

Virtual Verification Guidance

Updating the Form I-9 after conducting a physical inspection

Background

On March 20, 2020, the Department of Homeland Security (DHS) announced a temporary relaxation of the Form I-9 verification rules in a **special memorandum** posted to the Immigration and Customs Enforcement (ICE) website. Pursuant to this policy, DHS will defer the physical presence requirements associated with the Form I-9 document inspection process for employers and workplaces that are operating remotely due to COVID-19.

Employers taking advantage of this policy must inspect Section 2 or Section 3 documents remotely (e.g., over video, email, secure upload, etc.) and complete the Form I-9 within the required timeframe. Thereafter, employers must conduct a physical inspection of the documents once the virtual verification policy ends OR an employee commences non-remote employment on a regular, consistent, or predictable basis (whichever is earlier).

DHS Guidance on Updating the Form I-9 After Physical Inspection

Same individual conducts the verification

If the physical inspection is conducted by the same individual who examined the documents remotely and signed Section 2, the individual can simply write the date they physically examined the documents and then add their initials in the Additional Information box in Section 2 of the virtually completed I-9.

Different individual conducts the verification

If the physical inspection is conducted by someone else (including an authorized representative), the employer has a choice to make.

1. According to the USCIS guidance, the individual should write the date they physically examined the documents as well as their full name and title in the Additional Information box in Section 2 of the I-9.
2. However, according to ICE guidance, the individual should complete a new second page (Section 2) of the Form I-9 and attach that to the (complete) remote inspection Form I-9.





While ICE did not provide any reasoning for this contradictory instruction, one highly plausible theory is that the agency wants the new verifier to read and sign the Section 2 attestation under penalty of perjury, rather than merely enter their name and title in the Additional Information box. Employers may also choose to complete an entirely new Form I-9 for the physical inspection to ensure consistency of the data between Sections 1 and 2. Although not mentioned in the ICE guidance, completing a new I-9 in this scenario should be permissible so long as the employer follows this process without regard to an employee's citizenship status, immigration status, or national origin.

Updating Virtually Completed I-9s in Guardian

Same Individual Conducting the Inspection S Guidance on Updating the Form I-9 After Physical Inspection

The Guardian Electronic I-9 and E-Verify solution has a special workflow for I-9s completed pursuant to the virtual verification policy. Organizations can enable the "COVID-19 Virtual Verification Exception" in the Guardian administration settings, which enables users to flag an I-9 as having been completed using the virtual verification option. Employers can also enter a "Normal Business Operations Date" to track the required physical inspection step.

Once a Normal Business Operations Date has been entered, and an I-9 has been flagged with the Virtual Verification checkbox, a new "Enter Inspection Information" button will appear, allowing users to amend the I-9 with the Physical Inspection information according to the USCIS guidelines. This workflow is appropriate when the physical inspection is conducted by the same individual who examined the documents remotely and signed Section 2.

I-9 Overview

Provide Physical Inspection Information

This I-9 was completed utilizing the "Virtual Verification" exception. Please enter the date physical inspection of the actual documents occurred and by whom by clicking the **Enter Inspection Information** button in the **Physical Inspection** section below. Then **Approve Changes** in that section in order to finalize the update.

COVID-19 "Virtual Verification Exception"

Due to the COVID-19 issue, DHS temporarily began allowing organizations to complete document verification virtually, deferring physical inspection until normal business operations resumed.

Check the box below if this I-9 is subject to the exception.

Section 2 was completed utilizing the "Virtual Verification" exception enacted by DHS.

Physical Inspection

This I-9 was completed via "Virtual Verification" and is subject to deferred physical document inspection. Record the date physical inspection occurred and who performed the inspection so that the I-9 is properly amended with this information.

Completing New I-9s in Guardian

Different Individual Conducting the Inspection

When the physical inspection of documents is conducted by a different person, employers may use Guardian to complete an entirely new I-9 (i.e., both sections 1 and 2) to document the physical inspection. Completing a new I-9 has the following benefits:

- Completing a new Section 1 ensures you have the most recent (and up-to-date) information from the employee, which may be important if the employee has changed immigration status since the virtual I-9 was originally completed.
- Completing a new Section 2 enables employers to capture the authorized representative's attestation and signature in Section 2 (per the ICE guidance).
- Employers using our Remote Verification Network can direct the employee to schedule an appointment with a nearby verification center for purposes of reviewing the original documents and completing Section 2.

Additional Compliance Pointers for Employers Creating a New I-9

1. Although the ICE guidance referenced above mentions completing a new Section 2 alone (which is not possible in Guardian), completing a new I-9 in this scenario should be permissible so long as the employer follows this process without regard to an employee's citizenship status, immigration status, or national origin.
2. By design, Guardian will NOT submit these newly created I-9s for existing employees to E-Verify (assuming that an E-Verify case properly created from the original virtual I-9).
3. Once the second I-9 has been approved, employers should add an "Audit Note" to the I-9 which explains why a second record was created. A sample I-9 Audit Note is provided below.

Audit Note Date Entered: 01/05/2021

Entered By: HR Rep

Subject/Reference: New I-9 for Physical Inspection

Note: This employee was originally verified by a different individual through the COVID-19 remote inspection process. ICE guidance indicates that employers should complete a new second page (Section 2) for the physical inspection in this scenario, which is not possible in our electronic I-9 solution. Accordingly, we have created this new Form I-9 (both Section 1 and 2) to document the physical inspection. Please see the prior I-9 for the remote inspection.

Disclaimer: Please note that any information provided in this document is for educational purposes only and should not be construed as legal advice or as a substitute for legal counsel. If you have questions concerning how I-9 and E-Verify rules apply to your specific situation, please seek legal advice from a licensed professional attorney who is familiar with all of the facts.