

Virtual Coffee on Virtual I-9s

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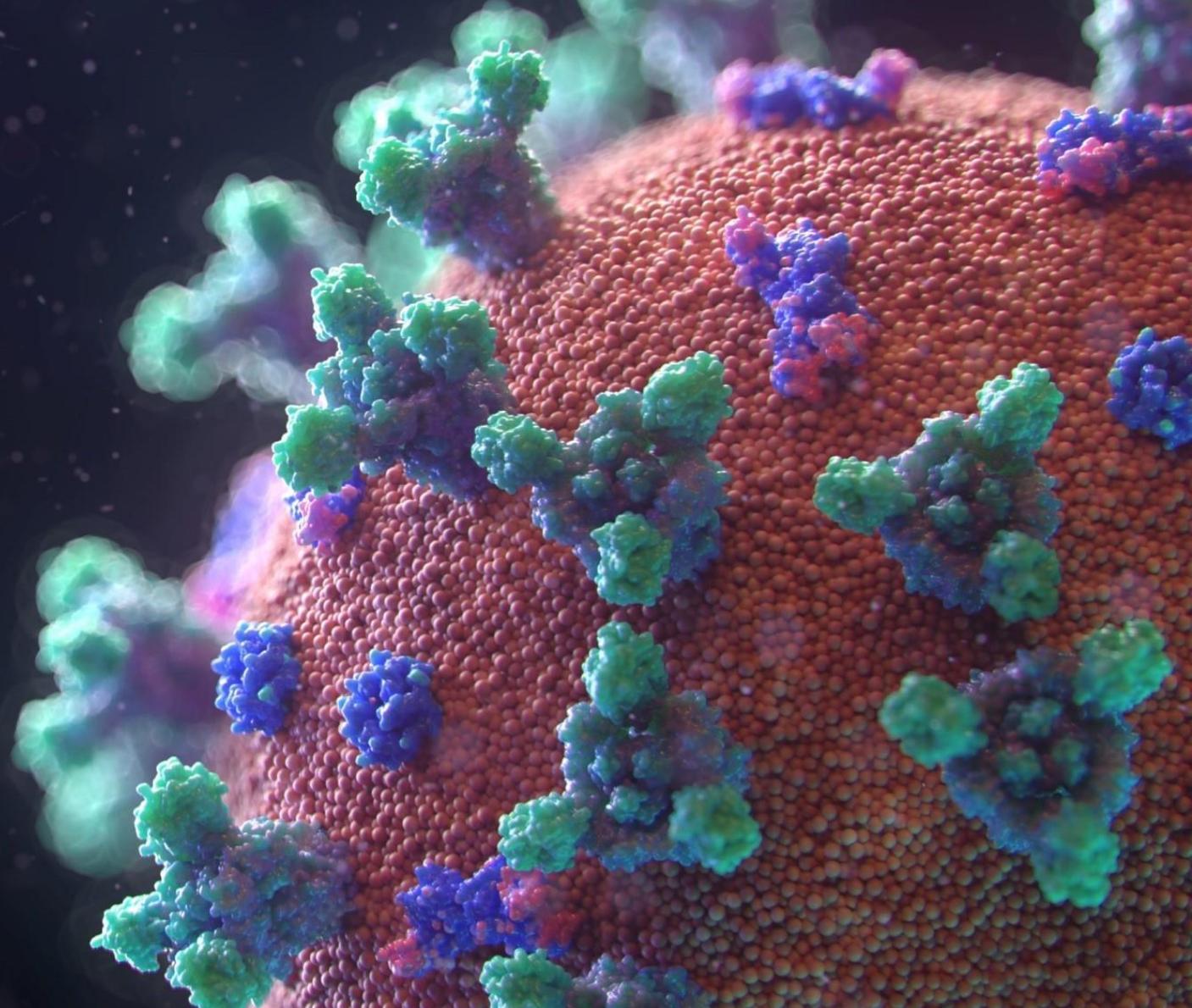
Jon Baselice

