

Form I-9 and Remote Workers: Is the Flexibility Almost Over?

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As most Canadian employers are aware, the Immigration Reform and Control Act of 1986 requires employers to verify the identity and employment authorization of each of their employees inside the United States. This process is documented through the completion of the United States Citizenship and Immigration Service (USCIS) Form I-9, Employment Eligibility Verification, for each employee at or shortly after their hiring date for work in the United States.

The Form I-9 has two Sections. Section 1 is for the employee to complete and asks basic personal questions such as name, address, and date of birth with further optional information such as Social Security number, email address, and telephone number. Section 2 is completed by the employer and is to verify identity documentation furnished by the employee and which must be physically inspected by the employer. The acceptable documentation is elaborated by the USCIS in their Handbook for Employers found on their website [here](#).

With the advent of remote work in the midst of the COVID-19 pandemic, the physical verification requirement of Section 2 has become a legal touchstone for employers that are hiring in the pandemic that wish to fully comply with USCIS Form I-9 legal requirements. Canadian companies that have hired employees that work remotely inside the United States should have particular sensitivities to complying with United States immigration laws on employer verification.

In March 2020, the Department of Homeland Security (DHS) announced it would be exercising prosecutorial discretion to defer the physical presence requirement associated with Form I-9 that only applies to those operating remotely, with no exceptions for employees physically present at a work location. In April 2021, DHS updated and extended this policy, pronouncing that newly hired employees working exclusively in a remote setting due to pandemic related precautions were temporarily exempt from the physical inspection requirements associated with Form I-9 until they return to “non-remote employment on a regular, consistent, or predictable basis.” Employers are given

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some flexibility if they are unable to timely inspect and verify, in-person, the Form I-9 documentary requirements and may document their reasons and attach them to affected employees' Form I-9 that will be evaluated on a case-by-case basis in the event of a Form I-9 audit by DHS Immigration and Customs Enforcement (ICE) agents.

In April 2022, DHS updated this policy with an extension of the above Form I-9 flexibilities until October 31, 2022. The policy, any changes, and its effective date can be found at the DHS ICE website [here](#).

For Canadian companies with United States-based remote employees, it is important to note that there are steps required to maintain compliance with both the Immigration Reform and Control Act and the updated DHS policies regarding the flexibility in enforcement of the physical inspection requirements associated with Form I-9. The verification flexibility announcements do not allow flexibility for Section 1 of the Form I-9, which is still expected to be completed by the employee prior to their first day of employment. Nor does the flexibility announcement allow the complete omission of any verification process for documents as to Section 2 of the Form I-9.