SBLC WEEKLY

E-VERIFY

Last week, the United States Supreme Court upheld an Arizona law that requires employers in Arizona to use the federal government's E-Verify system. The E-Verify system allows employers to check employment eligibility documents against a federal database. In addition to Arizona, some other states have variations of required use. Federal contractors are required to use it as the result of an Executive Order issued by President Bush.

The system is operated by the United States Citizenship and Immigration Service (USCIS) and the primary database used for verification is the Social Security Administration's (SSA) social security number database.

The E-Verify system has had a "checkered" past. It started out as a voluntary pilot program and was plagued with many problems, ranging from the inadequacy of the database to long delays in processing inquiries. The funding for the program was the bone of contention on numerous occasions.

The situation has changed. The program is currently funded through September, 2012. The database and processing have been improved.

A tricky issue for employers is the awkward time period after the employer checks a name and the initial determination is that it does not match the database. There is an eight day window for the employee to initiate an effort to correct the problem and another eight to ten days for the government to respond. During that time, the employer is at risk of employment discrimination claims if the employer does anything considered detrimental to the employee.

The General Accountability Office (GAO) recently issued a report on the program. Said the GAO, "the USCIS has taken several steps to improve the accuracy of the E-Verify system, including expanding the number of databases queried through E-Verify and instituting quality control procedures. However, E-Verify errors persist." The GAO made several observations:

 *If an authorized employee's name is recorded differently on various authorizing documents, the E-Verify system is to issue a TNC for the employee. Because such TNCs are more likely to affect foreign-born employees, they can lead to the appearance of discrimination.

 *USCIS has not disseminated information to employees advising them of the importance of consistently recording their names on documentation provided to employers, and doing so could help USCIS reach its goal to ensure data accuracy.

 *E-Verify remains vulnerable to identity theft and employer fraud

There are several bills that have been introduced to make the program mandatory for all employers. Importantly, House Judiciary Committee Chairman Lamar Smith (R-TX) has indicated he will introduce his own bill to make it mandatory for all employers.

So how does the E-Verify system work?

The employer and employee complete the Employment Eligibility Verification form (Form I-9) no later than 3 business days after the employee begins work for pay as all U.S. employers, regardless of whether they participate in E-Verify must do. Information about the employee from Form I-9 then serves as the foundation for an E-Verify "case",

which must be created also no later than 3 business days after the employee begins work for pay.

E-Verify guides the employer through a series of questions, which follow Form I-9, beginning with the employee's citizenship attestation, document type(s), then biographical information including name, date of birth, Social Security number and Alien or I-94 number (if a noncitizen). In some cases, the document number and expiration date are also required.

If E-Verify cannot initially match the information, the employer will be prompted to review and correct the information if necessary. Otherwise, E-Verify will display an initial response within three to five seconds.

If E-Verify returns an "Employment Authorized" response, the employer can continue to the last step in the verification process and close the case. Ninety-eight percent of employees are automatically confirmed as authorized to work either instantly or within 24 hours, requiring no employee or employer action. The other response, if the employee information does not match government records, is a "tentative nonconfirmation" (TNC) response.

(Sometimes, E-Verify's automated search of government records cannot immediately verify employment authorization, and a manual search is required. In this case, E-Verify will return a "DHS Verification in Process" response. The employer must check E-Verify until the employee's case is updated, which usually happens within 24 hours, though it may take as long as three business days.

When the employee's case is updated, E-Verify will return either an "Employment Authorized" or TNC response.)

A TNC response means that the SSA and/or the U.S. Department of Homeland Security (DHS) could not confirm that the employee's information matches government records. It does not mean an employee is unauthorized to work or is an illegal immigrant as there are legitimate reasons why an employee may receive this result.

There are several types of TNCs, and the type displayed in E-Verify depends on which government agency is involved and the cause for the mismatch:

  *SSA Tentative Nonconfirmation: This response indicates that the employee's information could not be verified by SSA. The employee must be notified of the TNC response and referred to SSA.

  *DHS Tentative Nonconfirmation: There are two types of "DHS TNCs." The first type means that DHS was unable to verify employment eligibility and the employee is instructed to call DHS to find out how to resolve the discrepancy. The second type is caused by a photographic mismatch, meaning the employer indicated that the photograph displayed by E-Verify did not match the photograph on the employee's document. If the employee contests this type of TNC, the employer must either scan and upload an image of the document or send a copy of the document via express mail at the employer's expense.

The employee can choose to contest the TNC and the employer must print and give the employee a "referral" letter that explains what the employee can do to resolve the TNC.

The employee has eight federal government workdays from date of referral to visit the local Social Security Office or the DHS depending on the type of TNC. SSA has ten federal government workdays to update the case result in E-Verify while DHS will update the case result in eight federal government workdays.

During this review period, the employee may not be terminated or suffer any adverse employment consequences based upon the employee's perceived employment eligibility status (including denying, reducing, or extending work hours, delaying or preventing training, requiring an employee to work in poorer conditions, refusing to assign the employee to a Federal contract or other assignment, or otherwise subjecting an employee to any assumption that he or she is unauthorized to work) until and unless secondary verification by SSA or DHS has been completed and a final nonconfirmation has been issued.

If the employee does not choose to contest a tentative nonconfirmation or a photo non-match or if a secondary verification is completed and a final nonconfirmation is issued, then the employer can find the employee is not work authorized and terminate the employee's employment.

If you want to look at the system, go to http://www.dhs.gov/e-verify