

**E-VERIFY
(BASIC PILOT PROGRAM)**

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I. INTRODUCTION.

In an attempt to address problems with the employment of unauthorized aliens and the employment verification procedures, the federal government, under the Illegal Immigration Reform and Responsibility Act of 1996 (“IIRRA”), created three employment eligibility verification pilot programs: the Basic Pilot Program, the Citizens Attestation Program, and the Machine Readable Program. The only one that continues to be in use is the Basic Pilot Program, which has been renamed E-Verify.

The Basic Pilot Employment Verification Program has been renamed E-Verify, although many of the government documents have not been changed to reflect the new name and it is still commonly referred to as the Basic Pilot Program. The program is jointly administered by the Social Security Administration (“SSA”) and the Department of Homeland Security (“DHS”).

Under the Legal Arizona Workers Act, all employers in Arizona are required to use E-Verify after December 31, 2007 to verify the employment eligibility of all employees hired after the employee signs up for the program. Please keep in mind that the Arizona law does not contain a penalty if a company fails to use E-Verify. In addition, the new Arizona law includes an affirmative defense that seems to encourage employers to use E-Verify as a voluntary program, as the employer that uses has an affirmative defense in a later action charging the employer knowingly or intentionally employed an unauthorized worker. The law itself is ambiguous, as it makes E-Verify appear voluntary by not imposing penalties for non-use.

II. NUTS AND BOLTS OF USING E-VERIFY

A. Employers Register Online.

Employers can register for E-Verify online at <https://www/vis-dhs.com/EmployerRegistration/StartPage.aspx?JS=YES>. Employers should not enroll until they are ready to begin verifying employment eligibility through the program. Employers are required to sign a Memorandum of Understanding (“MOU”) that identifies the responsibilities of the employer, the SSA, and the DHS. A sample MOU is attached. Employers using E-Verify must also comply with all the requirements of the I-9 process and complete an I-9 for each employee.

Every employee that uses E-Verify for the company must complete an online tutorial. The tutorial may take up to two hours. In addition, each user should maintain a copy of the Basic Pilot User Manual, an approximately 100 page manual describing E-Verify process employers must follow.

B. Employers Sign a Memorandum of Understanding.

The MOU is “signed” electronically by checking a box online saying “I agree that I have read and agree with the terms and conditions of the MOU, and am authorized by my company to act on its behalf with respect to the Basic Pilot Program. I understand that I must complete the electronic registration in order for the MOU to take effect.” This is one of the first pages of the registration process. By completing the registration, the Company is committing itself to comply with the MOU.

The company should print the MOU from this screen and ensure that all employees who will be using E-Verify for the company have read and understand the MOU. DHS warns that violations of the MOU may lead to legal liability for the company under federal or state law, including Title VII of the Civil Rights Act of 1964 and the anti-discrimination provision of the Immigration and Nationality Act.

In the MOU, employers agree to follow the program requirements, including the following:

1. The employer may not submit an inquiry to E-Verify until after an employee is hired and an I-9 has been completed for the employee.
2. The employer may use E-Verify to verify the employment eligibility only for new employees, and not for employees hired before the employer signed the MOU.
3. The employer must agree not to discriminate against employees based on national origin or citizenship status.
4. The employer must post notices provided by DHS regarding its participation in E-Verify and must post anti-discrimination notices issued by the DOJ Office of Special Counsel.
5. The employer may not use E-Verify to selectively verify employment eligibility. If used, it must be used for all new hires, regardless of their race, ethnicity, national origin, or citizenship status.
6. The employer may not use E-Verify to reverify the employment eligibility of an employee whose original work authorization documents have expired.
7. The employer must not take adverse action against an employee while the employee is challenging a tentative non-confirmation, unless the employer obtains knowledge (as defined in 8 C.F.R. § 274a.1(1)) that the employee is not authorized to work.
8. The employer must take steps to safeguard the information used for E-Verify and ensure it is not used for any purpose other than employment eligibility verification.
9. The employer must continue to use E-Verify while the MOU is in effect. The employer may formally terminate the MOU and close using the program upon 30

days written notice to SSA and DHS. The employer may request termination of its involvement in E-Verify online from the “Site Administration” page on the program.

