Legally Speaking
Fox Rothschild LLP
ATTORNEYS AT LAW
Current Issues in Immigration Law
VOLUME 3 JULY 2008

Going "E-Veri-Crazy" – Government Makes More and More Demands on Employers in the Name of Immigration Enforcement

By Robert S. Whitehill

"E-verify" isn't the latest video game fad or a murder mystery for beach reading. Rather, it's an Internet-based employment verification system that is the newest craze in immigration compliance and enforcement. The system is operated by the Department of Homeland Security (DHS) in partnership with the Social Security Administration (SSA). It allows employers to electronically verify the employment eligibility of newly hired employees. Employers must sign a serious Memorandum of Understanding with DHS and the SSA – definitely *not* beach reading material – to participate.

Use of E-Verify, which is cumbersome and invasive, does not prevent workplace raids by the federal government, nor the arrest and criminal prosecution of company executives, managers, or employees on a mass scale.

Electronic verification has been around since 1997. Over the years, it has gone through numerous changes, upgrades, and improvements, and still continues to evolve. The system allows participating employers to compare information about new hires against 425 million SSA records and 60 million DHS records to confirm eligibility to work legally. DHS reports that 94.2 percent of the time, employers receive confirmation within 24 hours that the employee is authorized. It's rather amazing technology – when it works.

According to DHS Secretary Michael Chertoff: "A large part of our success in enforcing the nation's immigration laws hinges on equipping employers with the tool to determine quickly and effectively if a worker is legal or illegal…E-Verify is a proven tool that helps employers immediately verify the legal working status of all new hires."

Most employers don't agree.

As of June 2008, only a reported 69,000 out of the millions of eligible U.S. employers participate in E-Verify, and many of those participate because they are required to in order to do business with state government. As of this writing, 10 states require the use of E-Verify for some or all employers. These state laws are complicated, but among them, Arizona and Mississippi are the most expansive, requiring E-Verify for *all* employers. Colorado, Georgia, Idaho, Minnesota, Oklahoma, Rhode Island, and Utah require E-Verify for employers that enter into contracts with the state. In North Carolina, all state agencies, including universities, must use E-Verify. There are diverse immigration compliance details and stiff penalties in the laws of those states, and practically all 50 states have gone "E-Veri-crazy."

On June 11, 2008, the White House issued an Executive Order stating that: "Executive departments and agencies that enter into contracts shall require, as a condition of each contract, that the contractor agree to use an electronic employment eligibility verification system …" So far, the Department of Defense, General Service Administration, and National Aeronautics and Space Administration (NASA) have issued proposed regulations requiring contractors to use E-Verify.

This is a wake-up call to employers. The electronic verification system is soon going to be everywhere.

How Does It Work?

It starts with an I-9. All employers and employees must first complete an I-9 form for every new hire. As part of this process, the employee provides acceptable original documentation to prove identity and

employment authorization. The types of acceptable documents are strictly limited, and an employer may be charged with discrimination for requiring specific types of documents of new workers. These documents and a good outline of the I-9 process are found in USCIS *Manual M-274*.

The employer then enters information from the I-9 into the E-Verify system and waits for a response. Most of the time a confirmation verifying an individual's employment authorization is received within 24 hours. If not, employers then enter a murky Twilight-Zone called "Tentative Non-Confirmation" (TNC).

TNC arises when the evidence given by the new employee and the information that the government has does not match. A 2007 study reports that: "The database used for verification is still not sufficiently up to date to meet the [Illegal Immigration Reform and Immigrant Responsibility Act] requirement for accurate verification." Since that report, the government has worked hard to improve the SSA's database so that it can be used more effectively as the employment authorization tool it was never intended to be.

What To Do When Records Don't Match?

If the electronic check of SSA's database does not verify the employee's information, E-Verify will provide the employer with a TNC report. The report must be given to the employee who must resolve the problem within eight federal government work days. Sometimes, that's the last the employer sees of the employee, and the employer so indicates in E-Verify.

That same 2007 study found that on average, 96 percent of the employees attesting to be U.S. citizens were automatically confirmed as authorized to work, as compared with 72 percent of permanent residents and 63 percent of immigrants. Many employees, especially immigrants and new citizens, choose to correct discrepancies in their SSA or DHS records.

If the employee seeks to resolve the matter with SSA, the employer must then make periodic status inquiries through E-Verify with the agency, which has 10 days (federal government work days) as of the initial inquiry to resolve the matter by confirmation or non-confirmation or give notice that more time is needed.

Confused? You should be. Read on.

The employer also may be notified that there is a Social Security confirmation that the DHS tentatively cannot confirm. DHS then has the same 10 days to confirm or not confirm employment authorization, unless it needs more time. Meanwhile, during the period in which the employee and the government are resolving the case, the employer may not take any action against the employee or put him or her to work.

Final non-confirmation is notice that the individual lacks authorization to work, so continued employment may result in employer sanctions for engaging an individual known to be without the government's approval.

Final confirmation is notice that the employee is authorized to work, and the employer must re-resubmit the I-9 and re-verify the employee's authorization to work in the U.S.

Meanwhile, while TNC is working its way towards confirmation or non-confirmation, the employer may not take any action against the employee. For most employers, this downtime means reduced production and lost revenue.

