

Managing E-Verify Use in the Real World – Beyond the Tale of "Free and Easy"

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In the past few years, there have been numerous stories about E-Verify, the federal government's internet-based system used to verify an employee's work authorization.¹ The standard E-Verify storyline covers a mandate to use the system, with proponents claiming that the system is "free and easy" to use,² and opponents rebutting with claims that E-Verify is inaccurate, discriminatory and burdensome.³ Human resources professionals and attorneys know the truth lies somewhere in between and that larger employers face potentially more challenges in implementing and managing E-Verify than smaller ones. Until recently, these compliance challenges have received little attention.

In January, the Social Security Administration ("SSA") publicized an audit of its own E-Verify use over a two-year period detailing several shortcomings, including:

- Failure to use E-Verify on 19% of its newly-hired employees,
- A 49% failure rate to timely conduct queries for new hires,
- Improper re-verification of existing employees,
- Verification of non-employees, and
- Inconsistent practices in pre-employment verification.⁴

The Washington Times reflexively admonished the agency for these shortcomings.⁵ The National Immigration Law Center, an immigrants' rights organization, claimed the audit supported its assertion that E-Verify is still not ready for widespread use.⁶ Both responses miss a valuable point. The SSA should be commended for its willingness to publicize its shortcomings because it highlights the problems with large scale implementation and operation of E-Verify.⁷

The SSA's Report Highlights Problems Faced by Employers

The SSA is not unlike many employers that have adopted E-Verify to check the work authorization of their employees. E-Verify use entails much more than its proponents purport. The Department of Homeland Security's bureau, U.S. Citizenship and Immigration Services ("USCIS") is in charge of the E-Verify program and has detailed an employer's basic duties in a 12-page Memorandum of Understanding, and a 63-page manual.⁸ Federal contractors are provided with an alternate 68-page manual and a 28-page document for supplemental guidance.⁹

In short, an E-Verify employer is required to:

1. Post four 8.5" x 11" notices visible to all prospective employees;
2. Identify a Program Administrator and establish a network of Users;
3. After completion of an I-9 form, initiate the E-Verify query within 3 days of the first date of employment;¹⁰
4. If the case immediately clears, resolve the case and complete additional steps to supplement the basic I-9 record;
5. If the case does not immediately clear, provide notice to the employee, offer the opportunity to contest, document employee's decision and record it in the system, print out government forms and provide them to the employee, add more data to the system, and then wait for the employee or government, or both, to resolve the information causing the "Tentative Non-Confirmation" or "TNC."
6. If the TNC is satisfactorily resolved, the employer then adds more data to the system and completes the I-9 record with all TNC documentation;
7. If the TNC is not resolved and results in an unsuccessful result, such as a "no show" or "Final Non-Confirmation," the employer must terminate the employment of the worker in question or face civil fines from \$550 to \$1,100. Additionally, failure to terminate creates a presumption that the employer knowingly hired an unauthorized worker.

The goal is to complete each I-9 and E-Verify query perfectly as employees are hired throughout an organization in various locations. Over time, larger employers have and will fail to be perfectly compliant. Just like the SSA, larger E-Verify employers will have instances in which employees are not verified in a timely manner, verified at all, or are improperly verified.

In Spite of E-Verify's Limitations, Employers Can Act to Improve Future Compliance

At present, limited means exist for an E-Verify employer to correct past errors. Corrections require official requests to the USCIS to investigate specific case records.¹¹ An employer should carefully consider the scope of questions asked when contacting the government's E-Verify operations for issues beyond garden variety case administration. Calls are recorded and the caller must provide identity information as a registered E-Verify user. There is a risk of disclosing information that may trigger a government investigation.¹² A prudent E-Verify employer should work with legal counsel to analyze options to possibly rectify past errors.¹³

However, it is possible to identify problems and implement solutions for future compliance. There is no official manual for accomplishing this objective. The following guidance has been developed after working closely with E-Verify employers to review and analyze existing E-Verify data; identify problem areas; and implement practical measures to minimize human errors.

