

# DHS & permanent remote I-9 verification — what we know so far

As an HR professional, Form I-9 may have been your first introduction to the world of immigration and work authorizations. There's a reason for that. The nation's immigration laws rely on employers to enforce those laws by enlisting their help in controlling our borders. Before a newly hired employee begins work, employers must inspect their official documents to verify the worker is legally allowed to work.

The I-9 guides that inspection. It lists permissible documents. Only individuals legally present in the United States and authorized to work can begin work *after* they have established the right to work. Those without valid documents on the I-9 lists can't begin working. Thus, even if an individual overstays a visa or crosses a U.S. border without authorization to do so, he or she can't legally work if employers are doing their I-9 due diligence.

But using the I-9 form can be tricky. For example, employers have to personally inspect documents and assess whether they appear to be genuine and not counterfeit. The Department of Homeland Security (DHS), the agency mainly responsible for enforcing U.S. immigration laws, is working to make your job easier. Currently under consideration is continuing to allow the remote inspection of documents in limited circumstances. Plus, DHS is working to make permanent a program that provides work permission to a select group of childhood arrivals who remained here into adulthood. Currently, employers have to monitor their precarious status and check for the renewal of their work eligibility using the I-9 instructions.

To make your job easier, we have prepared a brief guide to immigration and the I-9 process.

## Laws governing immigration

The Immigration Reform and Control Act of 1986 (IRCA) requires employers to have each new employee complete an I-9 form documenting the employee's status to legally work in the United States – or to be “work authorized.” The U.S. Immigration and Nationality Act (INA) sets immigration rules, including what type of work permission various visa programs have. The law clarifies who is legally authorized to remain in the country and what, if any, work permissions apply to each type of visa.

### Here are some of the main immigration categories:

- **U.S. Citizen.** All United States citizens are work-authorized subject to restrictions under child labor laws and the like. Individuals become U.S. citizens through birth in the United States or its territories, through their parental citizenship status, or through naturalization. To prove citizenship, individuals can provide a copy of their birth certificate within the United States or its territories or a U.S. passport. Naturalized citizens can provide a copy of their naturalization certificates.
- **Green card holder.** Individual non-citizens who have been granted permanent immigration status receive a Green Card. It comes with the same right to work a citizen has, with some limited national security exceptions.
- **Permanent immigrant workers.** Individuals who want to immigrate to the U.S. and remain indefinitely apply for one of a number of employment-based visas. These include visas set aside for persons of

extraordinary ability (the so-called genius visa) as well as individuals holding advanced degrees, other professionals, and business investors, among others.

- **Temporary non-immigrant workers.** These individuals are not immigrants and once their visas expire, they must leave.
- **Deferred Action for Childhood Arrivals (DACA).** These individuals arrived in the U.S. as children but without valid permission to enter or stay. Many are work authorized through an Obama-era executive order. Their status is currently in flux.
- **Asylum seekers and refugees.** International law and INA govern the immigration and work status of asylum seekers and refugees. Both immigration categories provide for work authorization.

## Be wary using work authorization type as a hiring consideration

INA also provides discrimination protection for all those legally authorized to work in the United States. The law specifically makes it illegal for employers to discriminate based on citizenship status with limited exceptions for jobs requiring security clearances and the like.

The DOJ, which enforces the INA non-discrimination provisions, says employers can't use an applicant's work authorization document's future expiration date as a reason to reject that applicant. Nor can employers decide who to hire based on the type of work authorization they hold as long as it qualifies the applicant for the job he's being hired to do. Employers often worry how long the applicant is likely to stay and may therefore prefer citizens on the theory that their work authorization will never expire and doesn't require the employer to monitor documents to ensure they're renewed on time.

The Department of Justice (DOJ) doesn't look kindly on discrimination based on type of immigration status or the future expiration of work authorization documents. It is going after employers who favor citizens over applicants with other legal work authorizations.

In one investigation at the Georgia Institute of Technology, DOJ caught a veritable who's who of employers posting recruiting ads that specifically excluded non-U.S. citizens from hiring or even speaking with a recruiter. Sixteen companies agreed to pay fines for violating the INA, including American Express, KPMG, and Edward Jones.

In another recent investigation, DOJ settled with Aero Precision, a firearms manufacturer that refused to consider asylum seekers and refugees for jobs even though they held valid work authorizations. Employers can learn more about DOJ's enforcement efforts, including a list of the most recent actions, [here](#).

## Using the I-9

[The I-9 instructions](#) tell employers to inspect identification documents as well as to inquire about any other names the employee may have used in the past. To begin the verification process, a newly hired employee must fill out the top of Form I-9.



**The new employee will:**

- Provide their full name, other names used in the past, and their address;
- Provide their date of birth and social security number;
- Designate their citizenship or immigration status, checking boxes for U.S. citizen, noncitizen national, lawful permanent resident or alien authorized to work. All who checked a non-citizen status must include additional information verifying their status.

Within 3 days of beginning work, new employees must show their employer documents from a long list of permitted documents depending on their immigration or citizenship status. The employer then has to review the documents the employee chose from the list in person and in the new employee's presence. Inspect them to make sure they appear to be genuine and belong to the employee presenting them. You may (and should) make copies, but must return the originals to the new employee.

## DHS I-9 form flexibility

The requirement to meet in person for document review changed with the COVID-19 pandemic when DHS developed a more flexible approach due to the national emergency. After all, it made no sense to require employers and new employees to meet face-to-face when federal agencies like the CDC were telling people to mask and social distance to "flatten" the infection curve. Challenges for employers completing basic hiring paperwork included dealing with new hires who would work remotely due to pandemic restrictions on in-person work. In response, DHS authorized employers to interview new hires and fill out the I-9 remotely. That workaround was set to expire late last year. Now the agency has [extended that flexibility to July 31, 2023](#).

### Using remote verification:

- If a new hire physically reports to a company location on a regular, consistent, or predictable basis, employers must continue to review that individual's documentation in person;
- New hires who work exclusively in a remote setting due to COVID-19 precautions are temporarily exempt from physical document inspection under I-9 flexibility rules. They must still review copies of the documents using remote technology, however. This includes e-mail, fax, video link technology, or the use of a secure upload process.

Employers should note what DHS is not saying. I-9 flexibility is meant to facilitate COVID-19 precautions. It's not

a *carte blanche* to remotely inspect documents for *all* remote hires. If you have created permanent telework positions unrelated to COVID-19 restrictions, there's nothing specific in the DHS flexibility rules that covers the situation. But help and clarification may be on the way.

### **DHS proposed a permanent flexibility rule**

There is the possibility that DHS will use the time until the extended flexibility expiration date (July 31, 2023) to finalize new rules on I-9 flexibility. The agency issued a Notice of Proposed Rulemaking back on August 18, 2022. Comments closed October 17, 2022, with 512 comments submitted. You can read [the comments here](#). The vast majority of comments favored making remote document review flexibility permanent.

### **Here is what we know about the proposal:**

- The Secretary of Homeland Security could authorize alternative options for I-9 document examinations;
- Those alternatives could apply to some or all employers depending on factors like past history of immigration violations or fines or whether they already participate in the E-verify program or whether the employee will telework full-time;
- Pilot programs could test the security and effectiveness of allowing remote document examination;
- DHS could authorize temporary alternatives during a public health emergency; and
- DHS could allow employers to choose from alternative examination processes.

In addition, DHS is considering adding employer training requirements at least for employers wanting to continue remote I-9 verification. Employers might receive training that likely would consist of a 30-60 minute online training session on detecting fraudulent documents remotely while avoiding discrimination.