

CLIENT ALERT

May, 2023

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更新情報：Form I-9のリモートフレキシビリティ制度が2023年7月31日に終了／対面審査を8月30日までに実施する必要 – その理由は？

Kathleen Campbell Walker 著

国土安全保障省(DHS)は、COVID-19により導入されたForm I-9 に関するリモートフレキシビリティ制度を2022年11月1日から2023年7月31日まで延長しました。その後の2023年5月5日、移民・関税執行局(ICE) は、リモートフレキシビリティ制度が終了した後は、30日以内にForm I-9の要件を満たす対応が求められることを発表しました。すなわち、2020年3月20日以降に採用され、かつForm I-9に関する書類がリモートで審査された従業員については、2023年8月30日までに身分・就労許可証明書の確認を対面で実施する必要があります。(対面審査を行った際のForm I-9への注釈の書き方については、以前配信したClient Alertをご参照ください。)

なお、新たなForm I-9 (1ページのもの) 及びリモートでの審査オプション (E-Verify登録済の雇用主など、限定的なりモートオプション) は2023年に運用開始予定である点に留意する必要があります。

2023年にE-Verify登録済の雇用主について、新たなForm I-9及びリモートでの審査オプションが利用可能となる中、リモートで書類を審査したForm I-9についてわざわざ再検証する必要があるのか？

率直にいうと、答えは「Yes」です。DHSは、米国移民弁護士協会 (AILA) の連絡委員会の会合やAILAの会議において、パンデミック最中の2020年3月20日以降にリモートでの書類審査を通じて作成されたForm I-9に対するICEの執行措置が停止されるわけではないこと、及びICEは雇用主が集団的に必要措置を講じるために、1か月間の猶予期間を設けることを示唆しています。

雇用主がリモートでForm I-9の書類審査を完了させた場合において、更なる身分・就労許可証明書の対面審査を実施しないと判断した場合はどうなるか？

ICEがリモート審査は原則としてForm I-9の作成時求められる審査要件を満たさないと判断した場合はどうなるのでしょうか？ リモートフレキシビリティ制度を使って書類審査をした場合でも、実質的な違反となるのでしょうか？

この点に関し、*U.S. v. Seven Elephants Distributing Corp.*, 10 OCAHO 1173 (March 18, 2013) では、行政法判事 (ALJ) により、雇用主がForm I-9確認用の書類をコピーしていたとしても、それはForm I-9のSection 2を完了したことにはならないと判断されました。8 CFR §274a.2(b)(3). 加えて、Section 2に関する認証を怠ることは、実質的な違反に該当すると判断されています。さらに、2016年の別のケースでは、「Section 2のList AからCまでの書類の確認や検証を怠ること」は、実質的な事務処理違反と判断されています。*United States v. Frimmel Mgmt., LLC*, 12 OCAHO no. 1271c, 16 (2016) (Virtue Memorandum 3-4を引用)。

もともと、リモートでの書類審査は、政府が採用したリモートフレキシビリティ制度に基づくものであり、これが通常のForm I-9の手続と唯一異なる点です。Section 2の記入漏れといった事象ではありません。雇用主はリモートではありませんが、書類審査をした上でSection 2を記入しているわけです。ですが、リモートフレキシビリティという一時的な政策によるものであっても、罰則が適用される可能性があります。一時的なCOVID-19によるリモートフレキシビリティ制度を使って完成されたForm I-9については、対面での確認を実施するための猶予期間を設ける、または、罰則対象から除外するといった措置が合理的であると思われ、対面での書面審査をしなかったことが実質的な違反と判断されるべきではないでしょう。しかしながら、ICEがこのようなアプローチを採用することはないと思われるため、この問題に関係する雇用主による、議会への代表者への一糸乱れぬ呼びかけが必要となるでしょう。

Form I-9に関する事務処理違反または就労資格を有しない者を雇用した場合 (雇用継続を含む) の罰則は以下の通りです：

8 CFR §274a.10(b)(2) – Paperwork Violations for Form I-9 (rev. Jan 2023 – 88 Fed. Reg. 2178, 2183)

Violations before 9/29/1999	Violations on or after 9/29/1999 and on or before 11/2/2015	Violations after 11/2/2015
\$100 to \$1000 per indiv.	\$110 to \$1100 per indiv.	\$272 to \$2701 per indiv.