The starting point is the E-Verify self-audit. There are nine basic steps associated with this process.

Step 1 – Trace the Organization's Corporate History back to 1996.

Today's employer may have been involved in one or more corporate transactions (e.g. mergers or acquisitions) since the late-1990s, when some employers began using E-Verify's predecessor, Basic Pilot.¹⁴ One must identify any past corporate transactions involving the current employer and compile a list of corporate names and Federal Employer Identification Numbers used since 1996.

Step 2 – Account for All Periods of Time of E-Verify Use.

Based upon information from Step 1, identify the existence of any type of E-Verify account, the geographic scope of E-Verify use, and the periods of time for system use.¹⁵ For example, many employers operating in Arizona in 2007 adopted E-Verify based upon a state law requirement. Since that time, additional hiring sites may have been added.

Step 3 – Aggregate All E-Verify Data.

Raw data from each E-Verify account should be exported into an Excel spreadsheet through the system's basic report generation function. If there is more than one account associated with the Federal Employer Identification Number, the data should be aggregated into one spreadsheet.

Step 4 - Incorporate Additional Data.

Additional data must be incorporated into the spreadsheet, to include names of all current employees, names of former employees employed within the last 3 years,¹⁶ dates of hire, and any termination dates. It is possible that an E-Verify record may not exist for some employees hired after the system was adopted.

Step 5 - Identify Potential Problems in the Data

There are a number of items considered by the government to be "red flags" of potential compliance problems, which include:

- Failure to E-Verify newly-hired employees at all, as indicated by the existence of employee records without corresponding E-Verify records;
- Failure to E-Verify all newly-hired employees at covered work locations, as indicated by the absence of an E-Verify record for every employee record;
- Failure to initiate E-Verify queries within 3 business days, as indicated by hire dates and case initiation dates beyond this time period;
- Initiation of E-Verify queries before start dates;
- The existence of E-Verify records without an employee record;
- Verification of existing employees when not permitted by law to do so, as indicated by case initiation dates well beyond start dates of employment;

- The continued employment of individuals who have a "Final Non-Confirmation" result; and
- Multiple uses of the same name and Social Security Number.¹⁷

Instances of each potential problem should be identified and highlighted in the spreadsheet.

Step 6 - Analyze Findings.

The self-audit data will need to be further analyzed.

If there are no E-Verify records that correspond to the employee records, it may indicate that the employer failed to utilize the system. It may also indicate that the employer may have conducted queries in another account, either through a third-party under a Designated Agent arrangement,¹⁸ or possibly through a related company's account, such as the parent company.

If there is not an E-Verify record for each newly-hired employee at a covered site, it may mean that the system is being used selectively. It may also mean that some queries may have been completed through another account.

The failure to initiate queries within 3 business days, or in advance of start dates, can be calculated by means of the spreadsheet. In conjunction with other data, it is possible to identify problems at certain hiring sites or with certain individuals engaged in this process. An employer may have adopted a policy to E-Verify employees after an offer has been accepted, but before the start date.

The existence of an E-Verify record without an employee record may indicate E-Verify was used to pre-screen an applicant. It is important to identify whether the person may be employed with a related company or failed to report for work.

If a large number of existing employees were verified, it may be that the action was permitted by a regulation affecting federal contractors.¹⁹ It may also have occurred because of a mistaken belief that such action was required.²⁰

Continued employment of individuals with a Final Non-Confirmation and multiple uses of identity information must be investigated immediately and any paperwork relating to the I-9 and E-Verify processes should be closely examined with legal counsel.²¹

Step 7 - Assess Findings.

After identifying potential problems and analyzing the self-audit data, it is possible to assess how the employer's problems occurred. For example, if an employer failed to E-Verify employees in a timely manner, the root of the problem may be an inadequate number of users to handle the tasks. Other problems may be the result of poor oversight, communication or training.

Step 8 - Take Corrective Action.

