

Facts About E-Verify

UPDATED
January 2011

■ What is the E-Verify program?

E-Verify (formerly known as the Basic Pilot program) is a primarily voluntary, Internet-based program created in 1997 that supplements the I-9 employment eligibility verification process. It allows employers to electronically verify U.S. citizen and noncitizen employees' employment eligibility with the U.S. Department of Homeland Security (DHS) and the Social Security Administration (SSA).¹ While it is voluntary for most employers, it is mandatory for some federal contractors and employers in four states.²

■ How does E-Verify work?

A participating employer first enters into a memorandum of understanding (MOU) with DHS and SSA regarding their use of the program to verify the employment eligibility of all newly hired employees.³ Once a worker is hired, the employer completes an I-9 form to verify the worker's employment eligibility, as is required under current law. The employer then en-

ters the worker's personal identification information from the I-9, such as name, date of birth, citizenship or immigration status, and Social Security number, into a form on the E-Verify website. The information is then electronically compared to information in DHS and SSA databases. The system either confirms to the employer that the worker is employment-eligible or it issues a "tentative nonconfirmation" (TNC) notice indicating that the databases cannot immediately confirm that the worker is employment-eligible. If the employer receives a TNC regarding the worker, the worker has only *eight* federal working days from the issuance of the TNC to initiate contact with SSA or DHS. If a worker does not initiate that contact, the TNC becomes final and the employer must terminate the employee or risk being found in violation of immigration laws. E-Verify also includes a "photo matching" tool that requires employers to compare a newly hired worker's U.S. passport or passport card, employment authorization document (EAD), or permanent resident card to the image of the card stored in DHS's database. See below for more information.

■ How does E-Verify change the current I-9 employment eligibility verification process?

The program modifies the existing I-9 process in three distinct ways. Although employers must still complete an I-9 form for each newly-hired employee within three business days of the date employment begins (as required under current law), they also must comply with the following:

- Employers may accept a document listed in the I-9 form's "List B" as proof of a worker's *identity*, but only if the document contains a photograph. The worker may still choose whether to present one document from "List A" — establishing *both identity and employment eligibility* — or to present one "List B" document to establish *identity* and one "List C" document to establish *employment eligibility*.

¹ All employers are required to verify newly hired employees' work eligibility using a government form called "Form I-9, Employment Eligibility Verification," or the "I-9 form." To enable employers to complete the form, workers are required to present documents proving their identity and employment eligibility. A copy of the I-9 form can be found on the U.S. Citizenship and Immigration Services (USCIS) website, at www.uscis.gov (search for "I-9 form"). For more information on E-Verify, see *Information Brief: DHS Basic Pilot/E-Verify Program* (NILC, Mar. 2008), www.nilc.org/immsemplymnt/ircaempverif/e-verify_infobrief_2008-03-13.pdf.

² Arizona, Mississippi, South Carolina, and Utah (as of Jan. 31, 2011).

³ The Federal Acquisition Rule (FAR) that was published in the Federal Register on Nov. 14, 2008 (73 FR 67651–705) mandates the use of E-Verify for certain federal contracts and allows its use to verify the employment eligibility of *existing* employees in some circumstances. For more information on the FAR, see *Summary of Final Rule: Federal Acquisition Regulation: Employment Eligibility Verification* (NILC, Aug. 2009), www.nilc.org/immsemplymnt/ircaempverif/e-verify-FAR-summary-2009-08-31.pdf.



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- If a worker presents a U.S. passport or passport card, an employment authorization document (EAD or I-766), or permanent resident card (“green card” or I-551) as part of complying with E-Verify’s photo-matching requirements, the employer must make a photocopy of the document and retain it along with the completed I-9 form. This requirement is specific to using E-Verify, since employers administering the traditional I-9 process are not required to make or keep copies of documents presented by employees.
- Employees must submit a Social Security number. This does not mean that the employee must submit a Social Security card as a “List C” document, but that the employee must provide a Social Security number on the I-9 form in order for the employer to use E-Verify. This also does not mean that an employer can demand a Social Security card from the employee.

■ What is photo matching?

