

Status Seeking

By Allen Erenbaum

While health care reform continues to swirl at the center of the policy universe, another hot-button issue is expected to follow — immigration reform.

Scheduled for kickoff late this year with the introduction of comprehensive immigration reform legislation in the Senate, one issue certain to be included, and hotly debated, is the electronic verification of employment eligibility. While various proposals have been discussed, including renewed calls for a national biometric identification card, most of the discussion concerns a government program called E-Verify.

E-Verify is a free, Internet-based system created by the federal government through which employers can check the legal status of new hires. E-Verify checks the information provided by a new employee against government databases and gives employers an instant response. Today, about 145,000 employers are using the system, representing about 2 percent of U.S. businesses but covering about 14 percent of non-farm employees. While E-Verify is currently voluntary for most employers, there are key exceptions. In a significant development, the Obama administration recently decided to implement a Bush administration rule that will require federal contractors to use E-Verify beginning today.

The electronic system has vocal supporters as well as staunch critics. Arguments primarily revolve around the accuracy, efficiency and capacity of the system, as well as the potential for discrimination and employer burden. Despite the controversy, some form of the E-Verify program is here to stay, so all employers need to understand the implications of incorporating E-Verify into their hiring process in order to make an informed decision whether to use the system — or to be prepared if policymakers make that decision for them.

E-Verify is run by U.S. Citizenship and Immigration Services, an agency of the Department of Homeland Security, in conjunction with the Social Security Administration. E-Verify supplements the paper I-9 requirement but does not replace it. Under the system, employers enter information provided by their new hires, such as their name, date of birth, Social Security number and immigration and citizenship status, into an Internet-based electronic verification application. This information is checked against Social Security's Numident database (and in some cases is also run through Homeland Security databases). E-Verify provides a response within seconds.

The three possible E-Verify responses are "employment authorized," "SSA tentative non-confirmation" and "DHS verification in process." If an employer receives the first response, the new hire may remain

employed. If an employer gets the second response, it must provide the employee with information about how to challenge the mismatch, which starts what can be a time-consuming process to correct the records. If the E-Verify inquiry results in the third response, the match is referred to Homeland Security for verification and a response returns within 24 hours.

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To use E-Verify, employers must agree to use it for new hires after the I-9 form has been filled out (no pre-screening of job candidates), use it for all new hires regardless of national origin or citizenship (not selectively), provide employees who receive a tentative nonconfirmation result with information about how to challenge the mismatch and a written notice generated by E-Verify and not take adverse action against an employee while they are contesting the mismatch.

While most employers may choose whether to participate in E-Verify, an increasing number of employers do not have a choice. The federal government published a final rule in November 2008 that mandates participation in E-Verify for almost all federal contractors. After delays due to litigation and a review by the Obama administration, the rule is set to take effect today.

With limited exceptions, the rule requires all federal contractors to enroll in E-Verify and will be inserted as a clause in all new federal contracts. Covered employers must use E-Verify not only on all new hires during the contract term, but also to confirm the eligibility of all of the contractors' current employees who perform services under the federal contract. The rule stipulates that companies awarded a federal contract must enroll in E-Verify within 30 days of the contract award date. Subcontracts for services or construction over \$3,000 are also required to contain the same clause.

The only contracts exempt from the E-Verify clause are contracts for less than \$100,000 and contracts for some commercially available off-the-shelf items, though the Senate recently passed an amendment

to cover these contractors as well. The rule is expected to cover 170,000 federal contractors and their 4 million employees. Failure to use E-Verify properly can lead to debarment.

Many other employers are already required to use E-Verify as more than a dozen states have taken action to require or encourage use of E-Verify for their employers. Most of these states require government entities or government contractors to use E-Verify, but Arizona, Mississippi and South Carolina have required its use by all employers. In addition, employers wishing to take advantage of a recent federal rule to extend the student work visas of their employees found that the extension comes with an unrelated string attached — it is only available if the employers enroll in E-Verify.

Advantages of Enrolling in E-Verify

Using E-Verify takes some of the guesswork of evaluating documents out of the hands of the employer. Employers should be aware, however, that E-Verify does not provide a safe harbor for violations of federal immigration laws.

Employers who use E-Verify can argue that they are using the best available means to verify the eligibility of new hires. Under federal law, employers who use E-Verify are entitled to a rebuttable presumption that they have not knowingly hired an illegal worker. Some states have also created a safe harbor from state penalties for employers using E-Verify.

E-Verify is already legally mandated in some form in over 15 states. The number of states and local jurisdictions requiring it is likely to increase over time, particularly in the absence of a broad federal expansion of the program.

