



Return to Business

Compliance ICEd Coffee: Chatting About I-9s

July 28, 2020

Seyfarth Shaw LLP

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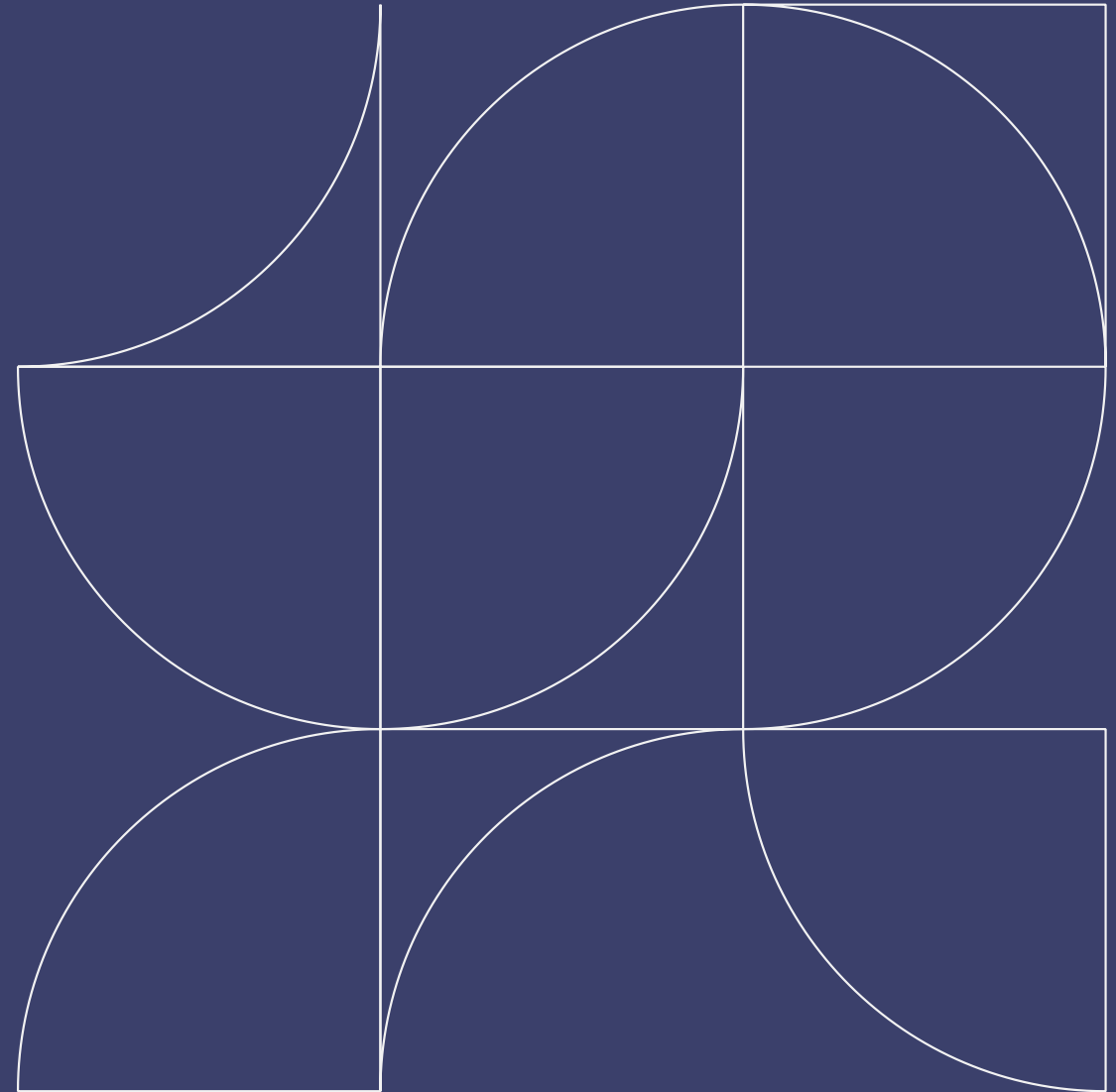


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Agenda

- 1 | Current State Overview**
- 2 | The Cost of I-9 Non Compliance**
- 3 | Policy Guidance From DHS**
 - **Electronic I-9 Considerations**
- 4 | Pandemic Driven Changes in Policy**
- 5 | Questions**

