

# THE STATE OF E-VERIFY: WHAT EVERY EMPLOYER SHOULD KNOW

The U.S. Department of Homeland Security (DHS), in an effort to deter unauthorized employment, has significantly increased both I-9 audits and work site raids. These enforcement actions have resulted in hefty fines and even, in some cases, criminal charges against some employers. Although the federal government does not currently require employers to participate in the government's E-Verify program (an Internet-based system that allows participating employers to electronically verify the employment eligibility of their newly hired employees), a growing number of states are requiring some or all employers to use E-Verify. Here is what employers need to know about E-Verify.



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The federal government's E-Verify Program has taken on a life of its own. The once small, voluntary program has evolved into the vehicle for a series of state laws, federal regulations, and possible federal legislation that make participation in E-Verify mandatory for some employers. The following update summarizes the status of the E-Verify Program as well as developments in the program that employers and their counsel should know.

## What is E-Verify?

The E-Verify Program (formerly known as the Basic Pilot/Employment Eligibility Verification Program) is an Internet-based database operated by the Department of Homeland Security (DHS) in partnership with the Social Security Administration (SSA). E-Verify allows participating employers to electronically verify the employment eligibility or work authorization of their newly hired employees regardless of whether they hired U.S. citizens or foreign nationals. U.S. Citizenship and Immigration Services, an agency within DHS, administers the E-Verify Program.

## What are the Origins of E-Verify?

Facing mounting concerns about unauthorized employment and a growing population of undocumented immigrants, the federal government created pilot programs intended to curb unauthorized employment as defined under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. One of those programs was the Basic Pilot/Employment Eligibility Verification Program, which the government rolled out in 1997 in the five states that had the highest estimated numbers of undocumented immigrants: California, Florida, Illinois, New York, and Texas. Two years later, the government expanded the program to include Nebraska. As part of the pilot program, employers in those states could voluntarily register to participate in the electronic employment verification system that was included in the program. By 2003, the availability of the pilot program was expanded to all 50 states, and the program was renewed through 2008.

In August 2007, the Bush administration launched an aggressive campaign to combat what it called "border security and immigration challenges."<sup>1</sup> As part of the plan, the Basic Pilot/Employment Eligibility Verification Program underwent a rebranding and became the E-Verify Program. During this time, the government launched a full-scale marketing plan to entice employers to participate in the program while simultaneously ramping up enforcement efforts to target employers who hire unauthorized workers and increasing the fines and penalties imposed on such employers.

## How Does E-Verify Work?

It is important to note at the outset that participating in E-Verify *does not* mean that an employer can skip completing the I-9 Employment Eligibility Verification form. Completing the I-9 is mandated by federal law, and E-Verify is considered a companion to the I-9 exercise, not a replacement. All employers must complete an I-9 form for every new person hired. Employers who are registered for E-Verify may submit an electronic employment verification query in the E-Verify system but only after completing the I-9 form.

To register and participate in E-Verify, employers must first sign a memorandum of understanding (MOU)—the agreement between the employer, the DHS, and the SSA that identifies each party's responsibilities with respect to the E-Verify Program and steps for resolving what are called "nonconfirmations" (to be discussed later in this article). If an employer violates the terms of the MOU, DHS or SSA may terminate the MOU and suspend or prohibit the employer from participating in E-Verify.

Once an employer registers with the E-Verify Program and signs a MOU with the DHS, the employer is authorized to electronically verify the name and employment eligibility of newly hired employees. An employer with multiple work sites may designate which job sites to enroll in the E-Verify system; the employer is not obligated to enroll *every* site. However, at each enrolled site, the employer must perform E-Verify checks for *all* new hires at that site and may not use the system selectively.

If the newly hired employee is authorized to work, the employer will receive electronic confirmation of the worker's employment eligibility. If the E-Verify system "confirms" that the employee has authorization to work, the employer is entitled to a presumption that he or she has not knowingly hired an unauthorized worker—an offense that carries civil and/or criminal penalties.

If the employer receives a "tentative nonconfirmation"—most likely because the Social Security number provided does not match the person's name in SSA's database—the employer must provide written notice to the employee and initiate a referral to the SSA so that the employee may contact the SSA to resolve the reason for the tentative nonconfirmation. From the time the employer initiates a referral for the employee to resolve the nonconfirmation with the SSA, the employee has eight federal government working days to resolve the discrepancy.