C. Employers May Use it for the Entire Company or on a Site-by-Site Basis.

Companies may register to use E-Verify at individual work sites and not use it at the entire company. Each site that verifies the employment authorization of employees at that site must sign its own Memorandum of Understanding. If the company’s human resource functions are centralized, the central office can perform the employment verification for all sites.

D. Employers May Outsource the Employment Verification Duties.

Additionally, an employer can outsource employment authorization verification to a third party service provider. However, if a company outsources its employment verification under E-Verify, it will still be required to sign a Memorandum of Understanding and be assigned a unique number that the service provider will use only for that company.

E. The Verification Process.

1. Complete a Form I-9.

Employers start the employment verification process essentially the same way that they would if not using E-Verify; by completing a Form I-9. This cannot be done until after a company hires an individual. E-Verify places one limitation on the I-9. The employer may accept a List B document to establish identity only if the List B document contains a picture. However, the employee still gets to choose whether to produce either (1) one List A document or (2) one List B and one List C document, and which document from the list to show, as long as the List B document has a photograph.

The Basic Pilot Program Users Manual reminds employers that they must accept the documents the employee provides, with the single limitation that the List B document must contain a picture. It also reminds employers that they may not request documents to verify information that the employee provided on Section 1. The employee alone is responsible for the information in Section 1 of the I-9. The employer is only responsible for making sure it is complete.

2. Enter Information in E-Verify.

The employer must enter information from Sections 1 and 2 of the Form I-9 into E-Verify , including:

- (a) Last name;
- (b) First name;
- (c) Social Security Number;
- (d) Date of birth;
- (e) Date of hire;

- (f) Citizenship status;
- (g) Alien registration or I-94 number (if applicable); and
- (h) Type of document verified on the Form I-9 with expiration date.

3. The SSA and USCIS Verify the Data.

The SSA first verifies if the name, date of birth, social security number, and citizenship status reported match the SSA's records. Inquiries regarding non-citizens are routed to the USCIS to verify the work authorization of the employee. If the information entered matches the SSA and USCIS databases, then no further action is required. The employer is provided a confirmation number and must retain a record of the confirmation number on the Form I-9 or print the confirmation screen and attach to the Form I-9.

4. If No Match, Employer Receives a Tentative Non-Confirmation.

If the SSA is unable to verify the information, the employer will receive an "SSA tentative non-confirmation." If the USCIS is unable to verify that the worker has proper work authorization, the employer will receive a notice, "DHS verification is in progress." An immigration status verifier will manually check the USCIS records if an automatic verification cannot be provided. If, after the manual check, USCIS cannot verify the employee's work authorization, the employer will receive a "DHS tentative non-confirmation." DHS plans to more than triple the number of status verifiers it has on staff to accommodate the increased use of E-Verify.

5. Employer Must Provide Notice to Employee of Tentative Non-Confirmation.

After the employer receives a tentative non-confirmation, it should first check to see that all information was entered correctly. If the non-confirmation did not result from a typographical error that the employer can fix, the employer must provide the employee with a *written notice* entitled "Notice to Employee of Tentative Non-Confirmation." The notice form is generated by E-Verify. The worker must indicate on the notice whether he or she intends to challenge the non-confirmation and both the employee and the employer must sign the notice. The employer should retain a copy of the Notice to Employee with the individual's Form I-9.

If the employee is challenging the non-confirmation, the employer is required to print a second non-confirmation letter, called a "referral letter," that contains information about how to resolve the non-confirmation. The employer should retain a copy of the referral letter with the individual's I-9 form. The referral information from the referral letter is transmitted electronically to the DHS or the SSA.

6. Employee Has Eight Working Days; SSA & DHS Have Ten Working Days to Resolve Discrepancy.

The employee has eight (federal government) working days to contact the SSA or DHS to try to resolve the discrepancy. The employee is to keep working during this time. The employer must treat this employee the same as it treats employees who received an automatic work

authorization and cannot delay the employee's start date or training opportunities based on a tentative non-confirmation.

