

STATE AND FEDERAL REQUIREMENTS TO VERIFY EMPLOYMENT STATUS THROUGH THE E-VERIFY SYSTEM

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Many employers are considering utilizing the federal E-Verify system to verify the work status of foreign nationals and other aliens employed in the United States. These employers now use the paper-based I-9 alone without any independent verification that their employees are authorized to legally work in the US.

In light of recent federal and state legislation, it may make business sense for employers to move to the E-Verify system. These laws, coupled with the reduced risk created by the E-Verify system, provide ample justification for considering such a move sooner as opposed to later. While massive immigration reform legislation appears to be on hold for now, there remains a strong possibility that Congress and an increasing number of states will mandate the use of E-Verify at some point in the future. Proactive employers are moving forward to keep ahead of the regulatory game.

This article will discuss the federal regulatory requirements of the E-Verify system, various state laws relating to E-Verify and the mechanism for integrating E-Verify into the hiring process.

1. Federal Requirements for Verifying Employment Eligibility.

Federal law prohibits employers from knowingly hiring or employing individuals who are not authorized to work in the United States. Employers are required to have all new hires complete the employment eligibility verification form known as an I-9. As part of completing the I-9, employers must examine certain documents to verify the identity and employment eligibility of all new employees. Employers are required to retain the I-9 forms for three years from the date of hire, or one year from the date of termination, whichever is later.

This process does not provide for the independent verification of the employment status of a new employee or of the documentation proffered in support of that status. Rather, the employer must rely upon the authenticity of the documentation, which creates some element of risk through forgery or other alteration. In many cases, a pre-employment background investigation which includes a verification of the applicant's driver's license and social security number through an address trace will reduce the risk associated with the paper-based I-9 process. However, there remains some risk where an illegal worker uses the identity of another person either through collusion or identity misappropriation.

As a supplement to the paper-based I-9 system, the federal government has developed an electronic verification system called E-Verify. E-Verify is operated by the U.S. Citizenship and Immigration Services in partnership with the Social Security Administration. E-Verify is Internet based and links an individual's social security number to federal databases, allowing employers the ability to verify the validity of an applicant's Social Security number and/or verify their employment eligibility status.

In most cases, using E-Verify is voluntary although several states have passed legislation making its use mandatory in certain circumstances. In most jurisdictions, employers are still free to use the paper-based I-9 form without E-Verify but may elect to use the system. It is important to note that in most cases, the program may not be used at the pre-employment stage and is only available for current employees.

The federal Department of Homeland Security, through the U.S. Immigration and Customs Enforcement Agency, is responsible for enforcement of the law. Non-compliance can subject an employer to criminal and civil sanctions, including fines for each illegally employed worker.

2. State Legislation Affecting Employment Eligibility Verification

During 2008, immigration reform was a hot topic on Capitol Hill. Since then, federal efforts to reform immigration have slowed considerably. However, several states have enacted new immigration laws that affect employers with operations in those states. Employers seeking to hire foreign nationals in those states must be aware of these laws to avoid potential exposure. While court challenges to some of these laws are pending and others are certain to follow, employers are encouraged to follow the state law requirements as long as those laws remain on the books.

The Arizona Fair and Legal Employment Act, passed in 2007, prohibits employers from knowingly hiring undocumented workers and requires all employers to use E-Verify, effective January 1, 2008. Arizona law also prohibits the awarding of any government contracts to any businesses not using E-Verify as of May 1, 2008. Employers found violating the law can have their business license suspended for up to 10 business days for a first violation and a second violation can result in the permanent revocation of the business license in the State of Arizona.

Similar laws exist in Mississippi and South Carolina.

Mississippi SB 2988 requires public and private employers to participate in E-Verify with a phase-in period beginning in 2008 and full participation by 2011. All government agencies and businesses with more than 250 employees were required to comply by July 1, 2008; employers with 30-99 employees must comply by July 1, 2010; and all employers must comply by July 1, 2011. Penalties include loss of public contracts for up to three years, loss of licenses for up to one year, or both.