If the E-Verify system indicates a final nonconfirmation (called a "no match") and the employer intends to continue to employ that worker, the employer must notify the DHS; otherwise, the employer will be subject to an administrative fine, which ranges from \$500 to \$1,000 for each failure to notify the DHS. If the employer continues to employ the worker after a final nonconfirmation, there is a rebuttable presumption that the employer is knowingly employing an unauthorized worker.

Finally, as part of the MOU, an employer who participates in the E-Verify Program is obligated to permit the SSA and/or the DHS to make "periodic visits" to the employer's work site(s) to review documents related to E-Verify, including I-9 forms, and to require the employer to "make

employment and E-Verify related records available."

## What are the Benefits of Participating in the E-Verify Program?

The E-Verify Program offers some notable benefits to an employer. Most important, the employer may electronically verify the name and employment eligibility of newly hired employees. In completing Form I-9, the employer must review the documents the newly hired employee presents and must determine whether the documents appear reasonably genuine and relate to the person presenting them. In an era of heightened immigration enforcement and with DHS work-site enforcement actions (or "raids") on the rise, many employers may take comfort in a second opinion about a newly hired person's authorization to work. In addition, receiving a confirmation that a newly hired employee is authorized to work is a presumption that the employer has not knowingly hired unauthorized workers.

In 2008, the government created a special benefit for employers who wish to sponsor certain college graduates who are foreign nationals—those holding degrees in science, technology, engineering, or mathematics—for specialty occupation visas (that is, H-1B visas). Employers may support extending such a student's Optional Practical Training work permit for an additional 17 months beyond the usual 12 months if the sponsoring employer participates in E-Verify.<sup>2</sup> In recent years, the H-1B category has been largely oversubscribed, resulting in a "lottery" system for these issuing these visas. Granting permission to work for an additional 17 months provides those employers and those students with at least two opportunities to be selected for the H-1B work visa program.

Finally, the E-Verify Program is currently voluntary, but several states are contemplating making participation mandatory in an effort to curb unauthorized employment. For example, in 2008, Arizona became the first state to require all employers to use the E-Verify Program for all newly hired workers. As discussed in more detail below, other states now require some or all employers to participate in the program.

## Are There Drawbacks to Participating in the E-Verify Program?

The E-Verify Program places some significant burdens on the employer. By signing the MOU, an employer is limited to accepting for I-9 purposes only those identity documents that include a photograph. In addition, even though federal law does not require employers to photocopy a newly hired person's documents, employers who participate in E-Verify must retain photocopies of any new employee's Employment Authorization Card or Permanent Residence Card issued by the Department of Homeland Security.

If the E-Verify system returns a final nonconfirmation (a "no match") for a particular worker and the employer continues to employ that individual, there is a rebuttable presumption that the employer has knowingly employed an unauthorized worker. This is particularly concerning in light of the SSA inspector general's December 2006 report that found 17.8 million discrepancies in the SSA database, with a large number of those errors involving authorized workers (meaning U.S. citizens as well as lawful permanent residents).<sup>3</sup> And even

though these errors are not the fault of the E-Verify system, if the employee cannot resolve the discrepancy in eight government working days, the employer will be faced with the difficult decision to terminate the newly hired employee.

As noted previously, an employer who participates in the E-Verify Program must permit the SSA and/or DHS to visit the employer's work site(s) periodically to review documents related to E-Verify, including I-9 forms. Such visits and access to records may result in increased exposure to fines and penalties based on errors and omissions on the I-9 forms, and voluntarily participating in E-Verify does not insulate employers from civil and criminal penalties.

### **What is the Status of E-Verify Today?**

Although funding for the E-Verify Program was scheduled to expire in March 2009, Congress has extended the program at least through Sept. 30, 2009. The Department of Homeland Security continues to promote E-Verify actively and to solicit additional employers to register. To date, approximately 117,000 employers have registered, including voluntary users and those obligated to participate by state law, though not all registrants are active users of the program.

