

EMPLOYER ISSUES: E-VERIFY

E-Verify (formerly known as the Basic Pilot/Employment Eligibility Verification Program) is an Internet based system operated by the Department of Homeland Security (DHS) in partnership with the Social Security Administration (SSA). E-Verify is designed to allow participating employers to electronically verify the employment eligibility of their newly hired employees. E-Verify is free and enrollment is voluntary. Information about E-Verify, including how to enroll is available from USCIS at <https://www.e-verify.gov/>.

This memo is a brief summary of issues that employers should consider when evaluating whether to join the E-Verify program.

Liability Issues for the Employer

- E-Verify requires the employer to sign a Memorandum of Understanding (MOU) with Department of Homeland Security (DHS). The MOU is extremely lengthy, and it requires (among other things) that the employer agree to permit a DHS audit of I-9s, and to ongoing DHS audits and interviews with HR and employees to assess the effective use of the E-Verify program. Failure to comply with the terms of the MOU can create liability for civil money penalties of \$500 to \$1000 per violation. As the MOU creates significant legal obligations for the employer, the decision to register for E-Verify should only be made after consulting with internal corporate counsel or chief executives.
- The I-9 audits authorized under the MOU permit DHS to review all I-9s created by the employer, not just new I-9s or I-9s for employees who are verified under the E-Verify program. The E-Verify team at DHS also can share information gathered from these I-9 audits with other DHS enforcement agencies, such as Immigration and Customs Enforcement (ICE).
- The terms of the MOU may effectively waive an employer's ability to claim certain documents as privileged in the event of a workplace audit or an I-9 audit – this may create additional liability for an employer, or limit the ability to raise certain legal defenses in the event of an I-9 audit or other enforcement action.

Additional Work for Human Resources

- E-Verify requires employers to submit the verification for all new hires within 3 days of starting work – this is another step that HR will be required to do as part of the I-9 process. Also, E-Verify must be used for **all** new hires at any worksite that is registered for E-Verify, regardless of their citizenship status or national origin. E-Verify does not apply only to non-citizens or individuals with temporary employment status in the U.S.
- Employers must be certified and trained in how to use the E-Verify program – this requires completion of a tutorial with DHS and completing refresher training as new features are introduced.
- Employers must still complete and maintain I-9 forms for all employees and conduct reverification as necessary; E-Verify participation does not waive or reduce that requirement.

Additional Burden on Employees

- If the E-Verify submittal results in a "tentative non-confirmation" (TNC) for a hire, the employer must advise the employee of the TNC and the employee must contact DHS and/or SSA to resolve the TNC issue. The employee must contact DHS and/or SSA within 8 business days to contest the TNC finding. While the employee can return to work while the finding is under review, if the agency does not find the employee to be employment authorized, the employer must terminate the employee, or risk a finding that they are knowingly employing an unauthorized worker.
- Due to problems with DHS and SSA databases, some individuals who are US citizens or authorized workers may not be confirmed through E-Verify. This can create a claim of discriminatory treatment from any potential hire who is termed due to an E-Verify database error, not to mention the possible loss of a qualified hire.

We would encourage you to review the terms of the MOU with our office and/or with your employment counsel, to ensure that you understand your obligations and liabilities under E-Verify. Companies should not enroll in E-Verify without first balancing its advantages against its disadvantages. The decision to enroll in E-Verify should be made only after consulting with the company's internal corporate counsel or chief executives.