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MEMORANDUM

To: SSB Clients
From: Greg Siskind
Re: E-Verify
Date: December 19, 2007

ABCs of Immigration: The E-VERIFY Electronic Employment Verification System

1. What is E-Verify?

E-Verify, formerly known as the Basic Pilot Program, is a free Internet-based system that employers use to confirm the legal status of newly hired employees. It is mandated by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA). The system compares social security number data and information in DHS' immigration databases to the employee's name and other Form I-9 information to confirm the employee matches. SSA has 425 million numbers in its database and DHS has sixty million records in its system. If an employee's information does not match up, USCIS will notify the employer of the non-confirmation. The average response time in E-Verify is three to five seconds.

2. How many employees are typically run through E-Verify in a year?

Right now there are over 33,000 employers using E-Verify. During the most recent fiscal year, nearly two million queries were made in the E-Verify system. That number is expected to increase dramatically as several states are requiring E-Verify be used by the states' employees. 92% of verification queries are instantly verified. According to DHS, the top industries using E-Verify are food services, drinking establishments, administrative and support personnel, professional and technical services, other information services and clothing and accessories stores.

3. Who administers E-Verify?

E-Verify is a partnership of the Department of Homeland Security and the Social Security Administration which is administered by US Citizenship and Immigration Services,

4. How does E-Verify work?

Employers submit information provided on an employee's Form I-9 in to the E-Verify web site. The E-Verify system will return one of three results:

- "employment authorized"- the employee is employment authorized
- "SSA Tentative Non-Confirmation" – the Social Security Administration database is showing the employee's name and social security number are not matching
- "DHS Verification in Process" – The Department of Homeland Security will respond within 24 hours with either an Employment Authorized or DHS Tentative Non-Confirmation

If a worker shows up as "employment authorized" the employer will record the system-generated verification number on the Form I-9.

If an employer gets a "tentative non-confirmation", the employer must promptly provide the employee with information about how to challenge the information mismatch and the employee can then contest the determination and resolve the mismatch with the Social Security Administration or Department of Homeland Security. The employee will have eight days to resolve the issue. The employee may continue to work with the case is being reauthorized.

If the employee does not contest the finding, the determination is considered final and the employer may terminate the employee and resolve the case.

Employers are also required to post a notice in an area visible to prospect employees that the company is an E-Verify participant. And the employer must post an anti-discrimination notice issued by the Office of Special Counsel for Immigration – Related Unfair Employment Practices, Department of Justice (DOJ) in an area visible to prospective employees.

5. What computer requirements are necessary to use E-Verify?

Users need an Internet-capable Windows-based personal computer and a web browser of Internet Explorer 5.5 or Netscape 4.7 or higher (with the exception of Netscape 7.0).

USCIS warns employers to "white list" the email address Employer.Pilots@dhs.gov in their spam filters.

6. Can a company batchload data to E-Verify?

Yes. DHS has a real-time batch method that requires a company develop an interface between its personal system or electronic Form I-9 system and the E-Verify database. Employers interested in more information on this including design specifications, should call 800-741-5023.

7. What is the required timetable for using E-Verify?

An employer can complete E-Verify any time after an offer of employment is accepted and after the Form I-9 is completed. This can be before the start date (as long as an employer is not pre-screening applicants), but in no case later than three business days after the new employee's actual start date. Note that this doesn't apply in cases where there is no social security number and then the employer should wait until the number is available (see question below regarding employees without social security numbers). A query may be submitted before the actual start date, but the employer needs to be careful not to pre-screen applicants and may not delay training or an actual start date based on a tentative non-confirmation and employee may not face adverse consequences as a result of the use of E-Verify unless a query results in a non-confirmation. And an employer cannot accelerate a start date for a worker because employment authorization is confirmed. Employers also must always be consistent in the timing of a query so as to avoid discrimination.

8. Does E-Verify tell an employer anything about the immigration status of a new hire?

No. The system only verifies an employer's authorization to work and not immigration status.