In its 2008 report on E-Verify, the Government Accountability Office found that about 7 percent of the queries submitted to the E-Verify Program could not be immediately confirmed as having authorization to work by the SSA, and about 1 percent of the queries could not be immediately confirmed as having authorization by the DHS. A higher incidence of nonconfirmations in the system was treated by the ombudsman as an indication of error in the system, not that the system was identifying unauthorized workers. Furthermore, the Government Accountability Office estimated that turning the now voluntary program into a phased-in mandatory one would cost more than a billion dollars and would require hiring hundreds of new federal workers. Despite the voluntary status of participation in E-Verify, participating in two areas of the program has become mandatory.

### **Do Federal Contractors Have to Participate in E-Verify?**

In November 2008, the Bush administration published a regulation requiring businesses that have contracts with the federal government to "verify the employment eligibility of: (1) all persons hired during the contract term by the contractor to perform employment duties within the United States; and (2) all persons assigned by the contractor to perform work within the United States on the Federal contract."<sup>4</sup> The regulation was scheduled to take effect on Jan. 15, 2009, but implementation has been delayed twice.

In late December 2008, the U.S. Chamber of Commerce and other representative organizations filed a federal lawsuit against the government over requirement that federal contractors participate in the E-Verify Program. Because of this lawsuit, the Bush administration agreed to delay the applicability date of the rule until Feb. 20, 2009. In February, the Obama administration issued a memorandum encouraging all federal agencies to extend for 60 days the effective date of regulations that had been published but had not yet taken effect. The Chamber of Commerce and the government's lawyers have agreed to stay the proceedings, and

federal contractors' mandated participation in E-Verify has been deferred until Sept. 8, 2009. A further delay or even a withdrawal of the regulation is possible; however, if it is not delayed further or withdrawn, the answers to the following frequently asked questions provide a framework for understanding the impact of E-Verify on federal contractors.

### ***Who Is Included?***

Once effective, the regulation applied to federal contractors will affect employers entering into future federal contracts with agencies and departments of the executive branch. The types of contracts include (1) prime contracts for periods longer than 120 days and valued above \$100,000 and (2) subcontracts for services and construction costing more than \$3,000 if the prime contract contains the E-Verify clause.

Federal contractors will be required to participate in the E-Verify Program and electronically verify the employment eligibility of all the employer's newly hired workers across-the-board, regardless of whether or not those employees perform work pursuant to the federal contract. Contractors will also have to verify the eligibility of all their employees—both current ones and those who are newly hired—who will directly perform the work under the government contract.

Institutions of higher learning, state or local governments, the government of a federally recognized Indian tribe, or a surety performing under a takeover agreement may choose to verify only those employees who are assigned to work under the contract—regardless of whether or not they are existing employees or new ones. Therefore, these organizations will not be required to use E-Verify for *all* newly hired employees.

### ***Who Is Exempt?***

The following prime contracts are exempt from the E-Verify rule:

- contracts for a period of fewer than 120 days;
- contracts valued at less than \$100,000;
- contracts only for commercially available off-the-shelf items (or with minor modifications) and related services; and
- contracts under which all the work performed is done outside the United States.

### ***When Does Required Participation Start?***

The timing of the contractor's obligation to comply with the verification requirements depends on when the contractor enrolls in the E-Verify Program. Contractors who are not enrolled at the time the contract is awarded have 30 days to enroll in the program, and they have 90 days from enrollment to initiate verification of employees already on staff who will be working on the contract and to begin using the system to verify newly hired employees. Contractors who have been enrolled in E-Verify for more than 90 days at the time the contract is awarded must initiate verification of newly hired workers within three days and will have 90 days to initiate verification of each employee already on staff who is assigned to work on the contract or will be assigned to do so.

Employers must initiate an E-Verify query if current employees will be assigned to perform work on the contract directly. Under this regulation, an employee is not considered assigned to the contract if the employee normally provides support services and does not perform any substantial duties that are applicable to the contract. Federal contractors and subcontractors also have the option of verifying the authorization of their entire workforce—both newly hired employees and existing ones, including those not assigned to a federal contract—but are not required to do so.

