

Moving Forward With E-Verify

BY DAVE FOWLER

E-Verify is an online program run by the federal government that employers can voluntarily use to verify that a newly hired employee is eligible to work in the United States, and that the employee's name and social security number (SSN) match government records.

While E-Verify can be used on a voluntary basis, a number of states now mandate its use. Under a recent presidential executive order, it will be required for federal contractors; this is expected to become effective during the current federal fiscal year, which ends on September 30, 2009.

E-Verify helps employers do their part in discouraging illegal immigration by employing only those persons who are authorized to work in the United States. It also helps employers limit liability and maintain compliance with federal immigration laws.

Approximately 90,000 employers are currently using the E-Verify system, which is operated by U.S. Citizenship and Immigration Services (USCIS) and the Social Security Administration (SSA). USCIS is part of the U.S. Department of Homeland Security (DHS). Go to www.dhs.gov/E-Verify for more information.

E-VERIFY IS FREE

Employers can participate in the program for free by signing an agreement referred to as a Memorandum of Understanding (MOU). Users must then complete a one-hour online training course.

Dave Fowler is Senior Director of Product Strategy for TALX, a provider of payroll and HR services. He also chairs APA's Government Affairs Task Force Immigration Subcommittee.

To use E-Verify, the user enters information from a new hire's Form I-9, *Employment Eligibility Verification*, within three business days of hire. The user will receive a response in seconds. The response should be attached to and retained with the I-9.

This manual, paper-based process works well for small employers or individual hiring locations. However, it currently does not work as well as the size of the employer increases and poses administrative costs and burdens for large employers.



E-VERIFY PROTECTS THE EMPLOYER

Using E-Verify allows the employer to comply with state laws and the upcoming rule for federal contractors. In addition, the MOU states that no person or entity participating in E-Verify shall be civilly or criminally liable under any law for any action they take in good faith on information provided through the confirmation system, such as terminating an employee.

Many companies are using E-Verify to protect their brand. As U.S. Immigration and Customs Enforcement (ICE is the investigative arm of DHS) steps up audits and worksite enforcement actions, employers are increasingly concerned about the negative impact an audit or enforcement action may have on the company's brand image and stock price.

HOW E-VERIFY WORKS

In 94% of E-Verify queries, the employee is immediately determined to be authorized to work in the United States, according to recent testimony by Jonathan Scharfen, Acting Director of USCIS.

For the 6% of employees that cannot be immediately authorized, the employer will receive a Tentative Nonconfirmation (TNC), indicating that there is some discrepancy. If the employee contests this, he or she must resolve the situation with either the SSA or DHS within eight working days. If the employee does not contest the TNC or does not resolve it, it becomes a final nonconfirmation, and the employer may terminate the employee.

In only 1% of E-Verify queries does the employee choose to contact a government agency to resolve an issue; in half of those, the employee is determined to be authorized to work. This means that 5.5% of the time, an employee is presumably not authorized to work.

USCIS is attempting to determine why the number of employees trying to resolve a Tentative Nonconfirmation is not higher. While this could represent the number of unauthorized workers being hired, it could be an indication of discrimination if employers are terminating employees without allowing them the opportunity to correct a TNC.

E-VERIFY MAY BE OUTSOURCED AND COUPLED WITH ELECTRONIC I-9S

The E-Verify Designated Agent (DA) program is designed to allow employers to outsource the verification process to a third party. Under one method, the agent can simply receive copies of the paper I-9s and key the information into the E-Verify website. Alternatively, the agent may offer its clients an online service integrated with E-Verify's web services for DAs, seamlessly allowing the employer to electronically process E-Verify transactions.

DAs that use the E-Verify web services interface tend to offer clients a service that allows the employee and employer to complete the I-9 online with electronic signatures. For these employers, the completion of the I-9 and the submission of the I-9 information to E-Verify are one process. Under Public Law 108-309, which took effect in 2005, and a supporting rule that took effect in 2006, electronic signatures are acceptable for Form I-9, and I-9 information may be stored electronically instead of on paper.



U.S. Citizenship and Immigration Services

There are many benefits to an electronic I-9 system, including real-time edits—which prevent errors—and search capabilities, which can locate an employee’s I-9 in seconds. Some DAs offer additional compliance features, including:

- Matching I-9 information to payroll data to ensure every eligible employee has an I-9 on file
- Tracking employees with expiring work authorization documents
- Purging Forms I-9 for terminated employees once the record retention requirements have been satisfied

Since electronic I-9 services collect and maintain personally identifiable information, security is a major priority. A DA offering an electronic I-9 service should be able to substantiate a secure application and operating environment by maintaining an independent audit like a Statement on Auditing Standards (SAS) 70 Type II. SAS 70 is an auditing standard developed by the American Institute of Certified Public Accountants.

INCREASING MANDATE OF E-VERIFY

One way for a state government to control costs is to decrease the taxpayer-paid benefits it provides to illegal

aliens. If illegal aliens are prevented from getting jobs within the state, it is possible they’ll move to another state. With no action from Congress, states are passing their own immigration laws, and E-Verify is required for certain new hires in many states, including Arizona, Minnesota, Mississippi, and Oklahoma.

The recent presidential executive order is particularly interesting. It

will require employers who are federal contractors to verify all employees hired during the life of a contract, and all existing employees directly engaged in work under a qualified contract. This is a major change for E-Verify, as employers are currently prohibited from verifying existing employees.

ACCURACY OF THE SSA DATABASE

In December 2006, the SSA estimated that 4.1% of the records in their database contained an incorrect name or SSN. E-Verify detractors claim that if E-Verify were mandatory for all employers, this would translate into a significant number of individuals being wrongly declared ineligible for employment.

However, it may be that such TNCs would inspire the affected individuals to contact SSA and correct the errors in SSA’s records—errors that may have otherwise never been detected. Correcting these errors will allow their W-2 wage data to be posted to their record at SSA, making it much easier when they apply for social security benefits.

ROOM FOR IMPROVEMENT

One of the goals of the Immigration Subcommittee of APA’s Government Affairs Task Force is to work with DHS to make E-Verify more effective and less

burdensome for employers.

Even the best system can be foiled if there is document fraud. For example, if an employee presents an identity document with valid information but with a fraudulent picture—one that matches the employee—that probably can’t be caught just by completing an I-9.

However, the E-Verify website includes a feature called the “photo tool.” The photo tool displays the picture that should be on the document and asks the employer to confirm that the pictures are the same. To be effective, the photo tool needs to encompass a wider variety of documents. Currently, it includes photos from only the Employment Authorization Document (EAD) and Permanent Resident Card (“green card”). Furthermore, DHS needs to design it to be accessible to employers using DAs.

If documents do not match and the employer receives a Tentative Nonconfirmation, the employee’s appeal process must be simple and paperless. Currently, the appeals process is paper-based and burdensome for the employer.

USCIS is being responsive to requests from employers and DAs. An example of this improved partnership is in the April 2008 update to the E-Verify User Manual. The manual now includes directions for employers that are unable to submit the initial E-Verify query within three business

days of an employee’s start date. Prior to this new direction, an employer was out of compliance if, for example, due to a technical problem or an honest mistake, the initial E-Verify query was not submitted within three days. The manual now instructs the employer to submit the initial E-Verify query, even after the three-day period, and record the reason for the delay and keep it with the I-9. ■