9. What is E-Verify's photo screening tool?

The E-Verify photo tool was incorporated in to E-Verify in September 2007 and enables employers to match the photo on an employee's Employment Authorization Document (EAD) or a Permanent Residence Card ("green card") to the photo that USCIS has on file for that employee. The tool enables employers to detect instances of document fraud.

10. What information does an employer need to supply for each employee?

After an employee completes an I-9, the employer must submit a query that includes

- The employee's name and date of birth
- The Social Security Number (SSN)
- The Citizenship status he or she attests to,
- An A number or I-94 number, if applicable,

- The Type of document provided on the Form I-9 to establish work authorization status, and
- Proof of identity, and its expiration date, if applicable

11. What about employees who don't have social security numbers yet?

E-Verify cannot be used for employees who do not yet have a Social Security Number (SSN). The I-9 still needs to be completed and after the Social Security Number is received, the query needs to be filed with E-Verify. If an employee otherwise meets the requirements to begin work without the Social Security number, the employee should be permitted to work until the Social Security number is received and the employee has gotten a negative response from DHS on the name check.

12. What happens if E-Verify issues a non-confirmation finding?

For SSA non-confirmations:

If the employer receives a tentative non-confirmation from SSA, the employer must print out the notice and provide it to the employee so the employee can decide whether or not to contest the finding. If the employer erred in the data input, the employer should attempt to refile with E-Verify.

The employer must then record the case verification number, review the data input in the system to make sure there was no error and find out if the employee will contest.

If the employee will contest, E-Verify will provide the employer with instructions on referring employees to SSA field offices. The employer will print out instructions on how to seek correction with SSA and provide the letter to the employee with instructions that the matter must be resolved within eight federal government work days.

After ten federal government work days, the employer will re-query E-Verify in order to get a confirmation or a final non-confirmation, unless the SSA instructs otherwise.

For DHS non-confirmations:

If the employer receives a tentative non-confirmation from SSA, the employer must print out the notice and provide it to the employee so the employee can decide whether or not to contest the finding. If the employer erred in the data input, the employer should attempt to re-file with E-Verify.

If the employer finds a photographic non-match for an employee who provides a document for which E-Verify has transmitted a photograph, the employer must print the photographic non-confirmation notice and present it to the employee so the employer can decide on contesting the finding.

If the employee will contest a regular non-confirmation case, the employer will print out instructions and the employee must phone DHS within 8 business days to attempt to resolve. In the case of a photographic non-confirmation, the employer will provide the employee with a referral letter to DHS. DHS will provide the results within 10 days of the referral unless it determines it needs more time.

In photographic non-confirmation cases, the employer will send a copy of the employee's Form I-551 permanent residency card or I-766 employment authorization document by scanning and uploading the document or mailing a photocopy via express mail (to be paid by DHS). Where an employer cannot decide if the photograph matches or not, the employer should forward the photographic document to DHS for DHS to decide.

13. Can employers selectively choose which employees are verified in the electronic system?

No. Employers must verify ALL newly hired employees including both citizens and non-citizens. Employers may not pick and choose which employees are put through the verification system.

14. Can an employer pre-screen job applicants through E-Verify?

No. The employer needs to be careful not to pre-screen applicants and may not delay training or an actual start date based on a tentative non-confirmation and employee may not face adverse consequences as a result of the use of E-Verify unless a query results in a non-confirmation. And an employer cannot accelerate a start date for a worker because employment authorization is confirmed. Employers also must always be consistent in the timing of a query so as to avoid discrimination.

15. Is E-Verify voluntary?

For most employers, E-Verify is voluntary. However, a few states require E-Verify including Georgia, Colorado and Arizona (as of 1 January 2008). Oklahoma and a few other states require E-Verify for public sector employers. See question in this document on state legislative activity.

16. What if a company does not have a computer or Internet access? Can a third party agent be used to manage E-Verify filings?

Employers can outsource to a third party agent the ability to submit employment eligibility verification queries. E-Verify designated agents must register online and sign a Memorandum of Understanding and an agent can represent multiple clients. The employer would still need to separately register and complete a Memorandum of Understanding and will have a unique client number. Designated agents can track their clients' reporting, billing and compliance.