March 30, 2020

Seyfarth Shaw LLP

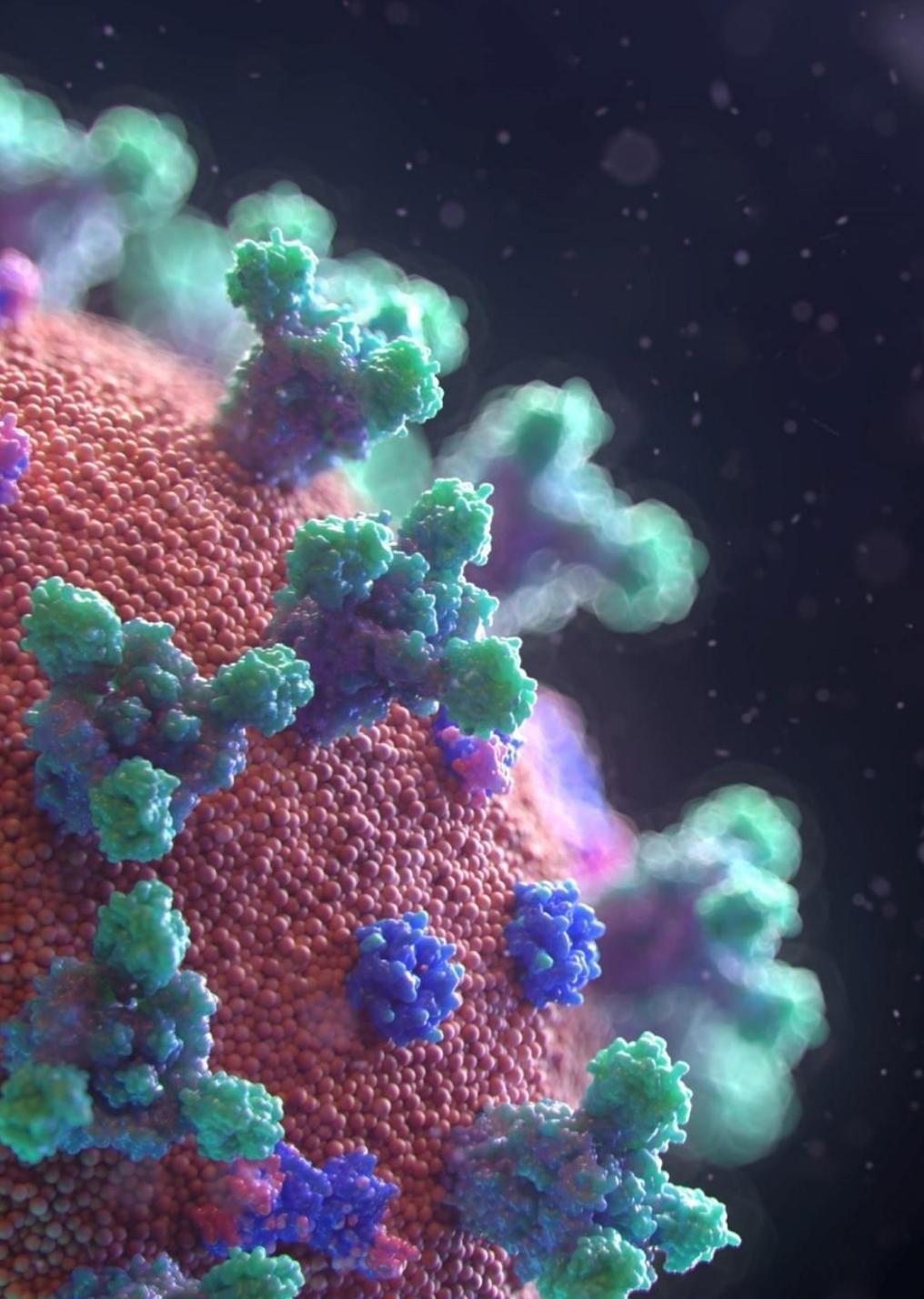
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U.S. Chamber of Commerce





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Objectives

- 01** State of Immigration Compliance
- 02** Overview of I-9 Rules
- 03** Relaxation of the In-Person Requirement
- 04** Compliance Options during COVID-19
- 05** Reasonable Interpretations of the Flexibility
- 06** E-Verify Chatter
- 07** Worksite Enforcement Post COVID-19

Speakers



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Worksite During COVID-19

- From the ICE Website:
 - ICE remains “committed to the health and safety of our employees and the general public. It is important for the public to know that ICE does not conduct operations at medical facilities, except under extraordinary circumstances”
 - ICE policy directs our officers to avoid making arrests at sensitive locations – to include schools, places of worship, and health care facilities, such as hospitals, doctors’ offices, accredited health clinics, and emergent or urgent care facilities – without prior approval for an exemption, or in exigent circumstances