Once the causes are clearly identified, an employer should take corrective action. If inadequate staffing is a problem, the employer should require additional staff to become registered E-Verify users. If it is an oversight issue, an employer may need to counsel the manager responsible for this function or transfer responsibility to someone else. Many employers have found it helpful to provide training on common deficiencies in periodic training meetings.

Step 9 - Implement Oversight of E-Verify Use.

The primary goals of oversight should be to assess the effectiveness of corrective action taken and to monitor overall compliance. This can be accomplished by conducting mini self-audits of E-Verify data on a monthly or quarterly basis. Additional corrective action may need to be taken if compliance doesn't improve. Another option to oversee E-Verify use is by means of a "Corporate Administrator" account. This is a separately created account that can be linked to a number of related companies. A senior manager can exercise oversight through the Corporate Administrator account, or duties may also be assigned to internal auditors as additional Corporate Administrators on the same account.

"Big Brother" Is Watching. What Will Your Storyline²² Be?

The USCIS continues to ramp up its efforts to police E-Verify usage through its Monitoring and Compliance operations and the use of data mining tools combing for non-compliant behavior.²³ The Administration is seeking \$103.4 million to fund E-Verify and enhance these investigative activities in the 2011 budget.²⁴ In light of increased surveillance, E-Verify employers, especially larger organizations, should make it a priority to evaluate current compliance, take steps to address problem areas, and closely monitor future compliance. The ideal storyline may be that problems with past usage exist, but the organization made steps to continuously improve the quality of E-Verify use going forward.

Conclusion

If there is a moral to the SSA's E-Verify story, it is that nothing is ever free or as easy as it may seem. Larger E-Verify employers face additional costs and challenges in implementing and using a system that involves numerous, meticulous tasks performed by human hands. Although perfect compliance is a goal, not a reality, E-Verify employers can and should take control of a storyline they hope to never tell. One can also hope that the SSA's disclosures help policy makers distinguish reality-based genres from tall tales when weighing the imposition or expansion of future E-Verify mandates.

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¹ National Immigration Law Center, *The History of Basic Pilot/E-Verify*, Oct. 2008, at <http://www.nilc.org/immsemplymnt/ircaempverif/e-verify-history-2008-10-17.pdf> (last visited Feb. 8, 2010), ("E-Verify works by "accessing information in databases maintained by the Social Security Administration (SSA) and U.S. Citizenship and Immigration Services (USCIS), a bureau within the U.S. Department of Homeland Security (DHS)"); and USCIS, *General E-Verify Information*, at <http://www.uscis.gov/portal/site/uscis/template.PRINT/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=75bce2e261405110VgnVCM1000004718190aRCRD&vgnnextchannel=75bce2e261405110VgnVCM1000004718190aRCRD>, (last visited Feb. 8, 2010).

² Kris Kobach, *The Immigration Answer*, N.Y. POST, Feb. 13, 2008, at https://secure.nypost.com/seven/02132008/postopinion/opedcolumnists/the_immigration_answer_97438.htm (last visited Feb. 8, 2010). ("E-Verify is free and easy to use. The employer simply types in the employee's name, date of birth and Social Security Number (or other work-authorization number). He gets an answer back from the government in seconds."); and 100,000 Employers Use E-Verify Program, USCIS Website, Jan. 8, 2009, at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=3df0f3addb6be110VgnVCM1000004718190aRCRD&vgnnextchannel=8a2791daff2df110VgnVCM1000004718190aRCRD> (last visited Feb. 8, 2010). ("...E-Verify, a free, easy to use online system.).

³ Tyler Moran, *Fatal Flaws: Social Security Administration Shows Us How E-Verify Doesn't Work*, Immigration Impact Blog, at <http://immigrationimpact.com/2010/01/15/fatal-flaws-social-security-administration-shows-us-how-e-verify-doesn%E2%80%99t-work/> (last visited Feb. 8, 2010).

