



**College and University Professional  
Association for Human Resources**

October 17, 2022

Sharon Hageman  
Deputy Assistant Director  
Office of Regulatory Affairs and Policy  
U.S. Immigration and Customs Enforcement  
Department of Homeland Security  
500 12<sup>th</sup> Street, SW  
Washington, DC 20536

Submitted via [www.regulations.gov](http://www.regulations.gov)

**Re: DHS Docket ICEB-2021-0010 and RIN 1653-AA86  
Optional Alternatives to the Physical Document Examination Associated With  
Employment Eligibility Verification (Form I-9)**

Dear Assistant Director Hageman:

I write on behalf of the College and University Professional Association for Human Resources ("CUPA-HR") in response to the Notice of Proposed Rulemaking ("NPRM" or "proposal") published August 18, 2022, in the Federal Register by the Department of Homeland Security ("DHS"), *Optional Alternatives to the Physical Document Examination Associated With Employment Eligibility Verification (Form I-9)*.<sup>1</sup>

CUPA-HR serves as the voice of human resources in higher education, representing more than 33,000 human resources professionals and other campus leaders at nearly 2,000 colleges and universities across the country, including 92 percent of all U.S. doctoral institutions, 76 percent of all master's institutions, 56 percent of all bachelor's institutions, and over 550 two-year and specialized institutions.

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<sup>1</sup> 87 Federal Register 50786 (August 18, 2022), pp. 50786-50794

## **STATEMENT OF INTEREST**

Colleges and universities employ approximately 3.9 million workers nationwide, and there are institutions of higher education located in all 50 states.<sup>2</sup> Many universities are the largest employer in the state in which they operate while serving as economic, civic, and cultural centers for their communities. At the start of the COVID-19 pandemic, recognizing the urgent need to prioritize the health and safety of students, faculty, staff, and their surrounding communities, thousands of colleges and universities shifted entirely to remote instruction and closed all but the most essential components of their campuses—shifting as many of their millions of employees to remote work as possible.

In the ensuing months and over the Summer, colleges and universities established innovative policies, hired staff, and built and reimaged existing structures to ensure the effective and safe reopening of campuses for the Fall Semester. This included establishing remote work environments for staff and faculty that did not need to return to campus as well as for employees during quarantine. The need to remain nimble in the face of uncertainties posed by the ever-changing direction of the COVID-19 pandemic, including pandemic-related work shortages, required many institutions to implement new workplace flexibilities programs, including greater dependence on remote talent. Remote document examination for Form I-9 has been a critical component of offering these programs and acquiring remote talent with the time frames demanded by the academic calendar. For many institutions, the pandemic has also demonstrated how outdated regulations often run counter to an ever-evolving workforce and its demands and needs for flexibility. Based on higher education's experience, we encourage DHS to continue full tilt with its modernization programs and to ensure that a remote review process remains available for all employers.

## **BACKGROUND**

For more than thirty years, federal law has required employers to examine documentation from each newly hired employee to prove their identity and work authorization in the United States. The Form I-9 is used to verify the employee's identity and employment eligibility and requires the employer to "physically examine" documentation provided by the employee to ensure that it is genuine.

On March 20, 2020, the DHS announced guidance ("I-9 Flexibility Guidance" or "I-9 flexibilities") providing flexibility in the Form I-9 verification process to defer the physical presence requirements associated with Form I-9 for 60 days.<sup>3</sup> The guidance allows for remote inspection of Form I-9 documents in situations where employees work exclusively in a remote setting due to COVID-19-related precautions. Employers are allowed to review documents through video, fax or email so long as they also retain copies of the documents. For employees who physically report to work at a company location on any regular, consistent, or predictable basis,

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<sup>2</sup> See [Higher ed workforce shrank by 4% in fall 2020 \(insidehighered.com\)](https://www.insidehighered.com/workforce-development/article/2020/11/19/higher-ed-workforce-shrank-by-4-in-fall-2020)

<sup>3</sup> See DHS Extends Form I-9 Requirement Flexibility (Effective May 1, 2022), <https://www.uscis.gov/i-9-central/covid-19-form-i-9-related-news/dhs-extends-form-i-9-requirement-flexibility-effective-may-1-2022> (last updated Apr. 25, 2022); ICE announces extension to I-9 compliance flexibility, <https://www.ice.gov/news/releases/ice-announces-extension-i-9-compliance-flexibility-3>.

employers are required to use standard I-9 procedures. The policy proved successful and has been extended numerous times throughout the pandemic—most recently, on October 11, DHS announced that the document examination flexibilities have been extended until July 31, 2023.

