

Everything You Should Know about E-Verify and FAR E-Verify

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What is E-Verify?



- Internet-based system run by Department of Homeland Security (DHS) with databases from DHS, SSA and State Department, which allows employers to verify employment eligibility of new hires, within seconds;
- E-Verify is voluntary, except if required by state law or one is applicable federal contractor; and
- Employers must post E-Verify notices.

Basics of E-Verify



- Enter data from I-9 form into E-Verify. If verified, employer will receive confirmation number;
- Attach verification/confirmation to I-9 form and/or write number on top of I-9 form,
- If not verified, employer will receive a “Notice of Tentative Non-Confirmation” (TNC);
- If employee does not contest TNC, employer should immediately discharge employee;

Basics of E-Verify (cont'd)



- If employee contests TNC, employer prohibited from immediately discharging or disciplining employee;
- If employee contests TNC, employer must refer employee to SSA or DHS and employee must contact SSA or DHS within 8 business days of referral;
- Employer should contact database within 8 business days after referral to receive updated status, authorization, final non-confirmation or DHS tentative non-confirmation;

Basics of E-Verify (cont'd)



- If employee receives final non-confirmation, employee is not authorized to work;
- Employer should terminate employee or will be subject to penalties for employing undocumented worker – 1st offense - \$375 to \$3200; later offenses - \$3200 to \$16,000;
- If no termination of employee, there are also potential fines of \$550 - \$1,100 per instance of failure to notify DHS of employing unauthorized worker.

Should Your Company Use E-Verify? - Pros



- It's a better system of employment verification than just use of I-9 form;
- E-Verify posters sharply reduce number of applicants without employment authorization; and
- You may be required to do so under state law if operating in certain states and/or contracting with state or local governments.

Should Your Company Use E-Verify? - Cons (cont'd)

- Monitoring & Compliance (M&C) Branch of USCIS is now “mining” data from E-Verify, and if it determines large number of green cards for LPRs, then it sends noncompliance letters to employers with high percentages;
- If M&C determines the employer is “out of line,” it will make an Office of Special Counsel referral; and
- Creates additional work for HR department;
- Allows the government more oversight of your company.

FAR E-Verify



- Required on federal contracts of over \$150,000 and related subcontracts of over \$3,000 (except if contract has performance terms of less than 120 days);
- Must E-Verify all newly hired employees and current employees assigned to contract; and
- May opt to E-Verify entire workforce.

E-Verify Issues



- Employers who learn that they inadvertently failed to create case by 3d business day after employee starts work for pay (1st day of employment in exchange for wages) should bring themselves into compliance immediately by creating case for employee;
- Employers must use E-Verify for all employees who are rehired; however, E-Verify should not be used to re-verify employment authorization of existing employee;

E-Verify Issues (cont'd)



- E-Verify has special rules if employer rehires employee, who previously provided U.S. Passport/Card, green card, Driver's License or State ID and document is now expired. There are 2 options:
 - If never created a case in E-Verify for the employee, employer must have employee complete new I-9 form and create case in E-Verify.
 - If you previously created case in E-Verify for rehired employee and received employment authorized, complete Section 3 of the employee's previous I-9 form and do not create new case for employee in E-Verify. Alternatively, employer may choose to complete new I-9 form and create case for employee in E-Verify.

State E-Verify Laws

- These states have laws requiring all employers to utilize E-Verify to verify work authorization of new employees:

- Alabama;
- Arizona;
- Georgia;
- Mississippi;
- North Carolina;
- South Carolina;
- Utah

Georgia E-Verify Law

- Georgia employers with 11 or more employees (employers with 10 or less employees are exempt) must use E-Verify to authenticate new hires; and
- All contractors or subcontractors, even with 10 or fewer employees, who contract with a state agency, must utilize E-Verify to verify the work eligibility of all new employees;
 - All contracts between state agency and contractor must include this requirement, as well as contracts between contractor and subcontractor.

