The Changing Landscape of Employment Eligibility Verification: The Electronic Employment Verification System

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E-verify is a free web-based system operated by the Department of Homeland Security (DHS) in partnership with the Social Security Administration (SSA). Although E-verify has been well publicized recently, it has been in existence since 1997 through its precursor program, Basic Pilot. The system is designed to supplement existing Form I-9 procedures with the hope of increasing the accuracy of an employer’s verification that each newly hired employee is authorized to work in the United States. The system is touted as requiring minimal effort: an employer simply inputs the employee’s information (as provided on Form I-9) into the program, which then compares it for accuracy to information contained in various federal databases. The federal records accessible through E-verify now include more than 444 million SSA records, more than sixty million DHS records (including naturalization records), and, as of February 2009, certain State Department passport records. According to an independent audit during the fourth quarter of 2008, 96.9% of queries made to E-verify returned an automatic confirmation within twenty-four hours, confirming that an individual is authorized to work. Of the remaining 3.1% of queries for which the system returned a Tentative Non-Confirmation, a further 0.3% of queries were successfully challenged by the employee. The most recent congressional appropriations conference bill (for Fiscal Year 2010) includes a three-year extension of E-verify.

The voluntary and mandatory use of E-verify has been steadily increasing. Currently, approximately one out of eight new hires is verified through the system, though it is unclear how many of those hires have been verified by employers that are voluntarily enrolled. Federal agencies and the legislative branch have been required to consider using either E-verify or an alternate supplemental verification program since 1997. In 2007, Arizona became the first state to mandate E-verify use by both public and private employers, and at least eleven other states have now passed legislation requiring certain, if not all employers to use E-verify. Moreover, on September 8, 2009, an amendment to the Federal Acquisition Regulation (FAR) took effect, which mandates that all federal contractors and subcontractors use E-verify.

Although existing I-9 procedures remain mandatory for all employers, regardless of their enrollment in E-verify, the government has been greatly buoyed by E-verify’s increasing accuracy. In fact, the federal government—as well as a growing number of state and local governments—have now come to believe that E-verify “represents the best means currently available for employers to verify the work authorization of their employees.” It is therefore vital for employers to be aware of the benefits and drawbacks of using E-verify and to understand their obligation to verify the work authorization of new hires in a nondiscriminatory manner.

The Mechanics of E-verify for Employers That Voluntarily Enroll

Any employer may voluntarily enroll by applying on the DHS website. As part of the application process, an employer is required to sign a Memorandum of Understanding (MOU) with DHS that outlines the respective responsibilities of the SSA, DHS, and the employer. An employer wishing to cancel a voluntary enrollment in E-verify must notify DHS. Until DHS confirms that the employer is no longer enrolled, the MOU remains in effect and the employer must comply with all employer obligations listed in the MOU.

Some of the employer’s key obligations include:

- Posting in a prominent place a notice to prospective and current employees that the employer uses E-verify to verify work authorization;
- Verifying the work authorization of every new employee within three days of hire. **Note that the employer may not use E-verify to prescreen employment applicants or to “reverify” existing workers**;
- For employees who present Form I-9 “List B” identity documents, accepting only those documents that contain a photo, such as a driver’s license, or Native American tribal documents that contain a photo;
- Making a photocopy of certain Form I-9 “List A” identity plus work authorization documents when they are presented, including Permanent Resident Cards (known colloquially as green cards);
- Notifying employees of Tentative Non-Confirmations of work authorization issued by E-verify and providing employees with written instructions issued by the system for challenging the Tentative Non-Confirmation;
- Adverse action may not be taken against an employee while SSA or DHS processes a query or during the period of time an employee is given to challenge a Tentative Non-Confirmation;
- Complying with the nondiscrimination provisions of the Immigration and Nationality Act and Title VII of the Civil Rights Act of 1964; and
- Allowing DHS and SSA, upon reasonable notice, to review the employer’s I-9 Forms and other employment records.

One of the significant advantages to using E-verify is that an employer that receives a confirmation of work authorization of a new hire may rely on a rebuttable presumption that the employer...
did not knowingly hire an unauthorized worker; the use of E-verify, however, does not create a safe harbor for the employer.

Significantly, all Tentative Non-Confirmations must be resolved within the E-verify system by recording whether the employee has chosen to challenge the Tentative Non-Confirmation, and if so, whether SSA or DHS has resolved the challenge in the employee’s favor. The continued employment of any worker who has received a Final Non-Confirmation from the program will create a rebuttable presumption that the employer is knowingly continuing to employ an unauthorized worker. The knowing employment of an unauthorized worker is unlawful.

On December 30, 2008, United States Citizenship and Immigration Services (USCIS), the component of DHS responsible for administering and monitoring the use of E-verify, signed a Memorandum of Understanding with Immigration and Customs Enforcement (ICE) for the sharing of certain information obtained from the E-verify system for investigation and possible enforcement action by ICE including: (1) information that an employer may be unlawfully employing unauthorized workers; (2) information that an employer enrolled in E-verify is not using E-verify for all new hires; or (3) information that an employer has retained a worker after the receipt of a Final Non-Confirmation. This memorandum has generated significant criticism that ICE is data-mining E-verify data and targeting E-verify employers for enforcement action.

**Mandatory Use of E-verify by Federal Contractors: FAR E-verify**

On June 6, 2008, President George W. Bush signed an executive order amending FAR to mandate the use of E-verify by all federal contractors whose contracts are subject to the regulation. Because of intervening litigation, however, the amended regulation did not go into effect immediately and only federal contractors whose FAR contracts were issued on or after September 8, 2009, are affected.

