



E-Verify: Coming Soon to a Theatre Near You

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I. A Brief History of E-Verify

Congress passed the Immigration Reform and Control Act in 1986 (IRCA) in an effort to address the problem of illegal immigration. By requiring employers to verify the employment eligibility of every new employee hired after November 6, 1986, Congress hoped to eliminate the lure of jobs that creates the magnet for illegal immigration. The Immigration and Naturalization Service developed a list of documents that individuals can use to prove their employment eligibility to new employers together with the I-9 form to record the eligibility. The myriad immigration documents and the resulting confusion for employers has been one of the primary reasons that this system hasn't solved the problems of illegal immigration. Another reason the system breaks down is the proliferation of fraudulent documents, many of which depend upon the confusing array of situations in which an individual may demonstrate employment eligibility. Twenty-three years after the enactment of IRCA, the list of acceptable I-9 documents continues to be modified, providing a dizzying set of instructions for employers. Moreover, there are specific statutes that provide employment authorization for certain foreign nationals, but there is no single document that demonstrates this eligibility. Indeed, in at least one situation, proof of employment eligibility would require at least one document that is not an acceptable I-9 document.¹

In response to these problems, Congress established a voluntary system, known as the Basic Pilot Program, as part of the reforms included in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. This program began experimenting with the means for employers to verify the employment eligibility of new employees with the relevant government agencies. Starting with 800 phone numbers, the system has now evolved to an internet-based system to search governmental databases to confirm

¹ Congress passed a specific statute that provides that foreign nationals approved for employment with one employer with an H-1B visa are eligible for employment with a new employer upon the filing of a non-frivolous H-1B petition, provided they have not worked without authorization. Although clearly authorized by statute for employment, there are no documents on the approved I-9 list that the foreign national can present to demonstrate this eligibility. Proof of a prior H-1B visa together with the receipt for a new H-1B petition would provide this proof, but neither of these documents are approved for I-9 employment verification.

employment eligibility. Known as E-Verify, the system is still a voluntary operation, and employers are not yet required to enroll in the program. However, the government is taking steps to both encourage more employers and require others to enroll in the system as a means of strengthening the verification process and discouraging illegal immigration by shutting down the magnet of jobs.

In June 2008, President Bush signed an executive order to make the program mandatory for all federal contractors. He based this directive on the perceived need to have a stable work force on government contracts. On November 14, 2008, the government first published a federal regulation implementing President Bush's executive order. The rule requires federal contractors to register in and use the federal government's E-Verify employment eligibility verification system upon its effective date. This significantly expands the E-Verify program, taking it from an entirely voluntary program and turning it into a requirement for many employers.

Although the Federal Contractor rules were first set to take effect on January 15, 2009, implementation of the mandatory E-Verify system has been postponed several times by the new administration. The last delay was announced on April 17, 2009, and implementation is now scheduled for June 30, 2009. The new administration, however, has suggested that implementation of the regulation may be postponed beyond even this date.

The U.S. Citizenship & Immigration Services also published a regulation in April, 2008, following the H-1B season², to permit a 17-month extension of Optional Practical Training for students who have graduated with a degree and will be working in a STEM occupation (Science, Technology, Engineering and Math). This extension permits a second try in the lottery for limited H-1B visas but, in exchange, requires the employer to register with the E-Verify program.

In the absence of comprehensive federal legislation, many states have sought to fill the void in immigration law. These states take several different and varied approaches, making it even more difficult for employers operating in several states to track and comply with the laws. For example, in Arizona, E-Verify is mandatory for all employers. Other states, such as Georgia, require E-Verify for all state and local government contractors. Illinois took a different approach and prohibited any Illinois employer from enrolling in E-Verify. This approach was challenged by the federal government, and was recently struck down by the federal district court.³

² The "H-1B season" results from the limitation of H-1B visas each fiscal year to 85,000 (65,000 plus 20,000 additional visas for advanced degree graduates of U.S. universities). The scarcity creates a race for the limited visas. Petitions can be filed six months in advance, and since the fiscal year starts on October 1 the first available date for filing is April 1. For FY2009, the USCIS received 166,000 petitions on the first day and they held a lottery to determine who would receive the limited visas. The number of petitions filed on April 1, 2009 for FY2010 was below 42,000 as a result of the recession.

