

2023 Mid-Year Report: Immigration Update

July 17, 2023

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Transcript

Alitia Faccone:

No matter the month or year, employers can count on one thing, changes in workplace law. Having reached the midway point of the year, 2023 does not look to be an exception. What follows is one of a collection of concise programs, as We Get Work™ the podcast provides the accompanying voice of the Jackson Lewis 2023 Mid-Year Report. Bringing you up-to-date legislative, regulatory, and litigation insights that have shaped the year thus far and will continue to do so. We invite you and others at your organization to experience the report in full on JacksonLewis.com, or listen to the podcast series on whichever streaming platform you turn to for compelling content. Thank you for joining us.

Amy Peck:

Hello, everyone. My name is Amy Peck. I co-lead the Jackson Lewis Immigration Practice Group. And I am here today with Nicola Prall in our Raleigh office. Nicola and I are going to talk to you today about what is happening in the world of I-9s, including the end of the COVID-19 flexibility that allowed virtual I-9 review, the possibility for a permanent virtual I-9 review option, and lastly, what we know about the new I-9 and when it will be coming out. As you will recall, on March 20 of 2020, which was three years ago now, when COVID-19 started, the Department of Homeland Security published temporary guidance which allowed employers to virtually review the documentation presented in section two of form I-9. Up to this point, as you will recall, form I-9 was required to be done face-to-face with physical documentation exchanging hands in front of the person who was completing the I-9.

But as a result of COVID, the Department of Homeland Security said that employers can start using a virtual review process, but that employers must have certain things in

place in order to use that virtual review process. The first thing that employers need to have in place according to the March 20 of 2020 guidance is a written policy describing the virtual I-9 practice. I'm finding that many employers do not have a written policy if they use this virtual process, but it's not too late to put one into place. If you did use a virtual I-9 review during COVID-19 and you do not have a written policy that describes your virtual procedures, it is possible that the government would disallow your I-9s in an audit and say that you didn't do it correctly and that you can't prove how you did it. Therefore, they would fine you for those I-9s. So it's our recommendation that you put a written policy in place, even though it's after the fact.

The second thing the government said is that, if you are completing virtual I-9s, that you have to annotate on the I-9 that this virtual review took place. So employers want to know, can I add this now? And the answer is yes. And that really dovetails with the next requirement, which is the government said if you do a virtual review of the I-9, you have to follow it up with actual physical documentation presented by the employee, which requires an in-person interaction. And when you do this requirement, when you do the actual physical documentation review, you can in fact annotate the I-9 at that time, indicating that it was virtually done initially but now there is a physical review.

I also get some questions by employers saying, "Well, how will the government know that this was virtually completed?" And the answer is that the I-9 is completed under penalty of perjury. So in an audit, if the government asks, you must tell the truth. Furthermore, it's usually patently obvious on the I-9 that it was done virtually because the section one has the employee's address, which is likely in a different state than the section two completer. So it would be obvious that it was virtually completed. Lastly, the virtual guidance says that employers doing a virtual review must retain copies of the presented documentation. So Nicola, the government recently announced that employers must complete the physical review. So in other words, employers who were using this virtual review guidance must complete a physical review of these same I-9s by a certain date. Tell us more about this.

Nicola Ai Ling Prall:

Sure thing, Amy. And I'll note that even under the original guidance, once the workplace was not remote due to COVID and people were back in-person, the physical inspection of the documents that had been reviewed virtually was to take place. And I found that this may or may not have happened with employers. But on May 4th of this year, Department of Homeland Security was very clear that the remaining COVID flexibility, which included the hire of remote employees that were remote due to COVID, even now, that would end on July 31st. And that employers must physically inspect all of the documents that were virtually reviewed by August 30th of this year.

Amy Peck:

Nicola, what happens if they don't get the physical review done by August 30th? Should they give up? Or should they just keep going and try to get all of these I-9s done?

Nicola Ai Ling Prall:

That's a great question. And I think it's one of the unknowns, of course, because this is not a situation we've been in before. But our recommendation would be to keep going and get it done. Because in the event of an audit, good faith compliance and being able to show that we really, really try to comply, I think, will make a difference with regard to any fines or the mitigation of any fines.

Amy Peck:

I agree with that. Additionally, if there is no physical inspection of the I-9s, what do you think, Nicola? How will that I-9 be treated in a government audit?

Nicola Ai Ling Prall:

Again, a slight unknown. But based on what we know of how the government would treat these audits and indications that we've gotten, I think that's going to be a substantive error. So that's going to be as if the I-9 wasn't completed. And that's going to be fined without the employer being given the opportunity to fix that mistake.

Amy Peck:

So it's as if there was a missing I-9, correct?

Nicola Ai Ling Prall:

Correct, which is one of the worst I-9 mistakes you can have if you're audited.

Amy Peck:

Yeah. So employers have every incentive to physically inspect those documents.

