

# I-9 COMPLIANCE HEADACHES TO CONTINUE FOR FORESEEABLE FUTURE

BY JOHN M. POLSON, ESQ. AND SHANON R. STEVENSON, ESQ.

**A**s PEOs look toward the horizon to forecast the immediate future, a gathering storm in the form of I-9 compliance headaches may be cause for concern. Several critical aspects of the employment eligibility documentation process are coming into focus—not just for the client companies that PEOs serve, but for PEOs' own workforces as well. There are several steps PEOs can take now to be in the best position to navigate these challenges.

## WORKPLACE ENFORCEMENT ACTIVITY CONTINUES

While the Biden administration has promised to tackle immigration reform,

there is no indication that all the bustle surrounding those impending efforts will cause worksite enforcement activity in the form of I-9 compliance audits to ease or slow down. In fact, all signs suggest that the focus on worksite enforcement may intensify. Further complicating matters, the significant backlog of I-9s many employers are facing after they deferred in-person document-examining requirements for much of the past 18 months or so will need to be addressed. The deferral period expired on August 31, 2021.

These developments impact every PEO's internal employees. PEOs will also face varying levels of complexity depending on their approach to worksite employee

I-9 compliance. Regardless, client companies are bound to have questions and concerns.

## SAY GOODBYE TO GOVERNMENT FLEXIBILITY

Many employers took advantage of the deferred physical presence requirements put in place for employee I-9 forms (formally titled the "Employment Eligibility Verification" form) at the outset of the pandemic. Under this temporary policy, employers were permitted to use a virtual inspection process for Section 2-required documents when newly hired workers (and employees with expiring temporary work authorizations) were unable to present their documents in person due to quarantine, stay-at-home orders, and other COVID-related business closure reasons. The timing of filling out Form I-9, however, was not altered. Newly hired employees are still required to fill out Section 1 of Form I-9 no later than their first day of employment, and employers are still required to fill out Section 2 of Form I-9 no later than three business days after the employee's first day of employment.

The Department of Homeland Security (DHS) and Immigration and Customs Enforcement (ICE) created this flexibility in March 2020 and extended its lifespan several times since then, but this flexibility was set to expire on August 31, 2021. Importantly, this temporary policy was a deferral—not a suspension or cancellation—of the required in-person I-9 document review procedures. Once the temporary policy expires or an employer's operation returns to "normal," whichever occurs first, employers who took advantage of the temporary policy must conduct the required in-person review of Section 2 documents they previously completed virtually.

## BEST PRACTICES FOR A POST-PANDEMIC 'NEW NORMAL'

Given the three-day period the DHS has allocated for this review, employers need

to be ready to address this requirement—particularly employers with a backlog of forms I-9 that were completed under this temporary policy. The federal agency has released examples of how the I-9s must be annotated once the original documents are physically reviewed, which can be found at [www.uscis.gov/i-9-central/form-i-9-examples-related-to-temporary-covid-19-policies](http://www.uscis.gov/i-9-central/form-i-9-examples-related-to-temporary-covid-19-policies). The DHS has also indicated that employers are free to conduct the in-person review of Section 2-required documents as soon as they are able to do so. There was no indication of how much time employers would have once the flexibility period was closed, so the best practice is to assume time is of the essence when it comes to prioritizing this task.

Importantly, neither the COVID pandemic nor DHS's temporary requirement flexibility changed basic Form I-9 best practices. Regardless of whether an

employer continues with in-person work arrangements, a distributed workforce, or a hybrid arrangement, compliance with basic Form I-9 requirements needs to be part of the planning. Notices of Inspection and Form I-9 compliance audits are part of the new normal for the employer community.

