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DHS Proposes New I-9 Rule That Would Remove Physical Inspection of Documents

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One of the many items on every employer's checklist while hiring a new employee is to verify the individual's identity and authorization to work in the United States. Employers are required to ask new hires to complete a portion of Form I-9, Employment Eligibility Verification (Form I-9) on the first day of employment and provide documentation supporting their work authorization for inspection within the first three business days. This obligation also extends to re-verifying documents with an expiration date on the work authorization and rehires of former employees.

The current rule for verifying employment authorization at 8 CFR §274a.2(b) and (c) requires physical inspection as a measure to prevent fraud, but what happened when employers were required to hire remote workers or re-verify existing employees remotely due to COVID-19 restrictions? It was impractical, if not impossible, due to shelter in place or similar mandates, to require employers to visit new hires' homes to conduct physical inspections, or ask them to visit an otherwise closed office building to complete a Form I-9 and do verification.

In an effort to solve this problem, on March 20, 2020, the Department of Homeland Security (DHS) announced along with other measures, a flexibility rule that deferred the physical inspection requirements for employers and workplaces that were operating remotely, which DHS extended several times. This flexibility policy did not eliminate, but rather deferred the physical inspection requirement. This allowed employers to satisfy the verification requirement by inspecting documents remotely via video or email, and keep a scanned copy or similar image. Once normal operations resumed, the employer would have to conduct a physical examination. Subsequently, DHS announced that as of April 1, 2021, only those employees who physically reported to work at a company location on any regular, consistent, or predictable basis needed to carry out an in-person examination, and those who worked remotely enjoyed a temporary exemption. DHS last extended this flexibility several times and is now in effect until Oct. 31, 2022.

This change has been widely accepted by employers and employees alike. The consistent feedback is that remote



U.S. Department of Homeland Security.

verification facilitates onboarding and compliance, and is a practice that would be welcome as a permanent rule. Since the implementation of the temporary exemption, there has been a lingering concern about having to conduct physical inspection of documents as the workforce transitions back to a hybrid or office work environment. The practical concern is that employers would have three business days following a return-to-office date to complete and conduct physical examination of all Forms I-9 that were completed or inspected remotely while the exemption had been in effect.

DHS has taken notice of the shift to remote working and hybrid schedules that have become increasingly common. Recognizing this, on Aug. 18, 2022, DHS published in the Federal Register a proposed rule titled *Optional Alternatives to the Physical Document Examination Associated With Employment Eligibility Verification (Form I-9)*. The Proposed Rule, if approved, would formalize the authority of the Secretary of DHS (the Secretary) to extend the flexibility regarding remote document inspection by employers, and to further explore alternative options to physical document examination procedures in the future for some or all employees. DHS may implement such alternative procedures as part of a pilot program, upon a determination that the procedures offer an equivalent level of security, or as a temporary measure to address public health emergencies.

While the new rule would grant DHS the authority to explore and create alternatives, the rule itself does not create any of such alternatives. The Proposed Rule simply gives DHS discretion to implement alternative options for the process of employers' document examination during the onboarding process on limited scenarios. This proposal however does not yet address the big question of whether employers that have been conducting remote verifications since March 2020 will need to conduct a physical inspection if they are not part of a pilot program. The current physical document examination procedures, and any changes, if any, are contained in 8 CFR §274a.2(b) and (c). The new rule will include additional language in paragraphs (b)(1)

(ii)(A), (b)(1)(vii), and (c)(1)(ii) stating that an alternative procedure may be authorized by the Secretary for examining the documentation presented by individuals to establish identity or employment authorization when completing a Form I-9 when they are hired, re-verified, or rehired.

The DHS proposal will also modify Form I-9 and its accompanying instructions to allow employers to indicate the use of any alternative document examination procedures. DHS is also considering various document retention requirements, including requiring employers to retain copies of any documents presented by electronic means. The rule now in effect does not require employers to retain any original or copy of any document presented for examination.

With this change on Form I-9, Immigration and Customs Enforcement, while conducting an audit to an employer, will know if the employer used an alternative verification procedure. If an employer decides to use an alternative procedure, they may be required to take online training on detecting fraudulent documents remotely, and to avoid discrimination in that process.

As previously mentioned, this proposal does not come without concerns. While employers generally welcomed the flexibility announced by DHS after the COVID-19 pandemic drastically incremented the number of employees working from home, making these changes permanent also poses a risk of facing unintended consequences for potential hires. A good strategy for the government could be to make this benefit available for employees in good standing in E-Verify,

a program administered by U.S. Citizen and Immigration Services, as the agency that issues most of the employment authorization documents. This would incentivize employers to enroll in this program and maintain good hiring practices, while also making the hiring process more efficient and reliable, both for the government and employers.

Overall, this rule seems to follow the DHS trend to adopt more electronic processes. While the proposed change would be limited, it is a start into formalizing this new practice given the large U.S. remote workforce. DHS is accepting comments from the public on the Proposed Rule until Oct. 17, 2022 about:

- the potential burden for employers who will be required to retain copies of documents submitted electronically;
- the potential benefits, costs, or burdens to employees related to document retention;
- the costs or increased burdens to employers to complete training on detecting fraudulent documents, while avoiding discrimination in the process, and
- the population that will be eligible to alternative document verification procedure.

If you are interested in submitting a comment to the Proposed Rule, you can do so electronically on the federal eRulemaking Portal at <https://www.regulations.gov> and follow the instructions on the website.

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