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DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

8 CFR Part 274a

Docket No. _____ ; **DHS Order No.** _____

RIN _____

Online Completion of USCIS Form I-9 (“G-Verify”)

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security

ACTION: Interim final rule with request for comments.

SUMMARY: This rule amends the Department of Homeland Security regulations relating to USCIS Form I-9 by requiring online completion by employers, thereby (1) relieving all employers of the need, under the current E-Verify program, of the need to enter the data a second time in order to confirm that a new hire may lawfully be employed and (2) relieving those employers who also choose to sign online of the burden of storing copies of the form.

DATES: *Effective date:* The later of 30 days after publication in the Federal Register or the first day of the first month after DHS has made Form I-9 available online. *Comment date:* Written comments must be submitted on or before 30 days after publication in the Federal Register. Comments postmarked on or before that date will be considered timely. The electronic Federal Docket Management System will accept comments until midnight Eastern Time on that date.

FOR FURTHER INFORMATION CONTACT: William W. Chip, Senior Counselor to the Secretary of Homeland Security, by email at william.chip@hq.dhs.org, by phone at (202) 891-

2150, or by mail to Department of Homeland Security Headquarters, 2703 Martin Luther King Jr Ave., SE, Washington, DC 20593.

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this rule. The Department also invites comments that relate to the economic, environmental, or federalism effects that might result from this rule. Comments that will provide the most assistance to the Department in developing these procedures will reference a specific portion of the rule, explain the reason for any recommended change, and include data, information, or authority that supports such recommended change.

Each submitted comment should include the agency name and reference RIN ____ or EOIR Docket No. ____ for this rulemaking. Please note that all properly received comments are considered part of the public record and made available for public inspection at www.regulations.gov. Such information includes personally identifying information (such as name, address, etc.) voluntarily submitted by the commenter. The Department may withhold from public viewing information provided in comments that they determine may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of <http://www.regulations.gov>.

If you want to submit personally identifying information (such as your name, address, etc.) as part of your comment but do not want it to be posted online, you must include the phrase "PERSONALLY IDENTIFYING INFORMATION" in the first paragraph of your comment and identify what information you want redacted. The redacted personally identifying information will be placed in the agency's public docket file but not posted online.

If you want to submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase "CONFIDENTIAL BUSINESS

INFORMATION” in the first paragraph of your comment. You also must prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on www.regulations.gov. The redacted confidential business information will not be placed in the public docket file.

To inspect the agency’s public docket file in person, you must make an appointment with agency counsel. Please see the **FOR FURTHER INFORMATION CONTACT** section above for the agency counsel’s contact information by topic in Section III, *infra*.

II. Background

In 1986, in order “to control illegal immigration,”¹ Congress enacted the Immigration Reform and Control Act (IRCA), which made it unlawful for any person or entity to hire an individual known by that person or entity to be an unauthorized alien worker (UAW).² To that end, IRCA required the Attorney General (now the Secretary of Homeland Security) to “designate or establish” by regulation a form, to be retained for a specified period by the employer, in which each new employee attests to his/her identity (name/SSN/birthdate) and authorization to work and the employer attests to having verified that the new employee is not a UAW, based on examination of specified documents.³ Apart from a subsequent amendment allowing “either a hand-written or electronic signature” to be manifested on the form and allowing the employer to retain either a paper or electronic version of the form,⁴ IRCA, as originally enacted and subsequently amended, provided no guidelines concerning the nature or scope of the form to be “designated or established” by the Secretary.

¹ <https://www.youtube.com/watch?v=FvZ0QHpxmRs>.

² 8 USC 1324a(a).

³ 8 USC 1324a(b).

⁴ 8 USC 1324a(b)(1)(A), 1324(b)(3).

Under current regulations, DHS (1) has “designated” and “established” Form I-9 as the form required by IRCA⁵ and (2) has provided that employers and their new employees must complete and sign either a paper copy or a downloadable PDF of the form.⁶ Because DHS does not itself receive copies of the completed forms, DHS is unable to examine the information reported on a given Form I-9 unless (1) DHS carries out a worksite-enforcement inspection of the employer to review the Forms I-9 and (2) the employer has not discarded Forms I-9 through negligence or withheld Forms I-9 that may be incriminating. Given the significant costs of worksite inspections and DHS’s total dependence on an employer’s diligence and integrity in storing the forms and then sharing them with DHS, it is likely that current practices fall far short of the outcomes anticipated by the enactors of IRCA.

The consequences of these IRCA shortcomings have been severely exacerbated by the COVID-19 pandemic, as a result of which approximately 17 million American citizens and permanent resident aliens who want to work cannot find jobs.⁷ These millions of unemployed Americans are competing for jobs with a UAW workforce of more than 8 million, who are now estimated to hold more than 7 million of the jobs so greatly needed by those Americans.⁸ According to the U.S. Commission on Civil Rights (USCCR), the American workers most likely to be competing for those UWA-held jobs are Black men.⁹

DHS has concluded that this unexpected, extraordinary, and racially discriminatory tragedy requires a prompt and strong remedy and is proposing as that remedy a regulatory requirement, specified in this interim final rule (IFR), that Form I-9 must henceforward be completed online,

⁵ 8 CFR 274a.2(a)(2).

