Proskauer

# Advice to U.S. Employers: Immigration Insights Series during COVID-19 Crisis

**March 19, 2020**

Proskauer's Immigration Practice Group is advising clients on an array of challenges as companies find it difficult to comply with their Immigration and Reform Control Act (IRCA) obligations and maintain the legal status of the non-immigrant population.

We will publish, in coming days, a series of alerts offering guidance on the many important issues facing our clients during this ever-changing and challenging situation.

Our first alert relates to the challenge of completing an I-9 form upon hiring a new employee when there is limited or no access to the company's facilities and "remote" alternatives must be considered.

As we point out in our first alert, USCIS has not yet authorized an adjustment and accommodation to the normal process, to allow for the use of video resources to complete I-9s long distance.

Our team is available to you to provide guidance and assistance in adapting to the challenges.

**Advisory 1: Completing Form I-9 Remotely**

The current Coronavirus Pandemic is highlighting some of the challenges employers have already been facing with compliance and telecommuting employees. This pandemic has exacerbated the challenges since many offices are closed or workers are choosing to telecommute – even from the Human Resources Department. As a result, there are some offices with absolutely no employees on site and it has become a challenge to complete some of the most basic employment procedures such as onboarding a new hire. Specifically, the Form I-9, required to demonstrate that the new hire is authorized to be employed in the United States, requires an in-person examination of documents. USCIS does not currently allow for electronic inspection of the documents used to complete the I-9 Form. Consequently, completing the Form I-9 has become a stumbling block in hiring during the pandemic.

Professional lawyers' organizations and employer organizations are lobbying strongly for an accommodation under this extraordinary circumstance, but there has been no change to date.

**Background**:

The Immigration Reform and Control Act (IRCA) of 1986, mandated that every employer must verify the identity and employment authorization of all employees in the United States. Therefore all employers in the United States must ensure the proper completion of Form I-9 for each individual they hire for employment. The Form I-9 must be retained and is subject to Audit, considering the Form I-9 was implemented over 30 years ago when telecommuting wasn't practicable for most occupations. Instead, for remote or offsite employees, IRCA allows employers to designate an authorized representative or agent outside of the company to act on its behalf to process and complete Section 2 of the I-9 form.

Specifically, the employer can designate any individual to meet with the new hire to review the documents that (s)he presents, confirm that they relate to the individual and sign the I-9 form on behalf of the company. The regulations and advice from USCIS do not indicate any limitations as to the individuals involved, although we recommend specifying that it be an adult over the age of 18 and preparing a simple information sheet for the individual to complete, which would include the person's name, address, and other contact information, and perhaps even a brief affirmation [not required] that the person has reviewed the requirements for processing an I-9 form and understands them. There may be companies that provide this service, including "PEOs," payroll and HR services.

If an authorized representative fills out Form I-9, the employer is still liable for any violations in connection with the form or the verification process. When completing the Form I-9, the employer or an authorized representative must physically examine each document presented to determine if it reasonably appears to be genuine and relates to the employee presenting it. USCIS specifically indicates that reviewing or examining the documents via webcam is not permissible.

A popular notion is to use local notaries for this process, but in some states it may be problematic and require extra certifications because notaries often misunderstand their responsibility assuming that they are verifying signatures, when in fact they have a different purpose here, having nothing to do with their capacity as notaries, namely to verify the documents and their relationship to the individual, not the signatures. In California, a notary public is prohibited from completing Form I-9 unless the notary is also a registered immigration consultant.

Employers can even have the new hire identify someone locally to complete the I-9 Form. Although we recommend avoiding the new hire's family members, there is no provision against it. Regardless of who complete the document review, the employer is ultimately responsible. Since the employer is responsible, a procedure could be in place that includes webcam or video communication between the employer, the authorized representative and the new hire. At the very least, the authorized representative can instantly transmit the documents for review before the employer accepts the action of this agent.

**Conclusion**:

The COVID-19 Pandemic has resulted in an unprecedented number of employees "sheltering in place."  Employers are developing methods to work remotely and streamlining procedures to meet this new challenge. As a result, many employers are asking whether it is permissible to review the documents electronically in order to complete Form I-9. As of now, it is not permissible and the documents must be reviewed in person, and this is specifically noted by USCIS in the FAQs of their I-9 Central website. *See*: https://www.uscis.gov/i-9-central/questions-and-answers. Considering the COVID-19 Pandemic, it is possible that USCIS may put in place some allowance for electronic review. So far, there is no indication that they are doing anything with respect to the I-9 Form. If the employer chooses to verify the forms electronically at the time of hire, we would suggest an in-person review and update to the I-9 Form once able. If Audited, and USCIS does not amend the rules and allow for electronic review, the employer would have a "technical violation" for each improperly completed I-9 Form and would be subject to a per violation fine as outlined here: (*See*: https://www.ice.gov/factsheets/i9-inspection ).

In order to comply with existing rules, employers must review the identity and work authorization documents in-person. If unable to do so because the new hire is a remote worker or the office is closed, the employer should designate an authorized representative or agent to complete the I-9 Form and review the documents in person. Since USCIS liberally allows the employer to designate agents, even in the event of office closures and pandemic, employers should be able to construct a procedure to properly review identity and work authorization documents to properly complete the I-9 Form.