

# Mobility: Immigration alert

July 2023

## United States

### July 2023 updates for Form I-9, Employment Eligibility Verification

#### Executive summary

The U.S. Department of Homeland Security (DHS) and U.S. Immigration and Customs Enforcement (ICE) have announced an optional procedure as an alternative to the in-person physical examination of documentation required to complete the Form I-9, Employment Eligibility Verification (Form I-9). The optional procedure may be used by qualifying U.S. employers beginning 1 August 2023.

In connection with this procedure, U.S. Citizenship and Immigration Service (USCIS) has introduced a new version of Form I-9 with a version date of "(Rev. 08/01/23)" that will also come into effect 1 August 2023. U.S. employers may continue to use the previous version of Form I-9 (Rev. 10/21/19) until 31 October 2023.

#### Background and analysis

Pursuant to Section 274A of the *Immigration and Nationality Act* (INA), Form I-9 regulations require U.S. employers to physically inspect an employee's identity and work authorization documents in-person, within three (3) business days after the first day of employment, to ensure that the documentation presented reasonably appears to be genuine and to relate to the individual who presents it. Throughout the COVID-19 pandemic, DHS offered Form I-9 flexibilities that allowed for employers to examine employees' documents remotely (e.g., over video call, fax, or email), as opposed to in-person, and document "COVID-19" as the reason for physical examination delay on Form I-9. DHS later announced that COVID-19 related Form I-9

flexibilities would end 31 July 2023 and that employers would have until 30 August 2023 to reach compliance with Form I-9 requirements.

On 25 July 2023, DHS published final rule "*Optional Alternatives to the Physical Document Examination Associated With Employment Eligibility Verification (Form I-9)*" in response to the practical benefits of an optional alternative to these physical documentation examination procedures. Under the final rule, certain employers may examine identity and work authorization documents remotely.

DHS has limited participation in the optional alternatives to the physical document examination to employers participating in E-Verify, who are in good standing. Qualified employers are required to complete on-line training through E-Verify in order to participate.

Under the rule, document retention requirements have been expanded to include clear and legible copies of all documents presented for the Form I-9. The optional alternative to physical documentation examination requires employers to conduct a live video interaction with the employee after the employee has transmitted a copy of their document(s) to the employer to inspect the employee's document(s), to ensure that the documentation presented reasonably appears to be genuine and to relate to the individual who presents it.



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### What the alternative procedure entails

Within three business days of an employee's first day of employment, the employee must transmit a copy of Form I-9 documents to the employer to examine the copies (front and back if the document is two-sided). The employer must conduct a live video interaction during which the employee must present the same document(s) that were transmitted to the employer to ensure that the documentation transmitted reasonably appears to be genuine and related to the employee. The employer must indicate on the new version of the Form I-9, by checking the relevant box, that the alternative procedure was used to examine documentation. The employer must retain a clear and legible copy of the documentation (front and back if the document is two-sided) to be made available in the event of a Form I-9 audit by a federal government agency.

### What this means

The alternative procedure will only be available to qualified employers that are in good standing in the E-Verify program as well as employers who have enrolled in E-Verify with respect to all hiring sites in the United States. Qualified employers must use E-Verify to create cases for all newly hired employees, regardless of whether the alternative procedure is used, at each hiring site that is enrolled in E-Verify. A qualified employer may continue to examine documents physically, instead of using the optional procedure, if they so choose.

However, if a qualified employer chooses to offer the alternative procedure for some employees at the E-Verify hiring site they must offer it to all employees at that site. A qualified employer may elect to use the alternative procedure for all remote hires only while continuing to apply the physical examination procedures to all employees who work on site or in a hybrid capacity, provided that the employer does not adopt such approach for discriminatory purposes.

Qualified employers may start using the alternative procedure on 1 August 2023 but may not apply the alternative procedure to employees hired before that date. Employers not currently registered E-Verify may start using the alternative procedure after becoming a participant in good standing in E-Verify, by enrolling and completing the required on-line training.

We will continue to monitor and review future developments. For additional information, or if you wish to discuss this further, please contact your EY Law LLP professional.

George Reis, Managing Partner  
+1 416 943 2535  
george.reis@ca.ey.com

Batia Stein, Partner  
+1 416 943 3593  
batia.j.stein@ca.ey.com

Marwah Serag, Partner  
+1 416 943 2944  
marwah.serag@ca.ey.com

Jonathan Leebosh, Partner  
+1 604 899 3560  
jonathan.e.leebosh@ca.ey.com

Stephanie Lipstein, Partner  
+1 514 879 2725  
stephanie.lipstein@ca.ey.com

Author: Jonathan Walker  
+1 403 956 5782  
jonathan.walker@ca.ey.com

Alex Israel, Partner  
+1 416 943 2698  
alex.d.israel@ca.ey.com

Christopher Gordon, Partner  
+1 416 943 2544  
christopher.d.gordon@ca.ey.com

Roxanne Israel, Partner  
+1 403 206 5086  
roxanne.n.israel@ca.ey.com

Nadia Allibhai, Partner  
+1 613 598 4866  
nadia.allibhai@ca.ey.com

Melanie Bradshaw, Partner  
+1 416 876 6671  
melanie.bradshaw@ca.ey.com

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EYG no. 007334-23GbI

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