³ *United States of America v. State of Illinois*, U.S. District Court, Central District of Illinois, Case No. 07-3261 (March 12, 2009).

These incentives are likely to be a precursor to the requirement of mandatory enrollment for *all* employers. The Obama Administration has announced its intention to seek passage of comprehensive immigration reform later this year. Congress has begun to draft and introduce proposals for consideration. Many observers believe that E-Verify is likely to become mandatory for all employers if and when comprehensive reform is passed by Congress.

II. The E-Verification Process

Employers may register for E-Verify on the USCIS web site dedicated to the program: <http://www.vis-dhs.com/EmployerRegistration>. After creating a log-in name and secure password, the system requires the employer's agreement to a Memorandum of Understanding (MOU) that sets forth the terms and conditions of the program for the employer, the Department of Homeland Security and the Social Security Administration. Among the more controversial aspects of the E-Verify program is the provision in the MOU that permits the government to inspect the employer's records without prior notice. Existing law provides that the government must either secure a search warrant subject to the Constitutional restrictions of the Fourth Amendment or provide three days notice to the employer.

The process to register also requires the employer's representative to complete an on-line tutorial on the E-Verify process, the employer's responsibilities, and the proper response to Tentative Non-Confirmation notices (see below). The employer must review and then demonstrate sufficient knowledge concerning the E-Verify process and both acceptable and unacceptable documents an employee may submit to demonstrate employment eligibility. This tutorial includes several modules, each followed by a test. If the registrant does not score at least 70 percent on the test, the registration process cannot be completed. At the conclusion of the registration, the employer must use the E-Verify system to verify all new employees. In certain circumstances, federal contractors also must verify segments of the existing workforce. (See below).

The verification process begins with completion of an Employment Eligibility Form (Form I-9) for each newly hired employee. The employer then logs onto the E-Verify website and enters the individual's name, Social Security Number (SSN), and immigration or citizenship status. The employer must submit verification queries for newly hired employees no later than three business days after the employee is hired. Notably, employers cannot use E-Verify to screen employees before the employee is hired.

The information submitted by the employer is transmitted to the SSA to verify the name, SSN, and date of birth. The data is then transmitted to USCIS to confirm citizenship or the immigration status of the worker. In the case of non-U.S. citizens, USCIS verifies that the individual is eligible for employment. If the employee's information matches the records of the agencies and the employee is employment-eligible, no further action is normally required.

III. Non-Confirmation: Tentative and Final

If the SSA cannot verify the data, the employer receives an “SSA Tentative Non-Confirmation” notice. If there is a discrepancy in the USCIS database, the employer receives a “DHS Tentative Non-Confirmation” notice.

If the employer receives either type of tentative non-confirmation notice, the employer must provide the employee with a “Notice to Employee of Tentative Non-Confirmation.” The employee must indicate on the notice whether he or she intends to contest the notice. Both the employee and the employer must then sign the notification.

If the employee chooses to contest the findings in a tentative non-confirmation, the employer must print a second notice from the E-Verify system called a referral letter that has the contact information for SSA or USCIS and instructions for contesting the findings.

An employee then has eight federal-government work days to contact the appropriate agency (DHS or SSA) to resolve the discrepancy. If a case is not resolved within those eight days, the case is continued and the employer cannot take any action against the employee until the matter is resolved. If the non-confirmation was from SSA, the employer must make a second inquiry on the tenth federal government workday after the date of the referral to obtain confirmation or final non-confirmation.

While the employee is contesting the non-confirmation notice, the employer is prohibited from taking any adverse action against the employee. This means that employers cannot terminate the employee nor can the employer restrict work assignments or pay or delay job training based on tentative non-confirmations.