**Who is Required to Participate in E-Verify Under State Laws?**

A growing number of states require some or all employers to use E-Verify. As more and more states introduce bills related to E-Verify and the debate surrounding the benefits and concerns about E-Verify continues to swirl, the list of states is likely to grow. Employers should check the regulations of states in which they conduct business and take any steps that may be necessary. The chart below summarizes relevant state laws.

Several other states—including Arkansas, Idaho, Indiana, Ohio, and Wyoming—have introduced legislation to make E-Verify mandatory for some or all state employers. It is unlikely this trend will slow down unless a federal law is passed that supersedes these state laws.

Finally, in the absence of federal law, legislation governing the E-Verify Program has trickled down to the local government level as well. The city of Mission Viejo, Calif., for example, requires that the city and employers that have contracts with the city confirm the work eligibility of new employees through E-Verify. In addition, Oregon’s Columbia County passed a law requiring all county employers to use E-Verify, but a court has preliminarily enjoined enforcement of the law.

**Does E-Verify Prevent Identity Theft?**

***The Problem***

Opponents of the E-Verify Program often focus on a problem that they perceive as the Achilles’ heel of the program: the system’s inability to preclude multiple individuals from

Arizona	Requires all employers in the state to participate in E-Verify.
Colorado	Requires all state contractors to participate in E-Verify.
Georgia	Requires all public employers and contractors and subcontractors who have contracts with state and local government employers to participate in E-Verify.
Illinois	In March 2009, a U.S. District Court struck down the Illinois E-Verify statute that banned employers from using E-Verify until the SSA and DHS can provide a three-day response in 99 percent of the cases that receive a tentative nonconfirmation for employers who use the E-Verify system. Therefore, employers in Illinois are free to register for E-Verify should they so choose.
Minnesota	Requires the executive branch of the state’s government and all state contractors to participate in E-Verify.
Mississippi	Requires all employers in the state to participate in E-Verify, but participation is being phased in based on the size of the employer.
Missouri	Requires the state’s government offices and agencies to participate in E-Verify and also requires the following to participate: (1) all state contractors for contracts in excess of \$5,000 and (2) any business entity that receives a tax credit, tax abatement, or loan provided, administered, or subsidized by the state and related to the employees who work in connection with the contracted services.
Nebraska	Requires state entities, state contractors for public projects, and businesses qualifying for state tax incentive programs to participate in E-Verify.
North Carolina	Requires all state government offices and agencies, including public universities, to participate in E-Verify.
Oklahoma	Requires state and local government agencies and contractors with those agencies to participate in E-Verify. A U.S. District Court has delayed enforcement of this law; therefore, it is not in effect at this time. Oklahoma filed an appeal, which is pending.
Rhode Island	Requires the state’s executive branch and all contractors and subcontractors who have state contracts to participate in E-Verify.
South Carolina	Requires all employers in the state to participate in E-Verify. Participation will be phased in based on the type and size of the employer.
Tennessee	Participation in E-Verify is not mandatory, but employers who verify newly hired workers using E-Verify within 14 days of the commencement of their employment are protected from state sanctions for hiring unauthorized workers.
Utah	Requires public entities to participate in E-Verify or a similar employment verification system and forbids those public entities from entering into contracts with contractors who do not participate in E-Verify or a similar employment verification system.

working under the same name and Social Security number. In some cases of identity theft—which has increased dramatically over the last several years—the culprit is an unauthorized worker who uses a U.S. worker's identifying information to obtain employment or documents permitting employment.

Fraud involving Social Security numbers happens in one of two ways: In one scenario, the unauthorized worker obtains a genuine Social Security number card that belongs to a U.S. worker. The unauthorized worker uses the Social Security card to obtain a document that will establish his or her identity as that of the U.S. worker. In most cases, the unauthorized worker fraudulently obtains a state identity card or a driver's license. In another scenario, the unauthorized worker obtains information about a legal U.S. worker and then purchases or creates a fraudulent Social Security card in the name of that individual and obtains a state's official identification document. Whichever method the unauthorized worker chooses, the person shows up for a new job with a state identity card and a Social Security card that "match." The human resources professional looking at the documents does not detect anything out of the ordinary and proceeds to run the new worker through the E-Verify system, which approves the worker. The unauthorized worker meets the E-Verify test because the system simply matches up the name the worker provided with the Social Security card the individual presented. At this time, the E-Verify Program lacks a fail-safe mechanism by which this form of fraud can be detected.

