

E-Verify: A New Cost of Doing Business in Allegheny County?

By Robert S. Whitehill and Catherine V. Wadhvani, Fox Rothschild LLP

E-Verify has been around since 1996, but only recently has its use become widespread. Initially intended to be a voluntary system to determine employment authorization, its use, whether mandatory or voluntary, by employers is growing. Indeed, Allegheny County Council recently passed an ordinance requiring that its contractors use E-Verify. This affects companies providing the County with services, working on any public buildings, or receiving a County subsidy of \$100,000.

E-Verify is a US government program by which subscribing employers seek from the Department of Homeland Security (DHS) and the Social Security Administration (SSA) verification of the employment authorization of new employees. E-Verify may only be used after the hiring decision is made (except for contractors with a federal contract that requires use of E-Verify).

Arguments against E-Verify, including some rejected by the U.S. Supreme Court, are that it leads to racial profiling, is inaccurate, and is time-consuming and expensive for employers. E-Verify also has been sharply criticized because of verification delays and inaccuracies.

Whether or not the system works well, and leaving out politics, E-Verify is designed to ensure that new hires are authorized to be employed and are not undocumented aliens.

Almost always, in addition to E-Verify, an I-9 form must be completed immediately for every new employee. Penalties for failure to comply can expose employers to serious fines and even criminal prosecution. Even paperwork violations, such as technical errors or omissions, are subject to fines. While this may sound innocuous, a vast majority of completed I-9 forms contain simple mistakes.

The process — Subscription to the program begins with an employer entering into a Memorandum of Understanding (MOU) with DHS and SSA. The MOU

explains the protocols of the program, the training requirements, and limits on the use of E-Verify to verifying the authorization newly hired employees. Pursuant to the MOU, the employer provides government inspectors access to its records.

Basic steps — Here are some basics that employers should bear in mind when hiring new employees, all of which are laden with opportunities for confusion, mistakes and government fines. Proper I-9 completion entails exquisite attention to detail.

I-9 law requires that the new employee (neither the I-9 nor E-Verify is a pre-hire screening tool) complete Part 1 of the I-9 form, then present to the employer original documentation of identity and work authorization. Independent contractors, casual, sporadic domestic laborers in a private home, and those hired before November 7, 1986 are I-9 exempt.

The documents, which the new hire presents, must be listed on the current list of acceptable I-9 documents. Some documents, like a US passport or Permanent Resident Card (green card), current USCIS-issued Employment Authorization Document, or foreign passport with form I-94 or Form I-94A bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, establish both. These are identified on the form as "List A" documents. List B documents establish only identity and for E-Verify users must contain a photograph. List C documents establish only work authorization.

But, that's only part of the I-9 process. In conjunction with the employee's presentation of documents within three days of hire, the employer must review the documents and accurately record information from them in Part 2 of the I-9 form, certify the employee's start date, and sign the I-9 form as the employer's authorized representative.

The third part of the I-9 form is used to update and E-Verify when required by an

extension of employment authorization or change of name by the employee.

Back to E-Verify — Employers executing the MOU and receiving mandatory training on the system may access E-Verify, start a new case, and enter the needed information.

E-Verify will check the Social Security and DHS databases to confirm, "electronically verify," that the information is accurate and that the person is authorized to work. In most cases, within a brief period of time there will be a "confirmation." Sometimes there is a "tentative non-confirmation."

When E-Verify can't immediately confirm work authorization, it becomes incumbent on the employer to resolve the issue within a prescribed time period. Sometimes it's as simple as correcting a typo or going to Social Security and entering a name change. A tentative non-confirmation should not be cause for termination of or other adverse action against an employee, but for some, the tentative non-confirmation becomes a "final" non-confirmation.

If the tentative non-confirmation is not resolved or is resolved with a non-confirmation, the new employee should become a former employee—engaging his or her services becomes presumptively a knowing violation of the immigration law and a violation of the contract with Allegheny County.

With the Supreme Court's approval of state legislation requiring E-Verify's mandatory use, immigration status laws of several states are now able to be enforced and many more government agencies are getting into the act...even here in Allegheny County.

Robert S. Whitehill (rwhitehill@foxrothschild.com) chairs the Immigration Group of Fox Rothschild LLP. Catherine Wadhvani (cwadhvani@foxrothschild.com) is a partner in the Pittsburgh office.