Nicola Ai Ling Prall:

Absolutely. And the fines are not nothing fines, they range from around 250 to 2,500 per I-9 that's not correct. And those fine numbers go up each federal fiscal year based on inflation.

Amy Peck:

That really adds up. So Nicola, there are a lot of different scenarios that can take place when the employee presents physical documentation in this required physical review. Let's walk through some of them. What if, let's say this employee was hired during COVID and the I-9 was virtually completed, but the employee has terminated before the physical review can take place. What do you do?

Nicola Ai Ling Prall:

Sure. And this happened a lot because this temporary policy was in place for three years. The employer should annotate the I-9 in that additional information box to explain that the employee separated and physical inspection didn't happen. And they should put the date that the employee separated in there too, because that'll help make it clear that it was before the physical inspection was required.

Amy Peck:

So if they are terminated and it's before this August 30th date, pretty much that

explains why the employer did not do the physical review. Is that right?

Nicola Ai Ling Prall:

Right. And I suppose there might be a scenario if we're not able to get it done by August 30th where the termination happens after that date. But again, I would put that information on there. And even though it's not perfectly compliant, you again at least have that good faith effort argument.

Amy Peck:

Very good. What if the employee has a virtual I-9, and let's say they presented their passport and it's a US passport? And then let's say the employee says, "Okay, Joe Smith, we need you to bring in physical documents." And the employee says, "Well, I lost my passport but I have a driver's license and social security card." So in other words, the employee is presenting different documents. Is that okay?

Nicola Ai Ling Prall:

Yeah, that's totally fine. And the employer has two options here. The employer can complete section two on a new form I-9 and then attach it to the original form I-9 that was used during the remote inspection. Or they can update on that original form I-9. They can update it with the new documents providing all the necessary information, the document title, number, issuing authority and expiration, and then notate that the employee presented this for the physical inspection. Department of Homeland Security is recommending that they complete a section two on a new form I-9, but either option is fine.

Amy Peck:

Awesome. What if, say, I was the section two completer under the virtual I-9, but I've gone to a new job and now you are the person who's doing the physical review of section two? So you're actually meeting the employee and completing the physical review requirement. Is that okay that it's a different person?

Nicola Ai Ling Prall:

That's okay as well. So that different person would have to put their name in it. So if it was the same person, the annotation would read, "Documents physically inspected or examined on," for example, "July 17th, 2023." If it was a different person, you would then add, "By," and I would put, "By Nicola Prall." And I would put my full name on there as well.

Amy Peck:

Okay. One more question. What if you're using electronic I-9s and your electronic I-9 program won't allow for somebody to log in and annotate on that document? So that I-9 is locked down. So what do you do?

Nicola Ai Ling Prall:

This is a tough one. And if this comes up, this is a situation where I highly recommend that you reach out to counsel who can review what your electronic I-9 program does. Because the main thing you want to be able to protect is when you produce that I-9,

however the electronic program is going to help be able to walk you through how to produce it, as well as the audit trail that will come along with that production and is required for all electronic I-9. If you're audited and you produce an electronic I-9, it'll be the I-9 as well as the audit trail. Confirm with counsel how the best way to do it is.

It might be that you may have to print out that I-9, physically inspect the documents, annotate it, and then upload it back in your system. But that's going to have to be very carefully documented and audited and annotated. It may be, because this is something now that electronic I-9 vendors have known about for a few months, it may be that they have a way to do it and you just haven't asked quite the right question. And they may be able to set up some access so that the I-9 can be annotated. So the most important thing would be to work with both your I-9 vendor and counsel to make sure that you can fulfill the physical inspection requirement without compromising the integrity of the electronic I-9 and the audit trail.

Amy Peck:

Fabulous. Wow. So it sounds like there's no one-size-fits-all and that there's a lot of individual advice and counsel that's needed. So lastly, after all of this chaos, many of our clients are wondering if or when permanent virtual review will become an option. There are so many of our employer clients now who are hiring permanently remote employees. Well, as it happens, the government's Office of Management and Budget announced last week that they anticipate publishing final rules with respect to allowing employers to review I-9s virtually on a permanent basis moving forward.

Now, this rule is not yet announced, but it is expected in the next two weeks. We believe that with the new rule, there will be a new I-9 that is also announced, and that that new I-9 will have a box on it that will need to be checked if the I-9 is completed virtually. Again, this is speculation, but all indications are that the new I-9 will be coming out with this permanent virtual review federal register announcement. This is a really exciting development. And of course, we will need to await the final rule to see what it says. But to suffice it to say that, in the next few weeks, we will be looking with anticipation to the announcement. And please note that any announcement of a permanent solution allowing virtual I-9 review will most certainly not grandfather the COVID-19 I-9s. And you will need to physically review those no matter what. So in other words, don't expect forgiveness if you don't complete physical review of the COVID-19 I-9s. The new rule will be only forward-looking, we believe. So thank you very much and we appreciate your time.