If a final non-confirmation notice is issued – or if the employee chooses not to contest the findings – the employee must be terminated. The employer is subject to monetary fines if it fails to notify DHS that it continued to employ an individual after receiving a final confirmation notice. If that employee is later found to be an unauthorized worker, the employer is subject to a rebuttable presumption that it has knowingly employed an unauthorized worker.

Employer sanctions for the continued employment of an unauthorized employee include escalating fines depending upon the number and severity of the violation, as well as criminal penalties in some situations. There are additional penalties that can be imposed upon federal contractors for noncompliance with the E-Verify system which may include contract termination and even debarment from future federal contracts.

IV. Which Federal Contractors Are Covered?

Absent any significant changes in the proposed regulation of the law, mandatory E-Verify will apply only to federal governmental contracts awarded and solicitations issued after June 30, 2009. Existing federal contracts will not be affected unless they are extended, renewed, or otherwise amended on or after that date. If a contract is for an indefinite delivery or for an indefinite quantity, the E-Verify clause must be modified on a

negotiated basis to include an E-Verify clause for future orders if the remaining period of performance extends at least six months beyond the effective date and the amount of work or numbers of orders expected is substantial.

The rule requires federal contracting officers to include an E-Verify clause in all federal contracts awarded and solicitations issued on or after June 30, 2009, with the exception of contracts that are: (1) valued at less than \$100,000; (2) only for work that will be performed outside of the U.S.; (3) for a period of performance of less than 120 days; or (4) only for “commercially available off-the-shelf” (COTS) items or for items that would be COTS but for minor modifications. Additionally, the E-Verify requirement generally applies only to the corporate entity that signed the contract. It does not automatically apply to a parent or any subsidiaries not obligated under the contract that does not perform direct services under the contract.

Federal contracting officers are responsible for determining which contracts are subject to the rule and for including the necessary E-Verify clause. The contractor is not responsible for ensuring that its contracts include the language, but the contractor is responsible for ensuring that certain covered subcontracts include the clause. A covered subcontract is one that is for services or construction with a value of more than \$3,000.

V. Contractors’ Different Obligations for Verifying Employees

E-Verify requirements will be different for federal contractors than they are for other employers. In short, employers voluntarily using E-Verify are permitted to verify only new hires. In contrast, federal contractors would be required to verify not only new hires but also certain segments of their existing workforce.

First, federal contractors would be required to use the system to verify all *new* employees, regardless of worksite and regardless of whether the employee is assigned to a federal contract. With respect to existing employees, contractors would be required to use E-Verify to confirm the eligibility of only those existing employees assigned to the federal contract. This is defined to mean any employee hired after November 6, 1986 who is directly performing work in the U.S. under a contract that includes an E-Verify clause. If, however, an employee has a federal-government credential or has access to confidential, secret, or top-secret information, the employer is not required to E-Verify the employee. Employees who do not perform any substantial duties under the contract or who perform support work (i.e., administrative or clerical functions) are not required to be E-Verified. As employees are assigned to work for the contract after any initial E-Verification process, the contractor must subject these existing employees to E-Verify. In other words, contractors have an ongoing obligation to E-Verify (if the employee was not already subject to E-Verify) as they assign employees to the contract. To avoid a “rolling” process of E-Verification, contractors may choose to E-Verify all existing employees – even those not assigned to a federal contract. If a contractor does this, it must notify DHS by updating its company profile in E-Verify.

Once an employer verifies an employee through E-Verify, the employer is not required to re-verify that employee. But an employer cannot rely on an E-Verification performed by a previous employer.

When a federal contract ends, the employer is not required to continue using E-Verify. The employer can terminate its participation by making a termination request through the E-Verify system. If an employer does not terminate participation, it is still bound by the E-Verify Memorandum of Understanding. An employer can continue to use E-Verify, but can only do so for new hires.