On October 26, 2021, the DHS issued a Request for Public Input (RPI) “seeking comments from employers, employer organizations, employee groups, and other members of the public on document examination practices for Form I-9, Employment Eligibility Verification.”<sup>4</sup> The RPI includes a list of questions grouped into two categories: “Experiences with Pandemic-Related Document Examination Flexibilities” and “Considerations for Future Remote Document Examination Procedures.” The RPI was designed to provide DHS with important feedback from employers who have conducted remote inspection and “inform and improve DHS policies and processes” regarding “alternative options to physical document examination that offer an equivalent or higher level of security for identity and employment eligibility verification purposes” moving forward.

In December 2021, CUPA-HR, joined by other higher education associations, submitted comments to DHS in response to the RPI. In its comments, CUPA-HR reported the results of a survey (CUPA-HR I-9 Survey) it conducted of member institutions’ experiences with the agency’s Form I-9 flexibilities. The responses to the survey were completed by 579 human resources professionals from 409 higher education institutions or affiliates (e.g., research centers) in the United States. CUPA-HR members reported positive experiences with the changes and said they did not run into challenges with implementation. Respondents strongly supported a permanent option for remote document examination and said the policy provides numerous benefits for higher education institutions, including providing more flexibility for remote work, reducing the time needed to complete document verification and reducing institutions’ paperwork burden. Respondents also criticized physical document examination as overly burdensome.<sup>5</sup>

On August 18, 2022, DHS issued this proposal. As explained in the NPRM, the proposal does not directly allow employers or agents acting on the employer’s behalf to use such alternative examination options, but instead would create a framework under which the Secretary would be authorized to extend the flexibilities. The Secretary would be authorized to implement alternative documentation examination procedures with respect to some or all employers as part of a pilot program; if they determine such procedures would offer an equivalent level of security; or as a temporary measure to address a public health emergency declared by the Secretary of Health and Human Services, or a national emergency declared by the President.

#### **A. Support for Modernizing Examination Requirements When Completing Form I-9**

CUPA-HR thanks DHS for its proposal and supports its efforts to establish optional alternative procedures to the physical examination requirements for examining the documentation

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<sup>4</sup> 86 FR 59183

<sup>5</sup> For responses to the CUPA-HR I-9 Survey see [2021-12-22-USCIS-Remote-Examination-Form-I9.pdf](https://www.dhs.gov/2021-12-22-USCIS-Remote-Examination-Form-I9.pdf) ([cupahr.org](https://cupahr.org))

presented by individuals to establish identity and work authorization when completing Form I-9. As noted by DHS in its proposal, the pandemic necessitated a rapid shift to remote work that has permanently transformed where, when, and how work is conducted. This shift has been pronounced amongst the higher education industry which the Bureau of Labor Statistics (BLS) identified as a sector with one of the highest percentage of establishments that increased telework during the pandemic.<sup>6</sup>

Human resources professionals at colleges and universities have relied on the I-9 Flexibility Guidance for employee onboarding throughout the pandemic to ensure that institutions can continue serving their students and their surrounding communities with minimum disruption. As we enter new phases of the pandemic, however, such flexibilities remain critical as colleges and universities face worker shortages and a tight labor market that make maintaining campus operations increasingly difficult. As a result of these shortages, institutions have successfully turned to out-of-state professionals and faculty to help fill open positions critical to institutions' missions. The flexibilities allow institutions to seamlessly hire and integrate such workers at a time when campuses are increasingly relying on the hybrid workplace model.

Furthermore, CUPA-HR's *Higher Education Employee Retention Survey* which piloted in May 2022 "to better understand the proportion of the higher ed workforce that is at risk for leaving their current jobs" indicates that a desire for remote work opportunities and more flexible work schedules is a driving cause behind the problem of retention in higher education.<sup>7</sup> The survey suggests that higher education institutions are at risk of losing half of their current employees in the next year, indicating that a permanent remote verification option could support employee retention. Given these factors, we support the proposed rule's formalization of authorities to allow the Secretary of Homeland Security to extend document examination flexibilities, provide alternative procedures, or conduct a pilot program and offer the following feedback to DHS potential conditions for establishing those alternative procedures.

## **B. Potential Conditions for Alternative Procedures**

### **a. Document Retention Requirements**

As part of its proposal, DHS is considering imposing some or all of the document retention requirements applicable to the remote examination process during the I-9 flexibilities period as well as requiring employers to retain copies of any documents presented remotely via video, fax, or email and asks for commenters feedback.