Current State Compliance Overview



DHS Relaxation of In-Person Review Requirement



- Overview from Washington D.C.
- On March 20, DHS and ICE announced an extension of the flexibility in complying with requirements related to Form I-9, due to COVID-19
- Extended until August 19, 2020
- Only applies to employers and workplaces that are operating remotely
- Reminder that there are no NOI extensions on March inspections

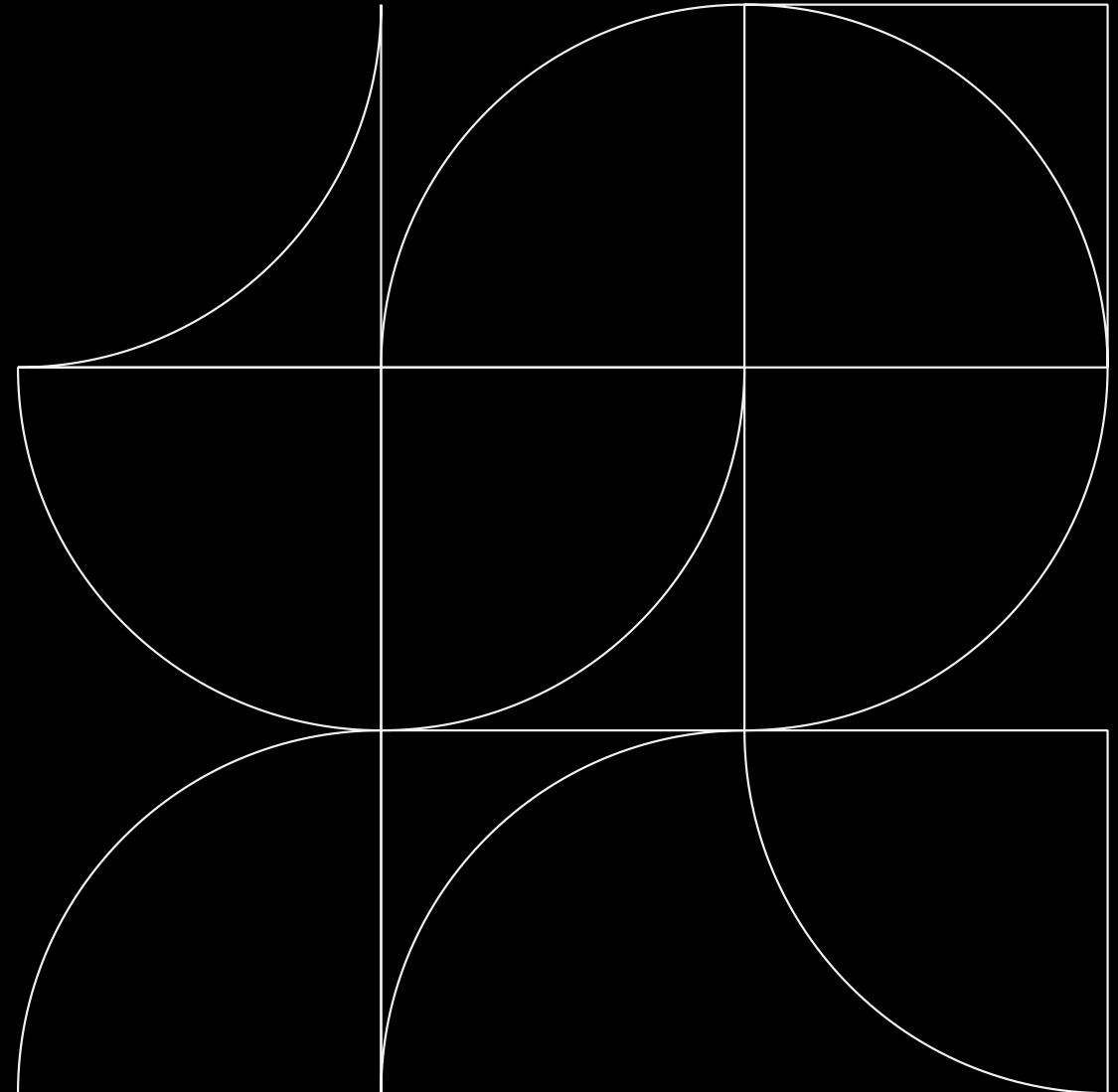
The Rules

- Must copy and retain “virtually” reviewed List A or B & C documents
- Must provide written documentation of remote onboarding and telework policy for each employee
- Must meet the 3 day rule, using whatever method company chooses
- Collect virtual I-9s from the I-9 Completers
 - What’s the process?
 - Who has Section 1?
- Certain businesses/sites may no longer be able to use virtual I-9 completion, things change as workforce is phased in
 - Fully remote to partially remote

The Questions:

- Do you have the process documented?
- Do you have a process owner?
- Are you using technology?
- Is your technology useful?
- Are you tracking?