Overview of I-9 Rules

- Section 1 must be completed by the employee
 - On or before first day of work for pay (aka Date of Hire)
 - After an offer and acceptance
- Section 2 must be completed by the employer, or authorized representative
 - On or before the third day of work for pay (same as Date of Hire)
 - Employee must present unexpired original documentation that verify his/her identity and his/her work authorization status in the U.S.
 - Employers must physically review the document(s) in-person
 - Employees may choose which documentation to present
- Section 3 must be completed by the employer, where necessary
 - On or before the expiration of work authorization

Relaxation of In-Person Requirement



- DHS Announces Flexibility on Form I-9 Compliance
- After persistent requests from Seyfarth, the Chamber, AILA, SHRM, Congress and other organizations, ICE issued the following guidance on March 20:

“Due to precautions being implemented by employers and employees related to physical proximity associated with COVID-19, the Department of Homeland Security (DHS) announced today that it will exercise discretion to defer the physical presence requirements associated with Employment Eligibility Verification (Form I-9) under Section 274A of the Immigration and Nationality Act (INA)”.

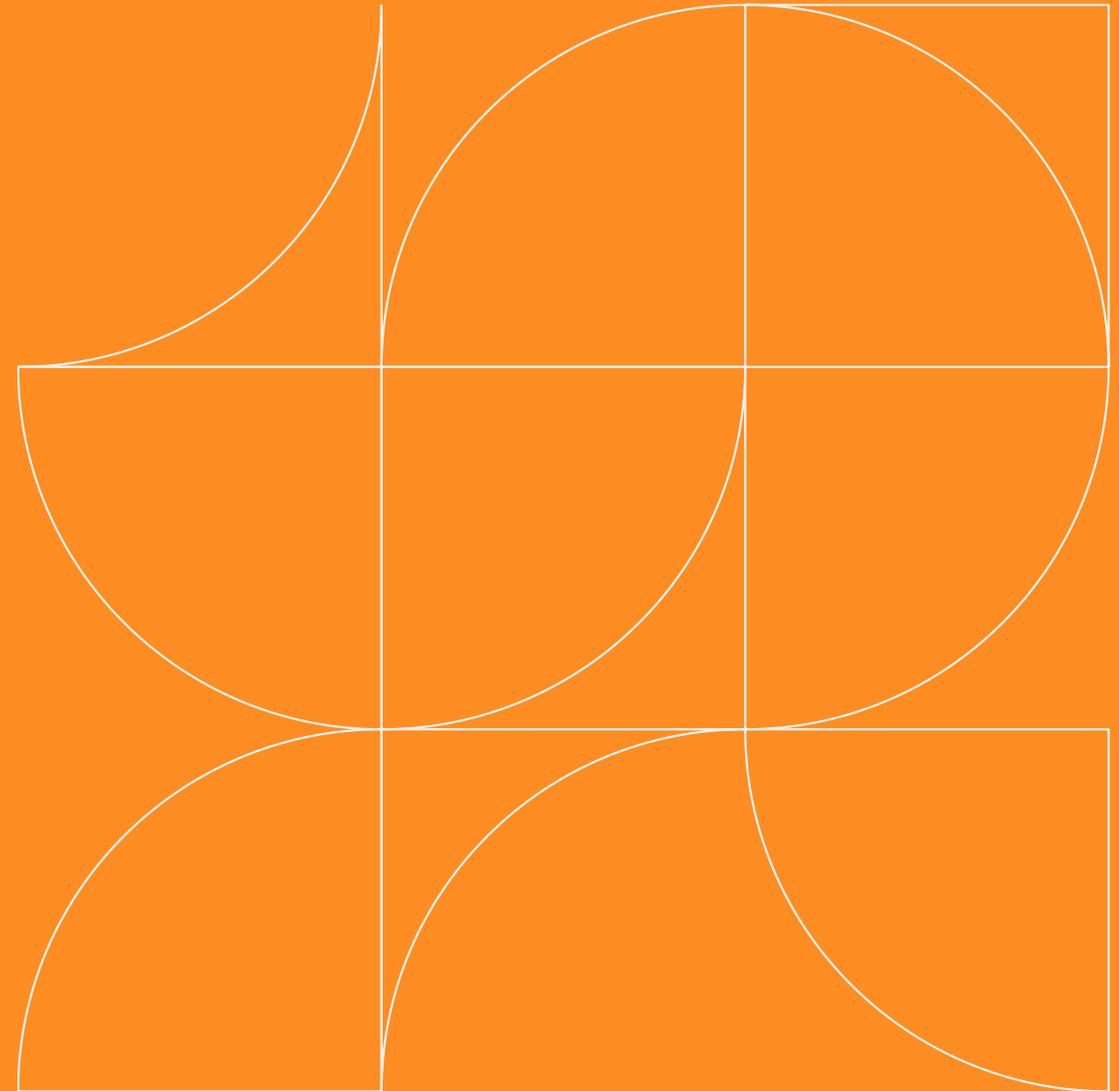
Historical View on In-Person Document Review

