

Ensuring Corporate Compliance: E-Verify and I-9 Employment Eligibility Verification

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As Governor of Arizona, Janet Napolitano signed a bill requiring all employers to use E-Verify, an electronic employment eligibility verification program.¹ As the new Secretary of Homeland Security, she is now in charge of combating unauthorized employment for the entire nation. Shifting the focus from employees to employers, Secretary Napolitano announced new work site enforcement initiatives and goals, concurrently increasing the number of investigations as well as I-9 audits.² In many cases, these audits may lead to civil and/or criminal sanctions.³ Indeed, she has pledged to aggressively investigate employers and pursue criminal enforcement wherever possible.⁴ While criminal enforcement against employers who hire unauthorized workers began under the previous administration, E-Verify and Form I-9 employment eligibility verification have moved to the forefront in the context of ferreting out violations.⁵ Secretary Napolitano has stated that, even more so than the prior administration, the focus will be on employer compliance with immigration rules.

The Immigration Reform and Control Act (IRCA)⁶ of 1986 prohibits employers from hiring individuals without work authorization.⁷ The statute requires employees to complete an employment eligibility verification form, also referred to as Form I-9, in which they provide information as to citizenship and employment eligibility.⁸ Within the first three days of beginning employment, the employee must also present supporting document(s) from the list of enumerated acceptable documentation; the employer may not request specific documentation.⁹

Employers must retain the Forms I-9 and Immigration and Customs Enforcement (ICE) may inspect them after providing three days advance notice to the employer or may conduct an inspection without warning after obtaining a warrant;¹⁰ civil penalties may be applied if the employer fails to produce the Forms I-9.¹¹ Although the I-9 process is designed for an employer to ensure a work-authorized workforce, if an employee presents false documents that reasonably appear genuine, the employer may inadvertently hire unauthorized persons.¹² As long as the employer makes a good faith attempt to verify the employment eligibility of its employees, ICE will not charge the employer with a verification violation; however, an employer is only protected from employer sanctions for knowingly hiring an unauthorized alien if

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ICE cannot prove that the employer had knowledge of the employee's unauthorized status.¹³

In part to combat the employment of unauthorized persons, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)¹⁴ of 1996 pursuant to which the Immigration and Naturalization Service (INS), now the United States Citizenship and Immigration Services (USCIS), developed E-Verify, a web-based employment verification system that checks employees' Form I-9 data against federal databases.¹⁵ Approximately 200,000 employers—of the 5.8 million employers in the U.S.—currently use E-Verify.¹⁶

An employer participating in E-verify inputs an employee's Form I-9 data into the E-Verify system and receives an automated response as to employment eligibility.¹⁷ The employee data is first compared against the Social Security Administration (SSA) database and then against the DHS database if the employee self-identifies as a noncitizen.¹⁸ The system will respond with "employment authorized" or "tentative nonconfirmation" (TNC).¹⁹ If a tentative nonconfirmation is received, the employer must inform the employee.²⁰ If the employee chooses to contest the result, the employer must provide the employee with a referral letter and the employee has eight days to contest the result.²¹ If not corrected, a final nonconfirmation is issued and the employer may terminate the employee on this basis.²²

E-Verify does not provide a safe-harbor for employers who use it nor does it relieve the employer of the statutory requirements of Form I-9.²³ Indeed, it does not protect against employees who use false documents to acquire employment and it often entangles employees who are authorized for employment, thereby giving rise to questions about the benefit of using E-Verify. If the results of the E-Verify system contradict the employer's Form I-9 employment verification determination, the employer is placed in a difficult position. In addition, using E-Verify exposes employers to running afoul of the anti-discrimination provisions of IRCA because of the additional regulations with which they must comply.²⁴ While a rebuttable presumption of not hiring unauthorized persons is established by receiving eligibility confirmation from E-Verify, retaining an employee after a final nonconfirmation leads to a rebuttable presumption that the employer has hired an unauthorized individual in violation of IRCA.²⁵ Alternatively, that same employer could violate anti-discrimination provisions of IRCA by dismissing an employee who presented documentation that satisfied the employer's I-9 verification process, but who is not determined to be employment eligible per E-Verify.²⁶