⁴ OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., *THE SOCIAL SECURITY ADMINISTRATION'S IMPLEMENTATION OF THE E-VERIFY PROGRAM FOR NEW HIRES*, NO. A-03-09-29154 (Jan. 2010), at <http://www.ssa.gov/oig/ADOBEPDF/A-03-09-29154.pdf> (last visited Feb. 8, 2010).

⁵ Stephen Dinan, *Social Security rarely uses E-Verify*, WASH. TIMES, Jan. 18, 2010, at <http://www.washingtontimes.com/news/2010/jan/18/social-security-often-fails-to-use-e-verify-tool-i/> (last visited Feb. 8, 2010).

⁶ Moran, *supra* note 3.

⁷ See OFFICE OF THE INSPECTOR GEN., *supra* note 4 at 3. The report states the SSA began using E-Verify in 2007, as required by an August 2007, Office of Management and Budget ("OMB") memorandum mandating E-Verify use by all Federal agencies. However, the initial legislation that created the E-Verify program mandated all departments of the federal government use an optional verification system in 1996. See Sec. 402(e)(1)(A)(i) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of the Defense Department Appropriations Act, 1997, Pub. L. 104-208, 110 Stat. 3009-659 (Sept. 30, 1996):

As summarized in U.S. Sen. Grassley: Questions use of E-Verify system by federal government, IowaPolitics.com, Nov. 19, 2007, at <http://iowapolitics.com/index.iml?Article=110971> (last visited Feb. 8, 2010), prior to the issuance of the OMB memorandum, a significant number of federal agencies had failed to comply with the decade-old legislative mandate to use E-Verify (Basic Pilot), to include 17 of 22 agencies comprising the U.S. Dept. of Homeland Security.

⁸ The E-Verify Program For Employment Verification Memorandum of Understanding, Revision Date Oct. 29, 2008 (*hereinafter* "MOU"), at <http://www.uscis.gov/files/nativedocuments/MOU.pdf> (last visited Feb. 8, 2010); and The E-Verify User Manual for Employers, Revision Date Dec. 2009 (*hereinafter* "E-Verify Manual"), at http://www.uscis.gov/USCIS/E-Verify/E-Verify/E%20Verify%20User%20Manual_Final_12.7.09_1.pdf (last visited Feb. 8, 2010) (Note: There have been several revisions of the E-Verify Manual.).

⁹ E-Verify User Manual for Federal Contractors, Revision Date Sept. 9, 2009, at http://www.uscis.gov/USCIS/E-Verify/Federal%20Contractors/FEDK%20Employer%20Manual%209.3.09_FINAL.pdf (last visited Feb. 8, 2010); E-Verify Supplemental Guide For Federal Contractors, Revision Date Oct. 21, 2009, at [http://www.uscis.gov/USCIS/Controlled%20Vocabulary/Native%20Documents/Supplemental%20Guidance%20for%20Federal%20Contractors%20090109%20FINALa\(1\).pdf](http://www.uscis.gov/USCIS/Controlled%20Vocabulary/Native%20Documents/Supplemental%20Guidance%20for%20Federal%20Contractors%20090109%20FINALa(1).pdf) (last visited Feb. 8, 2010).

¹⁰ Sec. 403(a)(3)(A) of Division C, Pub. L. 104-208, 110 Stat. 3009-659, fixes the period in which a query must be initiated at 3 business days. Congress could easily increase this period to 7 to 14 days, or give the USCIS the authority to establish an appropriate time frame, both of which could increase compliance rates for timely verifications.

¹¹ In limited instances, an E-Verify employer can contact USCIS to request assistance with modifying an erroneous record, such as an improper "Final Non-Confirmation." However, simple data entry errors, such as incorrectly resolving a case, cannot presently be amended. In such instances, USCIS personnel have recommended that an employer write an explanatory note and attach it to the I-9 and E-Verify record.