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<sup>6</sup> The three sectors with the highest percentage of establishments that increased telework during the pandemic are information (59 percent), professional and business services (52 percent), and educational services (60 percent). These sectors also are among the four sectors with the highest percentage of jobs that involved teleworking at least some of the time. See [Telework during the COVID-19 pandemic: estimates using the 2021 Business Response Survey : Monthly Labor Review: U.S. Bureau of Labor Statistics \(bls.gov\)](#)

<sup>7</sup> See [The CUPA-HR 2022 Higher Education Employee Retention Survey: Initial Results | CUPA-HR \(cupahr.org\)](#)

Based on responses to our CUPA-HR I-9 Survey, a large majority of human resources professionals in higher ed indicated that the document retention requirements associated with the I-9 flexibilities period was manageable and that they would continue to use remote verification regardless of whether this remains a conditional requirement of any future alternative procedure. That said, DHS should eliminate the “secondary review” requirement for employees who were onboarded using remote verification. As detailed in DHS’ announcement regarding the I-9 Flexibilities, once the National Emergency ends or normal operations resume, all employees, who were onboarded using remote verification, must report to their employer within three business days for in-person physical verification of their identity and employment eligibility documentation.

CUPA-HR believes this requirement is overly burdensome and unnecessary given the fact that a secondary review is unlikely to confirm anything other than whether the remote Form I-9 has been properly completed. As many institutions of higher education onboard thousands of employees every year, often in decentralized locations throughout a state or states, the requirement to re-inspect documents within 3 days of normal operations has been the biggest determining factor in whether institutions have utilized the I-9 flexibilities. Too many institutions that needed a remote verification option over the past two years have been unable to take advantage of the I-9 flexibilities due to the prohibitive burden of the requirement to view documents in-person within 3 days of opening a physical work location. We are also aware of institutions initially taking advantage of the I-9 flexibilities and then deciding to abandon the remote verification at a later date as the stress associated with requiring all remotely completed Form I-9s to present their documents in-person was too much.

As discussed earlier in our comments, the need to onboard employees in a remote environment is the new normal and we believe all higher education institutions should have the option to do so. Removing the secondary review requirement would allow more institutions to participate in a future permanent option and would aide in institutions’ employee retention efforts.

#### **b. Document Detection and/or an Anti-Discrimination Training Requirement**

Another conditional requirement DHS is considering adding to any alternative procedure is a fraudulent document detection and/or an anti-discrimination training. While DHS does not outline specific parameters of what the training requirements would entail, it provides the example that an employer or authorized representative who uses the alternative procedure may be required to take a 30-60-minute online training on detecting fraudulent documents remotely and avoiding discrimination in the process.

CUPA-HR appreciates DHS’ intent in maintaining the security of the Form I-9 verification process and preventing the exploitation and discrimination of employees by ensuring that those individuals verifying documents have received appropriate training. We agree that training is necessary and believe that most institutions would continue to utilize an alternative option if DHS were to make a 30-60 minute online training a mandatory requirement. We also

appreciate DHS understanding that any future training would need to be able to be completed virtually for the requirement to make sense. That said we encourage DHS to work with our members to ensure any training requirement is well-vetted before being implemented and to consider allowing an institutions' own training programs and requirements to meet any program DHS develops as long as it meets the same level of parameters offered by DHS. Furthermore, given the vast range of available resources in the higher education industry, we encourage DHS to offer any training at a minimal cost to the institution.

### **c. Mandatory Enrollment in E-Verify**

As another potential condition of utilizing the alternative procedure(s) the framework would establish, DHS has indicated it is considering limiting an alternative option to employers that are enrolled, and are participants in good standing, in E-Verify. While a significant percentage of colleges and universities are federal contractors and required to enroll portions of their workforce in E-Verify, CUPA-HR urges against an E-Verify requirement at this time given the unique nature of the E-Verify population on campus, concerns around the capacity of DHS to support a huge influx of users on the system, and the fact that a significant percentage of higher education institutions are not enrolled in the program and have participated in the temporary I-9 Flexibilities for the past two years without incident.

