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Client Alert: Department of Homeland Security Provides Employers with Some I-9 Flexibility

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Maria del Carmen Ramos

MEDIA CONTACT

Wendy M. Byrne
wbyrne@shumaker.com

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By way of background, under the Immigration Reform and Control Act of 1986, employers are required to complete a Form I-9 for each new employee hired. 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.

On March 20, 2020, the U.S. Department of Homeland Security ("DHS") [announced](#) a new exception for employers and workplaces that are operating completely remotely as a result of physical proximity precautions due to COVID-19. Specifically, DHS announced that it would not require employers to review the employee's identity and employment authorization documents in the employee's physical presence. Employers are still required to inspect the Section 2 documents but an employer can now do so remotely (e.g., over video link, fax, or email, etc.). Employers must also obtain, inspect, and retain copies of the documents, within 3 business days for purposes of completing Section 2. In addition, employers should designate "COVID-19" as the reason for the physical inspection delay in the Section 2 "Additional Information" field ***once physical inspection takes place after normal operations resume***. Once the documents have been physically inspected, the employer should 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. An employer may implement these provisions for a period of 60 days from the date of DHS's notice OR within 3 business days after the termination of the National Emergency, whichever comes first.

Now, for employers who decide to avail themselves of this option, it is imperative that they maintain written documentation of the remote onboarding and telework policy for each employee. Further, once normal operations resume, all employees who were hired 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, Employment Eligibility Verification. Once the employer physically inspects the employment eligibility documents, the employer should 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.

Any audit of subsequent Forms I-9 would use the “in-person completed date” as a starting point for these employees only.

Moreover, only employers and workplaces that are operating completely remotely can make use of the physical inspection of employment eligibility documents exception. According to DHS:

If there are employees physically present at a work location, *no exceptions* are being implemented at this time for in-person verification of identity and employment eligibility documentation for Form I-9, Employment Eligibility Verification. However, if newly hired employees or existing employees are subject to COVID-19 quarantine or lockdown protocols, DHS will evaluate this on a case-by-case basis. Additionally, employers may designate an authorized representative to act on their behalf to complete Section 2. An authorized representative can be any person the employer designates to complete and sign Form I-9 on their behalf. The employer is liable for any violations in connection with the form or the verification process, including any violations of the employer sanctions laws committed by the person designated to act on the employer’s behalf.

Continue to check back with us for updates. Our firm is available to assist with your immigration needs. For more information, please contact Maria del Carmen Ramos at 813.227.2252 or mramos@shumaker.com.

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