The Cost of I-9 Non Compliance



Fines

There are three areas of serious consequences for I-9 violations

Criminal Prosecution

Felony and
Misdemeanor

Imprisonment,
Fines & Forfeiture

Fines

Hiring violations
\$573 - \$22,927

Paperwork
violations \$230 -
\$2,292

Debarment

Prohibits Federal
Contractors for 1-
3 years

Through
Executive Order
2.13.1996

Form I-9 Violations

Substantive / Uncorrected Technical Violation Fine Schedule*

Effective for penalties assessed after April 5, 2019 whose associated violations occurred after November 2, 2015

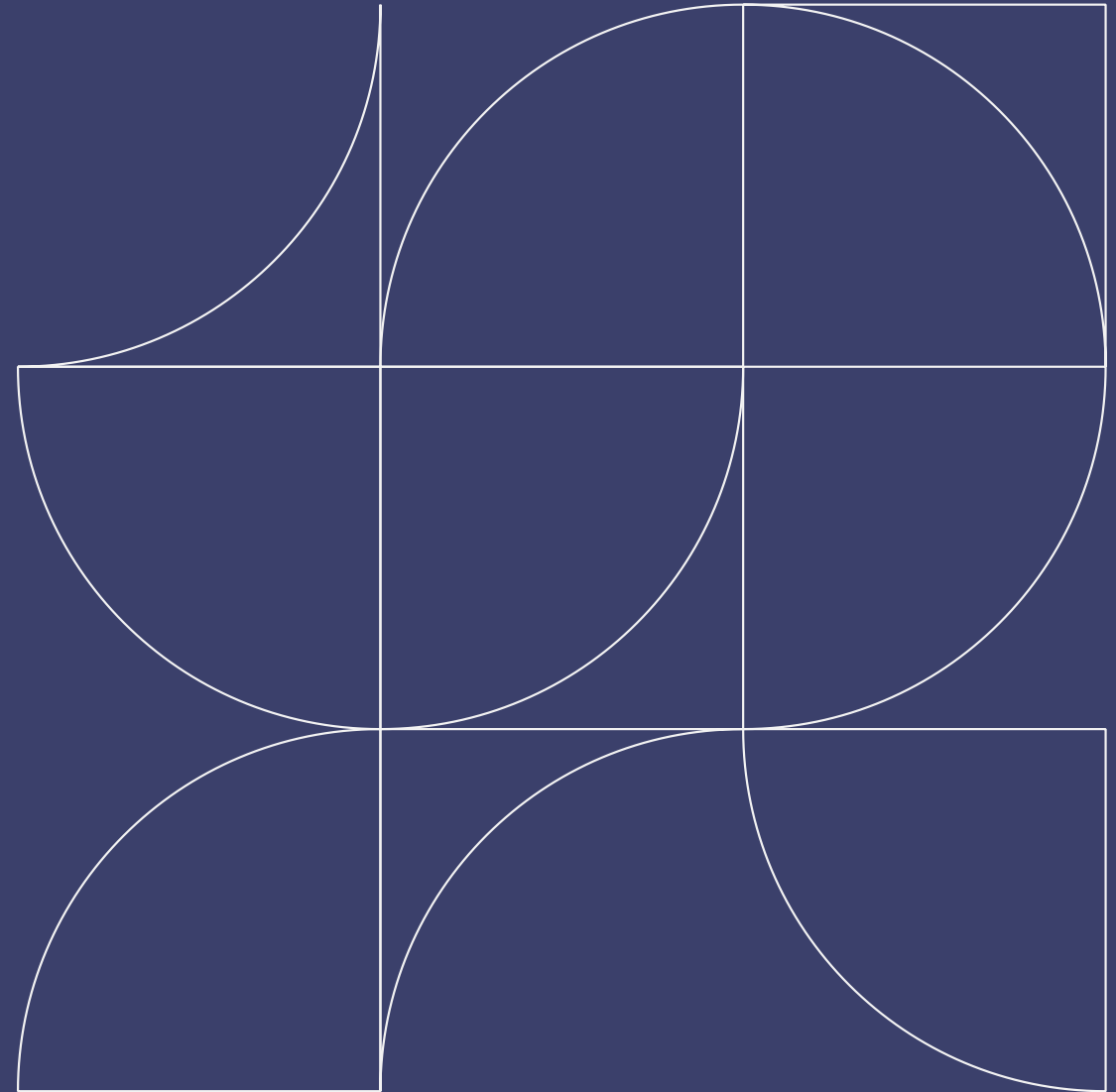
Standard Fine Amount

Substantive Verification Violations	1st Offense	2nd Offense	3rd Offense +
	\$230 - \$2,292	\$230 - \$2,292	\$230 - \$2,292
0% – 9%	\$230	\$1,146	\$2,292
10% – 19%	\$573	\$1,376	\$2,292
20% – 29%	\$917	\$1,604	\$2,292
30% – 39%	\$1,261	\$1,834	\$2,292
40% – 49%	\$1,604	\$2,063	\$2,292
50% or more	\$1,948	\$2,292	\$2,292

It's Too Late to Clean Up I-9 Lapses Once ICE Knocks

- Good faith compliance in making I-9 corrections will only reduce fines if made before ICE investigates. See: *United States v. Eriksmoen Cottages, Ltd*, 14 OCAHO no. 1355a (July 15, 2020)
 - *Eriksmoen Cottages* reverses course on Administrative Law Judge decisions that, in general, had been sharply reducing ICE's proposed fines
 - The ALJ found the Government's calculation of penalties to be generally reasonable, in light of the five statutory factors that must be considered under the Immigration and Nationality Act, but with a few adjustments
 - Employer's lack of a history of previous violations and the fact that all employees listed in ICE's Notice of Intent to Fine were authorized to work in the United States was treated as neutral because "compliance with the law is the expectation, not the exception."

Policy Guidance From DHS



Agency Guidance Summarized

- 3/20/20 announcement outlined how to obtain, remotely inspect, and retain copies of the identity & employment eligibility documents
- Guidance allows review of documents remotely (e.g., over video link, fax or email, etc.)
- Must obtain, inspect, and retain copies of the documents within three business days for purposes of completing Section 2
- Temporary reprieve; “after normal operations resume” – the employee must provide original documents in person for inspection
- Return to work requires a second action
- **USCIS issued Q&As**