⁶ <https://www.uscis.gov/i-9>.

⁷ <https://www.bls.gov/news.release/empsit.t01.htm>

⁸ <http://data.cmsny.org/>.

⁹ U.S. Commission on Civil Rights, *The Impact of Illegal Immigration on the Wages and Employment Opportunities of Black Workers*, p. 9 (October 14, 2010).

giving DHS immediate access to the name/SSN/birthdate of every new employee, as well as the claimed work authorization of every new employee who reports that he/she is an alien, thereby relieving employers of the need to enter the data a second time in the E-Verify program in order to confirm the lawful status of new hires. DHS may then compare this data against its own alien data files. Online completion would also afford DHS the opportunity to seek identity verification from the Social Security Administration (SSA) in accordance with the SSA's own rules and procedures; however, this regulation cannot and would not impose any new legal obligations on the SSA. DHS foresees that online completion will greatly assist in its enforcement of IRCA and of 18 USC 1001(a), 1028(a)(1), 1546(a).

DHS is publishing this rule as an Interim Final Rule rather than first requesting public comments in a Notice of Proposed Rulemaking because it would be "contrary to the public interest," as that term is used in the Administrative Procedures Act, to defer a prompt response to the aforementioned unexpected, extraordinary, and racially discriminatory tragedy the rule is meant to counter.

When IRCA was enacted in 1986, the completion of forms online, whether optional or mandatory, was virtually unheard of. In fact, it was only in 1986 that the IRS began a pilot program for voluntary online tax-return filing, which did not become a nationwide option until 1990.¹⁰ Not surprisingly, in the 34 years since enactment of IRCA, the number of federal forms that may or must be completed online has dramatically increased. USCIS alone now provides for online completion of ten different forms.¹¹ A multiplying number of immigration and non-immigration federal departments and agencies, including the USCIS office of Chief Counsel,¹² the

¹⁰ <https://www.e-file.com/help/history-of.php>.

¹¹ <https://www.uscis.gov/file-online/forms-available-to-file-online>.

¹² https://immigrantjustice.org/admin_policy/blog/new-online-filing-system-ice-office-chief-counsel.

U.S Patent and Trademark Office,¹³ the Federal Election Commission,¹⁴ and the Internal Revenue Service,¹⁵ today mandate online completion of certain forms.

Under this IFR, employers would be obligated to complete Form I-9 online and would be able to download or correct the form for a period of three calendar years. If the employer and employee sign the form online, DHS would treat the online form as an “electronic version” of the form that is “retained” (by virtue of online electronic access) by the employer, thereby eliminating the need for the employer to retain onsite a paper/pdf/electronic copy of the form. If either the employer or the employee declines to sign the form online, the employer would need to download a pdf copy, have the form signed by the employer and employee, and retain the signed form (or an electronically uploaded copy of the signed paper form) for the legally specified period.

By relieving employers of the need to retain paper or electronic copies of Form I-9 and of the need to enter the Form I-9 data twice in order to confirm the lawful status of new hires, and by relieving DHS of the need to conduct worksite enforcement visits to review the Form I-9 data, the new procedure is expected to provide substantial net cost savings to employers and to DHS. The only significant cost additions foreseen are the costs to UAWs, who will be unable to find a new job if they are laid off or move, of food and housing prior to their departure and the financial and administrative costs to federal, state, and local agencies that would likely provide emergency health and other assistance to the UAWs and their families during that period. Their departure may be long delayed because the UAWs (1) may lack travel documents or travel funds, (2) may fear turning themselves over to DHS and risk being prosecuted, and/or (3) may fear even more turning themselves and their families over to one of the violent cross-border cartels that may have brought them here in the first place.

¹³ <https://www.uspto.gov/trademark/laws-regulations/mandatory-electronic-filing>.

¹⁴ <https://www.fec.gov/help-candidates-and-committees/filing-reports/electronic-filing/>.

¹⁵ <https://www.journalofaccountancy.com/news/2011/mar/20113999.html>.

To mitigate those costs in a humanitarian way, DHS is developing a pilot Voluntary Repatriation Program (VRP) to which any UAW could apply at any Immigration and Customs Enforcement (ICE) office. DHS (1) would not prosecute VRP applicants for immigration-law violations, (2) would assist applicants in securing travel documents from their consulates, (3) would arrange safe transportation to the homeland for the UAW and any alien family members, and (4) would, within budgetary limits, cover transportation costs that the UAW cannot afford.

III. Online Completion of USCIS Form I-9

The interim final rule will mandate that, the later of (1) sixty days after publication of the rule in the Federal Register or (2) the first date of the first month after USCIS affords online completion of Form I-9 on its website, Form I-9 must be completed online at <https://www.uscis.gov/file-online>.

IV. Public Comments

This IFR provides an opportunity for DHS to hear and consider the views of employers, labor organizations, government agencies, civil rights organizations, and other interested members of the public on its proposed "G-Verify" rules. DHS requests that commenters discuss potential economic impacts, whenever possible, in terms of quantitative benefits and costs. DHS also requests that commenters provide any special circumstances related to farms or small businesses that may bear uniquely high costs from the requirement to fill in an online form rather than a paper/pdf form.

