

## Form I-9 Flexibility During the COVID-19 Pandemic and for Remote Workers

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The U.S. Department of Homeland Security (“DHS”) recently announced that it is extending the flexibility rules in place for Form I-9 completion until September 19, 2020. As part of the usual Form I-9 process, employers must physically examine, in the employee’s physical presence, the identity and work authorization documents presented within three (3) business days of the first day of employment. On March 20, 2020, DHS announced that it would temporarily permit employers that are operating remotely due to COVID-19 to examine the documents remotely, rather than in person, such as by video link, fax, or email. Note, however, that this I-9 flexibility applies only to employers and workplaces that are 100% remote. According to the DHS announcement, “[i]f there are employees physically present at a work location, *no exceptions* are being implemented at this time for in-person verification.” However, in the event employees are subject to COVID-19 quarantine or lockdown protocols, DHS will evaluate the flexibility rule on a case-by-case basis.

Employers taking advantage of Form I-9 flexibility rule must retain copies of the documents presented, complete physical inspection of the documents within three (3) business days after normal operations resume (i.e., once someone is back in the office to accept the documents), and provide written documentation of their remote onboarding and telework policy for each employee. Further, the Additional Information box in Section 2 of the Form I-9 must be annotated with COVID-19 and the date of remote inspection and subsequent date of physical inspection, as follows:

### ATTORNEYS

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### PRACTICE AREAS

Employment and Labor  
Immigration

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In addition to the above, employers should remember that whether the employer has remote workers due to the COVID-19 pandemic or otherwise, the employer has the option to designate a third party to act on its behalf in physically examining the documents and completing Section 2 of the Form I-9. This option provides employers with the necessary flexibility to onboard remote workers who may reside hundreds of miles away from the nearest office location (or who, during the pandemic, are local, but simply taking physical proximity precautions). Companies that offer or require its employees to work remotely should implement the following best practices:

- Have a policy that sets forth the company's preference in choice for the authorized representative. The authorized representative may be anyone, including a personnel officer, foreman, agent, HR representative at a nearby company, state workforce agency staff, notary public, or even an employee's own family member. With respect to a notary public, the notary public would be acting as an authorized representative of the employer, not as a notary, and thus a notary seal should not be placed on the Form I-9. DHS does not require the authorized representative to have specific agreements or other documentation for Form I-9 purposes, and the employer remains liable for any violations committed by the designated person acting as its authorized representative.
- Check for state and local law requirements that may bear on the Form I-9 process. For example, neither Nebraska nor Iowa has any state law restricting who can be designated as an authorized representative of the company, but California law specifies that a notary public may be designated as an authorized representative only if the notary public is also an immigration consultant registered with the California Secretary of State.
- Provide standardized instructions for both the employee and authorized representative to complete the Form I-9.
- Review remotely completed Forms I-9 as soon as possible in order to correct any deficiencies.

If you have questions regarding the Form I-9 flexibility rules, please contact a member of Koley Jessen's Employment Group.