U.S. immigration documents often are used fraudulently. An unauthorized worker will use the Permanent Residence Card (commonly known as a green card) or the Employment Authorization Card of an individual who has lawful status and the ability to work in the United States and will attempt to pass that card off as his or her own. In other cases, the unauthorized worker could use a legal worker's identifying information and create a fraudulent card that bears a photograph of the unauthorized worker. The employer reasonably believes the card to be genuine and checks the person's status through the E-Verify system, and the unauthorized worker is confirmed, because the system failed to detect the identity theft.

It is important to bear in mind that identity theft is not a victimless crime. The U.S. worker can suffer greatly after having his or her identity stolen. Imagine a U.S. citizen seeking federally subsidized housing being turned down because the Social Security Administration's records indicate that he or she is making too much money to qualify, when the SSA's data is based on income earned by an imposter who may be hundreds or even thousands of miles away. Even if the U.S. citizen is able to resolve such a discrepancy, the result could take weeks if not months. Another example is that of a U.S. worker who receives a letter from the Internal Revenue Service claiming that he or she owes back taxes because the worker did not withhold the proper amount based on his or her gross income, which includes a job many states away that the worker supposedly holds.

### **Government Solutions**

The government continues to use the E-Verify Program to make progress in thwarting identity theft by unauthorized workers. In late 2007, the Department of Homeland Security announced the E-Verify "Photo Tool," which allows employers to match the photo on a new employee's Employment Authorization Card or Permanent Residence Card to the photo that the government has for that individual in its database. For this reason, the E-Verify memorandum of understanding requires the employer to photocopy these two documents. The employer can compare the photo in the government's database to the photocopy made when completing the I-9 form and determine if the two match. If the photos do not match, the employer can indicate the discrepancy in the E-Verify system. Although the applicability of Photo Tool is currently limited, the DHS hopes that, in the future, it will become available for other documents—such as for state identification cards issued by the Department of Motor Vehicles that bear the cardholder's photograph.

The Department of Homeland Security has something new in the works for the E-Verify system to curb identity theft. The department has asked for public comment on its proposed Form G-1135 JobLock Application—the DHS's newest weapon to preclude multiple uses of the same Social Security number. JobLock is intended for victims of identity theft to have a means to block other individuals from trying to use their identity to pass an E-Verify check. According to the DHS, the victim would obtain a police report to document the identity theft, file an identity theft complaint with the Federal Trade Commission, and then ensure that local law enforcement has verified that the FTC complaint is in the appropriate law enforcement database. The victim can file Form G-1135 online to lock his or her Social Security number in the E-Verify system. As part of the application, the victim will have to provide answers to a series of "challenge" questions, which will be used for authentication when the victim needs to unlock the information. The DHS has indicated that the JobLock program will be free of charge.

### **Will Federal Laws Governing E-Verify Be Passed?**

The E-Verify Program continues to expand, but Congress has yet to pass a bill mandating all employers to use E-Verify. Congress has debated the inclusion of a mandatory E-Verify clause in several pieces of legislation, and there is a strong lobbying effort to make E-Verify mandatory for all employers nationwide.

Recently, Congress was divided when it came to provisions dealing with E-Verify during the debate on the American Recovery and Reinvestment Act of 2009. The House version of the bill required mandatory participation in E-Verify for businesses that contract with the government to receive stimulus money; the Senate removed this provision from the final bill. Proponents of mandatory participation in E-Verify expressed outrage, contending that removing this requirement was validation that unscrupulous employers and unauthorized workers would benefit from the stimulus package and that U.S. workers would lose out

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Martinez (R-Fla.), Sen. Robert Menéndez (D-N.J.), Sen. Patty Murray (D-Wash.), Sen. Bill Nelson (D-Fla.), Sen. Harry Reid (D-Nev.), Sen. Charles Schumer (D-N.Y.), Sen. Mark Udall (D-Colo.), and Sen. Sheldon Whitehouse (D-R.I.).

<sup>14</sup>For general information about the history of the legislation see [dreamact2009.com/about](http://dreamact2009.com/about).