An employer may determine that using E-Verify and risking additional violations of employment-related anti-discrimination law is acceptable when the verification system is nearly error-free and provides a safe haven from worksite enforcement; however, the E-Verify program does neither.²⁷ An investigation earlier this year into the E-Verify program revealed that it wrongly determines that one-half of unauthorized workers are authorized to work.²⁸ Such results are not due to a mistake by the E-Verify system, but because E-Verify is not equipped to handle situations in which a person assumes the identity of another and uses a real social security number.²⁹ In addition, as illustrated by the SSA's internal assessment of implementation of the E-Verify Program, not only were there inconsistencies in the usage of E-Verify to confirm employment eligibility, but nearly one-fifth of the SSA's

new hires were not checked through the E-Verify system.³⁰ Such inconsistent usage of the E-Verify system can expose employers to liability.³¹

In September 2007, to combat the assumption of false identities by unauthorized workers, the USCIS added a photo-screening tool to the E-Verify program that permits employers to compare DHS-issued documents presented by employees in support of their Form I-9 with the photograph in the E-Verify database.³² Although this measure attempts to combat identity fraud, the benefit of the photo tool is only available for persons of certain immigration statuses who present certain forms of identification: either a permanent resident card or an employment authorization document.³³ This tool is further limited because Form I-9 requires that the employee choose which documents to provide; an employer must avoid engaging in verification-related discrimination by requesting specific documents.³⁴ Finally, this measure, although potentially effective, is exposing employers to violating the terms of their agreement with DHS; recent analysis states that 59% of employers are incorrectly comparing the E-Verify database photo with the employee rather than the identification card.³⁵

The financial costs of using E-Verify can include \$1,000 or more in initial start-up costs and \$5,000 or more in ongoing annual maintenance costs.³⁶ Additionally, there are significant collateral costs that may be subsumed in overhead costs. Employers desiring to, or required to, participate in E-Verify must train employees in how to use E-Verify.³⁷ The training requirement burdens the employer multiple times as DHS releases new designs of the system thereby requiring retraining.³⁸ In addition, businesses must be willing to shoulder legal fees arising out of additional lawsuits and must still shoulder the costs of worksite enforcement. These costs are proportionally higher for smaller businesses and large companies with multiple authorized users.

Although it is essential for employers to ensure that their employees are work-authorized, E-Verify, as currently designed, is not the solution to reducing unauthorized employment nor is it a solution for companies seeking to avoid civil and criminal penalties. Considering the resources required to ensure that every new employee is work authorized, it is neither advisable from a compliance standpoint nor justifiable from a financial perspective for employers to use E-Verify. As long as E-Verify does not provide a safe-harbor for employers who use it, does not protect against employees who use false documents to acquire employment and entangles employees who are authorized for employment, the incentive for businesses to join voluntarily are too low and the costs of compliance too high.

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¹ Arizona Fair and Legal Employment Act, H.R. 2779, 48th Leg, 1st Reg. Sess. (2007); cf. *Department of Homeland Security (DHS), Fact Sheet: Worksite Enforcement Strategy* (Apr. 30, 2009), http://www.ice.gov/doclib/pi/news/factsheets/worksite_strategy.pdf (observing that as Arizona's Governor, Napolitano "signed into law one of the toughest employer sanctions laws in the country in 2007 to target employers who knowingly hired illegal workers").

² See Neil A. Lewis, *Immigration Officials to Audit 1,000 More Companies*, *N.Y. Times* (Nov. 19, 2009), <http://www.nytimes.com/2009/11/20/us/20immig.html> (announcing an immigration audit of employers connected to public safety and national security).

³ See DHS, *Worksite Enforcement Overview* (Apr. 30, 2009), http://www.ice.gov/doclib/pi/news/factsheets/worksite_strategy.pdf (recognizing that penalties deter unlawful employment).

