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I-9 Compliance: A Legal Requirement That All Banks and All Employers Should Understand

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The Department of Homeland Security (DHS) requires that all employers in the U.S. complete Form I-9, Employment Eligibility Verification, for all employees hired, regardless of their citizenship status. Form I-9 is used to verify the identity and the employment eligibility of the employee. The Form I-9 verification process has historically involved the participation of both the employee and the employer, including the completion of specifically designated sections of the Form I-9 by the employee and employer, the in-person physical inspection of the required verification documents presented to the employer by the employee, and proper retention of the completed forms and records by the employer for the mandated period of time. Failure to do so properly can result in significant fines and penalties for the employer.

Recent History of Changes to Form I-9 Compliance Obligations

On March 20, 2020, in light of the precautions implemented by employers due to the COVID-19 pandemic, DHS announced that it would exercise discretion to temporarily defer the in-person verification requirements associated with Form I-9 under Section 274A of the Immigration and Nationality Act (INA). Such flexibilities were accompanied by DHS guidance which stated that employers with employees taking physical proximity precautions due to COVID-19 will not be required to review the employee's identity and employment authorization documents in the employee's physical presence. Instead, in the face of this

international health crisis DHS instituted a provision that allowed employers to inspect employees' documents remotely and obtain copies within three business days. Further, all employees who were onboarded using remote verification must report to their employer within three business days of the resumption of "normal operations" for in-person verification.

The flexibilities guidance left numerous questions unanswered. For instance, the flexibilities provision would only apply to employers and workplaces that are operating remotely without a clear definition of work policy that constitutes remote work. The guidance also failed to define the circumstances that qualify as the employer's resumption of "normal operations," which would require employers to conduct physical examination of the documentation.

Effective April 1, 2021, a new set of guidance was issued and DHS amended the circumstances under which an employer must conduct an in-person inspection of an employees' documents. DHS replaced the phrase when the employer "resumes normal operations," with once the employee returns to non-remote employment on a "regular, consistent, and predictable basis." In addition, employees working exclusively in a remote setting due to COVID-19 precautions would continue to be exempt from the in-person document verification requirements. This updated Form I-9 flexibilities guidance did not provide clarity for employers.

After a series of extensions of the Form I-9 requirement flexibilities from 2020 to 2023, the DHS announced on May 4, 2023 that COVID-19 flexibilities, which enabled the temporary virtual inspection of Form I-9 documentation would end on July 31, 2023. On that basis, employers that virtually inspected Form I-9 documents during COVID-19 were given until Aug. 30, 2023 to complete the normally required physical re-inspection of all Form I-9s documents for employees whose documents were inspected virtually. In anticipation of this burdensome responsibility and rapidly approaching deadline, the DHS published a

final rule on July 25, 2023, declaring that this end to flexibilities with an exception for employers enrolled in E-Verify, who would be allowed to continue to remotely inspect identity and employment authorization documents.

A review of the above announcements and guidance make it exceptionally clear why so many employers have experienced great confusion as to their current Form I-9 obligations, and have come to find themselves in varying states of non-compliance given the evolving I-9 guidance issued over the course of the last 3 years.

We begin by assessing the initial announcement on March 20, 2020. While the March 2020 guidance began with language that the flexibilities of the in-person inspection of I-9 documents applied to “employers with employees taking physical proximity precautions due to COVID-19,” it was only much later in the announcement that the USCIS added that “this provision only applies to employers and workplaces that are operating remotely.” Further, in adding this caveat, the USCIS did not qualify this provision by indicating that these flexibilities were limited to employers operating remotely only because of COVID-19 precautions. The separation of these qualifications required a piecing of this jigsaw puzzle together to fully understand the application of these flexibilities.

This was followed by the March 31, 2021 announcement of the extension of the flexibilities which stated, “This provision only applies to employers and workplaces that are operating remotely” but requires the reader of this announcement to refer back to the March 2020 announcement or to “ICE’s guidance for clarification of this provision” for any reference to the fact that the workplace had to be operating remotely because of COVID-19 in order to be eligible for the flexibilities being announced, and extended. This means that if an employer decided to change their protocols (after a year of successfully operating remotely) and move to a hybrid or remote business model (not because of COVID-19 precautions but for efficiency reasons), which was an exceptionally popular

decision at the time, the March 31, 2021 provisions did not make it clear that the employer's business could no longer avail themselves of such flexibilities.

With regard to the eventual physical inspection of documents, it is difficult to imagine a more confusing set of guidelines as those released in connection with the I-9 flexibilities during this national emergency.

The March 20, 2020 announcement stated:

"Once normal operations resume, all employees who were onboarded using remote verification, must report to their employer within three business days for in-person verification of identity and employment eligibility documentation for Form I-9 ..."