Photo matching (PM) is a limited feature that allows an employer to compare a newly hired worker’s U.S. passport or passport card, EAD, or permanent resident card to the image of the card stored in DHS’s database. PM may be used only *after* E-Verify confirms the worker’s employment eligibility (i.e., after any TNC from SSA or U.S. Citizenship and Immigration Services is resolved) and only if the worker attests to being a lawful permanent resident or authorized worker *and*, on his or her own initiative, presents one of the documents listed above.⁴ PM does not currently have the capacity to verify the authenticity of older green cards, older EAD cards, or any of the other identification documents that an employee may present when completing the I-9 process. If the employer determines that the PM photo image does not “reasonably” appear to match the card presented by the worker, or if the employer cannot make a determination, DHS will issue either a TNC or review the case for confirmation. Workers still have eight federal working days from the issuance of the TNC to initiate contact with DHS. If the worker does not initiate contact with the agency within this timeframe, the TNC becomes final and the employer must dismiss the employee or risk being found in violation of immigration laws.

⁴ As explained below, an employer may not require an employee to present a specific document, nor to present more documents than are required by law.

E-Verify’s PM feature raises concerns about the potential for increased discrimination against employment-eligible immigrants. For example, because the U.S. passport or passport card, the I-766 EAD, and the I-551 permanent resident card are the only documents that PM can screen, the program may encourage employers to demand that workers show them one of those three documents, which is a violation of the Immigration and Nationality Act’s antidiscrimination “document abuse” provisions. These provisions prohibit employers from demanding specific documents from workers or more documents than the law requires to prove their employment eligibility.⁵ Furthermore, a recent Government Accountability Office (GAO) report found that employers are coaching workers about which documents *not* to present, in order to circumvent the PM component, so that they can reduce their liability for having hired workers who may be unauthorized.⁶

■ What rights do workers have under E-Verify?

Workers have the right

1. to complete an I-9 form only *after* an employer extends an offer of employment and before being electronically verified;
2. to choose which documents (from the I-9 form’s Lists A, B, and C) they will present to an employer;
3. not to comply with requests to present additional documents beyond what the I-9 process legally requires;
4. to know whether the employer uses E-Verify;
5. to know if a TNC has been issued;
6. to be provided eight federal work days after a TNC is issued/received in which to initiate contact with either SSA or DHS and to continue contesting it;
7. not to be dismissed from employment or subject to retaliatory or adverse action while contesting a TNC;
8. not to be subject to an arbitrary reverification after the initial verification; and
9. to file a complaint with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) or U.S. Citizenship and Immigration

⁵ See 8 U.S.C. § 1324b(a)(6).

⁶ See *Employment Verification: Federal Agencies Have Taken Steps to Improve E-Verify, but Significant Challenges Remain* (U.S. Gov’t Accountability Office, GAO-11-146, Dec. 2010), www.gao.gov/new.items/d11146.pdf, pp. 22-23.

tion Services (USCIS) in the event that an employer violates any of the above rights.⁷

■ Are businesses required to use E-Verify?

Use of the program by private businesses is still voluntary, with the following exceptions:

- Employers that have been previously convicted of hiring unauthorized workers or engaging in unfair immigration-related employment practices.
- Employers that do business in states that require them to use the program.⁸
- Employers that have certain federal contracts.⁹

Currently, approximately 33,000 companies have contracts with or supply services to the federal government and are required to use E-Verify. Federal contractors subject to the E-Verify requirement that do not use the program could lose their contracts due to nonperformance, i.e., failure to fulfill their obligations under the contract.

■ What are the major concerns with E-Verify?

While E-Verify is currently voluntary for most employers and used by only approximately 243,000 employers nationwide, it potentially affects every single worker in the United States, U.S. citizen and noncitizen alike. Numerous proposals are pending in Congress to mandate electronic employment eligibility verification of all 153 million workers in our civilian labor force, and a handful of states and localities already require all or some employers to use E-Verify.

In fact, in data compiled by Bloomberg, if E-Verify had been made mandatory in 2010, it would have cost small businesses \$2.6 billion; Bloomberg estimates that E-Verify cost small businesses currently enrolled in the program \$81 million in fiscal year 2010.¹⁰

The two most significant problems with the program include (1) inaccurate and outdated information

in the DHS and SSA databases that incorrectly identifies eligible workers as not eligible for employment or tentatively not eligible, and (2) misuse of the program by employers. The high TNC rate for employment-eligible foreign-born workers is of significant concern — particularly because evaluations of the E-Verify program have found that employers take adverse action against workers who receive TNCs. In addition, SSA estimates that a mandatory system would require 3.6 million U.S.-citizen and employment-eligible non-citizen workers to either visit an SSA office to correct their records or lose their jobs, which would pose a deep burden on SSA offices and individual workers. In addition, many foreign-born workers with TNCs lack the language ability to resolve issues with DHS or SSA, resulting in unnecessary job losses.

