Facts About E-Verify

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■ What is the E-Verify program?

E-Verify (formerly known as the Basic Pilot program) is a 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]

■ 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.[2] 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 enters 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, whereupon the information is electronically compared to information in DHS and SSA databases. The system then 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 contest the finding with SSA or DHS. If a worker does not contest the finding, the TNC becomes final and the employer must terminate the employee or risk being found in violation of immigration laws.

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

The program modifies the existing I-9 process in two 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*.

- If a worker presents an employment authorization document (EAD or I-766) or permanent resident card ("green card" or I-551), as part of complying

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[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/files/form/I-9.pdf (last visited Nov. 9, 2009). For more information on Basic Pilot/E-Verify, see *Basic Information Brief: DHS Basic Pilot/E-Verify Program* (NILC, Mar. 2008), www.nilc.org/immsemplymnt/ircaempverif/e-verify_infobrief_2008-03-13.pdf.

[2] 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 (last visited Nov. 7, 2009).

with E-Verify's photo screening tool 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.

■ What is the photo screening tool?

The photo screening tool (PST) is a limited feature that allows an employer to compare a newly hired worker's EAD or permanent resident card to the image of the card stored in DHS's database. The PST 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 to work in the U.S. *and*, on his or her own initiative, presents a newer version of the permanent resident card (I-551) or EAD (I-766).[3] The PST 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 PST 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 have three federal working days from the issuance of the TNC to resolve the issue with DHS. If the worker does not resolve the issue within this timeframe, the TNC becomes final and the employer must dismiss the employee or risk being found in violation of immigration laws.

E-Verify's PST feature raises concerns about the potential for increased discrimination against employment-eligible immigrants, since currently non–U.S. citizen workers are the only workers to whom the tool may be applied. For example, because the I-766 EAD and the I-551 permanent resident card are the only documents that the PST can screen, the program may encourage employers to demand that workers show them one of those two documents, which is a violation of the Immigration and Nationality Act's antidiscrimination "document abuse" provisions. These provisions prohibit employers from demanding specific docu-

ments from workers, or more documents than the law requires, to prove their employment eligibility.[4] The addition of another employment eligibility verification step that applies only to noncitizens also provides employers an added incentive to avoid hiring authorized immigrants, because it increases the amount of burden and expense involved in hiring them.

■ What rights do workers have under E-Verify?

Workers have the right (1) to be required to complete an I-9 form only after being extended 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 contest it, (7) not to be dismissed from employment or subject to retaliatory or adverse action while contesting a TNC, and (8) not to be subject to an arbitrary reverification after the initial verification.[5]

■ How does E-Verify affect workers?

While E-Verify is currently voluntary for most employers and used by only approximately 160,000 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 require electronic employment eligibility verification of all 153 million workers in our civilian labor force, and a handful of states already require all or some employers to use E-Verify.

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, and (2) misuse of the program by employers. The high TNC rate for employment-eligible foreign-born workers is of significant concern — particularly because the studies have found that employers take adverse action

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[3] 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.

[4] See 8 U.S.C. § 1324b(a)(6).

[5] 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 (last visited Nov 7, 2009).

against workers who receive TNCs. In addition, SSA estimates that a mandatory system would require 3.6 million U.S. citizen and employment-eligible noncitizen workers to visit an SSA office to correct their records or lose their jobs.

■ 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.[6]
- Employers that have certain federal contracts.[7]

Currently, more than 168,000 companies have contracts with or supply services to the federal government. 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. Indeed, according to a 2007 DHS study, employers often have failed to comply with E-Verify requirements.[8]

■ What are the major concerns with E-Verify?

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.

For example:

- The most recent independent evaluation of the program commissioned by DHS found that "the database used for verification is still not sufficiently up to date to meet the [Illegal Immigration Reform and Immigrant Responsibility Act] requirements for accurate verification."[9]
- Two separate reports from 2006 and 2007 found that employers do not follow program rules and that the rate of employer noncompliance is substantial.[10]
- Some employers that use the program engage in unlawful and prohibited practices, including preemployment screening, adverse employment action based on TNC notices, failure to inform workers of their rights under the program, and reverifying the employment eligibility of existing employees without a legitimate or lawful reason.
- DHS has a consistent history of mishandling the huge volume of data for which it is responsible, a history that includes shredding unprocessed files (90,000 in 2002), throwing away unprocessed files (2005), and losing records (110,000 files in 2006). In addition, because DHS's record-keeping system remains largely paper-based, databases are not updated in real time to accurately reflect, for example, the granting of work authorization to individual immigrants.
- 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.
- Further, a recent Government Accountability Office report indicated that the E-Verify system suffered two "extended" outages between June and September of 2009, indicating that Basic E-Verify is currently unable to handle existing queries.[11] If E-Verify is expanded, then the system may not be able to handle the expanded number of queries.

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[6] NILC currently is compiling a comprehensive list of states and localities that require employers to use E-Verify.

[7] See *Summary of Final Rule, supra* note 2.

[8] See *Why the Federal Rule Requiring Government Contractors to Use E-Verify Is Bad Public Policy* (NILC, July 2009), www.nilc.org/immsemplymnt/ircaempverif/FAR-TPs-2009-07-15.pdf (last visited Nov. 7, 2009).

[9] *Findings of the Web Basic Pilot Evaluation* (report submitted to DHS by Westat, Sept. 2007) (hereinafter "Westat 2007"), www.nilc.org/immsemplymnt/ircaempverif/WebBasicPilotRprtSept2007.pdf (last visited Nov. 7, 2009), at xxi.

[10] Westat 2007, and *Interim Findings of the Web-Based Basic Pilot Evaluation* (report submitted to DHS by Westat, Dec. 2006), www.nilc.org/immsemplymnt/ircaempverif/westatinterimreport_webbasicpilot_2006-12.pdf (last visited Nov. 7, 2009).

[11] See *Information Technology: Social Security Administration's Data Exchanges Support Current Programs, but Better Planning is Needed to Meet Future Demands* (U.S. Govt. Accountability Office, GAO-09-966, Sept. 2009), www.gao.gov/new.items/d09966.pdf (last visited Nov. 7, 2009), at 15.

■ What groups oppose a mandatory E-Verify?

Many diverse groups recognize that the existing program is deeply flawed and unworkable for employers and workers. There is also widespread recognition that proposals in Congress that seek to make the program mandatory fail to adequately address concerns about it that have not been substantially addressed in the ten years since the program was first piloted.

Groups that oppose the mandatory use of the program in its current state include:

- National labor groups and unions.
- Business associations.
- Computer technology experts.
- Scholars from conservative think tanks.
- Due process and constitutional rights advocates.
- Faith-based and social justice organizations.

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