This was followed by the March 31, 2021 extension of the flexibilities which stated:

"If employees hired on or after April 1, 2021, work exclusively in a remote setting due to COVID-19-related precautions, they are temporarily exempt from the physical inspection requirements associated with the Employment Eligibility Verification (Form I-9) under Section 274A of the INA until they undertake non-remote employment on a regular, consistent, or predictable basis, or the extension of the flexibilities related to such requirements is terminated, whichever is earlier."

To date, there has never been a definition of "regular, consistent, or predictable basis." A myriad questions remain regarding this phrase, including what constitutes "regular, consistent, or predictable basis?" Would any regular in-person services, even if de minimis, trigger the requirement and what level of regularly does an employee need to reach to trigger this requirement? For example, if an employee returned to work at the employer's worksite on a hybrid basis, performing in-person services for a varying number of days per week

(performing in-person services one to three days per week, with some variation from week to week) is that regular and predictable enough to trigger the requirement?

It is likely these questions will not be answered until audits have been conducted, fines are levied, and lawsuits are filed and settled or decided.

As noted above, on May 4, 2023 the USCIS announced the I-9 accommodations discussed above would sunset on July 31, 2023, and employers would be given until Aug. 30, 2023 to become compliant.

As a result of this announcement, many employers undertook extensive efforts reviewing Forms I-9 for all employees hired over the course of the prior three and a half years, including mitigating any errors made, rectifying areas of non-compliance and even hiring outside counsel to conduct internal audits and assist in reaching a state of full-compliance.

On July 25, 2023 a Final Rule was published in the Federal Register stating that the alternative procedures permitting remote inspection of an employees' documents would become a permanent option for employers enrolled in E-Verify.

In the course of this announcement, the USCIS declared that notwithstanding the permanence of the remote inspection procedures, employers must still conduct an in-person inspection of documents that were previously inspected remotely between March 20, 2020 and July 31, 2023, unless the employer was enrolled in E-Verify. More specifically, if the employer was (1) enrolled in E-Verify as of July 25, 2023 and during the COVID-19 flexibilities; (2) created a case in E-Verify for an employee during the COVID-19 flexibilities; and (3) conducted remote examination of an employee's documents between March 20, 2020 and July 31, 2023, then employer is not required to physically inspect documents that were previously inspected remotely while the flexibilities were in place, and may use the alternative procedures to meet the Form I-9 physical inspection requirement.

By the time this announcement was made, most employers had already undertaken the extensive efforts to ensure full compliance for employees hired over the course of the prior three and a half year period, so that the E-Verify employers, who were now declared exempt from the in-person reverification of documents which were remotely inspected, had already dragged their employees into the office and expended significant personnel resources to complete the in-person reverification. While at the same time, other employers (who were not enrolled in E-Verify) continued to scramble to reach full compliance because of a lack of understanding of the application of the flexibilities, and their obligations under those flexibilities.

Current Compliance Standard and Common Errors

The ability of an E-Verify employer to conduct a remote inspection of an employee's identity and employment authorization documents remains the current standard for I-9 compliance. All employers not enrolled in the E-Verify program must continue to conduct an in-person inspection of employees' Form I-9 documents.

One of the most common Form I-9 compliance errors inadvertently committed by employers is the completion of the incorrect version of the Form I-9.

On Aug. 1, 2023, a new Form I-9 was released. Beginning on Nov. 1, 2023, this form edition, dated Aug. 1, 2023, is the only acceptable version of Form I-9 to be completed upon the hiring or re-hiring of any employee. In this new iteration of Form I-9, the USCIS has reverted to a single-page form. While no fields were removed in reducing the form to one page, multiple fields were merged, resulting in a very significant amount of text on a the page, that must be read carefully in order to complete it correctly.

Another common inadvertent Form I-9 violation is the completion of a new Form I-9 when a revised form is released, when an error needs to be corrected or when

a re-verification must be conducted. None of the above referenced scenarios requires a new Form I-9, and it is an affirmative violation to complete a new Form I-9 in any of those situations.

In the aftermath of the COVID-19 pandemic, the temporary flexibilities on Form I-9 compliance requirements have left employers with many unanswered questions. The implementation of alternative procedures permitting remote inspection of an employees' documents has now become a permanent option for qualifying employers enrolled in E-Verify. However, for employers who are not enrolled in E-Verify or do not meet the qualifications of the alternative Form I-9 verification procedures, use of extra precaution is recommended, especially in choosing third parties to complete the physical inspection process, which requires due diligence in ensuring that the third party is properly trained, and establishing clear procedures or best practices to offer guidance to third-parties to properly complete Form I-9. Finally, it is highly recommended that employers conduct regular internal audits of Form I-9s to ensure accuracy and compliance with the most current regulations and obligations in order to avoid penalties due to innocent mistakes and oversights.

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