17. What is an E-Verify Corporate Administrator?

An employer can designate an employee as a Corporate Administrator who has management authority over an employer's hiring sites participating in E-Verify. This person generally would not conduct the actual inquiries, but after registering, would be able to register company sites, add and delete users at company sites and view reports generated by company sites.

18. How does an employer sign up for E-Verify?

To participate in E-Verify, an employer must register online at the DHS E-Verify page and accept the electronic Memorandum of Understanding (MOU) that details the responsibilities of the Social Security Administration, Department of Homeland Security and the employer.

The registration page for E-Verify is at <https://www.vis-dhs.com/EmployerRegistration> .

19. What are the government's obligations with regard to privacy and data security?

In the Memorandum of Understanding, the Social Security Administration agrees to safeguard the information provided by an employer and limit access to individuals responsible for the verification of Social Security Numbers and for the evaluation of E-Verify. DHS agrees to safeguard the information provided by the employer and to limit access to individuals responsible for the verification of alien employment eligibility and for the evaluation of E-Verify. Information can only be used to verify the accuracy of Social Security Numbers and employment eligibility, to enforce the Immigration and Nationality Act and federal criminal laws and to ensure accurate wage reports to the Social Security Administration.

21. What are the employer's obligations under the Memorandum of Understanding?

The employer agrees to

- display the notices supplied by DHS
- provide DHS with the names and contact information of the employer representatives responsible for E-Verify
- comply with the E-Verify manual supplied by DHS
- ensure that the employer representative takes the E-Verify tutorial before attempting to file an E-Verify case
- comply with I-9 rules except that List B documents proving identity must have a photograph; also, if an employee presents an I-551 permanent residency card or an I-766 employment authorization document, the employer must keep a copy of the document

- notify DHS of any employee the employer continues to employ after a final nonconfirmation and is liable for fines of between \$500 and \$1000 for each failure
- not use E-Verify to engage in pre-employment screening or to support any unlawful employment practice
- not use E-Verify to selectively check only some employees as opposed to all new hires
- not use E-Verify to re-verify employees with I-9s requiring reverification or run existing employees through E-Verify
- to follow the rules with respect to dealing with tentative non-confirmations
- not to terminate an employee until a final non-confirmation is received from DHS unless an employer gains actual knowledge beforehand that an employee is not work eligible
- comply with the INA Section 274B anti-discrimination rules
- safeguard the information provided to and received from E-Verify under subject of criminal penalties
- permit DHS and SSA to make periodic visits to the employer for the purpose of reviewing E-Verify records

22. Can a large employer have a controlled roll out of E-Verify instead of including every location? Can a large employer change the sites participating?

Yes. An employer with multiple sites has flexibility. The employer can have one of its sites verify new hires at all of its sites or it can have each site perform its own verification inquiries. Whether one site is handling queries or multiple sites, each site must sign a separate Memoranda of Understanding (though DHS has recently informed the American Immigration Lawyers Association that a single MOU may be used by employers with more than 1000 employees and multiple sites). Employers with multiple sites should select “multiple site registration” and give the number of sites per states it will be verifying. An employer can also choose to only include some of its sites and can control the roll out of E-Verify across an organization. However, at each work site, all new hires for that site must be verified.

23. What are the benefits of participating?

Employers are presumed not to have violated the employer sanctions rules in INA Section 274A with respect to the hiring of any individual if it obtains confirmation of the identity and employment eligibility in compliance with the terms and conditions of E-Verify. Note that DHS does not consider using E-Verify to provide a “safe harbor” from worksite enforcement. Some states such as Tennessee do, however, consider using E-Verify a safe harbor from violation of the state’s new law which can lead to the revocation of a business license for employer’s knowingly hiring unauthorized immigrants.

Using E-Verify will likely result in the elimination of no-match letters being received by a company. However, there are private companies that provide similar services, albeit at a cost. DHS also touts E-Verify as a way to improve the accuracy of wage

and tax reporting, protecting jobs for authorized US workers and helping US employers maintain a legal workforce.