Nicola Prall:

Well, Amy, we recorded that podcast on July 17th, which was a week ago today, and mentioned that a new rule was imminent and here we are and it's now been released. It was released on Friday, July 21st. So in addition to you being one of Jackson Lewis's Immigration Practice Group leads, you are also the chair of the American Immigration Lawyers Association Verification. And I know the verification committee has been working all weekend long trying to digest the 120 pages or so that discussed the new I-9 and the final rule. So let's get right to it. So, Amy, can we finally now do a virtual or remote I-9?

Amy Peck:

Yes. With an asterisk, depending on certain things. So the new rule will be effective August 1st, and they're calling it alternative procedures for Section 2 review. So basically the new rule allows E-Verify employers to complete Section 2 virtually assuming that certain things take place. So the new rule, again, can be taking place August 1st on the new I-9, which will be coming out this week, or you can use the current I-9 up to and through October 31st. You have to use the new I-9, which isn't out yet, but should be published on Wednesday. You have to use the new I-9 November 1st. So starting August 1st, E-Verify employers can virtually review Section 2, but certain things have to happen. First, the employee must send front and back, if applicable, copies of the documentation that they intend to use for Section 2 verification ahead of the virtual interview.

And then during the interview, that employee must virtually present the same documentation to the employer by holding it up in a same time interview. That employer must review the documentation front and back and compare image that is on the video interview with the copies that they received. They must do the analysis. Is the document genuine? Does that document relate to the person? And is the document basically on the list A, B, and C for Form I-9? The employer then must retain the front and back of the copies. And again, assuming the document is two-sided, if the document is only one-sided, you only need to retain the front like a birth certificate. This rule is only for E-Verify employers. That is really important. So if you are not an E-Verify employer at the hiring site where you want to use the virtual rule, then you cannot use the virtual rule.

Now remember, E-Verify can be used by an organization hiring site by hiring site. So you can use it in, for example, Florida, but you don't have to use it in Nebraska. But if you want to use this virtual rule, you need to be using E-Verify at that particular hiring site. And then there's all sorts of questions about, "If this is a remote employee, what is the hiring site?" And that's something you're going to have to go over with counsel. You can use a hybrid virtual, not virtual approach, at a particular hiring site, but it needs to be done in a non-discriminatory manner.

Again, these are very nuanced rules. They seem fairly, I'd say nondescript when you read them, but there's a lot of nuance on here and I would highly suggest you go over this with counsel. There is an E-Verify and fraud and anti-discrimination training that will be released through the E-Verify platform. New users and new E-Verify employers will need to go through that training. Existing users and existing E-Verify employers have the option of doing this new training. So a lot there. We haven't seen the new I-9 yet, so there will be more on that later.

Nicola Prall:

Very exciting. And so does that mean that for employers that used virtual I-9 due to the COVID flexibility policy, they don't have to worry about doing a physical inspection now?

Amy Peck:

So there were specific provisions in this new rule about the COVID-19 I-9s, and these two things need to be kept separate in your brain, the permanent virtual, we have the steps. You have to be an E-Verify employer. The temporary COVID-19, you didn't have

to be an E-Verify employer. The new rule that comes out says, "Okay. Look, we recognize the hardship that employers are facing doing physical re-verification of those COVID-19 I-9s that were virtually reviewed. So four qualified employers." So again, qualified employers are ones that were enrolled in E-Verify at the time they performed the remote or virtual examination during COVID. So you can't sign up now and take advantage of the COVID-19 rule. And they created an E-Verify case for that employee. Again, these are the COVID-19 I-9s, and that I-9 was completed between March 20, 2020 and July 31st, 2023.

They can use this new process to examine the employee's documents for Section 2 instead of a face-to-face interaction. We had all questions, but we did receive clarification over the weekend. So basically qualified employers will need to do another virtual inspection. So you have to virtually inspect the virtually inspected I-9s and annotate the I-9 as described in the rule. So this is a new virtual inspection, and supposedly there's new Q&A's keyed up and coming out soon on this. You don't have to retain new copies of the documents unless the employee during this second virtual inspection is producing new documents, then you have to retain them.

So really, again, nuanced but exciting. Many employers already have a process in place to do physical review. So I don't know if this rule comes in time for many employers, but for some this will be a relief. And then there was an announcement that was made that basically said, "Look, if you are getting these secondary reviews done or physical review and you're late, as long as you get them done, if you're audited, we'll probably forgive you." I wouldn't count on that, but it is potentially good news.

Nicola Prall:

Awesome. Thanks. Well, that was the exciting I-9 news that we had to share with everyone.

Amy Peck:

Thank you very much, and we appreciate your time.

Nicola Prall:

Thanks, everyone.

Alitia Faccone:

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