

Key I-9 Compliance Steps To Prepare For Office Reopenings

By **Melissa Allchin and Matthew Gorman** (July 29, 2021)

Many employers have chosen dates in the fall for their official office reopenings and have spent many months considering all the complicated factors involved in the post-pandemic workplace.

One time-sensitive topic that may have been overlooked is Form I-9, Employment Eligibility Verification compliance in the context of office reopening.

While U.S. Immigration and Customs Enforcement has allowed some flexibility for U.S. employers over the course of the COVID-19 pandemic, the relaxed rules will no longer apply once employees are routinely and predictably in the office. Without this flexibility, employers must act quickly to (1) update I-9s completed during the pandemic pursuant to ICE's flexible rules, and (2) put in place or refresh protocols for I-9 completion and maintenance in a workplace that is always changing with shifting post-pandemic norms.

The issuance of post-pandemic I-9 compliance is time sensitive and the failure to act timely will result in higher risk of fines during an investigation. For many employers, this will be a time-consuming and overwhelming task in light of the moving parts and other elements of office reopening. As a result, planning now to ensure I-9 compliance is an absolute necessity.

In this article, we will provide an overview of I-9 requirements and ICE's I-9 flexibility relating to COVID-19, and propose five steps that all employers should take in advance of office reopening.

The I-9 Requirement

Form I-9 requirements come out of the Immigration Reform and Control Act. The law prohibits employers from hiring and employing an individual for employment in the U.S. knowing that the individual is not authorized with respect to such employment. Employers also are prohibited from continuing to employ an individual knowing that they are unauthorized for employment.

This law also prohibits employers from hiring any individual, including a U.S. citizen, for employment in the U.S. without verifying his or her identity and employment authorization on Form I-9.

At a high level, the Form I-9 completion requirement is as follows:

- The employee must complete Section 1 of the Form I-9 no later than the first day of work for pay.



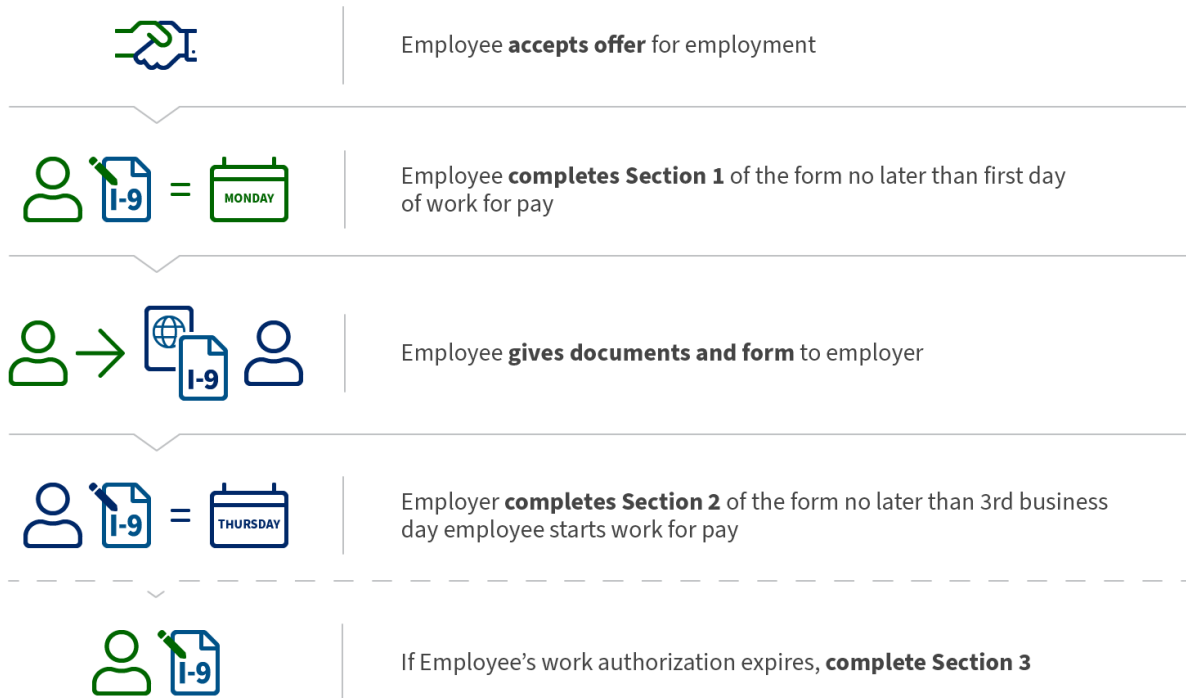
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- The employee must present original documents that verify their identity and employment eligibility, and the employer must review the employee's original documentation and complete Section 2 of the Form I-9 no later than the third business day that the employee starts work for pay.

U.S. Citizenship and Immigration Services illustrates these steps in the below graphic.[1]



Both the employee and the employer must sign the form under the penalty of perjury. Employers are required to maintain a valid Form I-9 for each employee hired on or after Nov. 6, 1986. Employers must also retain a Form I-9 for each terminated employee for a period of three years after the date of hire, or one year after the date employment is terminated, whichever is later.

ICE's Pandemic Flexibility: Relaxing the Rules Relating to Original Document Review

In March 2020 and in direct response to the COVID-19 pandemic, ICE announced that it would exercise its discretion to defer the physical presence requirements associated with I-9 completion. Under this guidance, employers with employees taking physical proximity precautions are not required to review the employee's identity and employment authorization documents in the employee's physical presence.

Despite this flexibility, employers are still required to inspect the Section 2 documents remotely, and obtain, inspect and retain copies of the documents within three business days for purposes of completing Section 2 of the I-9. Notably, this guidance only applies to employers and workplaces that are operating remotely.