24. Are there risks associated with participating?

An employer will have a rebuttable presumption that it knowingly employs someone ineligible to work if it continues to employ someone after receiving a final nonconfirmation. If an employer believe E-Verify is incorrect, the employer will have a strong incentive to terminate an employee anyway in order to minimize the risk since an employer acting in good faith on information received from E-Verify is immunized from civil and criminal liability.

Employers must agree to permit DHS and SSA officials to visit their work sites to review E-Verify records and other employment records related to E-Verify. And DHS and SSA may interview an employer's authorized agents or designees regarding the employer's experience with E-Verify for the purpose of evaluating E-Verify.

Employers who have "buyer's remorse" and choose to stop using E-Verify must continue using the program for 30 days after giving written notice to USCIS that it wants to stop using the system.

25. Can an employer verify existing employees as well as new hires?

No. E-Verify may not be used to go back and check employees hired before the company signed the MOU or re-verify employees who have temporary work cards.

26. Can an employer quit using E-Verify?

Yes assuming state law does not require it. The federal government is considering legislation to require beneficiaries of certain government agencies' contracts to use E-Verify, but no such law has passed yet.

For employers to stop using the system, they must continue using the system and, per the signed Memorandum of Understanding, provide 30 days written notice to the government.

27. Is an employer protected from an investigation if they use E-Verify?

No. Worksite enforcement is still permitted, but an employer using E-Verify is presumed to not knowingly have hired unauthorized aliens.

28. What can employees do who feel they have been subject to discrimination?

Employers may not take any adverse action against an employee because the employee contests the information mismatch. This would include firing, suspending, withholding pay or training, or otherwise infringing on the employee's employment. Employees who think they have been subject to discrimination because of their

national origin or citizenship or immigration status with respect to hiring, firing, recruitment or referral for a fee, through an employer's use of E-Verify, or when completing Form I-9, should call the Department of Justice, Civil Rights Division, Office of Special Counsel for Immigration Related Unfair Employment Practices at 1-800-225-7688 for assistance.

29. What states require E-Verify?

Four states have passed legislation mandating E-Verify be used by employers in the state – Georgia, Colorado, Oklahoma and Arizona. Idaho, North Carolina, Pennsylvania and Missouri mandate that its state agencies participate in E-Verify. Texas, Florida, Kentucky, Alaska, Kansas, South Carolina, Tennessee, Louisiana, Maryland and California are all considering legislation that would require state government employers to use the system and Utah, Missouri, Virginia and Rhode Island are all considering legislation that would require both public and private sector employers to use E-Verify.

The state of Illinois has passed a law that bans employers from using the system until DHS documents the accuracy of the system has increased substantially. DHS is fighting the legislation and Illinois has agreed not to enforce the law until the litigation is concluded.

30. How reliable is E-Verify in accurately identifying unauthorized employees? What other problems are showing up in the system?

On November 21, 2007, USCIS released a report it commissioned from Westat, Inc. which it retained to evaluate E-Verify. While the report found that the number of false positives has decreased (the numbers have gone from 79% of queries approved to 92%), there are still numerous problems.

E-Verify does not detect identity theft. In fact, Swift and Company, the meat processing company that was raided early in 2007 and had more than 1500 employees arrested, used the E-Verify system. The employees subject to the raid were accused of identity theft. The new photo tool in E-Verify is designed to address this problem.

One of the more disturbing findings in the Westat report found that foreign-born, work-authorized employees are much more likely to receive a tentative non-confirmation than a US-born employee. In fact, the foreign-born are thirty times more likely to receive a false-positive non-confirmation than a US-born employee.

The Westat report also reported on employer compliance problems with E-Verify including a failure to properly train employees using E-Verify, employers terminating workers improperly and other employers not promptly firing employees who receive final nonconfirmation notices. Employers were also found to be restricting work assignments, delaying training, reducing pay, or requiring employees to work longer hours during the period when a non-confirmation is being tested.

The Westat report can be found online at <http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf>.