¹² An E-Verify employer should be aware that the Dept. of Homeland Security can conduct any type of review of its E-Verify data because the employer waived its 4th Amendment rights and granted permission for DHS to do so when it signed the Memorandum of Understanding. *See supra* at note 8, Article II, Sec. C, Paragraph 14 of the MOU.

¹³ At present, if an attorney is a registered user on an E-Verify account, he or she can contact the E-Verify technical assistance line on behalf of an employer without disclosing the identity of the client. Additionally, an employer should carefully consider potential consequences of taking corrective actions for past errors that are not permitted by the E-Verify rules, such as using E-Verify on an existing employee who should have been verified at the time of hire.

¹⁴ The legal name of the system remains as "Basic Pilot Program." USCIS "re-branded" and began referring to Basic Pilot as "E-Verify" in 2007 for marketing purposes. *See* Sec. 403.(a) of Division C, Pub. L. 104-208, 110 Stat. 3009-659.

¹⁵ It is possible to contact E-Verify Technical Assistance and have them search for the existence of E-Verify accounts by Federal Employer Identification Number. If any "stray" accounts are located and the Program Administrator is no longer with the employer, it is possible to assign a new person to the account to access data and manage the account.

¹⁶ In the context of an I-9 audit, an employer would be required to produce forms for former employees for either one year after the date of termination, or three years after the date of hire, whichever is later. 8 U.S.C. §1324a(b)(3)(B)(i) and (ii). For purposes of the E-Verify self-audit, a three-year look back period should provide adequate feedback.

¹⁷ *See* American Immigration Lawyers Association, Comments on the DHS Docket Numbers 2009-0013 & 2009-0015; Regarding USCIS 009 Compliance Tracking and Monitoring System at 5-6, June 22, 2009 at <http://www.aila.org/Content/default.aspx?docid=29336> (last visited Feb. 8, 2010).

¹⁸ *See supra* note 8, E-Verify Manual at 9. A Designated Agent is an individual or company that acts on behalf of other companies to conduct E-Verify queries for employees of client companies.

¹⁹ *See supra* note 9.

²⁰ From late-2008 through 2009, the implementation of the FAR regulation was delayed for several months due to litigation challenging the rule. In its periodic updates, the USCIS ambiguously stated the requirements for federal contractors to re-verify existing employees, but later clearly stated that an employer must first have a contract with qualifying language in place before it re-verified its entire workforce. Many employers enrolled in E-Verify and reverified existing employees under the mistaken belief that such actions were required. See USCIS, Information for Federal Contractors, <http://www.aila.org/Content/default.aspx?docid=27606> (last updated Jan. 29, 2009 and maintained on third-party website), and compare to USCIS, Frequently Asked Questions: Federal Contractors and E-Verify (Revised Nov. 2009), at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=30edde1d67ee4210VgnVCM100000082ca60aRCRD&vgnextchannel=75bce2e261405110VgnVCM1000004718190aRCRD> (last visited Feb. 8, 2010).

²¹ Continued employment of an individual with a "Final Non-Confirmation" result may result in a fine, from \$550 to \$1,100 and may constitute a violation of the law prohibiting the employment of an unauthorized worker. Multiple use of identity information within an employer's organization indicates possible identity fraud and should be investigated with the assistance of legal counsel.

²² In this context, the word "storyline" is intended to be construed as a narrative report or account of factual information.

²³ See *supra* note 17 at 4–6; U.S. Citizenship and Immigration Services Opens New Verification Operations Center in Buffalo, N.Y., US FED. NEWS, Nov. 23, 2009 ("The Center's personnel will conduct monitoring and compliance activities....").

²⁴ U.S. Department of Homeland Security, Fact Sheet: Secretary Napolitano Announces Fiscal Year 2011 Budget Request, Feb. 1, 2010 at http://www.dhs.gov/ynews/releases/pr_1265049379725.shtm (last visited Feb. 8, 2010) ("A total of \$103.4M is requested for the E-Verify Program.... USCIS will enhance E Verify's monitoring and compliance activities through analytical capabilities that will support more robust fraud detection and improved analytic processes").