8 CFR §274a.10(b)(1) – Knowingly Hire/Recruited/Referred for a Fee or Continue to Employ Unauthorized Worker

Offense Level	Violations before 3/27/2008	Violations on or after 3/27/2008 and on or before 11/2/2015	Violations after 11/2/2015
First	Not less than \$275 to not more than \$2200 for each unauthorized worker	Not less than \$375 to not more than \$3200 for each unauthorized worker	Not less than \$676 to not more than \$5,404 for each unauthorized worker
Second	Not less than \$2200 to not more than \$5500 for each unauthorized worker	Not less than \$3200 to not more than \$6500 for each unauthorized worker	Not less than \$5,404 to not more than \$13,508 for each unauthorized worker
Third	Not less than \$3300 to not more than \$11,000 for each unauthorized worker	Not less than \$4300 to not more than \$16,000 for each unauthorized worker	Not less than \$8,106 to not more than \$27,018 for each unauthorized worker

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結論

ICEが恣意的に定めた期限までにForm I-9に関連する身分・就労許可に関する証明書の対面審査を完了できなかったことをもって、なぜ実質的な違反として取り扱われるのでしょうか？ また、DHSが近い将来、E-Verify登録を済ませた雇用主に対して、限られた状況下でのForm I-9のリモートオプションを認める動きがあるにもかかわらず、このような強硬なアプローチをなぜとのでしょうか？ 現実的かつ合理的な意味はほとんどないように思われます。

どのように対応すべきか？

ICEが設定した新たな期限までに行う、実施済のリモート審査への対応（Form I-9の書類の対面審査）に関するリスク評価に際しては、法律顧問に相談すべきです。また、2020年3月20日に発表された限定的なりモートオプションを利用してきた雇用主については、2023年7月31日より前にForm I-9のリモートでの書類審査を終了させることを確認してください。加えて、新たなForm I-9の形式と限定的なりモートオプションの可能性についてもチェックしておく必要があります。

著者について



Kathleen Campbell Walker は移民グループのグループ長を務めており、テキサス州エルパソを拠点としています。また、米国移民法弁護士協会（AILA）の元会長（2007）及びジェネラルカウンセル（2009）を務めていました。1986年に、移民法を専門とした執務を開始し、2014年には、移民法や移民政策に最も栄光を与えた人物や団体に贈られる「AILA Founder's Award」を受賞しています。加えて、テキサス州法律専門委員会から移民法及び国籍法の認定を受けている他、Chambers USA (Band One)、Chambers Global (Band One)、International Who's Who of Business Lawyers、Super Lawyers、Best Lawyers in Americaの表彰を受けています。また、Martindale-Hubbell®.において、AV® Preeminent™ の評価を受けています。

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May, 2023

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UPDATE: FORM I-9 REMOTE FLEXIBILITY ENDING JULY 31, 2023 / IN-PERSON INSPECTION REQUIRED BY AUGUST 30, 2023 – WHY?

by Kathleen Campbell Walker

The Department of Homeland Security (DHS) extended the COVID-19 remote completion flexibilities for Form I-9 effective [November 1, 2022](#), until **July 31, 2023**. On [May 5, 2023](#), U.S. Immigration and Customs Enforcement (ICE) announced that employers will have 30 days to reach compliance with Form I-9 requirements after the COVID-19 remote inspection flexibilities end on July 31, 2023. This announcement means that employers have until August 30, 2023, to perform the required physical examination of identity and eligibility documents for those hired on or after March 20, 2020, whose documents were reviewed via a virtual or remote examination. Please refer to my [prior blog](#) regarding the guidance DHS provided on how to annotate the Form I-9 when conducting this type of in-person review.

Keep in mind that the new one-page Form I-9 is expected to be implemented in 2023, along with a potential new option to verify documentation remotely in limited circumstances (e.g., E-Verify enrolled employer, limited remote visual options, etc.).

With the possibility of a new Form I-9 and a limited remote inspection option in the future for E-Verify employers in 2023, should employers still go through the trouble of verifying those Forms I-9 completed using remote verification?