South Carolina HB 4400, the South Carolina Illegal Immigration Reform Act, requires all South Carolina employers to use E-Verify on a phased-in basis. State contractors with 500 or more employees were required to comply by January 1, 2009; state contractors with 100-499 employees by July 1, 2009 and all other state contractors by January 1, 2010. Private employers who are not state contractors or sub-contractors and have 100 or more employees were required to comply by July 1, 2009 and all other private employers must comply by July 1, 2010. Employers could be fined between \$100 and \$1000 for each employee not verified and could face suspension of their business license for 10 to 30 days for a first offense, and up to five years for a third offense.

Other states have specific E-Verify requirements for employers who are state contractors or sub-contractors. These states include Colorado, Georgia, Idaho, Minnesota, Missouri, Nebraska, Oklahoma, Rhode Island and Utah. If your firm performs work as a public contractor or sub-contractor in any of these states, the use of E-Verify may be mandatory.

Additionally, Georgia, Idaho, Minnesota, Missouri, Nebraska, North Carolina, Oklahoma, Rhode Island and Utah require public employers to use the E-Verify system for newly employed individuals.

Finally, 10 local governments have enacted varying forms of regulation in this area including Albertville, AL; Decatur, AL; Palmdale, CA; Mission Viejo, CA; Bonita Springs, FL; Cherokee County, GA; Suffern Village, NY; St. George, UT; Prince William County, VA; Lakewood, WA; and Clark and Pierce County, WA.

3. The Mechanics of E-Verify.

Given the varying levels of regulation, more employers are moving to E-Verify to avoid potential exposure at the federal, state and local level. The initial question faced by employers seeking to make such a move is whether to perform the function in-house or outsource the searches to an outside firm.

Employers performing the function in-house must register to become an authorized E-Verify user at <https://e-verify.uscis.gov/enroll/>. The site contains all instructions for completing registration. Additional information can be found at www.dhs.gov/e-verify. This site contains useful educational information regarding the E-Verify system and process.

Employers seeking to perform the verifications in-house are required to execute a Memorandum of Understanding (MOU) with the Social Security Administration and the Department of Homeland Security delineating the responsibilities of each party. Employers should carefully review the MOU and understand its terms before registering for E-Verify. There is also mandatory training that must be completed by any employees having access to the E-Verify system. Once approved by the SSA and DHS, the employer then may begin using the E-Verify system.

After completing the Form I-9 for each employee, the employer then logs on to the secure DHS website and enters the employee's information, including the particular documents presented in support of the claimed work status. The E-Verify procedures must be initiated after the I-9 form has been completed and within three business days of the date of hire. The information is then transmitted to the SSA. If the Social Security Number (SSN) and name match SSA records, the employer receives an immediate message that the employee is authorized to work.

If the SSN and name match the SSA records but the SSA cannot verify the individual's work status, the employer will receive a message that the DHS is in the process of verifying the status and will then hand-check the records. The DHS typically completes this process within 1-3 days. If the DHS is able to then verify the status, it informs the employer and the process is completed.

If the work status is not confirmed, the employer will receive notification of a "tentative nonconfirmation" of employment eligibility. If the employee chooses to appeal or contest the finding, she or he should be directed to contact the DHS or SSA within eight government working days of the date of the notice. Employers must allow the employee the opportunity to contest the tentative non-confirmation and are prohibited from terminating an employee due to a tentative nonconfirmation until the individual has had time to follow the procedures for correcting any misinformation. However, where an employee has not followed the procedures for contesting the nonconfirmation, they are not entitled to continue employment.

Employers are advised to wait ten government working days after the original notification and then make a second inquiry on the E-Verify site to determine the status of the appeal. If the tentative nonconfirmation is not pursued by the employee or not successfully contested, the decision becomes a final nonconfirmation. The employer may then terminate the employee without civil or criminal liability. If the employer does not terminate the employee after a final nonconfirmation, the employer must notify the DHS and may be subject to a civil and criminal penalty.

The E-Verify system, though not mandated in most jurisdictions, provides the most complete verification system for the work status of an employee. Although providing an extra step in the hiring process, it reduces exposure and risk. Coupled with a comprehensive background investigation, E-Verify is an effective tool to verify the identity of an individual and insulate a company from liability.

Employers should consult with counsel to determine whether E-Verify makes sense at this time and whether to perform the searches in-house or on an outsourced basis. Also, since each case has its own particular set of facts and circumstances, employers should seek advice from immigration counsel before terminating any employee for a nonconfirmation.

Please contact RAI if you have questions regarding E-Verify or wish to discuss outsourcing options.