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Keeping Up with the Times: Solving the I-9 Conundrum for Remote Employees

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The impact that technology has on our everyday life is impressive. It touches us at work, home, and even while we're on the road. And while technology has its disadvantages (you are always "on"), it also has its advantages: for instance, it gives employees the ability to telecommute. Every day, more and more companies offer their employees the option to telecommute from home. In some instances, companies even hire individuals who live in a different state from where the employer is located. While allowing employees to telecommute from different states can be a great benefit for the employee (and the employer), it can create a nightmare for HR administrators trying to complete employment paperwork, such as the Form I-9, Employment Eligibility Verification.

Under the Immigration and National Act of 1986, employers are required to complete a Form I-9 for each new employee. The purpose of the Form I-9 is to verify the identity of each new employee and ensure that the new employee is authorized to work in the United States. The Form I-9 contains a list of acceptable documents for establishing an employee's identity and authorization to work. Those documents include a U.S. Passport, Permanent Resident Card, driver's license, social security card, and

birth certificate, among others. More importantly, federal law requires employers to *physically* examine each document—with the employee *physically* present—to determine if the document reasonably appears to be genuine and relates to the employee presenting it.

There are no exceptions to the requirement that the employer physically examine the documents in the presence of the employee. And with immigration enforcement—principally aimed at employers—at an all-time high, the pressure on HR professionals to satisfy their I-9 obligations for remote employees is even more important. That is because Immigration and Customs Enforcement ("ICE") primarily enforces employers' immigration-related obligations by auditing their I-9 forms. Fortunately, there is an easy solution for employers to satisfy their I-9 obligations for remote employees.

Most employers don't realize that USCIS allows them to designate *anyone* (except the new hire) to review the Form I-9 and identification documents for remote hires. Believe it or not, an employer's authorized representative could be the employee's next door neighbor (of course, a personnel officer, foreman, agent, or a notary would obviously be a better choice).

It can even be the employee who identifies and contacts an individual to act as the employer's authorized representative. And USCIS does not specifically require that the authorized representative have a written agreement (or other documentation) authorizing him or her to perform the employers' I-9 obligations. All that is required is that the employer specifically authorize the person to act on its behalf.

However, having some sort of formality in place (such as a letter) that sets forth what the authorized representative is required to do is actually not a bad idea. Remember, the employer is still liable for any violations in connection with the I-9 form and verification process and that liability cannot be shifted to a third party. We also recommend that the employer's authorized representative be someone with whom the new employee does not have a personal relationship. Commonly used as authorized representatives for Form I-9 purposes are notary publics because they are cloaked with a presumption of trustworthiness and are generally accustomed to reviewing documents, witnessing signatures, etc. Keep in mind, however, that a notary public is acting as an authorized representative, not as a notary. The notary public must perform the same required actions as an authorized representative—(i) examine the identity and employment authorization documents of the new hire and (ii) complete the employer section of the Form I-9.

Because the notary public is acting as an authorized representative of the employer, the notary public should not provide a notary seal on Form I-9. In addition, if an employer intends to use a notary public, the employer should consider preparing standard operating procedures with instructions for the new hire to bring to the notary. As part of the standard operating procedures for remote employees, the employer should: (i) outline the steps for the

notary public to follow; (ii) instruct the employee on what to do (if anything) after the notary public has completed their part; and (iii) instruct the notary to sign any additional business documentation, if necessary. Although not required, some employers ask the notary to sign a separate attestation that the employee appeared in front of them; the documents have been reviewed; and the documents are reasonably related to the person and appear to be reasonably genuine. Again, while this is not required, the fact that an employer goes through such hurdles to ensure compliance goes a long way in terms of demonstrating a good faith effort to comply with the I-9 rules (which typically translates into a fine reduction).

Currently, with immigration reform on the horizon, employers face significant uncertainty when it comes to their potential exposure for immigration compliance. However, one thing is certain—immigration enforcement aimed at employers will continue. Reform will not slow down or end employer inspections. In fact, it is more likely that there will be an increase in the penalties for non-compliant employers. Any immigration reform ultimately enacted will likely include an E-Verify component. Notwithstanding, an employer's participation in the E-Verify program, immigration reform will not do away with the Form I-9 process or compliance obligations. Employers will still be required to go through the verification process and complete the Form I-9. Consequently, employers are well served to focus on reviewing, improving, and updating their internal I-9 compliance programs and ensuring that their standard operating procedures address the conundrum of the remote employee. Have you developed a network of notary public agents in the cities where your company transacts business? Have you screened the potential notaries you intend to use? Are you going to use a traveling notary? Have you thought about using a designated attorney? Taking these steps today could go a long way tomorrow.