Opposition to mandatory use of the program is grounded in concerns over inaccurate databases that deprive lawful workers of jobs, discrimination against workers by employers, weak technology and infrastructure that do not protect personal data from cyber threats and that threaten privacy rights, and increased administrative burdens for DHS and SSA. A concern also has been raised that, if use of E-Verify is made mandatory at a point when a significant percentage of the U.S.'s workforce is unauthorized to be employed, jobs currently performed by unauthorized workers will simply move into the underground economy.¹¹

For example:

- An independent report commissioned by the federal government found that many employers who use E-Verify do not adhere to the program's rules — e.g., they prescreen job applicants through E-Verify or they use it to “reverify” existing employees, i.e., employees hired before the employer enrolled in E-Verify.¹²
- In addition, an independent government agency report on the Social Security Administration's own use of E-Verify found that the SSA's level of non-compliance was substantially high. In the following ways, SSA itself violated the terms of the agreement it requires employers to sign when they join the E-

⁷ For more information on this issue, see *Know Your Rights About E-Verify* (NILC, Oct. 2009),

www.nilc.org/immsemplymnt/ircaempverif/e-verify-kyr-2009-10.pdf.

⁸ NILC currently is compiling a comprehensive list of states and localities that require employers to use E-Verify. Four states — Arizona, South Carolina, Mississippi, and Utah — mandate E-Verify for all employers in the state. Ten other states mandate E-Verify for either public employers, public contractors, or both.

⁹ See *Summary of Final Rule*, *supra* note 3.

¹⁰ See Jason Arvello, “‘Free’ E-Verify May Cost Small Businesses \$2.6 Billion: Insight,” *Bloomberg* (Jan. 28, 2011).

¹¹ Letter to Rep. John Conyers, Chair, Committee on the Judiciary, U.S. House of Representatives, from Peter Orszag, Director, Congressional Budget Office (Apr. 4, 2008), www.cbo.gov/ftpdocs/91xx/doc91100/hr4088ltr.pdf.

¹² See *Findings of the E-Verify® Program Evaluation* (prepared by Westat and submitted to U.S. Dept. of Homeland Security, Dec. 2009), available at www.nilc.org/immsemplymnt/ircaempverif/Westat-E-Verify-report-2009-12-16.pdf, pp. 149-153.

Verify program: SSA failed to use E-Verify to screen over 1,500 new workers; it failed to timely verify nearly 50 percent of new hires; and it performed reverification checks on existing workers, in violation of the program's rules.¹³

- Some employers that use the program engage in unlawful and prohibited practices, including pre-employment screening, adverse employment action based on TNC notices, failure to inform workers of their rights under the program, and employment eligibility reverification of existing employees without a legitimate or lawful reason.
- Anyone posing as an employer can access data used by E-Verify. DHS does not screen those who enroll in the program to verify that they are bona fide employers. Indeed, this has been raised as a concern in the most recent independent evaluation of the E-Verify program.¹⁴
- Further, a recent GAO report indicated that the E-Verify system suffered two “extended” outages between June and September of 2009, indicating that E-Verify is sometimes unable to handle the volume of existing queries.¹⁵ If E-Verify is expanded, the system may not be able to handle the expanded number of queries.¹⁶

FOR MORE INFORMATION, CONTACT

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¹³ See *The Social Security Administration's Implementation of the E-Verify Program for New Hires* (Social Security Administration Office of Inspector General, A-03-09-29154, Jan. 2010), www.ssa.gov/oig/ADOBEPDF/A-03-09-29154.pdf, pp. 3-4.

¹⁴ See Westat 2009, *supra* note 12, p. xxxiii.

¹⁵ See *Information Technology: Social Security Administration's Data Exchanges Support Current Programs, but Better Planning is Needed to Meet Future Demands* (U.S. Government Accountability Office, GAO-09-966, Sept. 2009), www.gao.gov/new.items/d09966.pdf, p. 15.

¹⁶ See *Employment Verification*, *supra* note 6, pp. 54-55.