

updated April 29, 2022

End to Form I-9 COVID Flexibility – Employer Action Required

In the early days of the COVID-19 pandemic, the Department of Homeland Security (DHS) announced temporary flexibilities for employers in connection with the requirements to inspect documentation needed to complete Form I-9 (Employment Eligibility Verification). This included both the flexibility to accept certain expired documents and the flexibility to inspect documents remotely. Both these temporary policies may be ending shortly, and employers who hired new employees during the pandemic may need to take action.

Expired List B Documents No Longer Acceptable

DHS recently announced that it was ending the “COVID-19 Temporary Policy for List B Identity Documents”¹ effective May 1, 2022.² Because of the challenges that many individuals faced in renewing drivers licenses and other forms of identification during the pandemic, the temporary policy allowed employers to accept expired List B (Identity) documents.

Effective May 1, 2022, employers will need to ensure that all new List B documents are unexpired.

In addition, employers must take action with respect to all current employees who previously presented an expired Class B document under the temporary policy. **By July 31, 2022, employers must identify all current employees who previously provided expired List B documents and have all such employees provide unexpired Class B documents for inspection.** When the unexpired document is reviewed, the employer should update the “Additional Information” field of the Form I-9 and initial and date the changes.

These requirements only apply to individuals who remain employed by the employer; no additional action is required for individuals who presented expired List B documents but are no longer employed.

Remote Inspection of Documents

In March 2020, DHS announced temporary guidance that allowed for the physical presence requirements associated with the completion of Form I-9 to be deferred. The guidance allowed “employers with employees taking physical proximity precautions due to COVID-19” to inspect required documents remotely (e.g., by videoconference or e-mail), rather than inspecting those documents in the

¹ <https://www.uscis.gov/i-9-central/form-i-9-related-news/covid-19-temporary-policy-for-list-b-identity-documents>

² <https://www.uscis.gov/i-9-central/covid-19-form-i-9-related-news/reminder-dhs-to-end-covid-19-temporary-policy-for-expired-list-b-identity-documents>

“physical presence” of the employee.³ Such flexibility would extend until the employer resumed normal operations, at which point, the employer would have three business days to re-examine the required documents in-person.

Additional guidance was issued in April 2021 that clarified that employers were only required to physically inspect the Form I-9 documentation of employees who “physically report to work at a company location on any regular, consistent, or predictable basis.”⁴ Employees working remotely remain exempted from in-person inspection of their Form I-9 documentation until “they undertake non-remote employment on a regular, consistent, or predictable basis, or the extension of the flexibilities related to such requirements is terminated, whichever is earlier.”⁵

The policy is currently set to expire **October 31, 2022**⁶, but DHS has regularly extended the policy during the course of the pandemic and it could be extended again. Employers should monitor for updates on further extensions and should prepare to resume in-person inspection of Form I-9 documents when the policy expires.

In addition, employers who previously resumed in-person work should ensure that they have examined physical copies of any I-9 documents which were originally examined remotely during the pandemic and have updated their records accordingly.

This alert is meant to provide general information only, not legal advice. If you have any questions about this alert please contact Veronica Aksu at vaksu@lawyersalliance.org or visit our website at www.lawyersalliance.org for further information. To become a client, visit www.lawyersalliance.org/becoming-a-client.

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³ <https://www.ice.gov/news/releases/dhs-announces-flexibility-requirements-related-form-i-9-compliance>

⁴ *Id.*

⁵ *Id.*

⁶ <https://www.uscis.gov/i-9-central/covid-19-form-i-9-related-news/dhs-extends-form-i-9-requirement-flexibility-effective-may-1-2022>; <https://www.ice.gov/news/releases/ice-announces-extension-i-9-compliance-flexibility-3>.