

Virtual Inspection of Form I-9 Original Documentation Permanent Option for Qualified Retailers

By Michael H. Neifach, Otieno B. Ombok, Amy L. Peck &

August 7, 2023

Meet the Authors



Michael H. Neifach

Office Managing Principal
(703) 483-8300
Michael.Neifach@jacksonlewis.com



Otieno B. Ombok

Principal
914-872-6895
Otieno.Ombok@jacksonlewis.com



Proper completion of the Employment Eligibility Verification Form I-9 is one of the most important responsibilities of employers, including retailers, at the beginning of the hiring process. Saying it learned from the COVID-19 pandemic, the Department of Homeland Security (DHS) has published a [final rule](#) that provides eligible retailers and other employers filling out the I-9 an optional alternative to the in-person physical document examination method that employers have followed as part of the Form I-9 process. DHS also announce a new version of Form I-9.

Like all employers, retailers must use I-9s to verify the identity and employment authorization of anyone hired to work in the United States. Having multiple stores in many locations and having the task of ensuring I-9 compliance assigned to an individual who is not close in proximity to the applicant can make compliance challenging.

The DHS explains, “This rule responds to lessons learned during the COVID-19 pandemic, which demonstrated the substantial practical benefits of an optional alternative to the physical documentation examination procedures required by the employment eligibility verification regulations.” Only employers who are enrolled in E-Verify and participating in good standing will be eligible to use this optional alternative I-9 process.

In addition, the optional alternative verification process requires the following to occur within three business days of the first day of employment:

- The employee must transmit a front and back (if the document is two-sided) copy of the identity and employment authorization documentation to the employer;
- The employer must examine the copies of the Form I-9 documentation or an acceptable receipt to ensure that the documentation presented reasonably appears to be genuine;
- The employer then must conduct a live video interaction with the individual, who must present the same documentation to ensure that the documentation reasonably appears to be genuine and related to the individual;
- The employer will then indicate on Form I-9, by completing the corresponding box on the updated form, that an alternative procedure was used to examine documentation to complete Section 2 or for reverification, as applicable; and
- The employer must retain, consistent with applicable regulations, a clear and legible copy of the documentation (front and back if two-sided).

Amy L. Peck

Principal

402-391-1991

Amy.Peck@jacksonlewis.com

Related Services

Immigration

Retail

In the event of a Form I-9 audit or investigation by a relevant federal government official, the employer must make available the clear and legible copies of the identity and employment authorization documentation presented by the employee for document examination in connection with the employment eligibility verification process.

The new rule also provides relief for certain employers who completed I-9 forms virtually during the COVID-19 pandemic. Employers who participated in E-Verify and created cases for employees whose documents were examined virtually during the COVID-19 flexibilities period (March 20, 2020, to July 31, 2023) may choose to use the new alternative procedure starting on August 1, 2023, to satisfy the physical document examination requirement by August 30, 2023. These employers should not create a new case in E-Verify. This accommodation is available only to employers who participated in E-Verify during the COVID-19 pandemic. Employers not enrolled in E-Verify during the COVID-19 flexibilities period must complete an in-person physical examination by August 30, 2023.

A qualified employer does not need to use the alternative procedure, but if the employer offers the alternative procedure to new employees at an E-Verify hiring site, it must do so consistently for all employees at that site without discrimination. A qualified employer may offer the alternative procedure for remote hires only but require physical examination procedures for all on-site or hybrid employees, so long as the employer does not adopt such a practice for discriminatory purposes or to treat employees differently based on a protected characteristic (citizenship, immigration status, or national origin). Under no circumstances can employers unlawfully discriminate by deciding who is eligible for the alternative procedure based on a protected characteristic.

Qualified employers must retain clear and legible copies of all documentation presented by the employee seeking to establish identity and employment eligibility for the Form I-9 through the alternate procedures. However, E-Verify employers who do not apply the virtual I-9 procedures are only required to retain a photocopy of the required documents with an employee's Form I-9.

New Form I-9, Form Instructions

In addition, DHS [announced](#) a new version of Form I-9, to be consistent with its final rule. The new form introduces certain changes, including a checkbox to indicate that an employee's Form I-9 documentation was examined using a DHS-authorized alternative procedure.

The new version of Form I-9 "(Rev. 08/01/23)" is available starting August 1, 2023. Employers may use the current version of Form I-9 (Rev. 10/21/19) until October 31, 2023, after which the older version of the form will be obsolete and no longer valid. Beginning November 1, 2023, employers who fail to use the updated form may be subject to all applicable penalties.

The new Form I-9 will contain two sections and two supplements:

- Section 1 collects identifying information about the new hire and requires the employee to attest whether they are a U.S. citizen, noncitizen national, lawful permanent resident, or noncitizen authorized to work in the United States.
- Section 2 collects identifying information about the employer and information

regarding the employee's identity and employment authorization.

- Supplement A, Preparer and/or Translator Certification for Section 1 (formerly at the bottom of Section 1), is completed when employees have preparers and/or translators assist them in completing Section 1 of the form.
- Supplement B, Reverification and Rehire (formerly Section 3), is primarily used to verify the continued employment authorization of the employee and for other changes.

Changes to Actual Form I-9

U.S. Citizenship and Immigration Services (USCIS) will implement certain changes to the newly updated Form I-9 and form instructions, including the following:

- Reduces Sections 1 and 2 to a single-sided sheet. While the new form does not remove any previous fields, it merges multiple fields into fewer fields when possible.
- Moves the Section 1 Preparer/Translator Certification area to a separate, standalone supplement (Supplement A).
- Moves the Section 3 Reverification and Rehire area to a separate, standalone supplement (Supplement B) for rehires or reverifications.
- Removes the use of "alien authorized to work" in Section 1 and replaces it with "noncitizen authorized to work"; USCIS has also clarified the difference between "noncitizen national" and "noncitizen authorized to work."
- Ensures the form can be filled out on tablets and mobile devices.
- Removes certain features to ensure the form can be downloaded easily. This also removes the requirement to enter "N/A" in certain fields.
- Updates the notice at the top of the form that explains how to avoid discrimination in the Form I-9 process.
- Revises the "Lists of Acceptable Documents" page to include some acceptable receipts, as well as guidance and links to information on automatic extensions of employment authorization documentation.
- Adds a box that eligible employers must check if the employee's Form I-9 documentation was examined under a DHS-authorized alternative procedure rather than by physical examination.

Changes to Form I-9 Instructions

- Reduces the length of instructions from 15 pages to 8 pages.
- Adds definitions of key actors in the Form I-9 process.

- Streamlines the steps each actor must take to complete their section of the form.
- Adds instructions for the use of the new checkbox for employers who choose to examine Form I-9 documentation under an alternative procedure.
- Removes the abbreviations charts and relocates them to the M-274, Handbook for Employers: Guidance for Completing Form I-9.

DHS further clarifies that employers do not need to complete the new Form I-9 (Rev. 08/01/23) for current employees with a properly completed Form I-9 on file unless reverification applies after October 31, 2023.

Starting on August 1, 2023, employers may download the new Form I-9 (Rev. 08/01/23) from the USCIS website.

If you have any questions about Form I-9 or E-Verify processes or compliance, please reach out to your Jackson Lewis attorney.

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