

Avoiding DHS Work Permit Extension's I-9 Compliance Pitfalls

By **Morgan Bailey and John Corgan** (July 13, 2022)

Employers are responsible for verifying the identity and employment authorization of newly hired employees. Form I-9 employment eligibility verification is critical to any employer's onboarding process for new hires, but ongoing Form I-9 maintenance is equally important with respect to existing employees who need to renew their work authorization documents with the U.S. Department of Homeland Security.



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Some employers have faced challenges in this regard following DHS' recent announcement of a temporary final rule that increases the automatic extension period for employment authorization for certain individuals from 180 to 540 days.[1]

The rule was intended to provide additional security to both employees and employers while their renewal applications are being adjudicated by U.S. Citizenship and Immigration Services. However, the rule also raises significant considerations for employers seeking to maintain proper Form I-9 compliance and avoid liability for past errors.



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What Does the Temporary Final Rule Provide?

DHS' temporary final rule allows qualified individuals who have timely filed an application to renew their work authorization to continue working for up to 540 days from the expiration date stated on their employment authorization document, or EAD.[2]

To benefit from the DHS announcement, individuals must:

- Have a pending Form I-765 application for employment authorization;
- Have timely filed their renewal application;
- Be applying for renewal in the same employment category; and
- Have received a Form I-797C notice confirming receipt of their application.

Previously, individuals who met the above criteria only benefited from an automatic 180-day extension of work authorization. However, due to USCIS processing delays, many individuals who had timely filed for EAD renewals saw their work authorization lapse, as the agency required more than 180 days to process the renewal applications.

Employers were accordingly forced to remove these individuals from their active payrolls, causing disruptions throughout the labor force.

Who Benefits From the Temporary Final Rule?

Under the temporary final rule, individuals who had to be removed from active payroll when their EAD renewal applications remained pending beyond 180 days are again considered work authorized from May 4, and for up to 540 days beyond the expiration date on their existing EAD. As such, employers may return these employees to active payroll following a Form I-9 work authorization check.

Likewise, individuals who meet the above criteria and who timely filed for EAD renewal before May 4 may continue working for up to 540 days beyond the expiration date of their existing EAD — even if their I-797C receipt notice describes only a 180-day automatic extension.

Individuals who file for an EAD renewal after May 4 will receive an I-797C receipt notice expressly stating the 540-day automatic extension. Both sets of individuals will continue to be considered work authorized for Form I-9 purposes.

What Does the Temporary Final Rule Mean for Form I-9 Compliance?

Employers seeking to ensure ongoing Form I-9 compliance should refer to DHS' Handbook for Employers M-274, which establishes basic guidelines and instructions for completing Form I-9.[3] With respect to automatic extensions of work authorization, the handbook now provides specific guidance tied to the temporary final rule.

However, some employers are identifying potential pitfalls.

For example, employers may face a situation where an employee's EAD renewal application is approved before the end of the 540-day extension period. The employee's new EAD card may then indicate an expiration date that is sooner than the end of the 540-day extension period.

In such cases, employers should defer to the expiration date on the new EAD card, as the new EAD takes precedence over the automatic extension. Thus, in some instances, the employer must amend the employee's existing Form I-9 to reflect the sooner expiration date for work authorization.

Should Employers Attach the DHS Webpage Announcement to Form I-9?

The USCIS website was updated to reflect the change in the automatic extension period. The public should refer to the DHS employers' handbook and the USCIS webpage when determining whether a Form I-797C notice of action, if presented with the expired EAD, is acceptable for Form I-9 compliance purposes.[4]

The temporary rule states that employers should attach a copy of the webpage with the employee's Form I-9 to document the extension of employment authorization or EAD validity.

Are There Other New Rules?

Yes, for instance, separate from the new automatic extension rule, employers may face questions regarding Form I-9 verification process for employees whose I-94 arrival record states their class of admission as L-2S, E-1S, E-2S or E-3S.

These new codes for classes of admission were implemented by DHS in connection with a settlement agreement recognizing L and E dependent spouses as work authorized incident to status.[5]

For I-9 purposes, employers should note that while the employee's I-94 stating one of these classes of admission is sufficient to verify work authorization — i.e., as a List C document — it is not sufficient to verify identity — i.e., as a List B document.

In addition to the I-94 showing admission to the U.S. in a work authorized status, the employee must also present a state driver license or identification card, a school ID, Canadian driver license, or other List B document in order for the employer to verify the employee's identity.

A foreign passport or visa notably will not satisfy this requirement for List B, and the individual may have to visit their local department of motor vehicles before their employment may begin.

What are the Consequences for Form I-9 Violations?

Employers who violate the law may be subject to civil fines, criminal penalties, debarment from government contracts, payment to discriminated individuals, court orders and other sanctions.

What Additional Steps Can Employers Take to Ensure Form I-9 Compliance?

By designating a core compliance team, developing clear documentation and review procedures, and receiving regular training that is supplemented when major policy updates are implemented, employers can minimize risks associated with Form I-9 verification.

In addition, the cornerstone of an organization's compliance program is the periodic external audit, which is designed to provide an independent assessment of the employer's Form I-9 records.

A regular review of Form I-9 records is vital for identifying errors, proactively remediating issues and ensuring due diligence. Employers that vet and mitigate errors — including by carefully utilizing and reviewing available data analytics — will be in a stronger position to defend against challenges to their Form I-9 verification program.

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[1] <https://www.uscis.gov/newsroom/news-releases/uscis-increases-automatic-extension-period-of-work-permits-for-certain-applicants>.

[2] <https://www.mobilework.law/2022/05/dhs-extends-work-permits-for-approximately-18-months-affecting-87000-applicants/>.

[3] <https://www.mobilework.law/2022/05/dhs-extends-work-permits-for-approximately-18-months-affecting-87000-applicants/>.

[4] <https://www.uscis.gov/i-9-central/form-i-9-resources/handbook-for-employers-m-274>.

[5] <https://www.mobilework.law/2022/02/cbp-announces-new-admission-codes-for-work-authorized-l2-and-e2-spouses/>.