Thursday, June 24, 2021

The U.S. Department of Homeland Security (DHS) recently issued updated guidance extending the Form I-9 flexibility rule that temporarily relaxes the document inspection requirements for employers operating remotely.

Under this rule, which was first announced on March 20, 2020, if your employees are working remotely as a result of COVID-19, you may initially inspect those employees’ identity and work authorization documents remotely (e.g., by video link, fax, or email) to verify or, if necessary, re-verify, their work eligibility. However, as we explained in a previous post, the rule also makes clear that, once those remote employees commence or resume non-remote work, you must physically inspect their original documents, in person, within three business days. At that time, you must also make a note in the Additional Information field of the employee’s Form I-9, reflecting the date you did this follow-up inspection and who conducted it.

This Form I-9 flexibility rule was initially set to expire on May 19, 2020, but, as the COVID-19 pandemic raged on, DHS extended the rule several times. Initially, the
rule applied only to employers and workplaces that were operating entirely remotely, but the flexibilities were later extended to cover all employees working exclusively on a remote basis because of COVID-19. Under its most recent guidance, announced on May 26, 2021, DHS indicated that the flexibility rule would be extended through August 31, 2021.

Over the past 15 months, many employers have used the Form I-9 flexibility rule to onboard employees who were initially hired to work on a remote basis or to re-verify incumbent employees working remotely. However, as the pandemic has subsided, many of those employees are now starting or resuming work at their employers’ regular offices and workplaces.

Employers should remember that, when these remote employees begin working non-remotely, the employer needs to follow up – within three days – to conduct the in-person document inspection. But what if an employee does not fully return to the regular workplace all at once, but instead “phases in” to a more regular routine? DHS has indicated that remote employees covered by the rule are temporarily exempt from the normal Form I-9 in-person inspection requirements “until they undertake non-remote work on a regular, consistent, or predictable basis, or the extension of the flexibilities related to such requirements is terminated, whichever is earlier.” While this does not provide a bright-line test, it does suggest that an employer’s obligation to do the physical inspection does not commence simply because the employee works non-remotely a single time or on isolated occasions.

That said, employers can certainly get ahead of the curve and do the in-person document inspections before they are legally required. In fact, DHS has affirmatively stated that the flexibilities “do not preclude employers from commencing, in their discretion, the in-person verification of identity and work authorization documentation” for employees initially verified remotely under the rule. In addition, unless the flexibility rule is extended again, it will expire on August 31, 2021. Employers will then have three days after that to complete the physical document inspections for every employee who was initially verified remotely, regardless of whether that employee is still working exclusively on a remote basis.

For this reason, employers who have taken advantage of the flexibility rule to verify their remote employees are encouraged to keep these obligations in mind and to develop a plan now to make sure that those employees’ documents are physically inspected on a timely basis and that their Form I-9s are update as required.

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