- Before the emergence of COVID-19, employers were asking for a relaxation of the in-person review
- DHS perspective
 - Regulatory
 - Criminal
- The Reality of 2020 should outweigh prior concerns



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8	9	10	11	12	13	14
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COVID-19 Options



1. Virtual/Remote



- **Who Qualifies?**
 - Applies to employers and workplaces that are operating remotely
- **Timing?**
 - Section 1 on Day 1 and section 2 within three days of the employee’s start date
- **What are our choices?**
 - Remote inspection using video (think Facetime, Zoom, Goto, Amazon Chime, Google Meets), fax, or email
- **How does it work?**
 - Define process based on vehicle to complete
 - Paper or Electronic? Will your system support?
 - In order to avoid confusing and ensure clarity direct I-9 Completers to annotate Section 2 of the I-9 “COVID-19 Completed Remotely” in the Additional Information Box

1. Virtual/Remote



- Once normal business operations resume, the new hire must have his/her documents verified in-person within the three day time period
- During in-person verification, ensure that

“COVID-19”

was already entered in Section 2 *Additional Information Box* or Section 3 (if for reverification) by the individual who performed the initial I-9 document verification

- The person now viewing the original documents should then put a 2nd annotation in the *Additional Information Box* and include their name and the date completed

**Documents Physically Examined by [Jane Smith]
on 06/04/20**

1. Virtual/Remote



- **The Ownership Logistics:** Who keeps the completed I-9 papers, how are documents saved/uploaded, who is tracking this for the company?
- **How Long?** Recognizing the fluidity of the situation, DHS noted it would continue to monitor the ongoing National Emergency
 - While updated guidance can be expected, the in-person review provision is suspended initially for 60 days (May 19, 2020) or within 3 business days after the termination of the National Emergency, whichever comes first
- **Memorialize Everything**
 - Any business using the remote/virtual verification process must memorialize (and justify), in writing, the company's remote onboarding/telework policy for each employee

2. Third Party, AKA “Friends & Family” or “Crowdsourced”



- Who Qualifies?
 - Always allowable
 - Reminders on the new I-9 Instructions about Authorized Representatives
- Timing?
 - Section 1 on Day 1 and section 2 within three days of the employee’s start date
- What are the Choices?
 - Before 3rd party vendors, notaries, professionals etc.
 - Currently Friends & Family/Crowdsourced
- How does it work?
 - Very carefully outline process including directives to employee
 - Best Practices: Need secondary review, mandatory copies, E-Verify
- Other Considerations:
 - Electronic I-9 software, Copies/PII, Ownership Logistics, concerns regarding fraud

3. Suspended/ Delayed Verification*



- Decision to complete Section 1 now and then delay Section 2 altogether until “normal” business operation
- Some will have extenuating circumstances and will argue a “good faith” exceptions
 - Ex. Hospital in NYC onboarding newly graduated medical students and retired staff, very quickly, with limited HR resources during COVID-19

* Not approved by ICE

4. Regular I-9 Completion: In person & timely



- Business as usual - Complete I-9 in person
- Consider document copies if not already doing so
 - Ensure back and front of clear copies are made
 - Have a process to protect the employee's PII
- After reviewing with counsel, consider enrolling your company in the E-Verify program if not already participating
- Big shifts in the legacy workforces for the first time in many years will necessitate new I-9s in some cases for returning workers (rehire rules)
- May provide much needed labor but possibly unauthorized

Interpretations and Business Realities

ICE states:

