



E-VERIFY

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PURPOSE

- Ensures employers hire eligible workers by comparing I-9 information with government database
- Overseen by U.S. Citizenship & Immigration Services and operated by DHS and SSA



PURPOSE ...

- Internet based
- Federal Acquisition Regulation (FAR)



PRESIDENTIAL SUPPORT

- Bush initiative – Executive Order 6/6/08
- Obama supports now



E-VERIFY LITIGATION

- On-again/off-again
- Federal court Maryland upheld regulations
- SHRM and Chamber contesting
- Reliable database?
- Delayed since January



ICE ENFORCEMENT ENHANCED

- U.S. Immigration & Customs enforcement
- 652 Notices of inspections with I-9 scrutiny
 - July 2009 Krispy Kreme \$40,000 fine
- Supporting documentation must “reasonably appear genuine”



I-9s

- Require all new hires to complete/sign Section 1 on their first day of work
- Employee must provide SSN
- Review employee documents to make sure on new version of I-9 list of acceptable documents and that they appear genuine (see the new I-9 at www.uscis.gov/I-9)



I-9s ...

- Establish a consistent procedure for completing I-9s, and educate hiring managers on procedure
- Make and retain copies of all I-9 documentation



I-9s ...

- Keep I-9s and copies of documents for three years after employee's hire date or one year after termination, whichever comes later
- Don't ask an applicant to complete I-9 prior to making a job offer – discrimination?



I-9s

- **Don't** ask new hires for any particular documents or for more documents than the I-9 requires - employee chooses
- **Don't** consider expiration date of I-9 documentation when making hiring/firing decisions



I-9s ...

- **Don't** forget tickler file to follow up on expiring documents that limit employee's authorization to work
- **Don't** re-verify identity documents such as driver's license



I-9s ...

- **Don't** put the I-9 in employee's personnel file



I-9 Penalties

- Poor documentation - \$1,000 per worker
- Knowingly hiring an illegal immigrant - \$10,000 per worker



VOLUNTARY E-VERIFY PROGRAM

- P.K.A. – basic pilot/employment eligibility verification program – 1996
- Must sign memorandum of understanding
- 1,000 employers a week enrolling
- 134,000 employers enrolled (1-2%)



VOLUNTARY E-VERIFY PROGRAM ...

- New hires only verified
 - Can't recertify
- Must update enrollment as government contractor

VOLUNTARY E-VERIFY PROGRAM ...



- Do you really want to volunteer
 - Employee terminations
 - Discrimination claims
 - Training and use of system
 - Rebuttable presumption of liability
 - ICE searches without advance notice versus 3 day inspection notice



THE LAW

- An amendment to the Federal Acquisition Regulation (FAR) requiring that a new clause be inserted in subject federal contracts
- The new clause, with some exceptions, requires use of E-Verify for all new hires and all existing employees directly performing work under a contract
- Is **not** automatically and retroactively applied to existing contracts
- www.dhs.gov/e-verify



REQUIREMENTS

- Subject government contracts (FAR) must include E-Verify clause in contracts awarded on or after 9/8/09
- Government agencies must amend existing indefinite delivery or indefinite quantity contract to include E-Verify if delivery date is 6 months after 9/8/09 and contractor agrees to amendment
- Employer E-Verify requirements only triggered when a contract or subcontract contains an E-Verify clause



COVERED CONTRACTS

- Prime contracts with a performance period of 120 days or more and a value of \$100,000
- Subcontracts (stemming from covered prime contracts as described above) over \$3,000 for services or construction
- American Recovery & Reinvestment Act funds
- Contracts for commercially available off-the-shelf items are specifically excluded



ENROLLMENT

- When:
 - Within 30 calendar days of contract award/ amendment date
 - Online tutorial must be completed before enrollment
 - 90 days from date of enrollment to initiate verification of required employees



ENROLLMENT ...

- Where:
 - www.dhs.gov/e-verify
 - Website also contains form to un-enroll or revise status from voluntary contractor to federal contractor



EMPLOYEES REQUIRED TO BE E-VERIFIED

- New hires within 3 business days of start date
- Existing employees assigned to covered federal contract within 90 days of contract award date or within 30 days of assignment to contract
- If federal contractor chooses to voluntarily e-verify all existing employees must do so within 180 days of enrollment



EMPLOYEES REQUIRED TO BE E-VERIFIED ...

- “Employee assigned to the federal contract”
- Hired after 11/6/86
 - Performing work in U.S. under contract that includes the clause committing contractor to use e-verify
 - Not considered assigned to contract if employee normally performs support work – indirect or overhead functions – and does not perform substantial duties under contract



PRE-SCREENING

- Employers may not pre-screen applicants
- Verification must occur after acceptance of a specific job offer and completion of I-9 form
- Employers may not rely on e-verify performed by another employer
- Employers may not re-verify any employee previously e-verified



E-VERIFY RESULTS

- Confirmation written on I-9
- Non-confirmation
 - Provide employee with “Notice to Employee of Tentative Non-Confirmation”
 - Cannot terminate based on this tentative non-confirmation notice unless employee does not contest result



E-VERIFY RESULTS ...

- Employee has 8 work days to contact SSA or USCIS
- Continue allowing employee to work until final determination from E-verify is made
- If final non-confirmation letter is received, employer can terminate



E-VERIFY RESULTS ...

- If continue to employ after final non-confirmation letter
 - Employer must notify DHS of continued employment or be fined
 - Rebuttable presumption that employer knowingly employed unauthorized alien



POSTING AND NOTICE OBLIGATIONS

- Post notice provided by DHS indicating participation in E-verify program
- Post anti-discrimination notice issued by Office of Special Counsel for Immigration-Related Unfair Practices at Department of Justice
- Notices provided after online enrollment



SS NO MATCH – SAFE HARBOR PROVISIONS

- 2007 Bush initiative but SSA program
 - Provided steps for employers receiving no match letters re W-2 to escape liability and discrimination
 - Safe harbor gone! Procedures gone



SS NO MATCH – SAFE HARBOR PROVISIONS ...

- SSA policy – 10 or more no matches and .5% of workforce
- Do what you want to employee at your peril but you are on notice to inquire
- Constructive knowledge?
- Union contracts – just cause for termination



SS NO MATCH – SAFE HARBOR PROVISIONS ...

- Terminate all no matches?
- DHS Secretary Napolitano rescinds regulations 8/19/09



STATE MANDATED E-VERIFY

- Georgia, Mississippi, South Carolina, Utah, Arizona (not District of Columbia)
- 13 States with some form of E-verify
- Ohio H.B. 184 (5/19/09)
 - All employers must enroll to verify all new employees
 - Public employer contract requirement
 - Confirm participation on State tax return



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