⁴ See DHS, *Fact Sheet: Worksite Enforcement Strategy*, *supra* note 1 (refocusing resources towards the criminal prosecution of employers who knowingly hire unauthorized workers).

⁵ See *id.* (reaffirming the central role of the E-Verify program in "maintain[ing] a legal workforce").

⁶ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

⁷ See § 101(a) (controlling illegal immigration by prohibiting the employment of persons unauthorized to work).

⁸ See § 101(a) (requiring attestations by the employee and document examination by the employer); see generally *U.S. Citizenship and Immigration Services (USCIS), Handbook for Employers: Instructions for Completing Form I-9*, M-274 (revised 04/03/09), available at <http://www.uscis.gov/files/natedocuments/m-274.pdf> (providing employers guidance on completing Form I-9) [hereinafter "*M-274 Handbook*"].

⁹ See *M-274 Handbook*, *supra* note 8, at 6 (indicating sections of the form that the employee must complete). Not all situations have been described in the list of acceptable documents appended to Form I-9: certain employees such as foreign students and asylees may present other documents and/or expired documents. See *id.* at 8–9 (listing documents that may be accepted from those with temporary employment authorization).

¹⁰ See § 101(a) (establishing that the forms must be retained for three years after the date of hiring or for one year after termination, whichever is later); *M-274 Handbook*, *supra* note 8, at 37–38 (explaining that an employer may waive the three day warning period or may request an extension to produce the Forms I-9).

¹¹ See *M-274 Handbook*, *supra* note 8, at 38 (requiring production of the forms for inspection by either a Department of Labor (DOL) or DHS officer).

¹² See *id.* at 30 (rejecting documents that reasonably appear to be genuine could result in an unfair immigration-related employment practice); *Andorra Bruno, U.S. Congressional Research Service, Unauthorized Employment in the United States: Issues, Options, and Legislation* (RL33973; Mar. 2, 2009) at 2 (describing document fraud, in which false documents are used and identity fraud, in which a person assumes another person's identity) [hereinafter "*CRS Report*"].

¹³ *M-274 Handbook*, *supra* note 8, at 30.

¹⁴ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, §§ 401–404, 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C.).

¹⁵ See USCIS, *Companion to Form I-9*, <http://www.uscis.gov/portal/site/uscis> (follow "E-Verify Homepage" hyperlink; then follow "What is E-Verify?" hyperlink; then follow "Companion to Form I-9" hyperlink) (last visited June 14, 2010) (stating that E-Verify provides

employers with a tool to determine if the documents that an employee presents for Form I-9 are genuine). The employee Form I-9 data is checked against 455 million SSA records and 80 million DHS records. *See USCIS, Instant Verification of Work Authorization*, <http://www.uscis.gov/portal/site/uscis> (follow "E-Verify Homepage" hyperlink; then follow "What is E-Verify?" hyperlink; then follow "Instant Verification of Work Authorization" hyperlink) (last visited June 14, 2010) (stating that the DHS database contains information about "about employment-based visas, immigration and naturalization status, and U.S. passport issuance").

¹⁶ *See USCIS, What is E-Verify?*, <http://www.uscis.gov/portal/site/uscis> (follow "E-Verify Homepage" hyperlink; then follow "What is E-Verify?" hyperlink) (last visited June 14, 2010) (stating that most employers use E-Verify voluntarily but that some states, such as Arizona and Mississippi, have it mandatory; *U.S. Census Bureau, Statistics of U.S. Businesses: 2004: All Industries*, <http://www.census.gov/epcd/susb/2004/us/US—.HTM> (last visited June 14, 2010). All employers must use E-Verify for employees working on federal contracts that contain the Federal Acquisition Regulation E-Verify clause. *USCIS, For Federal Contractors*, <http://www.uscis.gov/portal/site/uscis> (follow "E-Verify Homepage" hyperlink; then follow "For Federal Contractors" hyperlink) (last visited June 13, 2010); see Exec. Order No. 13,465, 73 Fed. Reg. 33,285 (June 6, 2008), 40 U.S.C. § 121(a), 3 U.S.C. § 301 (2008). A number of states have made the use of E-Verify mandatory for state employees. *See National Conference of State Legislatures, E-Verify: Frequently Asked Questions*, <http://ncsl.org/default.aspx?tabid=13127> (last visited June 12, 2010) (summarizing the passage of such laws in Arkansas, Colorado, Georgia, Idaho, Minnesota, Missouri, Nebraska, North Carolina, Oklahoma, Rhode Island, and Utah). Finally, all Federal departments and agencies must use E-Verify. Memo from Office of Management and Budget ("OMB") to the Heads of Departments and Agencies, *Verifying the Employment Eligibility of Federal Employees*, M-07-21 (Aug. 10, 2007).