The mechanics of E-verify for federal contractors differs only slightly from the mechanics for voluntarily enrolled employers. The primary differences are in the identity of the workers who must be verified. Federal contractors must verify not only all new hires, as is the case for the voluntary E-verify, but additionally must verify all workers assigned to do work pursuant to the contract (with the exception of support staff). Finally, under FAR E-verify rules, an employer has the additional option to verify the employer’s entire workforce, including “reverifying” existing workers not assigned to do work pursuant to the contract.

The implementation of FAR E-verify did not change the scope of contracts affected by that regulation. Although broad in scope, FAR only reaches contracts for the acquisition of goods or services by a federal agency with appropriated funds. Moreover, there should be very little guess-work involved in determining whether a contract is subject to the FAR E-verify provision because all contracts subject to the provision must include a specific E-verify clause in the contract.

In particular, Medicare providers will not be affected by FAR E-verify because although Medicare services are subsidized by the federal government, Medicare provider agreements do not involve the acquisition of a good or service by a federal agency through appropriated funds. In contrast, the Centers for Medicare & Medicaid Services has determined that federal contracts with Medicare Administrative Contractors are acquisition contracts within the meaning of FAR. As a result, all contracts to those entities issued after September 8, 2009, will include the mandatory E-verify clause.

**The Changing Landscape**

Since 1986, when Congress passed the Immigration Reform & Control Act, employers have borne the primary responsibility for determining the work authorization of workers. It was pursuant to that act that Congress first outlawed the knowing hire or continued employment of an unauthorized worker. To police that prohibition, Congress created the mandatory I-9 process through which it intended that employers identify and refuse to employ unauthorized workers.

The current verification system requires that an employer collect certain information from each new hire, inspect identity and work authorization documents provided by the individual, and record that information on the I-9 Form. Because the I-9 is retained by the employer and not submitted to the government for verification, the verification of the employee’s work authorization depends entirely on the employer’s willingness—and, significantly, the employer’s ability—to determine the validity of the employee’s documents, and if the documents were issued to that employee and not another person (i.e., identity theft). Given the seemingly facial validity of many documents being presented, the current verification process is not achieving Congress’ intent of preventing unauthorized workers from obtaining or maintaining employment.

Over the years, the executive branch—at Congress’ direction—has experimented with other verification systems to supplement the I-9 process. For example, in August 2007, DHS announced the No-Match Rule. Although never implemented because of significant litigation, the No-Match Rule was intended to provide employers with a series of steps to take after receiving notice from SSA that an employee’s information did not match information contained in the SSA database. Unlike the case with E-verify, employers who followed the recommended steps to determine the source of the mismatch—and who took appropriate action—were entitled to a safe harbor provision shielding them from subsequent enforcement action.

On July 8, 2009, President Obama directed DHS to rescind the No-Match Rule and committed to focusing all employment eligibility determinations on E-verify use: “E-verify addresses data inaccuracies that can result in No-Match letters in a more timely manner and provides a more robust tool for identifying unauthorized individuals and combating illegal employment.” The federal government’s commitment to increasing E-verify use is
being matched by numerous state and local governments who are likewise mandating or encouraging E-verify enrollment.

Conclusion

E-verify is here to stay. Whether Congress will act to eliminate the current I-9 system in favor of mandatory E-verify use is still unclear. However, given the changing enforcement climate and concerns that ICE may be broadly data-mining E-verify data, it is vital for employers to develop and maintain effective, nondiscriminatory employment verification procedures. Voluntary E-verify enrollment may be an appropriate strategy for some employers but not necessarily all. Employers are encouraged to review their current verification procedures for the purpose of determining whether they are sufficiently robust to comply with their obligation to employ only authorized workers in a nondiscriminatory manner.

5 8 U.S.C. § 1324a(b).
7 8 U.S.C. § 1324b (identifying unfair, immigration-related employment practices).
8 73 Fed. Reg. 67651, 67652; see also, IIRIRA, § 402(b) (participants in pilot programs for the verification of employment eligibility entitled to rebuttable presumption).
11 Executive Order 13465, amending Executive Order 12989 (as previously amended by Executive Order 13286).
13 48 C.F.R. §§ 22.1802(b)(2), (3).
14 48 C.F.R. § 22.1802(c).
15 See 48 C.F.R. § 2.101 (defining “contract” within the meaning of FAR, in relevant part, as all “commitments that obligate the Government to an expenditure of appropriated funds.”).
16 The mandatory E-verify clause to be inserted into FAR contracts issued on or after September 8, 2009, is at 48 C.F.R. § 55.222-54. Note, however, that certain federal acquisition contracts, such as contracts for the acquisition of commercially available off-the-shelf items, are exempt from the E-verify requirement. 48 C.F.R. 22.1802(b)(4)(i).
18 IRCA, § 101(a) (codified at 8 U.S.C. 1324a(b)).
19 8 U.S.C. § 1324a(d)(1) (directing the President to monitor and evaluate the mandatory 1-9 process and, to the extent that process does not allow for the accurate determination of employment eligibility, directing the President to implement changes to the verification system).
21 Press Release, DHS, Secretary Napolitano Strengthens Employment Verification with Administration’s Commitment to E-verify (July 8, 2009).
22 On April 30, 2008, ICE issued several press releases outlining a new enforcement strategy to target employers that are found to have unauthorized workers in their employ with civil or criminal fines and penalties. This strategy replaces ICEs previous focus on identifying and removing unauthorized workers and aliens. In addition, federal contractors (as well as entities that could reasonably become federal contractors) found to have knowingly violated the prohibitions on hiring unauthorized workers face debarment from future federal contracts. As of October 20, 2009, at least 121 individuals and companies have been debarred because of immigration violations.