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WORK AUTHORIZATION IN THE ELECTRONIC AGE

By: Laurie M. Chess and Mary Ellen Burggraf Jordan

I-9 compliance and work authorization are hot topics in the human resources world. Two government programs, E-Verify and IMAGE, are aimed at addressing the problems employers face in maintaining a legal workforce. This article addresses E-Verify. The IMAGE program, which encompasses E-Verify, will be addressed in a subsequent E*Zine.

E-Verify

What it is

E-Verify is a voluntary and free web-based system that electronically verifies the employment eligibility of newly hired employees. E-Verify involves a partnership between the Department of Homeland Security (DHS) and the Social Security Administration (SSA). U.S. Citizenship and Immigration Services (USCIS) oversees the program. You may have heard of the Basic Pilot/ Employment Eligibility Verification Program, which has been in existence since 1997. The name has been changed, and E-Verify now takes the place of that program.

E-Verify allows participating employers to electronically compare employee information taken from the I-9 against more than 425 million records in SSA's database and more than 60 million records in DHS' immigration databases. Results can be returned within seconds. The program can cut down significantly on no-match letters and identify any potential issues with work authorization sooner rather than later. This is clearly a benefit for employers who invest significant time and resources in training employees only to find out later through the social security no-match process or otherwise that the employee was not authorized to work in the U.S.

Registration

Employers can register for E-Verify at <https://www.vis-dhs.com/EmployerRegistration>, which provides instructions for completing the registration process. At the end of the registration process, you will be required to sign a Memorandum of Understanding (MOU) that provides the terms of agreement between you the employer, the SSA, and USCIS. An employee who has signatory authority for the employer can sign the MOU.

Employers can choose to register all sites or just some sites. The question remains whether U.S. Immigration and Customs Enforcement (ICE) will view an employer's use of E-Verify at one location and not another with suspicion. Only time will tell.

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An employer may choose to quit the E-Verify program at any time.

How it Works

The earliest the employer may initiate a query is after an individual accepts an offer of employment and after the employee and employer complete the Form I-9. In other words, you cannot use E-Verify to pre-screen applicants. The employer must initiate the query no later than the end of three business days after the new hire's actual start date. You **cannot** use it to check current employees.

An employee should not face any adverse employment consequences based upon an employer's use of E-Verify unless a query results in a final non-confirmation. Employers must verify employees in a non-discriminatory manner and may not schedule the timing of queries based upon the new hire's national origin, citizenship status, race, or other characteristic that is prohibited by U.S. law.

Here's a summary of the process:

- You enter various information from the employee's I-9.
- You will receive one of the following responses:
 - Employment Authorized: This means eligibility is verified.
 - SSA Tentative Non-Confirmation: This means the employee's social security number could not be verified. You must notify the employee of this and refer him/her to SSA. The employee **MUST** be allowed to continue working during the verification process. The E-Verify User Manual contains notices and forms for notifying the employee should the employee contest the tentative non-confirmation. The employee has 8 federal workdays to follow up with SSA. The case may then be resubmitted, at which time you will get a response that the employment is authorized, a SSA final non-confirmation (this ends the verification process and employment may be terminated), or DHS verification in process.
 - DHS Verification in Process: This means the non-citizen's information provided to SSA matches the information contained in SSA records. The case is then referred to DHS for employment eligibility verification. DHS can take between 24 hours to 3 business days to resolve this.
 - DHS case in continuance: This means DHS needs more than 10 Federal Government workdays to resolve employment eligibility. You have to wait until DHS provides a definitive response before resolving the case or taking action. Again, the employee must be allowed to continue working pending resolution.

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- **DHS tentative non-confirmation:** This means the employee must be notified and referred to DHS. Again, the employee has eight federal workdays to contact DHS. Once again, the E-Verify User Manual contains form referral letters and notices. The employee must be notified of the tentative non-confirmation within three Federal Government workdays. If the employee contacts DHS, the E-Verify system will provide one of two responses: (1) Employment authorized; or, (2) DHS employment unauthorized (upon receipt of this, you may terminate the employee). If the employee fails to contact DHS to resolve his/her case, and 10 Federal Government workdays have passed since the date of referral, the system automatically provides the following response: DHS No Show. This is a final non-confirmation, and you may terminate the employee.

If you continue to employ a worker after a final non-confirmation, there is a rebuttable presumption that you have knowingly employed an unauthorized individual. You could face fines for this.

Other Things You Should Know About E-Verify

Employers who use E-Verify can only accept List B identity documents that contain a picture.

Notices regarding your use of the program and an anti-discrimination notice must be posted. These notices may deter applicants who are not authorized to work from applying with your company.

There are errors in the SSA and DHS databases. Thus, as discussed above, it is imperative that employers notify employees of tentative non-confirmations and give them an opportunity to correct or explain the discrepancy. In other words, do not terminate an employee, restrict work assignments, or delay job training based on a tentative non-confirmation from either SSA or DHS.

An employer who verifies work authorization under E-Verify has established a rebuttable presumption that it has not knowingly hired an unauthorized alien. Participation in the program, however, does not provide a “safe harbor” from worksite enforcement (*i.e.*, ICE raids).

E-Verify will not necessarily detect or protect against identity fraud, where a worker uses another person’s name and social security number.

At least seven states make participation in E-Verify mandatory. Arkansas, Colorado, Georgia, Oklahoma, and Rhode Island require the use of E-Verify for public employers and/or contractors with state agencies or political subdivisions. Arizona and Mississippi (phased in based on the number of employees) require private employers to use E-Verify. Other states, such as Illinois, basically bar an

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employer from using E-Verify, and legislation regarding E-Verify is pending in at least 14 other states. Obviously, this program is still somewhat controversial.

Are there alternatives to E-Verify?

At least for now, federal law does not mandate use of E-Verify. As discussed above, however, some states are requiring use of E-Verify. Of course, employers can be diligent about completing I-9's, exercise good judgment in reviewing identity and work authorization documents, and comply with the safe harbor guidelines in responding to social security no-match letters. Yet another alternative exists. The Social Security Number Verification Service (SSNVS) is run through the Social Security Administration and only checks SSA records—not DHS. It, too, is an internet based program. Employers can register online at <http://www.ssa.gov/bsowelcome.htm>.

There are two Internet verification options you can use to verify that your employee names and Social Security numbers match Social Security's records. You can verify up to 10 names and SSNs (per screen) online and receive immediate results. This option is ideal to verify new hires. You can also upload overnight files of up to 250,000 names and SSNs and usually receive results the next government business day. This option is ideal if you want to verify an entire payroll database or if you hire a large number of workers at a time. While the service is available to all employers and third-party submitters, it can only be used to verify current or former employees and only for wage reporting (Form W-2) purposes. Do not use SSNVS before hiring an employee. You cannot use SSNVS to take punitive action against an employee whose name and Social Security number do not match Social Security's records. Rather, social security no-match safe harbor procedures should be followed. It is improper to use SSNVS for non-wage reporting purposes, such as identity, credit checks, and mortgage applications.

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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