect these identification documents and annotate the Section 2 "Additional Information" box with the reason for the delay, an endorsement that the identification documents were physically inspected, and the date of the inspection. We suggest using the language "COVID-19 delay; documents physically inspected on [DATE]."

Note that while the new guidance contains separate requirements for the employer to "inspect" and to "obtain, inspect, and retain" the identification documents (2.a and 2.b above), the precise language of the order suggests that **these requirements could be accomplished in a single step: by obtaining scanned copies of the documents via email.** However, to be especially rigorous, an employer could decide to both request emailed copies and conduct a remote, virtual inspection of the actual documents via video call.

One additional requirement is that employers who exercise this deferred physical inspection option must provide written documentation of their remote onboarding and telework policy for each employee.

It is very important to note that ICE is only permitting this remote verification option for work locations where there are no employees physically present. **If a company has any employees continuing to physically work at a specific worksite, then the normal I-9 requirement for physical inspections apply.** However, companies may consider the remote status of their different worksites separately.

If a company does have employees continuing to work onsite and is thus ineligible for the deferred physical inspection option, the "normal" I-9 rules apply, under which the company may designate an authorized representative to complete the physical inspection requirement. The company remains liable, however, for any violations on the form, or violations committed during the verification process. While the I-9 is a seemingly straightforward form, there are lurking risks; any person acting as an authorized representative should be given appropriate training on how to complete the process in a transparent, fair, and compliant manner.

On the whole, this new guidance from ICE grants employers much appreciated flexibility in achieving I-9 compliance while also protecting the health of their workers and ensuring business operations continue during these difficult times.

If you or your company have any questions about this new guidance, questions about other compliance-related matters, or you would like help developing or implementing telework policies, remote workforce policies, or other workforce policies, please reach out to a Dorsey Labor & Employment attorney. Our attorneys have extensive experience in all aspects of I-9 compliance, including investigations and audit defense, and would be happy to assist you with your needs.