<sup>15</sup>See, for example, INA, § 240A: “Special Rule for Battered Spouse or Child.”

<sup>16</sup>S.729 and H.R. 1751 (2009), § 4.

<sup>17</sup>*Id.*, § 5.

<sup>18</sup>See National Immigration Law Center, [www.nilc.org/immlawpolicy/DREAM/DREAM-econbens-2009-03-26.pdf](http://www.nilc.org/immlawpolicy/DREAM/DREAM-econbens-2009-03-26.pdf).

<sup>19</sup>For additional references on numerous studies finding a positive fiscal impact, see Gonzales, *supra*, 7, at 14.

<sup>20</sup>U.S. Department of Education, National Center for Ed-

ucation Statistics, *The Condition of Education 2008* (NCES 2008-031), which defines the status of “dropout rate” as the percentage of 16- through 24-year-olds who are not enrolled in high school and who lack a high school credential. A high school credential includes a high school diploma or equivalent credential such as a GED certificate.

<sup>21</sup>Between 1990 and 2005, the enrollment of students under the age of 25 increased by 33 percent; the enrollment of people aged 25 and older rose by 18 percent during the same period. From 2005 to 2016, the National Center for Education Statistics projects enrollment of people under age 25 to increase by 15 percent and enrollment of aged 25 and older to increase by 21 percent. U.S. Department of Education, Institute of Education Sciences, *Fast Facts*, available at [nces.ed.gov/fastfacts/display.asp?id=98](http://nces.ed.gov/fastfacts/display.asp?id=98).

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on jobs created by stimulus funding. Critics of mandatory participation in E-Verify applauded the measure, claiming that errors in the SSA database would result in U.S. workers being denied jobs and that the program would hurt small businesses that lack the resources to implement E-Verify in these tough economic times.

Numerous bills dealing with verification of authorization for employment have been introduced in Congress during the last year. Some of these bills mandate E-Verify and seek to expand it to current employees; others propose entirely new systems to prevent unauthorized employment. For instance, in late April 2009, some legislators took a step toward replacing the E-Verify Program. Rep. Gabrielle Giffords (D-Ariz.) and Rep. Sam Johnson (R-Texas) introduced a bill, the New Employee Verification Act, to establish a mandatory electronic verification system that would take the place of E-Verify. This new system would rely on the electronic system used to enforce child support payments or a database using biometric information, and then the information would be checked against the Social Security Administration’s and Department of Homeland Security’s databases. This bill also would do away with Form I-9 altogether. The representatives who introduced the new bill expressed hope that it would either be the foundation for employment verification in a broader immigration bill or move through Congress on its own.

Undoubtedly, the E-Verify Program will continue to be a hotly contested issue in Congress and more proposals dealing with mandatory participation in E-Verify or other employment verification programs as well as state legislation are likely to arise in the coming year. **TFL**

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### Endnotes

<sup>1</sup>See Office of the President, *Improving Border Security and Immigration Within Existing Law*, White House communication (Aug. 10, 2007), republished as a DHS Press Release; available at [www.dhs.gov/xnews/releases/pr\\_1186757867585.shtm](http://www.dhs.gov/xnews/releases/pr_1186757867585.shtm).

<sup>2</sup>The applicable federal regulations can be found at 8 C.F.R. §§ 214.2(f)(5),(10), (11), and (12) and 247a12(b)(6)(iv) and (v). Additional explanatory information about the rule can be found at [www.uscis.gov/files/articleOPT\\_4Apr08.pdf](http://www.uscis.gov/files/articleOPT_4Apr08.pdf).

<sup>3</sup>Office of the Inspector General, Social Security Administration, *Congressional Response Report: Accuracy of the Social Security Administration’s Numident File* (Dec. 2006); available at [www.socialsecurity.gov/oig/ADOBEPDF/audittxt/A-08-06-26100.htm](http://www.socialsecurity.gov/oig/ADOBEPDF/audittxt/A-08-06-26100.htm).

<sup>4</sup>The regulation amends 48 C.F.R. parts 2, 12, 22, and 52, and was published in the *Federal Register* at 73 F.R. 67651–67705 (Nov. 14, 2008).