Overview
For additional guidance, please refer to Steptoe’s COVID-19 Resource Center.

As businesses remain closed and employees continue to work remotely, the Department of Homeland Security (DHS) has revisited COVID-19 related accommodations for Form I-9 Employment Verification. There have been several flexibility policy extensions, with related employer follow-up obligations that must be tracked. There also has been a scheduled Form I-9 update, with related guidance. Employers need to follow all of these developments closely, to assure compliance during this unprecedented situation and after businesses resume normalized operations.

Remote I-9 Verification Extended

Most recently, on May 14, US Immigration and Customs Enforcement (ICE) announced a 30-day extension to its temporary flexibility provisions relating to I-9 Employment Eligibility Verification compliance. As we explained in our March 23 client alert, “I-9 In-Person Employment Verification Deferred During COVID-19 Pandemic,” due to the COVID-19 stay-at-home orders, employers were temporarily permitted to conduct I-9 document inspection electronically. Employers utilizing this electronic documentation must complete the otherwise-required physical examination of documents within three business days of the business returning to normal operations. The original exception was due to expire on May 19. The newly-announced extension of this accommodation is necessary and sensible given the nationwide patchwork of ongoing legal and practical employment restrictions related to COVID-19.

Select Expired Identity Documents Accepted

As an additional COVID-19 accommodation, DHS issued a temporary policy on May 1 regarding acceptable identity documentation that can be utilized to complete the Form I-9 employment eligibility verification process. Specifically, in many cases, it is difficult or impossible for employees to renew the identity documents set out in Form I-9 List B. While some of these documents, such as certain state driver’s licenses, have been automatically extended by the issuing authority, that is not the case for all such documents. Thus, DHS is accommodating those situations as explained, below.

List B identity documents that expired on or after March 1 and are not otherwise automatically extended may be treated in the same manner as if the employee presented a valid receipt for an acceptable document. Employers are instructed to note COVID-19 in the additional information field when presented with an expired document that is permitted under this policy.
Employers must be mindful that this is a temporary exception, which requires them to take additional steps within 90-days of termination of this policy. Specifically, Form I-9 must be updated with the employee's presentation of a valid, unexpired identity document to replace the temporarily-acceptable expired document used initially. The employee is permitted to present any allowed Form I-9 documentation at the time of reverification—they are not limited to presenting a renewal of the document that was initially presented.

Employers should distinguish between situations in which the facially expired document has been automatically extended due to COVID-19. In such situations, the document is acceptable as a List B document for Form I-9 during its extended validity. Where a document has been automatically extended and, thus, is considered valid when presented for Form I-9 purposes, the employer is not subject to the reverification requirements explained above. Employers can and should confirm state automatic extension driver's license and state ID policies (and applicable durations) by checking state Motor Vehicle Administration/Department of Motor Vehicle websites. It is the employer's responsibility to determine when reverifications are required and to comply with, but not exceed, these requirements.

**Notices of Inspection Responses Extended**

Employers who have received Notices of Inspections (NOI) from ICE have also been provided an extended response period for an additional 30 days as part of the on-going flexibility policy. As with the policy to allow remote Form I-9 verification, ICE had granted an automatic 60-day extension to employers who were served with NOIs during the month of March and had not yet responded. That policy will also be extended for an additional 30-days from May 19. However, these are temporary measures. Employers who have received NOIs must be prepared to respond within the extended deadlines. All other employers must maintain their Form I-9 compliance protocols. The government's current flexibility is driven purely by COVID-19 related realities; it is not reflective of any change in overall immigration enforcement policies with respect to employers.

**New Mandatory Form Version**

As of April 30, it is mandatory for all employers to use the October 2019 version of the Form I-9 when verifying new hires. The deadline for mandatory use of the revised Form I-9 is unchanged. The new form and scheduled use date were issued well before COVID-19 forced businesses to adapt to remote work; however, it is a subtle change that could easily be overlooked amid so many other employment and compliance changes. This version of the Form I-9 contains minor changes to the form and its instructions. The most notable changes in this version of the form are the clarifications on acceptable documents to establish work authorization and identity. The instructions also contain additional details on who can complete a Form I-9 as an authorized representative of an employer.

Employers are not required to update existing employees' Form I-9s with this form; the new form must be used for all new hires after April 30. As always, an employer's failure to use the correct version of Form I-9 is a violation of the Immigration and Nationality Act and subjects the employer to potential fines and penalties.

**Handbook for Employers Released**

In conjunction with the required implementation of the new Form I-9 version on April 30, USCIS released changes to the M-274, Handbook for Employers: Guidance for Completing Form I-9. USCIS is attempting to provide more uniformity between recent immigration laws and Form I-9 compliance measures. The handbook serves as an invaluable resource for employers and provides informative clarifications on changes in the law such as how to complete the I-9 with EADs automatically extended by Federal Register notices and explanations on documents may be used as List B identity and List C employment authorization documents. Employers should find these updates useful, but handbook clarifications heighten the information available to employers and the compliance expectations. The handbook must be carefully reviewed and incorporated into an employer's compliance practice.

**General Compliance Efforts**
Form I-9 compliance rules are strict and have now become more complicated given the unexpected workplace changes driven by COVID-19. Despite the increased flexibility granted by DHS, employers are still fully responsible for I-9 compliance and face liability for errors or omissions in the I-9 verification process. It is important for employers to ensure they do not exceed the limits of these requirements by requesting new documents when not required to do so, or demanding a specific or more limited group of documents than is appropriate for Form I-9 completion.

HR teams will need to make sure they update their Form I-9 alert systems so as to properly verify documents that were accepted under COVID-19 flexibility policies within the required deadlines. They should include the Form I-9 verification process high on their checklist for planning the re-opening of offices. There must be a detailed and specific practice in place for designated HR professionals on proper completion, updating, and documentation of Form I-9 under each of the above scenarios. Employers should expect that the current economic downturn and general immigration policy trends will lead to renewed focus on employer compliance once we transition from the current COVID-19 state of emergency. Employers should assess their confidence in their compliance programs while implementing the changes explained above and prepare for renewed enforcement coinciding with the reopening of business operations. Steptoe's cross-disciplinary team of lawyers can help with these employment law issues and the countless legal and policy issues that companies are now navigating.