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Client Alert: Department of Homeland Security Announces Extension of the Form I-9 Flexibilities Until October 31, 2022

BY RAYMOND M. RIPPLE • APRIL 29, 2022

On April 25, 2022, the Department of Homeland Security (DHS) announced an extension to I-9 compliance flexibility previously announced in March 2020 and updated in March 2021. DHS has agreed to extend the flexibility until October 31, 2022.

Due to concerns related to COVID-19, in March 2020, DHS exercised its discretion and deferred the physical presence requirements associated with Employment Eligibility Verification (Form I-9) under the Immigration and Nationality Act (INA). As a result, initially employers that implemented social distancing requirements in the workplace were permitted to complete the review of identity and employment authorization documents remotely as opposed to in person. Effective April 1, 2021, DHS updated its guidance to provide that the requirement that employers inspect employees' Form I-9 identity and employment eligibility documents in-person applies only to those employees who physically report to work at a company location on any regular, consistent or predictable basis. If employees hired on or after April 1, 2021 work exclusively in a remote setting due to COVID-19 related precautions, they are temporarily exempt from the physical inspection requirements until they undertake non-remote employment on a regular, consistent or predictable basis, or the extension flexibilities are terminated by DHS, whichever is earlier.

Employers need to monitor this new, extended deadline closely. Whenever the flexibility granted by DHS ends, whether that is October 31, 2022 or some other date extended by DHS, employees will be required to report to their employers within three business days for in-person verification of identity and employment eligibility documentation for the Form I-9. Given the number of employees that switched employers since the implementation of this temporary program, this requirement could present logistical issues for employers and their human resource departments. Employers that have begun transitioning employees from remote work back to a hybrid or in-person office setting can take steps now to reduce any future logistical issues. Employers can designate a representative to maintain a list of employees subject to this guidance and develop a plan to follow-up with them and obtain updated documentation. Additionally, even while some employees continue to work remotely, employers can develop procedures to inspect the documentation in-person.

Employers with questions should consult their Bowditch Employment & Labor attorneys.

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