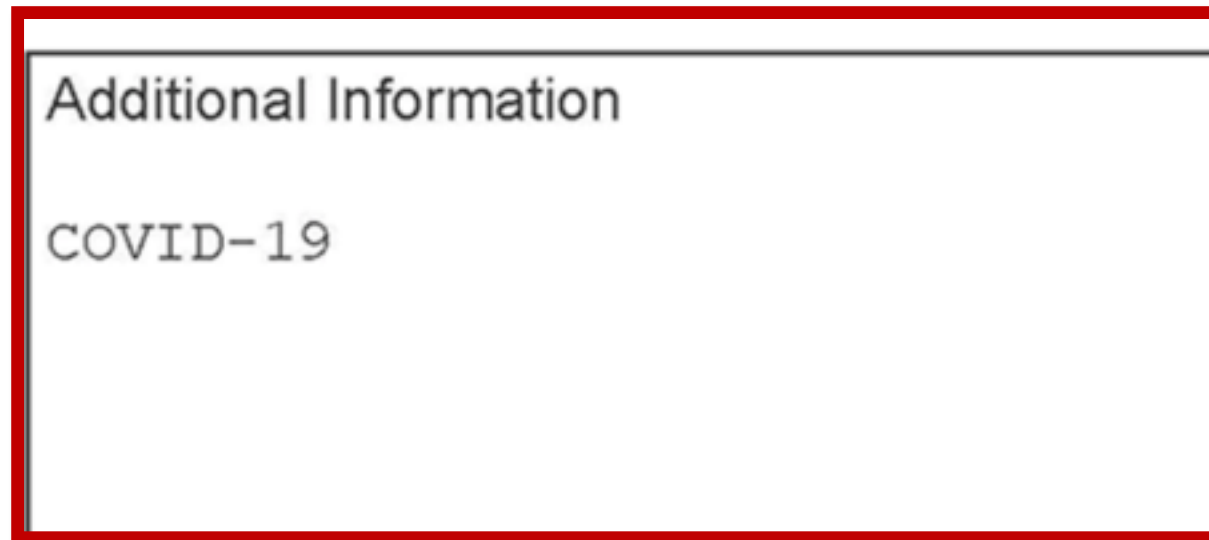
USCIS Guidance

- After document review, enter in the Additional Information field
 - “COVID 19” as the reason for the physical inspection delay
 - “Documents physically examined” and the date of physical inspection and who conducted it
- Follow the expired List B guidance documents
 - update when necessary
- E-Verify participating employers
 - use the employee’s expired List B document number from Section 2 to create an case
 - within three days of the date of hire
 - TNC have been extended due to SSA and USCIS closures

List B Document Extensions- Receipt or Not a Receipt?

1. If List B is expired on or after March 1, **and extended**, then doc is acceptable - Record it
 - Do **NOT** reverify later
2. Beginning on May 1, ID documents set to expire on or after March 1, with no extension may be treated the same as if the employee presented a valid receipt for an acceptable document

- Department of Defense has an excellent Tracker <https://bit.ly/3jMVvHd>
- Examples look exactly alike for I-9 completion
- Write COVID-19 in the Additional Information Box
- Write COVID-19 in the Additional Information Box
- Write COVID-19 in the Additional Information Box



Additional Information

COVID-19

issuing Authority USCIS	issuing Au Social Se
Document Number 123456789	Document 1234567
Expiration Date (if any) <i>mm/dd/yyyy</i> 03/05/2020	Expiration N/A

Additional Information

COVID-19

USCIS Government ID Card
Document Number 987654321
Exp. 06/15/2025

TJ 10/01/2020

y, that (1) I have examined the document(s) presented to me and found them to be genuine and to relate to the employee named, and (3) I am a resident of the United States.

mm/dd/yyyy: 05/18/2020 (See instructions)


Section 2: List B Extensions

- Updating Section 2 when employee presents unexpired document
- When? Within 90 days after DHS's termination of this temporary policy
- This example illustrates the same person performing both the remote and subsequent physical inspections, complete as shown
 - if a different person conducting the physical inspection, they should write their full name and title, instead of their initials

issuing Authority USCIS	issuing Au Social Se
Document Number 123456789	Document 1234567
Expiration Date (if any) (mm/dd/yyyy) 03/05/2020	Expiration N/A

Section 2: List B Extension AND Virtual Inspection

- Not contemplated
- Needs to be considered

Additional Information COVID-19	Additional Information Remote inspection completed on 03/30/2020
	COVID-19 Documents physically examined on mm/dd/yyyy by AA
<i>USCIS Government ID Card</i> <i>Document Number 987654321</i> <i>Exp. 06/15/2025</i> <i>TJ 10/01/2020</i>	

y, that (1) I have examined the document(s) presented to me and found them to be genuine and to relate to the employee named, and (3) I am a resident of the United States.

mm/dd/yyyy): 05/18/2020 (See instructions)