Bluntly, yes. DHS has signaled in meetings with the liaison committee for the American Immigration Lawyers Association (AILA) as well as at a recent AILA conference that ICE will not suspend its enforcement actions related to I-9 Forms completed using the remote inspection flexibility policy followed on or after March 20, 2020, during the pandemic. ICE has provided an extra month post the end of the option to use remote verification for employers to get their collective acts together.

What if an employer decides not to proceed with verifying the identity and employment authorization documents of employees for whom remote inspection of their Form I-9 was completed?

What if ICE decides that a remote inspection is basically no inspection of qualifying documents for the Form I-9? Does this mean a substantive violation even though the employer did review the documents to determine identity and work eligibility via a government-issued flexibility policy?

For some history, in *U.S. v. Seven Elephants Distributing Corp.*, 10 OCAHO 1173 (March 18, 2013), the Administrative Law Judge (ALJ) found that even though the employer had copied the supporting documents for Form I-9 verification, this was not a satisfactory substitute for properly completing Section 2 of the Form I-9. 8 CFR §274a.2(b)(3). In addition, the failure to complete the section 2 attestation, in this case, was a substantive violation. In yet another OCAHO case in 2016, a “[F]ailure to review and verify a proper List A or Lists B and C document(s) in section 2” of the Form I-9 is a substantive paperwork violation. *United States v. Frimmel Mgmt., LLC*, 12 OCAHO no. 1271c, 16 (2016) (citing *Virtue Memorandum 3-4*).

In the remote inspection scenario, though, the employers’ only variance from the standard Form I-9 process was tied to a government-based remote verification policy and not a failure to complete Section 2. Employers did review the documents (remotely) and completed Section 2. The temporary policy of remote verification is opening the door to penalties. It would be more reasonable to allow those subject to an inspection notice for Forms I-9 in the future to be given a grace period to conduct in-person inspections of Forms I-9 completed using the temporary COVID-19 flexibility policy or to exempt those Forms I-9 completed during this time frame from a penalty for failure to verify documents in-person. In addition, the failure to do so must not be categorized as a substantive violation. However, it does not appear that ICE will take this approach. Calls to congressional representatives are in order by concerned employers regarding this issue.

The current Form I-9 civil penalties for paperwork and knowing hire (continue to employ) violations are as follows:

8 CFR §274a.10(b)(2) – Paperwork Violations for Form I-9 (rev. Jan 2023 – 88 Fed. Reg. 2178, 2183)

Violations before 9/29/1999	Violations on or after 9/29/1999 and on or before 11/2/2015	Violations after 11/2/2015
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Conclusion

How does this approach treat the failure to complete an in-person inspection of the Form I-9 related identity and employment documents as substantive based on ICE's arbitrary deadlines for in-person inspection? In addition, why take such a draconian approach when DHS intends to allow the option in the near future for remote verification of Forms I-9 in limited circumstances for E-Verify employers? Makes little pragmatic/reasonable sense.

What to do?

Employers should consult legal counsel as they make risk assessments regarding compliance with the new ICE deadline for remote verification corrections (in-person review) of Form I-9 documents. As to those employers who have been using the limited remote verification option announced as of March 20, 2020 — make sure to end any remote verification of the documents for Form I-9 completion on or before July 31, 2023. Finally, keep checking for the new Form I-9 announcement and a possible remote inspection option on a limited basis.

ABOUT THE AUTHOR



Kathleen Campbell Walker is chair of the Immigration Practice Group, based in El Paso, Texas. She is a past president (2007) and general counsel (2009) of the American Immigration Lawyers Association (AILA). She began practicing immigration law in 1986. In 2014, Ms. Walker received the AILA Founder's Award, given occasionally to the person or entity having the most substantial impact on immigration law or policy. She is board certified in Immigration and Nationality Law by the Texas Board of Legal Specialization. In addition, she is recognized in Chambers USA (Band One), Chambers Global (Band One), International Who's Who of Business Lawyers, Super Lawyers, and Best Lawyers in America. She is rated AV® Preeminent™ in Martindale-Hubbell®. She can be reached at 915-541-9360 or kwalker@dickinsonwright.com, and her biography can be accessed [here](#).