The SSA or DHS has ten working days to resolve the case after it receives the referral from the employer, which occurs electronically when the employer provides the employee with a "referral letter." If more time is needed, the employer will receive a "case continuance" notice. The entire procedure is designed to provide a final confirmation or final non-confirmation within ten business days after the employer enters the information in E-Verify.

7. Final Non-Confirmation Requires Employer Action.

If an employee does not challenge a tentative non-confirmation, the non-confirmation becomes final.

In the case of an SSA tentative non-confirmation, the employee should notify the employer when he or she visits the SSA. The employer must check the employee's information through E-Verify at least 24 hours after the employee informs the employer he or she has visited the SSA office but no later than ten working days after the employer sent the referral information to the SSA. If the employee does not contact the SSA, the employer should resubmit the employee's information for verification no later than ten working days after the employer sent the referral to the SSA.

The employer will then receive an employment authorization confirmation or an SSA final non-confirmation. The employer may also receive a notice that DHS verification is in progress if the SSA issue was resolved because the information matches SSA's records but the SSA does not have employment authorization information for the individual.

In the case of a DHS tentative non-confirmation, ten business days after the employer makes the referral, it should check the employee's information for verification through E-Verify. It will receive either an employment authorized notice, an employment unauthorized notice (final nonconfirmation) or a DHS no show response. The DHS no show response is provided if the employee failed to contact the DHS within ten days after the referral. The no show response is considered a final non-confirmation.

After a non-confirmation becomes final, the employer must either terminate the individual's employment or notify DHS if it continues to employ an employee after receiving a final non-confirmation. An employer is subject to fines of \$500-\$1,000 for each failure to notify the DHS that it continued to employ the individual. If the employer continues to employ an individual after a final non-confirmation, the employer is subject to a rebuttable presumption that it has knowingly employed an unauthorized alien.

8. Employer Cannot Take Action Against Employee Who is Contesting Tentative Non-Confirmation.

An employer is prohibited from taking adverse employment action against an employee who is contesting a tentative non-confirmation. The employee should continue to work during the window of ten business days with which the SSA or DHS has to resolve the discrepancy. The employer cannot treat the employee who is contesting a tentative non-confirmation any differently than the employee who gets an initial confirmation. If the employee is not challenging the non-confirmation, the employer should terminate the individual's employment or report to DHS it is not terminating the individual's employment after the non-confirmation.

An employee cannot face *any* adverse employment consequences based on a tentative non-confirmation. An employer may not delay the employee's start date, delay training, or otherwise treat an employee with a tentative non-confirmation differently than an employee that received an instant confirmation. An employer cannot speed up an agreed-upon start date based on a confirmation from E-Verify, because this would be disparate treatment of employees based on results from E-Verify. If the employer generally offers training to employees in the first ten days of employment, it must provide the same training to the employee with the tentative non-confirmation.

III. PROBLEMS WITH E-VERIFY

E-Verify has several drawbacks as an employment verification vehicle. It requires employees to have a computer and internet access to use the program. E-Verify has a high rate of tentative non-confirmations and erroneous non-confirmations. Additionally, it is unable to detect fraud and identity theft. There is also a potential to allow access to employees' personal, confidential information. Additionally, misuse of E-Verify may lead to discrimination and unfair employment practices. A Position Paper prepared by the Arizona Chamber of Commerce and Industry regarding the Basic Pilot Program is attached.

A. E-Verify Requires Employers to Have a Computer and Internet Access.

E-Verify is a computer-based system that requires employers to have a computer and Internet access. There is no telephonic equivalent that would allow employers to verify employment eligibility

Because E-Verify requires employers to enter personal, confidential information regarding employees, employers must use care to protect the information. If an employer does not have a computer with Internet access, the employer may be tempted to use a public computer, such as a computer at a public library. However, use of a public computer raises serious confidentiality and privacy concerns. If the information could be recovered by other computer users, they would have all the information they needed to steal a person's identity. The employer could be liable for that loss.