Georgia E-Verify Law - Penalties

- Private employers - failure to use E-Verify means company is unable to receive renewal of business licenses;
- Public contractors -
 - 1st offense - listed on the website;
 - 2d offense - debarment from public contracts for 12 months; and
 - If one provides a false statement, one faces fine of up to \$1,000 and imprisonment for 1 to 5 years.

Alabama and Mississippi E-Verify Laws

- All Alabama employers must use E-Verify to authenticate new hires;
 - Penalties for hiring unauthorized workers range from temporary suspension of business licenses for up to 60 days for 1st violation, to permanent revocation of the business licenses statewide for multiple violations.
- All Mississippi employers must use E-Verify to authenticate new hires
 - The penalties for violating the statute are loss of any business license or permit granted by the State of Mississippi, for up to one year; the cancellation of any state contract, and ineligibility for any state contract for up to three years; or both.

Arizona E-Verify Law

All employers in must use E-Verify to check employees' work eligibility. An employer is prohibited from "knowingly" or "intentionally" hiring unauthorized workers;

Employers may also be held liable for knowingly or intentionally using independent contractors who employ unauthorized workers;

Arizona E-Verify Law - Penalties

- Penalties for "knowingly" employing an unauthorized alien are:
 - 1st violation: Suspension of the business license, where the unauthorized alien(s) performed work, until the employer files sworn affidavit stating it has terminated unauthorized alien and will not intentionally or knowingly employ unauthorized alien.
 - If employer fails to file such affidavit, court may suspend license at that jobsite, for up to 10 business days.
 - Employer is placed on probation for 3 years during which time the employer must file quarterly reports with county attorney.
 - 2nd violation: during three-year probationary period, permanent revocation of licenses at that jobsite.

North Carolina E-Verify Law

- North Carolina employers, with 25 or more employees in NC (employers with less than 25 employees are exempt), must use E-Verify to authenticate new hires;
- State agencies, universities, counties and municipalities are also required to use E-Verify for new employees hired.

North Carolina E-Verify Law - Penalties

- 1st violation - N.C. Commissioner of Labor shall order employer to file a signed sworn affidavit with the Commissioner within 3 business days after the order is issued. The affidavit shall state with specificity that employer has, after consultation with the employee, requested a verification of work authorization through E-Verify.
 - If an employer fails to timely file an affidavit required by this subsection, the Commissioner shall order the employer to pay a civil penalty of \$10,000.
- 2nd violation - Civil penalty of \$1,000;
- 3rd violation - Civil penalty of \$2,000 for each required employee verification that the employer failed to make.

State E-Verify Laws/Executive Orders

- These states have laws or Executive Orders requiring employers contracting with state and/or local governments to utilize E-Verify to verify work authorization of new employees:

- Colorado;
- Florida;
- Indiana;
- Idaho;
- Louisiana
- Minnesota
- Missouri;

- Nebraska;
- Oklahoma;
- Pennsylvania;
- Texas; and
- Virginia

Florida E-Verify Executive Order

- By Executive Order, Governor Scott directed:
 - All agencies under the direction of the Governor to verify the employment eligibility of all new agency employees through E-Verify system; and
 - All agencies under direction of Governor must include, as a condition of all state contracts, requirement that contractors utilize E-Verify system to verify employment eligibility of:
 - (a) all persons hired during the contract term by a contractor to perform employment duties within the State of Florida; and
 - (b) employees hired by subcontractors during the contract term.

Texas E-Verify Executive Order

- By Executive Order, Governor Perry directed:
 - All agencies under the direction of the governor to use E-Verify to verify the employment eligibility of all current and prospective employees. The same order applies to all contractors and sub-contractors that have contracts for services with any agency under the direction of the governor.
- What's illegal about this Executive Order?

Pennsylvania E-Verify Law

- Contractors and subcontractors performing “public work” for state agencies in Pennsylvania are required to use E-Verify to determine the employment eligibility of all newly-hired employees.
- “Public work” is defined as: Construction, reconstruction, demolition, alteration and/or repair work other than maintenance work, done under contract and paid for in whole or in part out of the funds of a public body where the estimated cost of the total project is in excess of \$25,000.

