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EMPLOYMENT LAWSCENE ALERT: SHOULD I USE E-VERIFY OR NOT?

E-Verify is an internet-based system that is operated by the Department of Homeland Security (DHS) in conjunction with the Social Security Administration (SSA). In theory, the program simplifies the process of ensuring new employees have the appropriate work authorization. After registration, employers enter sections 1 and 2 of the new employee's I-9 Employment Eligibility Verification Form into the system, allowing the system to cross-reference the employee's information with information stored by the SSA. After entering the information, employers would receive either an initial confirmation or a "tentative non confirmation" in seconds. The program sounds like an easy way to navigate the dark waters of unintentional unauthorized employment; however, the program, with many advantages and disadvantages is not for everyone.

The question then becomes—should I use E-Verify or not?

In some cases, the answer is simple. All federal contractors are required to use the program. Similarly, Arizona and Mississippi have passed laws requiring all employers to use the program while South Carolina "encourages" but does not mandate its use. Colorado, Georgia, Missouri, Nebraska, Rhode Island, and Utah have passed legislation that required the use of E-Verify for all public contractors and state agencies while Idaho, Minnesota, and North Carolina require state agencies to use the program.

If your company falls into one of these categories, you must use the program, regardless of the well-documented downfalls. If, however, you live in any other state or are not otherwise required to use E-Verify, each employer must balance the pros and cons of the program before deciding whether to enroll.

Benefits of E-Verify

Simply put, E-Verify is a quick way of receiving an initial determination of a new employee's authorization to work. By entering information from the employee's I-9, the employer receives an automatic reference which provides the employer protection against inadvertently hiring an individual without work authorization. Although the program does not provide complete immunity, it does create a rebuttable presumption that the employer has not violated INA section 274A(a)(1)(A) ("Unlawful Employment of Aliens").

Moreover, if an employer hires a foreign national who recently received a degree in science, technology, engineering, or mathematics (i.e., the STEM fields), voluntary usage of the E-Verify program may make those new employees eligible to work an additional 17 months before the employer is required to file an H1-B petition on their behalf.

Finally, there have been efforts on the federal level to make E-Verify mandatory nationwide. Should these proposed bills turn into law, those employers who have already been using E-Verify will already be familiar with the program. If E-Verify becomes mandated nationally, the program would likely experience technical issues and the error-rate would likely expand. Being familiar with the program would thus be an advantage.

Downfalls of E-Verify

DHS claims that E-Verify is free to use; however, there are some built in costs to consider. First, E-Verify is an "all-or-nothing" program. In other words, employers may not use the program intermittently. Rather, signing up for E-Verify represents an organizational shift that may require extra time, money, and effort to train and supervise staff on how to properly use the system. Depending on the size of the company, this shift may involve significant costs.

Importantly, e-Verify is far from perfect. There have been many reports of e-Verify providing tentative or final non confirmation notices to employees who have proper work authorization—even to U.S. Citizens. Moreover, the issuance of a tentative non confirmation notice requires the employer to provide adequate notice to the new employee, allowing them the opportunity to challenge the determination. Failure to provide adequate and timely notice may open the employer up to legal action by the new employee. Additionally, the system can be cumbersome and difficult to manage, particularly for smaller businesses. For example, with E-Verify, employers may only accept an I-9 List B document if it bears a photograph and employees must possess a social security number. Neither of these requirements is needed to prepare an I-9 outside of the E-Verify program.

Moreover, the government is able to use E-Verify to ensure that employers are timely filing I-9s on behalf of new employees and to correct any errors in a timely fashion. E-Verify provides the government with a swath of information about employers and employees and allows the government to mine this information for employer violations. Voluntarily entering information into this database, in other words, increases the risk that the employer may be investigated and fined for intentional or unintentional violations.

Finally, many immigration reform advocates criticize the program as a means of shifting the burden of immigration enforcement from the government to private employers. Immigration enforcement has always been the responsibility of the federal government. As with the debate behind the implementation of 287(g) agreements by some local law enforcement agencies, critics of the program argue that E-Verify shifts one aspect of enforcement from the

government onto private businesses.

In conclusion, employers should weigh the benefits and disadvantages of enrolling in E-Verify before doing so. What may seem like an easy way to ensure the proper work authorization of employees may actually create significant human and financial costs.

For more information on the E-Verify program and to discuss whether enrollment is right for your business, please contact us.