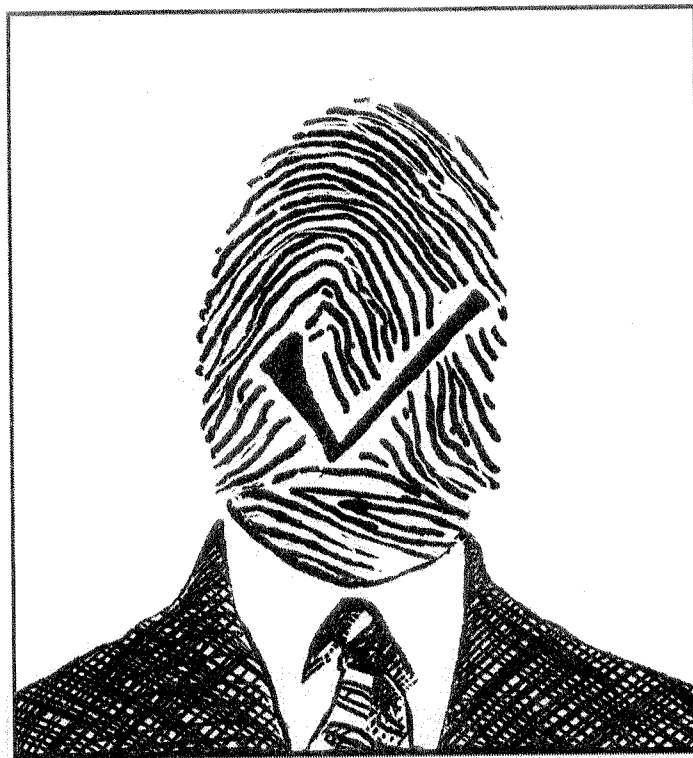
E-Verify continues to improve. The government continues to add features to the program to improve its accuracy and user-friendliness, and is looking toward greater integration with the I-9 process, which could simplify use of the program.

Some form of electronic verification is likely to be a part of any comprehensive immigration package. At the same time, it may be a while before any blanket federal requirement is imposed, and E-Verify may change significantly before this happens.

Disadvantages of Enrolling in E-Verify

E-Verify is not always accurate. In the first few years of the program, the percentage of tentative nonconfirmation errors (where a person who is in fact authorized to work received a "tentative nonconfirmation") was as high as 4.8 percent. While this error rate has since been reduced to about 1 percent, the error rate for foreign-born individuals is still as high as 9.8 percent.

E-Verify does not capture stolen docu-



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ments. While it has been very good at identifying forged documents, the program has not been successful at catching people using documents that do not belong to them. This is because the system simply checks whether the information provided (such as a name and Social Security number) is valid, not whether the person providing the information is the person named on the valid documents. A "photo tool" now allows an employer to compare the new hire's photo on the document presented against what should be the identical photograph from the Citizenship and Immigration Services database. Despite this enhancement, E-Verify is not fully capable of identifying all instances where a worker is providing someone else's documents.

The underlying Social Security database that E-Verify utilizes has a significant rate of errors. It is known to have inaccuracies, including typographical errors and incorrect citizenship information. Recent improvements incorporating naturalization data and Department of State data into E-Verify should ameliorate these problems. As more employers use the system, more employees will need to challenge the bureaucratic errors. Without additional staff, the Social Security Administration may become overwhelmed and slower at fixing problems.

Enrolling in E-Verify means signing up for additional costs. Because the program may only be used to check the status of new hires after they have already been hired, it creates wasted resources when that person is not confirmed. In addition, E-Verify has time costs for the new hire who receives an erroneous tentative nonconfirmation and must expend time correcting the error. Employers must also ensure that they are carefully following E-Verify procedures. Misuse, such as by using it to pre-screen

potential employees or to verify only certain new hires, can subject the employer to liability under federal anti-discrimination laws.

Enrolling in E-Verify invites government scrutiny in regards to the I-9 process. Employers participating must allow the government to audit I-9 documents as stated in the memorandum of understanding required for participation in the program, effectively waiving the employer's right to challenge a search of their records.

Further, the government intends to expand data mining of E-Verify information and refer "non-compliant activities" to enforcement agencies. Therefore, employers electing to participate should ensure that they are following the I-9 procedures properly by conducting an internal audit of their I-9 records before they sign up.

Once the congressional debate over comprehensive immigration reform begins in earnest a few months from now, mandatory electronic employer verification systems are sure to be a central focus.

Understanding how these systems work, and preparing for them, are critical for both employers considering enrolling now as well as those who may face a federal deadline for verifying their employees.

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