

Try E-Verify; Avoid the Fine for Hiring Illegal Aliens

On March 27, 2008, the fines for hiring an illegal immigrant increase. Fines, combined with an increasing number of criminal prosecutions for violation of the immigration laws, make the availability and use of the federal government's E-Verify system an increasingly important program for employers.

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With today's complex immigration laws, all employers must be careful to avoid hiring illegal aliens. Employers no longer can rely on an alien's presentation of an apparently authentic work authorization document. Employers now must make good faith efforts to verify the document and the alien's social security number.

On January 1, 2008, the federal government's new E-Verify system became operational. This system is an internet-based application, operated jointly by the U.S. Citizenship and Immigration Services ("USCIS") and the Social Security Administration ("SSA"), and intended to provide employers with an easy way to verify both employment eligibility of newly hired employees and the legality of each employee's social security number.

What Does E-Verify Actually Do?

E-Verify assists employers to determine whether a newly hired employee is authorized to work in the United States and if the social security number presented by the employee is valid.

Why E-Verify?

E-Verify is both free and easily accessed. More importantly, in the event of a USCIS raid or audit, it provides a useful tool for the employer to demonstrate good faith in its employment eligibility verification procedures and record maintenance. With specially developed software, an employer can extract information from the employer's computerized records or electronic I-9 filings, and transmit the data directly to the SSA and the USCIS's E-Verify database.

How Can You Qualify to Use E-Verify?

Each employer wishing to employ the E-Verify system must enter into a form Memorandum of Understanding with the USCIS and the SSA. The employer can designate one site to perform the E-Verify functions on behalf of the employer's entire company, in which case only one Memorandum of Understanding needs to be signed; alternatively, the employer can designate each of its sites to perform its own E-Verify, in which case each site must sign a Memorandum of Understanding. Once this is completed, the person specified by the employer or employer worksite as its designated agent can register to use E-Verify and obtain passwords for access by

permitted users. The chart below will assist with understanding the functions of various employees who may need to access the E-Verify system.

	Case Administration Initial Verification View Cases	Client Administration Add Client View Client	User Administration Change Password Change Profile	Site Administration Add User View Users Maintain Employers Request Termination	Reports View Reports
General User	X		X		X
Program Administrator	X	X	X	X	X
Corporate Administrator			X	X	X
Method of Access	E-Verify Designated Agent	Designated Agent	E-Verify Designated Agent	E-Verify Designated Agent	E-Verify Designated Agent

What are the Requirements Related to Use of E-Verify?

As soon as an employer decides to participate in E-Verify, it is required to post a clearly visible notice advising its employees and prospective employees of that participation. A copy of this notice also must be provided to the Department of Homeland Security and appear with any antidiscrimination notice issued by the Office of Special Counsel for immigration-related unfair employment practices. All of these notices are available online once a business registers with E-Verify.

What are the Restrictions on E-Verify Use?

It is critical that employers understand that prescreening job applicants by using the E-Verify system is prohibited; it may be used only on newly hired employees prior to or within three days after the employee's actual start date. It may not be used to delay an employee's training or commencement of employment, or to accelerate the start date for employment.

Also, the E-Verify system may not be used selectively; once the employer registers with E-Verify, all new employees, United States citizens and non-citizens alike, must be entered into the system. An employee who already has been hired may not be subjected to E-Verify to confirm or re-verify employment authorization. E-Verify information must be kept separate and apart from an employee's personnel records.

What Are the Limitations of E-Verify?

E-Verify cannot be used for employees who do not yet have a social security number, since one of the data fields necessarily will be left blank and the system will not function.

Also, E-Verify does not verify immigration status. It verifies only the identity and employment eligibility of newly hired employees.

What Employee Documents Can an Employer Use for E-Verify?

E-Verify can verify any document with a photo that is provided by the employee to the employer as proof of work eligibility in completion of the I-9. The I-9 contains a List A and List B of acceptable documents for use in verifying eligibility to work in the United States. The List A documents include a United States passport, expired or unexpired; an unexpired foreign passport with a temporary I-551 stamp or with an unexpired I-94 endorsing the nonimmigrant status; a Permanent Resident Card; and an unexpired Employment Authorization Document with a photo. The acceptable List B documents, those with a photo, include a driver's license or ID card issued by a state or outlying possession of the United States; an ID card issued by federal, state, or local government agencies or entities; or a school ID card.

The E-Verify System contains a photo screening tool which assists employers in determining whether documents presented by the employee during the Form I-9 completion are valid. This system allows the employer to match photos, such as a DHS-issued "green card" or permanent resident card or employment authorization card, presented by new employees when completing the I-9, with any photograph that appears in the records of the USCIS.

It is important to remember that there are documents which may be presented to the employer for verification purposes which do not contain a photo. While it is prudent for the employer to retain a copy of all documentation presented as evidence for the I-9, to the extent the employer is using E-verify and the employer receives a document that does not contain a photo, the significance of having a copy of such document on file escalates.

How do Form I-9 and E-Verify Interface with Each Other?

A Form I-9 must have been completed before an employer seeks employment eligibility through E-Verify. Electronic I-9 filings currently do not generate E-Verify inquiries. However, some private companies are offering this integration of E-Verify with the electronic I-9 filings.

What are Possible Results of an E-Verify Submission?

After an employer submits an initial verification, the E-Verify system will display one of the following results: employment authorized, SSA tentative nonconfirmation, DHS tentative nonconfirmation, SSA final nonconfirmation, DHS verification in process and case in continuance. Tentative nonconfirmations are accompanied by instructions to the employee (not the employer) to contact the SSA or DHS, and mechanisms and filing requirements for the

employer to prove that it has given these instructions to the employee. A final nonconfirmation requires the employer to terminate the employee's employment.

Conclusion

The E-Verify system is so new that it is not yet possible to confirm its ability to protect the participating employer in the event of an audit by the USCIS. However, the system is free and relatively user-friendly, and provides tangible proof to the USCIS in the event of an audit that the employer did everything in its power to determine employment eligibility and takes its obligation to employ legal workers seriously. E-Verify also improves the accuracy of employer wage and tax reporting and eliminates, for the most part, receipt by the employer of SSA-generated mismatch letters.

Ward and Smith, P.A. provides a multi-specialty approach to the representation of technology companies and their officers, directors, employees, and investors. Jennifer Parser practices in the Labor and Employment Section and Immigration Practice Group, where she concentrates her immigration practice on business immigration, particularly investor visas, both nonimmigrant and immigrant. Jennifer's practice is limited to Federal Immigration and Naturalization Law. She currently is licensed in New York only. Comments or questions may be sent to jgp@wardandsmith.com

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