Additional Information
Remote inspection
completed on 03/30/2020

*COVID-19
Documents physically
examined on mm/dd/yyyy
by HR Manager Betsy Ross*

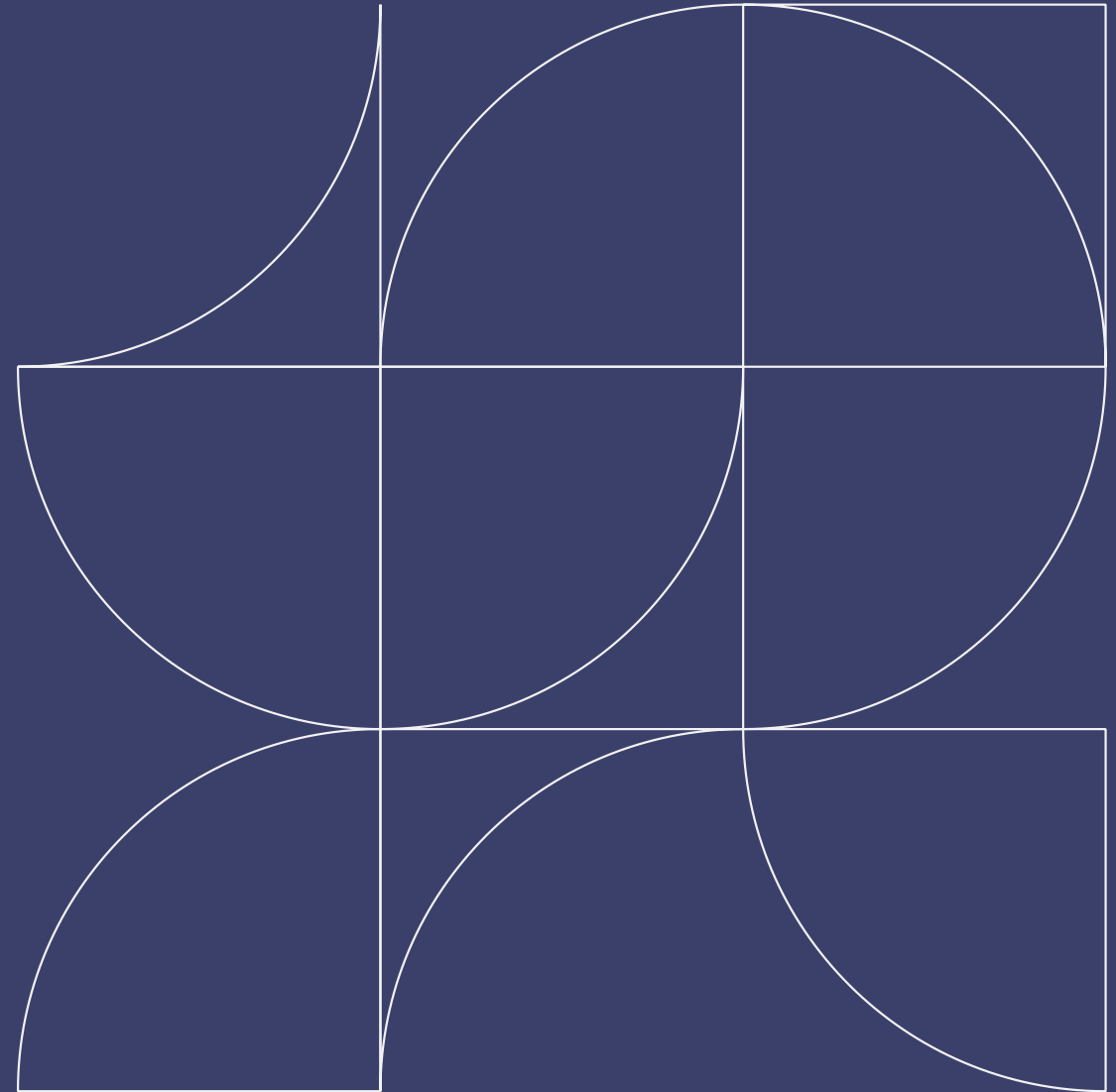
Remote inspection completed on
03/30/20 COVID-19

*COVID-19 Employee RTW on
10/21/20 Documents physically
examined on 10/23/20 by HR
Manager Betsy Ross*

Performing Physical Inspection by a Different Completer:

- USCIS says: the person who performs the physical inspection should indicate the date they physically examined the documents
 - include full name and title in the Additional Information field
- We say: consider documenting & memorializing
 - Add RTW date

Pandemic Driven Changes in Policy



COVID-19 Complications Layered on a Confusing Legacy

- I-9 completion is not easy
- Returning to Business in 2020 and beyond will be different
- Companies need simple solutions
- In the interim, should you consider changing internal processes and policies?
 - consider the Authorized Rep method?

