CLIENT ALERTS & INSIGHTS

Benesch COVID-19 Resource Center: DHS Demonstrating Flexibility in Response to COVID-19

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Physical Presence Requirement

As a result of the COVID-19 pandemic, and effective March 20, 2020, the Department of Homeland Security ("DHS") is permitting employers to defer the requirement to physically inspect eligibility and identity documents when completing a Form I-9 for new or current employees. This only applies to employers and workplaces that are operating remotely.

If a current or new employee is taking physical proximity precautions, such as by working from home, the employer does not have to review identity and employment authorization documents in the employee's physical presence. Employers can instead remotely inspect the Section 2 documents, including through fax, e-mail, and video, etc. Employers also should obtain, inspect, and retain copies of the documents within three business days for purposes of completing Section 2.

Once normal business operations resume, employers should enter in the "Additional information" field in Section 2, COVID-19 as the reason for the physical presence delay. And, in the same field, add "documents physically examined" with the actual date of physical inspection.

Employers who commence using remote inspection have the burden of documenting their on-boarding and telework policy for *each* employee. Take care to thoroughly document any changes to your normal business operations. Include specific dates any remote operations commenced, and the justification for taking physical proximity precautions, such as whether self-imposed or government directed.

If your business is not operating remotely, than the deferred physical presence requirement does not apply to your workplace. However, if you have new or existing employees who are not at work due to COVID-19 quarantine or lockdown protocols, DHS will evaluate these cases on an individual basis. As a result, be sure to attach documentation to these I-9s, such as e-mails stating that they are self-quarantined, or have been ordered to do so, and the anticipated duration of the lockdown or quarantine.

Be cautious when designating an authorized representative to act on your behalf in completing Section 2. As a work around, employers have been permitting family members in the same household as a new or current employee on quarantine or lockdown to act as their authorized representative.

Remember that employers remain liable for any I-9 violations, including violations committed by the person designated to act as the employer's behalf in completing Section 2. As a result, if you plan to

use authorized representatives, consider using a notary public or legal counsel, rather than an employee's family member.

Notice Of Inspection

Commencing March 19, 2020, DHS announced that it is granting employers who were served with a Notice of Inspection in March, and who have not already responded, an automatic 60-day extension to respond. This is a great opportunity for employers to commence an internal I-9 audit, which can be done remotely if the I-9 forms, and any identity documents, are electronically stored. Remember to monitor the DHS or ICE websites for any updates, or contact your legal counsel for assistance and guidance during these challenging times.

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Please note that this information is current as of the date of this client bulletin, based on the available data. However, because COVID-19's status and updates related to the same are ongoing, we recommend real-time review of guidance distributed by CDC and local officials.

