



Immigration ADVISORY ■

JULY 27, 2023

New Form I-9, New Document Review Procedure, and COVID-19 Flexibility Reverification

In the coming days, there will be a new I-9 Employment Eligibility Verification form. As of August 1, 2023, employers should begin using Form I-9 with a version date of "(Edition: 08/01/2023)." However, employers may continue using the prior version of Form I-9 (Edition: 10/21/2019) through October 31, 2023. After October 31, 2023, the prior version of Form I-9 will no longer be valid for use. After October 31, 2023, employers that fail to use the new Form I-9 may be subject to penalties. Employers do not need to complete the new Form I-9 for current employees who already have a properly completed Form I-9 on file unless reverification applies.

New Alternative Document Review Procedure for E-Verify Employers

In the past, employers were generally required to examine the documents submitted with the Form I-9 in the physical presence of the employee presenting them. Starting August 1, 2023, employers enrolled in E-Verify and in good standing will have the new option of conducting a "remote" review of this document. Under this new procedure, within three business days of an employee's first day of employment, qualified E-Verify employers (or an authorized employer representative) that chose to use the new alternative procedure must:

- Examine copies of Form I-9 documents submitted by the individual before the remote examination "to ensure that the documentation presented reasonably appears to be genuine."
- "Conduct a live video interaction with the individual presenting the document(s) to ensure that the documentation reasonably appears to be genuine and related to the individual."
- "Indicate on the new Form I-9, by completing the appropriate box, that an alternative procedure was used to examine documentation."
- Retain a "clear and legible copy" of the documentation (front and back for two-sided documents).
- If there is a governmental audit or investigation, make available the copies of employment authorization documentation presented by the employee for remote document examination (this document retention requirement applies only to employees for whom the employer used the alternative procedure, not all employees of the employer).

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E-Verify employers continue to be required to create an E-Verify case for all newly hired employees, whether or not the alternative procedure is used, at each hiring site that is enrolled in E-Verify and operated in accordance with the E-Verify Memorandum of Understanding terms.

Q: May a qualified employer continue to physically examine documents instead of using the alternative procedure?

A: Yes. Use of this alternative procedure is entirely optional.

Q: May a qualified employer offer the alternative remote procedure to only some employees, but require the in-person physical review of other employees at the same hiring site?

A: No. If the employer chooses to offer the alternative procedure to some employees at an E-Verify hiring site, that employer must do so consistently for all employees at that site. To do so for some employees but not others may give rise to discrimination claims. However, a qualified employer may choose to offer the alternative procedure for remote hires only but continue to 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.

Q. Is there a special reporting requirement for the Form I-9 for the alternative procedure?

Yes. Qualified employers must indicate by completing the corresponding box on the new Form I-9 that an alternative procedure was used to examine documentation. For employers that continue to use the 10/21/2019 edition of the Form I-9 between August 1 and October 31, 2023, if the employer used the alternative document examination procedure, the employer must indicate this by writing "alternative procedure" in the Additional Information field in Section 2.

Q: If the employee does not want the employer to apply the alternative procedure, can qualified employers refuse to perform physical document examination?

A: No. Qualified employers must allow employees who are unable or unwilling to submit documentation using the alternative procedure to submit documentation for physical examination.

Expiration of COVID-19 Flexibility and Reverification Requirement

The COVID-19 temporary flexibilities for Form I-9 ends July 31, 2023. Employers that adopted those flexibilities and did not perform an in-person review of the actual documentation presented by the employee will be required to perform a post-COVID-19 flexibility reverification for all such employees by August 30, 2023. Failure to record a required reverification by August 30 will result in a Form I-9 violation and an associated fine for each violation.

However, after August 1, 2023, qualified employers may be able to use the new alternative procedure for their post-COVID-19 flexibility reverification if all the following are satisfied:

- The employer was enrolled in E-Verify at the time the COVID-19 remote/virtual document inspection was performed.
- The employer created a case in E-Verify for the employee if required.
- The remote/virtual inspection was performed between March 20, 2020 and July 31, 2023.
- The employer is currently enrolled and in good standing with E-Verify.

Qualified employers that meet these requirements and utilize the alternative procedure to comply with their reverification obligations should not create a new case in E-Verify. Employers that do not meet the requirements must *physically examine documents* to comply with their reverification obligations.

REMINDER: Regardless of the version of the form used, or the method used to inspect documentation for the Form I-9, or whether an employer participates in E-Verify, all employers will want to verify documents consistently and in a nondiscriminatory manner. A person's citizenship, national origin, or legal status should never be the reason to treat any applicant or employee differently from other persons. The best practice is to consistently use the same process, communication, and standards for all employees.

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