

PUBLICATION

Physical Document Examination is Dead! Long Live Physical Document Examination!

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Starting August 1, 2023, employers who have registered for E-Verify for a location may use a new video procedure in lieu of an in-person inspection to verify new hires and their documents to complete Form I-9. Employers who had used special COVID-19 procedures to verify employees remotely may use the new video procedure to meet the August 31 deadline for updating Form I-9 for work associated with locations for which the employer had been registered for E-Verify by the time the worker was hired.

On July 21, 2023, the U.S. Department of Homeland Security (DHS) released its vision for a remote alternative to the physical document examination required by Form I-9. The possibility of a permanent remote examination procedure has been a hot topic since DHS announced the end of temporary I-9 flexibilities that allowed employers to inspect certain workers' I-9 documents virtually during the COVID-19 pandemic.

The alternative procedure announced by DHS differs substantially from the COVID-19 flexibilities and will not, as many employers hoped, alleviate the need to physically examine the identity and employment authorization documents for workers hired on or after March 20, 2020, whose documents were previously examined virtually or remotely.

DHS' announcement makes clear that all employers, not just those ineligible for the new alternative procedure, must still complete those physical examinations by the August 30, 2023, deadline. However, the agency did state that as long as an employer is otherwise compliant with I-9 regulations and followed the COVID-19 flexibility guidance when conducting remote or virtual document examinations during the flexibility period, U.S. Immigration and Customs Enforcement (ICE), the agency charged with enforcement of the Form I-9 employment authorization verification rules,

". . . will generally not focus its limited enforcement resources on Form I-9 verification violations for failing to complete physical document examination by August 30, 2023, particularly where the employer can show that it has taken timely steps to complete physical document examination within a reasonable period of time."

As noted in the July 21, 2023, [release](#), DHS Provides Employers Certainty and a New Flexible Option for Employment Eligibility Verification.

Employers may take advantage of this alternative procedure beginning August 1, 2023. Here is what employers need to know before abandoning physical document inspection altogether.

The New, Permanent Remote Document Verification Procedure

The elegantly titled, "Optional Alternative 1 to the Physical Document Examination Associated with Employment Eligibility Verification (Form I-9)," modernizes employment eligibility verification by allowing, "employers who participate in E-Verify and are in good standing with the program to conduct document verification electronically and with a live video call interaction." *Id.*

Only employers that are enrolled in E-Verify may use the remote document verification procedures. E-Verify employers seeking to use the alternative procedure must be in compliance with all requirements of the E-Verify program, including verifying all new hires at each registered hiring site through E-Verify.

Only E-Verify hiring sites may use the remote document verification procedures. When an employer enrolls in E-Verify, it can select which hiring sites to enroll in – there is no requirement that an employer registers every location that hires workers. Many multistate employers will enroll in E-Verify to register only the hiring sites located in states with mandatory E-Verify laws. Under this new procedure, only hiring sites that are registered in E-Verify may offer remote document verification as an option to all workers hired at that site, or only to fully remote workers hired at that site; but they may not pick and choose. Additionally, retaining clear and legible copies of all documents presented by the worker is mandatory for employers using the remote document verification option.

Employers must conduct a live video interaction with the worker. To better approximate the reliability of in-person inspection, the remote document verification option requires workers to submit copies (front and back) of each document they are presenting. Employers must then have a video call with the worker, during which the worker will present their original document on-camera for the employer's comparison.

Employers must indicate on the worker's Form I-9 that the remote document verification procedure was used. The new edition of Form I-9, effective August 1, will have a box that employers can mark for this purpose; until then, DHS advises employers to write "alternative procedure" in the Additional Information field in Section 2.

Employees may decline to participate in remote document verification. Employers may not require workers to participate in the remote document verification procedure. If a worker is unable or unwilling to submit documentation using the alternative procedure, the employer must allow them to present their documents for physical examination.

Effect of Alternative Verification Procedure on the August 30 Reverification Deadline

"Wait, about that August 30 deadline?" you may be asking yourself. DHS has great news for you – qualifying employers can use the new remote document verification procedure to complete the required document examination for workers hired on or after March 20, 2020, whose documents were remotely examined under the COVID-19 flexibilities. That is, as long as the employer was enrolled in E-Verify at the time the original remote document verification occurred; the employer created an E-Verify case for that employee; and the remote examination occurred between March 20, 2020, and July 31, 2023.

But employers will have to complete any required document examinations by the August 30 deadline, whether they choose physical examination or the new alternative verification procedure.

Those willing and able to use the remote document verification option for the examination of documents originally inspected remotely should not create a new case for the worker in E-Verify. Instead, they can simply conduct a second remote examination of the worker's documents, this time following the new alternative verification procedure. Once that is complete, the employer must annotate the worker's Form I-9 with "alternative procedure" and the date the live video interaction occurred.

Any other employers, including E-Verify employers who don't meet all qualifying criteria for the new remote examination option, must conduct a physical examination of the identity and work authorization documents presented by any workers hired using remote document verification under the COVID-19 flexibilities.

All employers should remember that **the August 30, 2023, deadline still stands.**

What Were the Terms of the COVID-19 Flexibilities?

DHS has made clear that only employers who correctly utilized the COVID-19 flexibilities in the first place and who make some efforts toward completing the necessary re-verifications can hope for ICE not to "focus" on such violations in a subsequent I-9 audit.

So, in addition to taking "timely steps" toward completing the physical inspection requirement for relevant workers, employers should take time to review their onboarding processes during the pandemic, to ensure that they complied with all of the requirements of the COVID-19 flexibilities.

The COVID-19 flexibilities were not as broad as many employers believed this to be on its face. ICE's guidance continuously changed throughout the lifetime of the Policy which, of course, affected employers' ability to stay in compliance. The Policy only applied to [employers and workplaces that were operating remotely due to the COVID-19 pandemic](#). This meant that the Policy never applied to [employees physically present at a work location during the COVID-19 pandemic or to those maintaining permanent remote positions](#). Whether completing a physical document inspection by the August 30 deadline can cure improper use of the COVID-19 flexibilities by employers is unclear.

In response to the gradual reintegration of the workforce that occurred as COVID restrictions relaxed in the U.S., ICE did update its instructions to allow for remote document examination of employees working remotely due to COVID-19 related precautions until the relevant employee undertakes "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."

The remote document inspection permitted under the COVID-19 flexibilities also attached additional recordkeeping requirements to the policy. Employers who took advantage of the COVID-19 flexibilities had to retain copies of all documents remotely inspected, regardless of their normal document retention policies. Such employers also, "must provide written documentation of their remote onboarding and telework policy for each employee. This burden rests solely with the employers." As noted in the [March 20, 2020, update](#), "DHS announces flexibility in requirements related to Form I-9 compliance."

What to Expect After August 30, 2023

The new alternative verification procedure has the potential to streamline the Form I-9 verification process for employers with geographically distributed workforces. In June 2023, DHS published a request for comments on its E-Verify NextGen project, an initiative that would further integrate the I-9 verification and E-Verify processes, allowing for electronic completion of Form I-9.

Despite these promising advances, there remains plenty of room to modernize and improve the I-9 employment authorization verification process to better align with the demands of the modern workplace.

If you have any questions regarding this new process, please reach out to [Meredith Doll](#), [Matthew Kim](#), or any member of Baker Donelson's [Immigration Group](#).