Generally speaking, federal contractors with qualifying contracts are required to verify the employment eligibility of all employees assigned to the contract and all new hires, whether they work under the contract or not. However, colleges and universities have the option of limiting the use of E-Verify to employees assigned to covered federal contracts. If only certain components of the university, such as a department, college, school or campus, will hire employees and create E-Verify cases, the university may choose to have each of those separate components enroll in E-Verify and sign an MOU. As a result, unlike many other employers that are required to be enrolled in E-Verify, there are many institutions of higher education where only a subsector or subsectors of their employee body is enrolled in E-Verify.<sup>8</sup> An E-Verify mandate would cause confusion amongst higher education institutions where only certain portions of their workforce are enrolled and would limit the potential benefits of an alternative procedure outlined in the NPRM such as the centralizing of Form I-9 processing.

There also are concerns that E-Verify's workload capacities cannot handle the potential influx of users to the system. Last summer, the DHS Office of Inspector General (OIG) issued a report entitled "USCIS Needs to Improve Its Electronic Employment Eligibility Verification Process"

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<sup>8</sup> For example, if a university research lab completes Forms I-9 for its new employees, it is considered a hiring site. The research lab could then enroll in E-Verify with its own MOU and create cases for new hires at the research lab. In this case, the research lab would only create E-Verify cases on new hires at the research lab; not all new hires at the entire university. Alternately, if the human resources department typically completes Forms I-9 for all of the university's new hires, it would be considered the university's only hiring site. When the university enrolls in E-Verify, the human resources department will need to create E-Verify cases for all the university's new hires. In this case, the university could not limit the creation of cases in E-Verify to new hires in specific departments. See <https://www.e-verify.gov/faq/studentsuniversitiesinterns/what-options-does-a-university-have-for-enrolling-in-e-verify>

which indicated that E-Verify's workload capacities to handle a higher volume of queries and a higher number of concurrent users may not be sufficient.<sup>9</sup> The report identified three factors that have hindered USCIS from completing necessary testing to ensure E-Verify could meet future demands including lack of coordination with its external data partners. Given the likely increase in demand of the E-Verify system were DHS to require enrollment as a condition for use of the alternative procedure(s), it is imperative that DHS conducts sufficient testing before mandating enrollment as a conditional requirement.

Lastly, thirty-six percent of institutions that responded to our CUPA-HR I-9 Survey and have utilized the COVID-19 flexibilities are not enrolled in E-Verify. Despite this fact, most institutions did not experience issues with employees' remote completion or submission of Section 1 of the Form I-9 and nearly all institutions were able ensure that remotely examined documents were genuine. As all of the higher ed institutions that are not currently enrolled in E-Verify expressed an urgent need for a remote verification option, CUPA-HR urges DHS against limiting an alternative document review option to only those employers using E-Verify.

#### **d. Restricting Employers from Participation Based on Fines, Settlements, or Convictions**

In its proposal, DHS has stated that it may consider restricting certain employers from the alternative procedure if they have been the subject of a fine, settlement, or conviction related to employment eligibility verification practices. CUPA-HR supports the intent behind DHS desire to restrict potential program usage from employers who are egregious violators of I-9 rules. However, we are concerned that such a restriction could affect employers that have been fined for simple paperwork violations that were committed without an intent to deceive or otherwise subvert the I-9 verification process. For instance, it is common during an Immigration and Customs Enforcement (ICE) audit for the agency to fine an employer for technical or procedural errors or for failing to prepare I-9s on a timely basis. While ICE levies fines against an employer as a result of these violations, oftentimes ICE reduces the fine as a result of the following mitigating factors: absence of bad faith, absence of illegal workers and no history of prior violations. DHS should ensure that any limitations from the alternative procedure(s) only apply to the most egregious of I-9 violations and that minor or unintended errors do not lead to disqualification from program participation.

### **C. Conclusion**

CUPA-HR greatly appreciates DHS issuance of this NPRM and we appreciate the agency's consideration of our feedback. We also welcome DHS' decision to extend the I-9 Flexibilities through July 23 as that decision provides additional certainty for institutions of higher education while DHS embarks on the rulemaking process to modernize the Form I-9. We encourage DHS to move swiftly in finalizing this proposal and to ensure the that the higher

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<sup>9</sup> See: [OIG-21-56 - USCIS Needs to Improve Its Electronic Employment Eligibility Verification Process \(dhs.gov\)](https://www.dhs.gov/oig-21-56-uscis-needs-to-improve-its-electronic-employment-eligibility-verification-process)

education community's experience working to implement the I-9 flexibilities guidance during the past two-year "pilot program" is reflected in a final rule that recognizes the realities of the new workplace environments COVID-19 has ushered in and that are here to stay beyond the end of the pandemic. We look forward to working with you to modernize workplace regulations to meet the demands of today's workforce.

Sincerely,

*Basil Thomson*

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