- Employers with employees taking physical proximity precautions due to COVID-19 will not be required to review the employee's identity and employment authorization documents in the employee's physical presence
- **This provision only applies to employers and workplaces that are operating remotely**
- If there are employees physically present at a work location, **no exceptions are being implemented at this time for in-person...**
- However, if newly hired employees or existing employees are subject to COVID-19 quarantine or lockdown protocols, DHS will evaluate this on a case-by-case basis



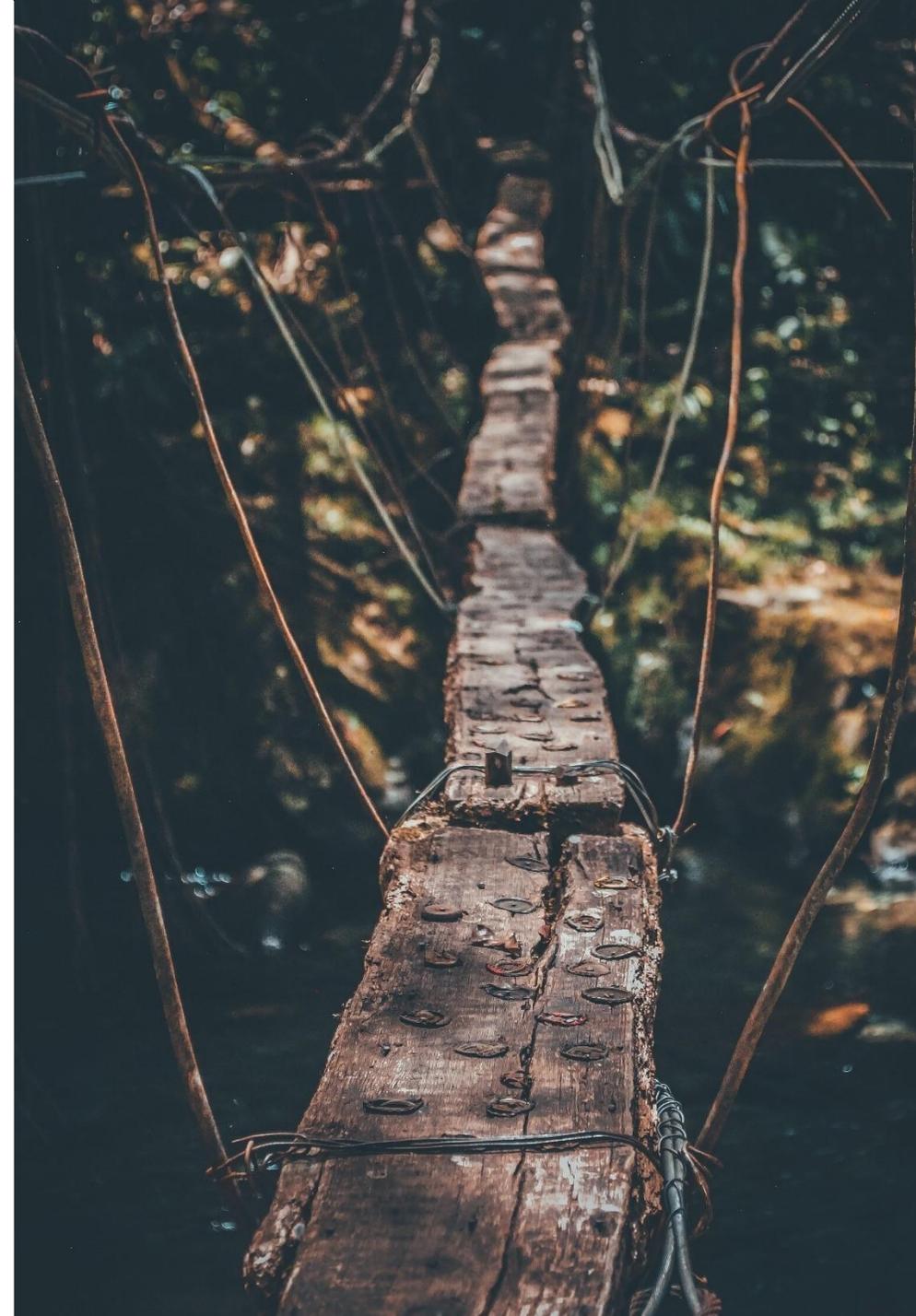
E-Verify Guidance From USCIS

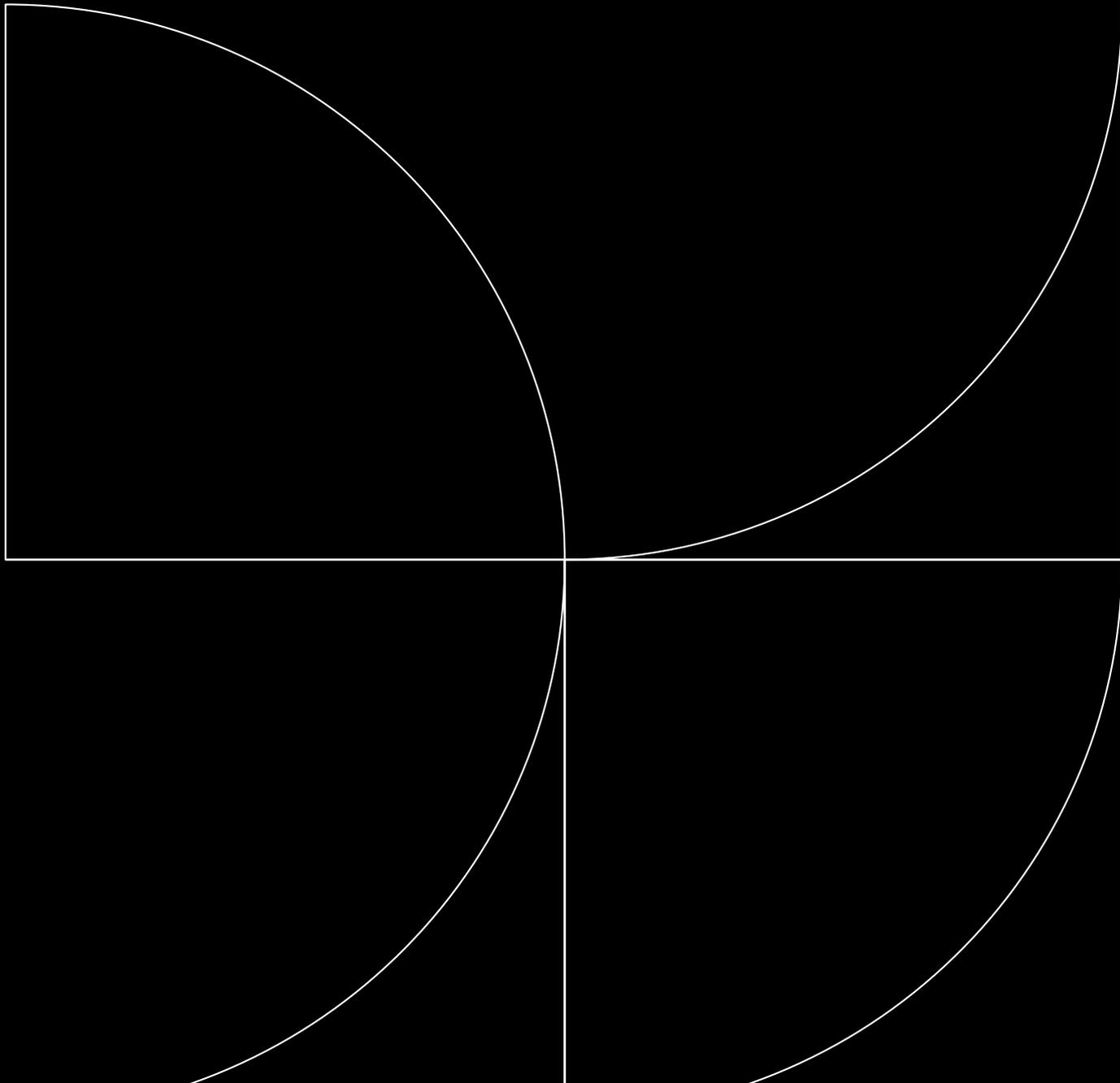


- Extended timing to take action to resolve Tentative Non-confirmations (TNCs) in light of SSA closures and DHS related delays
- Employers must still notify employees about their TNC results as soon as possible
- Driver's License expirations in light of DMV closures
- Where state extended a DL expired doc is acceptable as a List B
 - Enter the document's expiration date in Section 2 and enter "**COVID-19 EXT**" in the Additional Information field
- Attach a copy of the state DMV Info
- New FAQs expected this week