¹⁷ *See M-274 Handbook*, *supra* note 8, at 27 (stating that if the employer participates in E-Verify and the employee submits for Form I-9 verification a List B and a List C document, the former must contain a photograph). In addition, for E-Verify participating employers, the employee must provide his/her social security number on Form I-9. *USCIS, Companion to Form I-9*, *supra* note 15.

¹⁸ *See CRS Report*, *supra* note 7, at 12 (describing the E-Verify process and discussing various proposals to combat illegal immigration and unauthorized employment).

¹⁹ *USCIS, Tentative Nonconfirmations*, <http://www.uscis.gov/portal/site/uscis> (follow "E-Verify Homepage" hyperlink; then follow "For Employers" hyperlink; then follow "Tentative Nonconfirmations" hyperlink) (last visited June 14, 2010) (stating that it is also possible to receive a "DHS Verification in Process" response in cases where a manual review is required).

²⁰ *USCIS, Companion to Form I-9*, *supra* note 15 (providing a brief overview of the process).

²¹ *See Dept. of Homeland Security, The E-Verify Program for Employment Verification: Memorandum of Understanding at 8–9*, *available at* <http://www.uscis.gov/files/nativedocuments/MOU.pdf> (revised Oct. 28, 2008) [hereinafter "*E-Verify MOU*"] (establishing that to contest SSA's TNC the employee must visit an SSA office and that for DHS's TNC the employee must call a toll-free number). Both DHS and SSA must inform the employer of the result in 10 days unless they determine that additional time is required. *Id.*

²² *See USCIS, Companion to Form I-9*, *supra* note 15 (permitting termination on this basis only after a final nonconfirmation is issued).

²³ *See E-Verify MOU*, *supra* note 21, at 3 (stating that the employer must also continue to comply with the anti-discrimination provisions of section 274B of the INA); see also Peter F. Asaad & Stephanie S. Wesley, *E-Verify: A Trojan Horse at the Employer's Doorstep*, 5 *Bus. L. Brief (Am. U)* 26 (2008) (noting that regardless of the results of an E-Verify search, the employer must comply with the requirements of Form I-9). Form I-9 must be completed by all employees upon beginning employment and it is designed for an employer to confirm that the employee is work authorized. *USCIS, Companion to Form I-9*, *supra* note 15.

²⁴ See U.S. Department of Justice, Office of Special Counsel for Immigration-Related Unfair Employment Practices, *E-Verify: Employer Dos And Dont's*, available at http://www.usdoj.gov/crt/osc/pdf/e_verify.pdf (stating employers must not use E-Verify to screen employees that they suspect are not authorized and that employers must not request specific documentation from employees so that they may use E-Verify's photo verification tool).

²⁵ See *E-Verify MOU*, *supra* note 21, at 4 (establishing also that the employer must inform DHS of the continued employment of an employee who received a final nonconfirmation).

²⁶ See *supra* note 15 (establishing that the employer is not freed of the obligation to comply with the requirements of Form I-9); IRCA § 102 (establishing that discriminating against an individual in employment matters due to national origin or citizenship status is unlawful). Therefore, an employer who discriminatorily dismisses employees who are work-authorized based on an E-Verify nonconfirmation may be held to be in violation of IRCA § 102.

