

Coppersmith Briefs

Temporary Form I-9 Flexibility in the Wake of COVID-19

Jill Chasson, Coppersmith Brockelman PLC
April 15, 2020

Although many sectors of the economy are suffering substantial hardship right now, some businesses and industries are faring well, and even hiring new employees. Questions have arisen, though, about how to properly complete an I-9 form – which requires physical inspection of the identity and employment authorization documents presented by a new hire – when most or all employees of a company are working from home and company personnel might not interact in-person with a new employee for weeks or even months.

To address these concerns, Immigrations and Customs Enforcement (ICE) recently announced temporary flexibility related to certain Form I-9 requirements, and U.S. Customs and Immigration Services (USCIS) prepared a Q&A document explaining the temporary policies. The temporary guidelines are in effect through May 30, 2020 or until three business days after the National Emergency related to COVID-19 ends, whichever comes first. As with all things coronavirus-related, however, the situation remains fluid and the timing could change: ICE states in its announcement that it will “continue to monitor the ongoing National Emergency and provide updated guidance as needed. Employers are required to monitor the DHS and ICE websites for additional updates regarding when the extensions will be terminated, and normal operations will resume.”

You can read the USCIS Q&A document, which includes a link to the ICE announcement, [here](#). Here’s a summary:

- **What hasn’t changed:** The employee must complete Section 1 no later than the first day of employment, and the employer must complete Section 2 within three business days of the employee’s first day of employment.
- **Virtual inspection:** To complete Section 2, employers with workplaces that are operating remotely due to COVID-19 will not be required to review a new employee’s identity and employment authorization documents in the employee’s presence until normal operations resume. In the interim, employers must conduct a virtual inspection of the new hire’s Section 2 documents (such as by videoconference, email, or fax) and obtain, inspect and retain copies of the documents within the usual three business days.

- **Physical inspection:** Within three business days after normal operations resume, all employees who were hired using remote verification must submit to in-person verification and present the original documents that were inspected remotely.
- **Section 2 “Additional Information”:** There are some inconsistencies between the ICE news release and the USCIS Q&A. The USCIS guidance states that employers should enter “COVID-19” in the “Additional Information” field at the time Section 2 is initially completed, whereas the ICE announcement advises that this notation should be added when the documents are physically inspected, plus the phrase “documents physically examined” and the date of inspection. Additionally, USCIS advises that the person who conducts the in-person physical inspection “should sign Section 2,” but this is not mentioned in the ICE announcement. A logical, good faith way to reconcile this guidance is to have the person who conducts the virtual inspection sign and date Section 2 and write “COVID-19” in the Additional Information field at that time, and then have the person who conducts the later physical inspection write “documents physically examined” and the date of inspection and their signature in the Additional Information field.
- **Employees still on site:** The ICE announcement states that if employees are still physically present at a work location, the employer may not avail itself of the remote inspection option, and that it is not making exceptions at this time. However, the agency does acknowledge that where new hires or existing employees “are subject to COVID-19 lockdown or quarantine protocols,” it will evaluate situations on a case-by-case basis. Although ICE has not defined such protocols, this language appears to allow for the possibility that shelter-in-place orders, or even the employer’s own safety protocols, may justify conducting the initial inspection remotely.
- **Rehire or reverification (Section 3):** The same process of virtual verification followed by later physical inspection also is available if an employer needs to complete Section 3 for a rehired employee or to reverify an expired employment authorization document. In those situations, ICE and USCIS instruct that “COVID-19 EXT” should be written in the margin of Section 3 or in the Additional Information field. Consistent with its guidance regarding Section 2, the ICE announcement also advises that “documents physically examined” and the date of examination should be added once the documents are physically inspected.
- **Authorized representatives.** ICE reminded employers in its notice that they may designate any person to act as an authorized representative to complete Section 2 or Section 3 on their behalf. This may be a viable alternative for conducting remote hiring during the COVID-19 pandemic. Employers electing this option should choose a representative carefully, though, because the employer remains liable for any violations committed by its representative in connection with completion of the form or the verification process.

The logo for Coppersmith Brockelman Lawyers is centered at the top of the page. It features the name "COPPERSMITH" above "BROCKELMAN" in a large, white, sans-serif font. A thin horizontal line separates the two names. Below "BROCKELMAN", the word "LAWYERS" is written in a smaller, white, sans-serif font. The background of the logo is a dark blue image of a city skyline.

COPPERSMITH
BROCKELMAN
LAWYERS

- **E-Verify.** For employers using E-Verify, ICE advises that after conducting the remote inspection, employers should still create an E-Verify case for the new hire within three business days from the date of hire. Employers must use the hire date from the employee’s Form I-9 when creating the E-Verify case. If case creation is delayed due to COVID-19 precautions, the employer should select “Other” from the drop-down list and enter “COVID-19” as the specific reason.

Finally, employers also should take this opportunity to make sure they are using the current edition of the I-9 form. A new version was released at the end of January (dated 10/21/2019, with an expiration date of 10/31/2022), and usage becomes mandatory on May 1, 2020. Forms and instructions may be downloaded at <https://www.uscis.gov/i-9>.

Jill Chasson focuses on helping businesses of all sizes in a variety of industries with their employment law needs. She provides practical advice to employers regarding compliance with the many federal and state laws that govern the workplace and regularly provides training for supervisors and human resource professionals. When disputes arise, Jill represents employers before administrative agencies, in arbitration proceedings, and in litigation in federal and state courts regarding a variety of employment-related claims.

*By the way, you know the Coppersmith Briefs are not legal advice, right? Right!
Check with your attorney for legal advice applicable to your situation.*