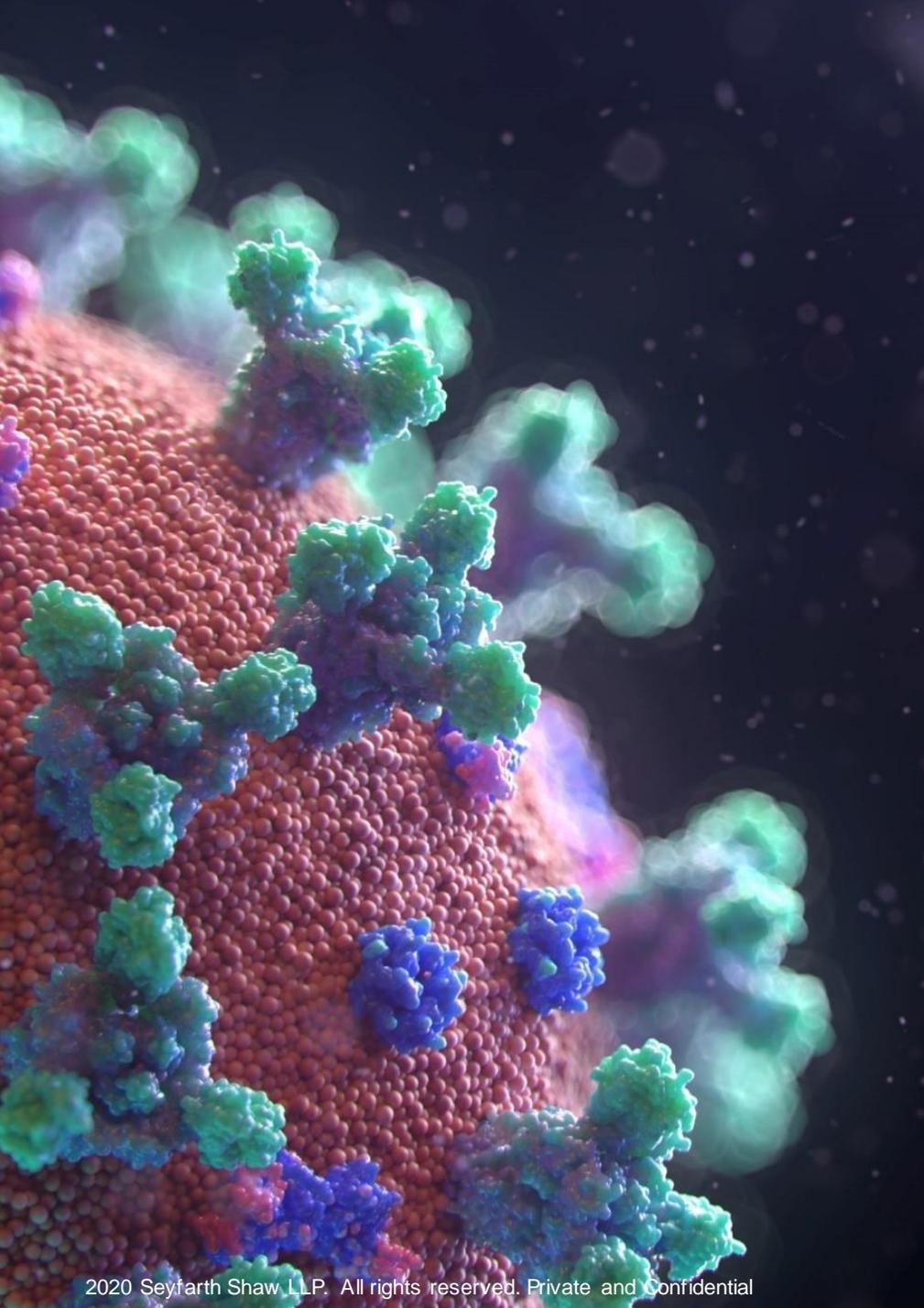
Pre COVID and Post COVID-19

- Compliance Requirements Will Vary
- Pre COVID and Post COVID Employment Verification
- Document and Memorialize
- Current Worksite Enforcement
 - NOI Guidance
 - Criminal Enforcement
 - Backlog at the field offices
 - National Audits?
 - Electronic I-9 focus?
- Enforcement Post COVID-19
 - What do you see in the cards?





Questions?



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