DHS also invites interested persons to submit written comments, data, or views on how the current Form I-9 regulations, codified at 8 CFR 274a.2, "Verification of identity and employment authorization," might otherwise be improved. Please explain the reason for any comments with available data and include other information or authority that supports such comments.

DHS encourages interested parties to provide specific data that documents the potential costs of modifying the existing regulation as contemplated by DHS's G-Verify proposal or as suggested by the commenter, the potential quantifiable benefits including security and societal benefits of either such modification, and the potential impacts on small entities of either such modification.

To help DHS organize and review all comments, please identify the relevant provision of 8 CFR 274a that relates to the specific comment provided (e.g., 8 CFR 274a.2(b)(1) *Examination of documents and completion of Form I-9*). Commenters may comment on topics related to the current 8 CFR 274a.2 not included in this IFR as well as those questions posed in this IFR. Written comments may be submitted electronically or by mail, as explained previously in the ADDRESSES section of this IFR. To avoid duplication, please use only one of these methods to submit written comments.

Except as provided below, all comments received, as well as pertinent background documents, including any personal information provided will be posted without change to <http://www.regulations.gov>.

Interested parties are encouraged to submit comments in a manner that avoids discussion of trade secrets, confidential commercial or financial information, or any other category of sensitive information that should not be disclosed to the general public. If it is not possible to avoid such discussion, please specifically identify any confidential or sensitive information contained in the comments with appropriate warning language and submit them by mail or email to the person listed in the FOR FURTHER INFORMATION CONTACT section.

DHS will not place any confidential or sensitive comments in the public docket; rather, DHS will handle them in accordance with applicable safeguards and restrictions on access. See, e.g., 6 CFR 29.5 through 29.7. DHS will hold any such comments in a separate file to which the

public does not have access and will place a note in the public docket that DHS has received such materials from the commenter. DHS will provide appropriate access to such comments upon request to individuals who meet the applicable legal requirements for access.

The transition from a paper/pdf version of Form I-9 to an online version must be addressed and managed on several levels. This IFR seeks comments on making a practicable transition to online Form I-9 completion. This IFR's goal is to adopt solutions that streamline workflow performance rather than continuing existing processes that have become outdated.

To help DHS identify ways, if any, to improve the manner in which it administers Form I-9, DHS seeks public comments on any and all aspects of 8 CFR 274a from all interested parties and subject matter experts. Areas that DHS is most interested in receiving comments on include, but are not limited to, the following:

(1) Comments on any technological or other practical concerns with mandating completion of an online form.

(2) Comments on whether the contemplated scope of the small-business exemption is excessive or inadequate.

(3) Comments on the need or scope of an exception for agricultural businesses,

(4) Comments on whether affording the option of downloading and hand-signing online forms is legally necessary or practically beneficial to employers and new employees.

(5) Comments on whether online completion will reduce or add to compliance costs for non-exempt employers.

(6) Comments on the legality, advisability, or practicality of the VRP, including any recommendations on how the goals of the VRP might better be achieved.

V. Regulatory Requirements

A. Administrative Procedure Act

B. Regulatory Flexibility Act

C. Unfunded Mandates Reform Act of 1995

D. Executive Orders 12866 (Regulatory Planning and Review), 13563 (Improving Regulation and Regulatory Review), and 13771 (Reducing Regulation and Controlling Regulatory Costs)

E. Executive Order 13132—Federalism

F. Executive Order 12988—Civil Justice Reform

G. Paperwork Reduction Act

H. Congressional Review Act

List of Subjects in 8 CFR Part 274a

Administrative practice and procedure, Aliens, Immigration, Organization and functions (government agencies).

Accordingly, for the reasons stated in the preamble, part 274a of title 8 of the Code of Federal Regulations is amended as follow:

PART 274—U.S. CITIZENSHIP AND IMMIGRATION SERVICES

1. The authority citation for part 274 continues to read as follows: Authority: 8 U.S.C. 1101, 1103, 1324a; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 101–410, 104710; § 274a.1 Stat. 890, as amended by Pub. L. 114–74, 129 Stat. 599.
2. Part 274a.2(a)(2)(a)(2) of title 8 of the Code of Federal Regulations is amended to read as follows:

§ 274a.2(a) Verification of identity and employment authorization.

(2) *Verification form.* Form I-9, Employment Eligibility Verification Form, is used in complying with the requirements of this 8 CFR 274a.1-274a.11. Form I-9 is available online at <https://www.uscis.gov/file-online> and must be completed online. The online form must be signed by the employer and the employee, either online or on a downloaded version of the online form. Any employer that completes Form I-9 online and has the form signed online by the employer and employee may, for a period of three years after completion, download the online form or amend it as needed to correct errors on the initial version. During those three years, for purposes of 8 CFR 274a.2(b)(2)(i), the online form will be treated as an “electronic version” of the form that the employer “retains.”

* * * * *

Chad F. Wolf
Acting Secretary of Homeland Security

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