VI. Problems and Concerns

In addition to the administrative burden of the additional work required to participate in E-Verify, there has been a raging debate about both its effectiveness and its accuracy. Governmental oversight bodies, such as the SSA Office of the Inspector General and the Government Accountability Office (GAO), along with independent research firms, businesses, and civil liberties groups have all identified problems with the administration of the program as well as the hardships for both employees and employers when false non-confirmation findings are imposed.

The E-Verify system produces false tentative non-confirmations when the SSA or DHS databases are incomplete or have inaccurate data. There is broad disagreement regarding the error rate of the underlying databases, but even a small rate (i.e., less than one percent) results in significant non-confirmations. The government acknowledges that the error rate in the Social Security database can mean up to 17 million people's names may not be exactly correct or that there was an error when information like date of birth was entered. Though legal, residents facing these types of problems would come back as tentative non-confirmations.

For the individual eligible to work but for whom the databases are unable to confirm eligibility, the loss of a job based upon this "small" error rate becomes a life altering problem. Both DHS and SSA have been working to correct the known errors by including additional databases and correcting the discovered problems, but it is an on-going process that is far from complete. While there are some safeguards built into the system, such as the prohibition against adverse action while an employee contests a non-confirmation, E-Verify often adds stress and administrative expense to the hiring process.

Employers should be careful not to place too much reliance on the "computer" and recognize the potential error rate. Studies show that almost half of employers already using E-Verify violate the rule that no adverse action be taken against the employee until the non-confirmation notice is finally resolved. This creates instability for the employer and individual who is eligible to work but is wrongfully denied employment.

As the government seeks to modify the databases and correct the errors, it is important to understand that some categories remain difficult to verify through the electronic means. For example, children of naturalized citizens become citizens by operation of

law, often at a very young age. However, they do not receive any independent documentation of their citizenship and instead must rely on their parents' documentation to prove U.S. citizenship. Because no confirming document of their citizenship was ever issued, this fact is not recorded in any of the government databases. Often, these children may not have access to their parent's documentation, which may have been issued years earlier and is no longer available. Because proof of their citizenship is not contained in the databases and they lack sufficient documentation to satisfy the SSA, employers risk sanctions and even criminal penalties to continue their employment. While documentation can be secured from USCIS, this process often takes several months or even years. Yet, they are citizens and fully authorized to work. The government has added a database of issued U.S. passports to help resolve this issue, but even this addition will help only those citizens who have previously applied for a passport.

VII. The Future of E-Verify

Currently, litigation is pending in a United States District Court challenging the mandatory E-Verify regulation for government contractors. The lawsuit claims that making E-Verify mandatory exceeds the executive authority and is therefore unlawful. The plaintiffs are asking the court to nullify the government's regulation in its entirety. The case has not yet been decided, which could be a factor in another delay of the implementation date.

Nevertheless, DHS is addressing the problems outlined above, and is seeking to strengthen the program. Many in Congress and DHS believe that a mandatory E-Verify program has the ability to solve the myriad problems of enforcing the employer sanctions provisions of the 1986 Act. Thus, we can foresee a time when Congress views E-Verify as a technical solution to solve the problem of illegal immigration. If the prospect of employment for undocumented workers can be diminished, it will be easier to control the borders and stem the flow of undocumented workers. Many remain skeptical that this will resolve the problems as a growing economy can be a powerful force for job creation. Until Congress is able to create an immigration system that can respond to economic fluctuations and support economic growth, even high tech solutions such as E-Verify will attack symptoms and not problems.

Nevertheless, two members of the U.S. House of Representatives have already introduced legislation, the New Employee Verification Act, to establish a mandatory electronic verification system to replace the existing E-Verify system. There is a widespread belief among the pundits and observers that mandatory E-Verify will be a critical component of Comprehensive Immigration Reform.

VIII. Conclusion

Although E-Verify is still voluntary for employers, if there are no further delays of implementation, federal contractors will be required to use the system for all new hires and many existing employees. The system will almost certainly bring additional and unanticipated problems for these employers along with increased time and expense verifying employees' employment eligibility.