

AMERICAN PAYROLL ASSOCIATION

October 3, 2022

Sharon Hageman
Deputy Assistant Director
Office of Regulatory Affairs and Policy
U.S. Immigration and Customs Enforcement, DHS
500 12th Street, SW
Washington, DC 20536
<https://www.regulations.gov>

Re: Optional Alternatives to the Physical Document Examination Associated With Employment Eligibility Verification (Form I-9); Docket No. ICEB-2021-0010

Dear Deputy Assistant Director Hageman:

The American Payroll Association (APA) supports the U.S. Department of Homeland Security (DHS) in its efforts to allow alternative Form I-9 document review for remote workers as published in 87 *Fed. Reg.* 50786 (August 18, 2022).

The APA is a nonprofit association representing more than 20,000 payroll professionals throughout the United States. APA's primary mission is to educate its members and the payroll industry regarding best practices associated with paying America's workers while complying with applicable federal, state, and local laws. The APA's Government Relations Task Force works with government to help payroll professionals with compliance, while minimizing the administrative burden on government, employers, and individual workers.

Alternative Procedures

The proposed procedures under § 274a.2(b)(1)(ix) are too vague (87 *Fed. Reg.* 50786 at 50794). The APA understands the need for testing through a pilot program and temporary procedures because of emergencies, but the provision on "equivalent level of security" as determined by the Secretary does not offer employers an understanding of procedures. For example:

- What criteria will the DHS use to determine an equivalent level of security?
- When will the Secretary decide on alternatives, e.g., only after a pilot is completed?
- Are employers expected to request an alternative procedure and, if so, what are the procedures for making the request?
- What should employers do regarding remote worker verification pending the Secretary's decision on alternatives?

The APA suggests that the DHS already has some level of knowledge regarding the effectiveness of alternative procedures for document review following two years of temporary requirements created to address COVID-19.

Document Retention

In the request for comments point 1 on document retention, the DHS's proposal to require that employers retain copies of documents presented through alternatives potentially creates a requirement stricter than the law. Employers are not required to prove that a document is real. At issue is whether an employer or the employer's agent can examine employees' presented documents virtually to determine if they are genuine and reasonably associated with the individual (employee). Making a copy of documents will only show that an employer has seen presented documents not whether the employer conducted a compliant examination.

In comments submitted to the DHS in 2021, regarding "Remote Document Examination for Form I-9, Employment Eligibility Verification: Request for Public Input" (Docket No. USCIS-2021-0022), the APA offered that there are historical assumptions in the question on whether documents are genuine that are not accurate or are no longer true and should be reviewed, including:

- The physical touching of documents is necessary to determine if they are genuine.
- Seeing documents within arms-reach is more likely to determine if they are genuine and reasonably associated with the individual as opposed to seeing the documents from a distance.
- The appearance of an individual in the presence of the document examiner is necessary to determine identity and whether documents are associated with the individual.
- All virtual environments distort documents and human faces to prevent reasonable examination.
- The use of authorized representatives, such as notaries, is the best alternative for document examination in a remote environment.

Training and Outreach

The APA agrees with the DHS in specific request point 2 in that an appropriate fraudulent document detection and/or anti-discrimination training requirement for employers is necessary as is training on the Form I-9. The APA works closely with the U.S. Citizenship and Immigration Services to provide payroll professionals with training on employment verification, Form I-9, and E-Verify requirements.¹ We offer the DHS our services for purposes of training to help prevent fraud.

¹ The latest offering occurred on September 20, 2022, when Realuz Bisa, Manager and Program Analyst, Immigration Records and Identity Services Directorate, U.S. Citizenship and Immigration Services, spoke in an APA webinar on "Form I-9 – The Employment Eligibility Verification Process."

Eligible Population

The APA recommends for point 3 that the DHS allow all employers to use alternative document review methods for remote workers with one exception – bad actors. If an employer has knowingly failed to comply with employment verification requirements or the DHS-authorized alternative method of document review, a reasonable remedy may be to restrict use of that alternative method. The best approach may be to add the restriction to the settlement process based on the facts in an individual case rather than to codify the restriction. This approach will add flexibility depending on the circumstances.

Alternative document review should not be restricted to only those employers using E-Verify. Federal law does not require the use of E-Verify and, for some employers, use of E-Verify may be a hardship. E-Verify potentially offers greater scrutiny on an employee's eligibility to work in the United States, but employer responsibility for Form I-9 document review does not change. In addition, an employer's decision regarding a remote work environment is based on service needs and employee work-life balance. Requiring use of E-Verify or other restrictions for alternative document-review methods could create a fairness issue for employers and employees.

The APA believes that Form I-9 document review can be performed effectively through virtual environments with certain restrictions. To discuss these comments, please contact me by phone at 202-669-4001 or by email at ajacobsohn@americanpayroll.org.

Sincerely,



Alice P. Jacobsohn, Esq.
Director, Government Relations

For: APA Government Relations Task Force Federal Issues Subcommittee
Chairs Rebecca Harshberger, CPP, and Jon Schausten, CPP