As such, employers should make sure they understand the basic I-9 process. Whenever possible, forms I-9 should be completed by way of in-person Section 2 document review by an employee who is trained in I-9 protocols or a third-party authorized representative. The person completing Section 2 for the employer should meet with the employee in person, either at the workplace or a convenient location, examine the documents provided with the employee present, and fill out the employer's portion of the Form I-9. An employer may designate an

authorized representative to fill out forms I-9 on behalf of the company, including family or household members (during COVID), neighbors, managers, personnel officers, foremen, agents, staff at your state unemployment or workforce agency, or a notary public (except in California, where notaries are not permitted to complete I-9s). DHS does not require the authorized representative to have specific agreements or other documentation for Form I-9 purposes. While this flexibility sounds appealing, employers should keep in mind that if an authorized representative fills out Section 2 of Form I-9 on behalf of the employer, the employer is still liable for any violations in connection with the form or the verification process.

#### WHAT CAN YOU EXPECT IN THE FUTURE?

The Biden administration announced an ambitious immigration reform agenda

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## DID YOU KNOW?

The U.S. Citizenship and Immigration Services has a website with everything you ever wanted to know about Form I-9: [www.uscis.gov/i-9-central](http://www.uscis.gov/i-9-central). Now you know!



upon taking office, including sending to Congress the U.S. Citizenship Act of 2021. While the primary focus of this agenda is on humanitarian issues such as family separation and asylum procedures, employment-related aspects will remain a critical focus of this—and likely any other—immigration reform measure. The U.S. Citizenship Act currently sits in committee, and its future—like that of the immigration reform efforts that have gone before it—is far from certain.

Employers will want to track the progress of these measures to gauge their potential impact on their organizations, which will most likely pick up steam once infrastructure has been addressed.

The pandemic has changed much about the workplace, including how and where employees work. But in all this change, an upward trend of government worksite enforcement activity will continue into the foreseeable future. Employers should be working to adapt

their Form I-9 procedures to the post-pandemic world and prepare their forms I-9 for the Notice of Inspection that may be coming. ■

▼ This article is designed to give general and timely information about the subjects covered. It is not intended as legal advice or assistance with individual problems. Readers should consult competent counsel of their own choosing about how the matters relate to their own affairs.



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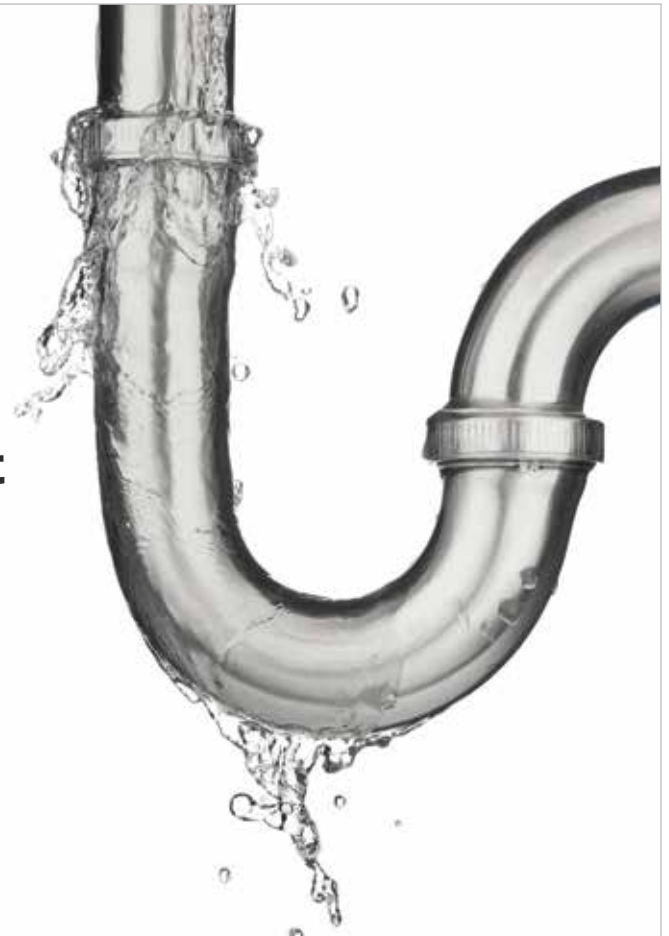
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