

# Remote Document Review for I-9 Completion Purposes: Fair or Foul Clouds Ahead?

The COVID-19 pandemic has brought many unprecedented changes, not least of which is the temporary relaxation of rules related to how some employers must review the documentation provided by employees during the Form I-9 process. While the torrent of the pandemic continues, the end of the temporary remote I-9 document verification rule may soon appear on the horizon. On August 18, 2022, the U.S. Department of Homeland Security (DHS) proposed rule 87 FR 50786, allowing long-term and extended allowance for remote (e.g., non-physical) employer review of employment eligibility documents (e.g., List A, B and/or C documents) for the purpose of Form I-9 completion. However, the fate of the proposed rule is far from certain. Cautious employers should take this time to evaluate how best to prepare.

An essential first step for employers is to evaluate whether they were ever allowed to take advantage of the Form I-9 temporary remote employment eligibility document review exception (temporary remote exception). Before the COVID-19 pandemic, employers were required, without exception, to review original personal identity and work authorization documentation of a newly hired employee (or an employee requiring work authorization reverification), as listed on the Form I-9's "List of Acceptable Documents," in the physical presence of the person presenting them, either directly or through an authorized representative of the employer.

However, in March 2020, DHS issued temporary guidance applying only to employers whose workplace was operating entirely remotely with no employees physically reporting to the workplace. The guidance does not apply to those employers whose workforce was only partially remote. The initial guidance also allowed, on a case-by-case situation, where employees hired between March 20, 2020, and March 31, 2021, were subject to either quarantine or lockdown protocols. The initial temporary remote exception allowed this narrow group of employers to temporarily conduct the I-9 process remotely for either new workers or those requiring work authorization reverification while the federal COVID-19 emergency declaration remains in effect. During the COVID-19 emergency, this group of employers has been allowed to remotely review (via teleconference, email, fax, etc.) documents presented by employees to prove their identity and authorization to work in the United States. Employers who took

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advantage of this temporary remote exception are expected to maintain written documentation of their remote onboarding and work policies. They should also maintain proof of any applicable local or state quarantine or lockdown orders that may have affected their workplace since 2020.

In March 2021, DHS expanded the temporary remote exception to allow all employers to use remote I-9 document verification procedures for employees hired on or after June 1, 2021, or those who require reverification on or after such date and are working fully remotely because of COVID-19-related physical proximity precautions, even if the employer has employees working in-person. The expanded exception to remove the requirement of an entirely remote workforce due to COVID-19 precautions does not allow remote I-9 document verification for new hires who regularly, consistently or predictably work remotely for reasons not related to COVID-19 cautions (e.g., a salesperson working remotely to be closer to customers or a software developer to be closer to recreational opportunities). Because the exemption is strictly tied to the underlying reason(s) for the remote nature of employment, employees who initially began working remotely on a temporary basis because of COVID-19 precautions but who then do so for non-COVID-19-related purposes on a consistent, indefinite or predictable basis, must undergo in-person verification of their identity and employment authorization documentation upon the change in the rationale for their remote work status.

The expanded temporary remote exception also does not permanently exempt the in-person review of an employee's identity and work authorization documentation for I-9 purposes. Instead, the expanded temporary remote exception created a two-step process. The first step is the virtual review of the employee's documentation verifying their identity and employment authorization. The second step is the in-person verification of the employee's documentation verifying their identity and employment authorization when the temporary remote exception is canceled by DHS (or upon the employee's decision to work remotely on a regular, indefinite or predictable basis for non-COVID-19-related purposes). Once either of these triggering events occurs, employers will have three business days from the event to complete the in-person document review and form I-9 update. Form I-9s completed during the above-described temporary remote exception periods should note on each I-9 completed pursuant to either exception a notation, such as "Remote Inspection Completed on [date]" or "COVID-19" in the Section 2 "Additional Information" field or Section 3 in the case of reverification. Similar to the initial exemption, the new broader exception also



requires that employers maintain written documentation of their remote onboarding and work policies. DHS has extended the temporary remote exception issued in March 2021 multiple times and it is currently set to expire on July 31, 2023. However, there is no guarantee that DHS will grant another extension.

With the fate of the proposed remote physical I-9 rules uncertain and the potential end of the COVID-19 emergency declaration some time in the not-too-distant future, employers may consider battening down their hatches in several ways.

First, complete a thorough internal review of your Form I-9s. Ensure there is a correctly completed Form I-9 for each current employee. Create a separate list of Form I-9s completed since March 20, 2021, and break down this list between Form I-9s completed between March 20, 2020, and March 31, 2021, and Form I-9s completed since June 1, 2021. Carefully review the date of hire listed on each of these Forms I-9s to ensure the listed employees' hire dates also fall within the temporary remote exception eligibility dates.

If you discover that employee I-9s were completed during the applicable periods using the temporary remote exception, carefully review your company's remote onboarding and telework policy(s) that were in place when the company began using the exception. If no formal remote onboarding and telework policy(s) were in place at the time, work with your legal counsel to develop such policy(s) and compile any proof that the company had reasonable de facto remote onboarding and telework policies in place that were developed in response to the COVID-19 pandemic, and that your workplace acted consistently and reasonably in handling the completion of Form I-9s given the evolving circumstances and challenges at the time. Be especially careful to document any local or state COVID-19-related workplace restrictions that directly affected your workplace or remotely located employees during the applicable periods.

Second, determine which Form I-9s were completed using remote verification of the employee's identity and work authorization documentation and further highlight these remotely verified employees on your list. Review this highlighted list to determine if any of these employees have become full-time remote employees who intend to stay as remote workers indefinitely, regularly, or predictably for reasons other than COVID-19 precautions or other related workplace restrictions. For these covered employees, prepare a separate list to begin the process of reviewing their identity and work authorization



documentation in-person. Remember that employers may use an outside agent, such as an attorney, account, another employee or even a family member of the employee, to review the affected employee's original documentation and complete an update on the affected employee's Form I-9s. Upon the in-person physical review of the affected employee's Form I-9s, the employer must add "documents physically examined" with the date of inspection to the Section 2 "Additional Information" field on the Form I-9 or to section 3 as appropriate. Employees do not have to provide the same documentation for their in-person review as they did for their remote review.

For the remainder of employees whose Form I-9s were completed following the temporary remote exception, create a game plan for how in-person document review should be completed. Will you wait until DHS announces a formal end to the remote policies; begin a system for completing the in-person review of affected employee documents and updating of their Form I-9s, giving yourself the luxury of time and control of how the process will be completed; or will you tempt fate and maintain faith that the proposed remote Form I-9 document rule will become law, providing you with sufficient protections to cover your heretofore remote Form I-9 completion practices, policies and procedures? The best game plan for each employer will vary based on resources available to them, the distribution of their workforce and their risk tolerance.

DHS has indicated that it will consider on a case-by-case basis the unusual circumstances that employers were forced into during the COVID-19 pandemic during any future Form I-9 audits and enforcement actions. However, it is unknown how strictly and with how much vengeance DHS will conduct any future audits of Form I-9s created during COVID-19 pandemic times. All future audits are highly subject to the political winds at the time. Therefore, using prudence may be an employer's best course of action, regardless of what uncertainties may still lie on the horizon.

Employers interested in analyzing their risk exposure and next steps if they have utilized the temporary remote exception should contact Reinhart attorney Ben Kurten.

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