B. The DHS Admits E-Verify is Not Ready to Go National.

In June 2007, officials from the Department of Homeland Security ("DHS") testified before the House Ways and Means Subcommittee on Social Security in response to inquiries regarding E-Verify. According to the SSA, 4.1% of the Social Security records contain errors that would result in incorrect feedback under E-Verify. The error rate was even higher for individuals born outside of the United States.

The DHS estimated that if the federal government were to require all employers to use E-Verify, the DHS would be required to hire hundreds more employees and need several hundred million dollars. The DHS claims that right now E-Verify confirms 92% of response within seconds (other reports suggest that the number is closer to 85%), but that expanding the number of users will increase the number of potential errors. Therefore, the time and personnel required to respond to tentative non-confirmations would be immense.

C. Employers Misuse E-Verify.

Studies have shown that employers using E-Verify do not fully understand the requirements and restrictions of the program. The study found several employer practices that did not comply with the requirements of E-Verify that are considered prohibited employment practices, including:

1. Using E-Verify for pre-employment screening;
2. Taking adverse action against an employee while tentative non-confirmation results are being resolved;
3. Failing to maintain proper security of the information;
4. Failing to follow through on dismissal when a tentative non-confirmation was not resolved and became a final non-confirmation; and
5. Failing to properly notify employees of a tentative non-confirmation.

D. E-Verify Does Not Detect ID Theft or Document Fraud

E-Verify is highly susceptible to document fraud and identity theft. An employee could use valid documents in a fraudulent manner and the employer could receive a confirmation of work authorization that was false. For example, an alien from Russia with valid documents could lend them to his cousin, an unlawful alien that happens to look like him, and E-Verify would provide a confirmation of employment eligibility.

An employee could use fraudulent documents that contain some valid information, and get a confirmation of work authorization from E-Verify. For example, if Heidi stole Julie's identity and made fraudulent documents with Julie's name, date of birth, and social security number but Heidi's picture, E-Verify would provide a confirmation, as long as the information entered into the system matched Julie's correct information. However, if Heidi were to keep her own date of birth and use Julie's social security number, E-Verify would provide a tentative non-confirmation.

The system is not designed to identify if an identification is being used at multiple worksite, so the same information could be used by multiple parties at different companies. The system would not identify that the documents had been used more than once.

E. E-Verify Provides Numerous Erroneous Nonconfirmation Results.

Because of errors in the SSA's database or the DHS database, because of delays in information being input into those databases because of limitations on data-input format, or because of user error by E-Verify user, E-Verify provides erroneous nonconfirmation results. Studies vary, but all agree that between 8% and 20% of E-Verify inquiries result in a tentative non-confirmation that requires additional work by the SSA or DHS to resolve. Inquiries that required manual verification by the DHS to resolve often take longer than the 10 business days that are allotted under the program.

IV. A CAUTIONARY TALE: SWIFT MEAT PACKING.

Swift & Company, the third largest processor of fresh pork and beef in the United States, started using the Basic Pilot Program when it was first introduced in 1997. It completes an I-9 on all new employees and verifies work authorization through the Basic Pilot Program. Swift was so zealous in verifying the employment eligibility of its employees that in 2001, the Department of Justice Office of Special Counsel sued Swift for unfair immigration related practices because the Company allegedly went too far in trying to verify employee's work eligibility. The DOJ sued for \$2.5 million. The case was settled for \$200,000.00 with no admission of wrongdoing by Swift.

Despite its long-term use of the Basic Pilot Program and its reputation as being overzealous when verifying employment eligibility, ICE raided six Swift production facilities and arrested 1,283 employees who were allegedly using false documents -- completely stolen identifications that slipped through the Basic Pilot Program. The raids and loss of employees cost Swift \$30 million. ICE has not brought any charges against Swift or any of its upper management relating to the raids. However, approximately 275 former Swift employees have been charged with identity theft or use of fraudulent documents. Additionally, 19 Swift employees were arrested in July 2007 and were charged with harboring illegal aliens. The arrests included human resources personnel and a union representative. Swift continues to be a target of investigation, despite the fact it has been using the Basic Pilot Program for ten years.