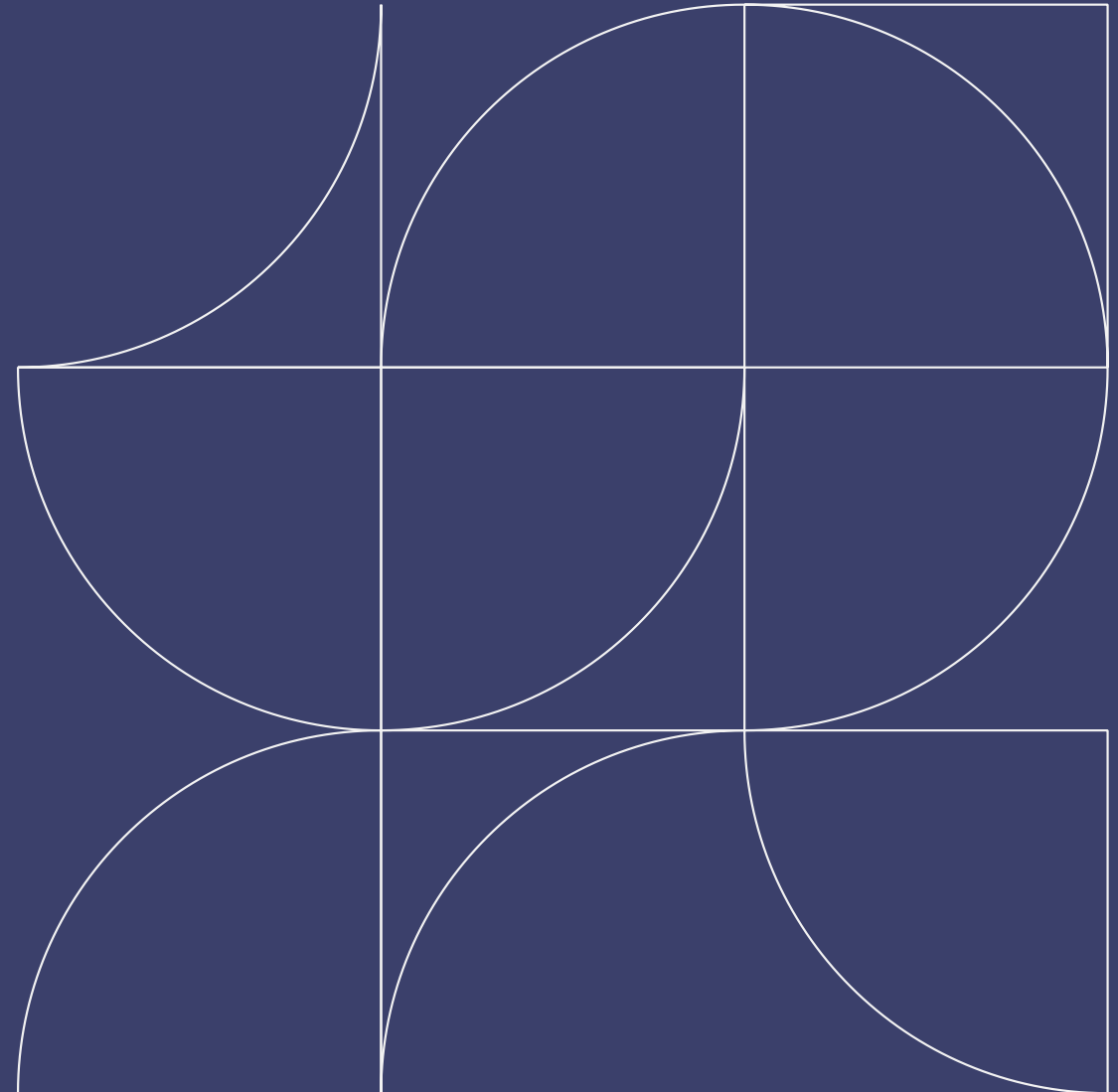
Authorized Representative Method

- What is it?
- Can you really use a friend or family member?
- Pros and Cons of this process
- Must be structured
- Must have gates and precautions
- Must have an audit protocol

Why Might 2021 Be Different?

- Slow Return to Work means many businesses will remain partially remote for a long time
- Some employers are seeing this as an opening to relax the physical inspection
- Virtual I-9s with no follow-up, the future if we organize
- Avenues of Advocacy
 - Department of Homeland Security – USCIS, ICE, Private Sector Office
 - Congress
- Change in the Regulations
 - Creative strategies
- Litigation may be an option
 - Efforts underway to organize
 - Delays on EADs and LPRs

**Questions?
We got Answers.**



**thank
you**

**For more information please contact
your Seyfarth immigration attorney or
any of the speakers.**