All of this and much more is set forth in USCIS' *E-Verify User Manual*. This 79-page document guides a user through many of the mysteries of E-Verify. It is officially known as *Manual M-574*. This manual, the M-274, and other relevant materials can be accessed through the "E-Verify" portal of the USCIS Web site, www.USCIS.gov.

How to Participate – Very Cautiously

To participate in this program, an employer directly or through a designated agent must execute a Memorandum of Understanding (MOU) with DHS and SSA. If you have a choice, read this document very carefully before agreeing to its terms.

The MOU binds the employer, SSA, and DHS. SSA agrees to confirm the accuracy of Social Security numbers of new employees and the employment authorization of U.S. citizens. They agree to provide confirmation or tentative non-confirmation within three federal working days and to provide final confirmation or non-confirmation within 10 federal working days, unless longer is required.

DHS agrees to permit access to limited database information to enable the employer to perform verification checks of new hires and to provide certain notices. DHS agrees to the same timeframes as SSA. But as to sharing the information, the MOU states that: "Information will be used only 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 SSA." DHS is on record stating that E-Verify will be used as an enforcement tool against an employee's false claim of identity or work-authorized status. This is

frightening – just look at the Postville example included below.

Under the terms of MOU, employers have the following responsibilities (and more):

1. Display a DHS notice that E-Verify is being used by the employer
2. Provide SSA and DHS with contact information for the employer representative responsible for E-Verify
3. Learn and comply with the E-Verify manual
4. Require any employees performing verification to be trained and tested on E-Verify usage, including refresher courses
5. Comply with I-9 requirements for E-Verify users, which are different than for non E-verifiers
6. Use E-Verify ONLY for new employees and for all of them
7. Follow proper procedures when there is a TNC and agree to take no adverse action against an employee during the verification process

(There are others, and these are shortcuts, but the next one is especially critical, as it exposes employers to the risk of unfriendly raid-like "visits" by the federal government.)

8. The employer agrees to allow DHS and SSA, or their authorized agents or designees, to make periodic visits to the Employer for the purpose of reviewing E-Verify….to interview employees…and to make employment and E-Verify records available to DHS and the SSA…

Use of E-Verify is an add-on to I-9s. It is not completely accurate, requires additional steps to be taken in the employment process, and allows a TNC worker to remain employed and not work for an indefinite period of time. Moreover, employers agree to "visits" by DHS and SSA and others without any immunity from USICE raids and other employer sanctions.

In Arizona, for example, the imposition of E-Verify may lead to increased compliance, but it has had negative consequences for employers needing or seeking workers. According to one source, "There is additional evidence that many more companies will avoid doing business in Arizona simply because of the requirement that they use Basic Pilot/E-Verify, or that they will stop doing certain kinds of business there, such as farmers deciding not to plant certain types of crops because at harvest time there won't be enough workers to pick them." ("Erecting Its Own Tombstone: Arizona's Mandatory Basic Pilot/E-Verify Law," National Immigration Law Center, April 2008)

USICE's Largest Workplace Raid in History at Postville, Iowa

USICE is increasing its immigration compliance raids. Such "visits" to slaughter houses have led to the arrest of hundreds of unauthorized workers but have numbed the nation's psyche and are not the breaking news stories that they once were. That is, until "Postville" occurred. Postville, Iowa, is home to Agriprocessors Inc., known as the nation's largest kosher meatpacking plant. On May 12, 2008, an USICE raid netted nearly 400 undocumented workers, resulting in the arrest of several company executives and (this is new) criminal charges being brought against the workers.

Erik Camayd-Freixas was a Spanish language court interpreter for the federal court hearings of those charges, which began May 12, 2008. Dr. Camayd-Freixas, a Professor of Spanish at Florida International University, described those proceedings in a chilling essay reported in The *New York Times*, July 11, 2008, and commented upon in its July 13, 2008, editorial.

> *Under the old way of doing things, the workers, nearly all Guatemalans, would have been simply and swiftly deported. But in a twist of Dickensian cruelty, more than 260 were charged as serious criminals for using false Social Security number or residency papers, and most were sentenced to five months in prison.*
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> *What is worse, Dr. Camayd-Freixas wrote, is that the system was clearly rigged for the wholesale imposition of mass guilt….He wrote that they had waived their right in hopes of being quickly deported, "since they had families to support back home." He said that they did not understand the charges they faced, adding, "and, frankly, neither could I."*

USCIS dramatically has upped the stakes for undocumented workers. But at what cost?

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In Memoriam

The field of immigration law has lost a giant, a leader, a teacher, and a friend. Stephen Fischel died at age 59, ironically while attending this year's annual conference of the American Immigration Lawyers Association (AILA). Steve had been with the State Department for 30-plus years, retiring as Director of the Office of Legislation, Regulations and Advisory Assistance in the Bureau of Consular Affairs, after receiving Superior Honor Awards from the Department. He was a regular speaker at AILA conferences and other venues. He taught us how to represent our clients in dealings with the State Department and how to be better immigration attorneys. His career exemplifies the mutual benefit of cooperation and respect between competing interests in immigration. He was a friend and will be sorely missed.

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