The flexibility is temporary and the original announcement includes annotation requirements

effective once offices reopen. Specifically, employers must add 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.

Employers must add "documents physically examined" with the date of inspection to the Section 2 additional information field or to Section 3, as appropriate. ICE's temporary guidance also requires that employers document the remote onboarding telework policy for each employee.



Employment Eligibility Verification
Department of Homeland Security
 U.S. Citizenship and Immigration Services

USCIS
Form I-9
 OMB No. 1615-0047
 Expires 10/31/2022

Section 2. Employer or Authorized Representative Review and Verification
(Employers or their authorized representative must complete and sign Section 2 within 3 business days of the employee's first day of employment. You must physically examine one document from List A OR a combination of one document from List B and one document from List C as listed on the "Lists of Acceptable Documents.")

Employee Info from Section 1	Last Name (Family Name)	First Name (Given Name)	M.I.	Citizenship/Immigration Status
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List A Identity and Employment Authorization	OR	List B Identity	AND	List C Employment Authorization
Document Title		Document Title		Document Title
Issuing Authority		Issuing Authority		Issuing Authority
Document Number		Document Number		Document Number
Expiration Date (if any) (mm/dd/yyyy)		Expiration Date (if any) (mm/dd/yyyy)		Expiration Date (if any) (mm/dd/yyyy)
Document Title		Additional Information		QR Code - Sections 2 & 3 Do Not Write In This Space
Issuing Authority				
Document Number				
Expiration Date (if any) (mm/dd/yyyy)				
Document Title				
Issuing Authority				
Document Number				
Expiration Date (if any) (mm/dd/yyyy)				

Critically, the ICE guidance states:

Once normal operations resume, all employees who were onboarded 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.

Expiration of ICE's Pandemic Flexibility

ICE's I-9 pandemic flexibility has been continuously extended since March 2020, and currently expires at the end of August. It is not clear whether ICE will continue to extend this guidance and, if so, when it will eventually expire. Given that ICE previously extended this guidance just prior to expiration, employers must be prepared should ICE determine that further extensions will not occur.

Importantly, ICE's I-9 guidance has been updated to provide more information regarding employers who have or will reopen their doors. Specifically, as of April 1, ICE's I-9 flexibility does not apply to employees who "physically report to work at a company location on any regular, consistent, or predictable basis."

While ICE's guidance does not define "regular, consistent, or predictable," employers' post-pandemic policies will likely play a large role in determining when ICE's flexibility will no longer apply to them.

Employers must be prepared to nimbly shift their I-9 policies in a number of scenarios. This shift in protocol must occur upon the earlier of two triggering events: (1) ICE's I-9 flexibility ends; or (2) employees have returned to the office on a regular, consistent or predictable basis.

Employers' post-pandemic I-9 protocols must allow for (1) review of original documents and annotation of existing I-9s for all employees onboarded pursuant to ICE's I-9 flexible guidelines within three days of the triggering event; and (2) a return to in-person review of original documents on a moving-forward basis.

Remote Workers

Historically, ICE has not allowed for any flexibility of the original-document-review requirement for remote workers. Rather, ICE's guidance has confirmed that:

[The] employer or authorized representative must physically examine, with the employee being physically present, each document presented to determine if it reasonably appears to be genuine and relates to the employee presenting it. Reviewing or examining documents via webcam is not permissible.

An authorized representative may be an employee (e.g., personnel officer), foreman, agent or notary public. Utilizing a third party — i.e., nonemployee — carries risk, in that the company inherits the I-9 in complete form, meaning that any errors contained therein will be attributed to the employer.

ICE's current stance regarding remote workers during COVID-19 remains the same, i.e., that the pandemic-based flexibility only applies if the remote worker's arrangement is due to COVID-19 concerns.

Unless ICE changes its policy with regard to remote workers outside the context of COVID-19, employers will need to return to historical alternatives if remote hires are not able to complete the I-9 at the employer's office and a valid COVID-19-related reason cannot be provided.

Five Steps all Employers Should Take to Plan for Future Office Reopenings

Planning for I-9 annotation and the return to in-person review of original documentation will be different for each employer depending on a number of factors, including but not limited to: (1) the number of worksite locations; (2) the number of employees onboarded since March 2020; (3) the reopening timeframe; and (4) reopening specifics — e.g., staggered, fully onsite, etc.

However, all employers should take the following five steps now to plan for this future task:

1. Determine the employees onboarded during the pandemic for whom original documents were not inspected and continue to maintain a separate list or chart for this population, adding any new hires before reopening.
2. Categorize this employee population by (1) worksite, (2) business unit and (3) office reintegration date.
3. Communicate internally to your human resources team — or whoever is responsible for I-9 compliance — that immediately upon reopening this will be a large, time-consuming and time-sensitive requirement.
4. Create a communication strategy to the affected employee population that includes multiple messages to notify each employee of the requirement and timing leading up to office reopening.
5. Create a plan across work sites and employee populations to set aside a dedicated time and space during the first three days of office reopening to ensure I-9 compliance is met. Employers considering staggered return plans should require I-9 teams to work across multiple weeks once the office reopens.

Conclusion

While ICE's pandemic-based flexibility has made I-9 compliance easier over the course of the pandemic, changes in the upcoming months are likely, either due to the return-to-office plans of employers or the termination of ICE's flexible guidelines.

In either event, the burden of updating I-9s completed during the pandemic, as well as installing protocols for future in-person review of original documents during I-9 completion, must be considered ahead of time. The steps listed above are a start to ensuring corporate I-9 compliance in this changing landscape.

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[1] <https://www.uscis.gov/i-9-central/complete-and-correct-form-i-9>.