Pennsylvania E-Verify Law - Penalties

- First Offense: warning to violator and posting on Pennsylvania's website;
- Second Offense: 30 day debarment from state public works contracts;
- Third Offense: 180 days to one year debarment from state public works contracts; and
- Willful violators (as determined by a court) may be debarred for up to three years.

Colorado E-Verify Law

- Contractors who contract with state and local governments, to participate in E-Verify;
- Employers must provide certification attesting to:
 - (a) it has verified the "legal work status" of each employee and retained copies of such federal documentation;
 - (b) it has not altered or falsified the employee's documentation; and
 - (c) it has not knowingly hired an unauthorized alien.

Colorado E-Verify Law (cont'd)

- Colorado Labor and Employment Department may request each employer to provide proof of compliance with federal immigration laws;
- Agency may conduct random audits to ensure compliance;
- Employers face a fine of up to \$5,000 for first offense concerning documentation;
- Up to \$25,000 for second or subsequent offenses related to lack of documentation or fraudulent documentation.

Indiana E-Verify Law

- All contractors who enter into contracts with state and local governments must use E-Verify for all new hires;
- If subcontractors are employed under public contract, subcontractor must certify to contractor that it uses E-Verify and does not knowingly employ illegal immigrants; and
- State agencies or local governments may terminate public contract, without penalty, if contractor knowingly employs illegal workers.

Missouri E-Verify Law

- All contractors, who enter into a state contract of at least \$5,000, to use E-Verify with respect to employees hired to work on state contract.
- Contractor who employs unauthorized aliens has its contracts voided and barred from contracting with state for 3 years.
- General contractor/subcontractor is not liable when it contracts with its direct subcontractor, who violates law, **if** contract affirmatively states direct subcontractor is not and will not knowingly employ unauthorized aliens and contractor/subcontractor receives sworn affidavit stating direct subcontractor's employees are lawfully present in U.S.

Virginia E-Verify Law

- State contractors with more than 50 employees for the 12 months prior to entering into a contract with any agency in Virginia for more than \$50,000 must use E-Verify for new hires;
- State agencies must enroll in E-Verify for all newly hired employees; and
- Penalties - failure to comply with the law:
 - (i) denial of prequalification of employers to enter into contracts with Commonwealth and (ii) debarment from contracting with Commonwealth for up to 1 year. Such debarment would cease upon employer's registration and participation in E-Verify.

Tennessee and Louisiana E-Verify Laws

- Both states have non-mandatory E-Verify laws, which provide incentives for employers to use E-Verify to verify work authorization of new employees but do not require use of E-Verify;
- Instead, must maintain copy of a certain type of identification – most of which are I-9 related documents.

Basics of Tennessee Lawful Employment Act (TLEA)

- Employers may enroll and use E-Verify for newly-hired employees, or it may accept, copy and maintain one of the following:
 - State-issued driver's license or photo ID; Unexpired permanent resident card or work authorization; Birth certificate; Certificate of naturalization; Unexpired U.S. passport; etc.
- Under TLEA, employer has a “safe harbor” and cannot be found to have violated the law by employing an employee without work authorization if:
 - Employer utilized E-Verify & received a confirmation; or
 - Employee appealed the tentative non-confirmation and the appeal has not been resolved.



Bruce E. Buchanan

Bruce E. Buchanan is an attorney at the Nashville and Atlanta offices of Siskind Susser P.C. He represents employers in immigration law matters, with a special emphasis on immigration compliance, and in employment law matters. He received his J.D. from the Vanderbilt University. Bruce worked for the federal government for 20 years before going into private practice in 2003. He also served from 1991 to 2003 as Adjunct Law Professor at William H. Bowen UALR School of Law.

Bruce blogs for ilw.com at www.EmployerImmigration.com and is a regular contributor to *HR Professionals Magazine* on immigration compliance issues. He is the past -Chair of TBA's Immigration Law Section and served on AILA's Verification Liaison Committee relate to OSC, OCAHO, and ICE in 2014-15.

Bruce is admitted to practice in Tennessee, Florida, Georgia, and Arkansas, and the U.S. Court of Appeals for the 5th, 6th, 8th, and D.C. Circuits.