²⁷ See *supra* notes 8–12 and accompanying text (discussing the requirement to comply with the I-9 process; Asaad and Wesley, *supra* note 23, at 26 (discussing worksite enforcement by Immigration and Customs Enforcement (ICE) on two registered users of E-Verify); *infra* notes 28–31 and accompanying text (discussing the errors in the E-Verify system).

²⁸ See USCIS, *Westat Evaluation of the E-Verify Program: USCIS Synopsis of Key Findings and Program Implications*, at 7, <http://www.uscis.gov/USCIS/Native%20Docs/Westat%20Evaluation%20of%20the%20E-Verify%20Program.pdf> (Jan. 28, 2010); see generally Westat, *Findings of the E-Verify Program Evaluation* (Dec. 2009) available at http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf.

²⁹ See Asaad and Wesley, *supra* note 23, at 27 (examining weaknesses of the E-Verify program).

³⁰ See Office of the Inspector General, Soc. Sec. Admin., *The Social Security Administrations' Implementation of the E-Verify Program For New Hires*, No. A-03-09-29154 (Jan. 2010), <http://www.ssa.gov/oig/ADOBEPDF/A-03-09-29154.pdf>; see also Anthony E. Weigel, *Managing E-Verify Use in the Real World – Beyond the Tale of "Free and Easy,"* Bloomberg Law Reports: Immigration, Vol. 3, No. 3 (Mar. 2010) at 1 (enumerating the steps in E-Verify compliance and discussing the results of the SSA's audit results).

³¹ See *E-Verify MOU*, *supra* note 21, at 3–5 (stating the selective verification of employees can be evidence of discriminatory hiring practices in violation of federal law).

³² See Doris Messiner and Marc R. Rosenblum, Migration Policy Inst., *The Next Generation of E-Verify: Getting Employment Verification Right* at 11 (July 2009) (discussing two improvements to prevent fraud: photo screening improvement and a plan to "block" an employee's identity data).

³³ See USCIS, *Photo Matching*, <http://www.uscis.gov/portal/site/uscis> (follow "E-Verify Homepage" hyperlink; then follow "For Employers" hyperlink; then follow "Photo Matching" hyperlink) (last visited June 14, 2010) (reminding employers in the second paragraph that they must compare the E-Verify photograph with the identification provided by the employee, not with the employee himself/herself); see also Messiner and Rosenblum, *supra* note 32, at 11 (stating that photo-matching is limited to 5–7% of job applicants). Although incorporating state driver's license photos to the E-Verify databases would increase usefulness of the tool, it would make the system more vulnerable to error and no state has agreed to provide these photos. *Id.*

³⁴ See *supra* notes 8–12 and accompanying text (discussing the documentation requirements of Form I-9). If the employee presents either a permanent resident card or an employment authorization card for Form I-9 employment eligibility, then an employer participating in E-Verify must retain a photocopy of document so that he/she may compare the photograph in the DHS database against the document provided by the employee. *M-274 Handbook*, *supra* note 8, at 32.

³⁵ See Westat, *Findings of the E-Verify Program Evaluation*, *supra* note 28, at xxxviii (reporting also that 97% of employers find the photo matching tool "easy to use").

³⁶ See *id.* at 182–83 (stating that most employers did not identify any direct costs of enrolling in E-Verify or subsequent maintenance costs).

³⁷ See *id.* at 183 (stating of those who provided cost information, approximately one-fifth reported training costs).

³⁸ See *USCIS, E-Verify Redesign*, <http://www.uscis.gov/portal/site/uscis> (follow "E-Verify Homepage" hyperlink; then follow "Customer Support" hyperlink; then follow "E-Verify Redesign" hyperlink) (last visited June 14, 2010) (announcing a redesign to E-Verify that "enhances [its] usability, security, accuracy, and efficiency" and which requires users to take a short tutorial upon their next log in to the system).