



E-Verify Continues To Be Employers' Best Tool to Verify Employees' Work Authorization

By Elizabeth Jacobs

Civil-rights icon Barbara Jordan — chairwoman of the Clinton administration's Commission on Immigration Reform — said in 1994, "Employment continues to be the principal magnet attracting illegal aliens to this country. As long as U.S. businesses benefit from the hiring of unauthorized workers, control of unlawful immigration will be impossible."¹

Analysis of data provided by the U.S. Department of Homeland Security ("DHS") shows that E-Verify is one of the strongest tools employers have to ensure they are hiring only workers who are authorized to work in the United States, consistent with federal immigration and labor laws. It may also be one of the strongest tools lawmakers and government officials have to protect U.S. workers from unlawful competition and wage suppression resulting from large-scale illegal immigration.

Background on Work Authorization Verification Requirements

The Immigration and Nationality Act ("INA") at section 274A(a)(1) makes it "unlawful for a person or other entity ... to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien." 8 U. S. C. §1324a(a)(1)(A). IRCA defines an "unauthorized alien" as an alien who is not "lawfully admitted for permanent residence" or not otherwise authorized by the attorney general or secretary of Homeland Security to be employed in the United States.

Section 274A(a)(1)(B) requires employers to verify the employment authorization of any individual they hire to work in the United States, primarily by completing a Form I-9 and examining documents establishing both employment authorization and the identity of the individual. The implementing regulations at 8 C.F.R. § 274a.2(b)(1)(ii)(A), require that every employer "[p]hysically examine" and then attest that the documents appear to be genuine and relate to the person presenting them. If the individual submits a document that does not reasonably appear to be genuine or to relate to him or her, the employer must reject that document and may then request that the individual present other acceptable documents to satisfy the requirements of Form I-9.

Individuals must also attest, under penalty of perjury on the Form I-9, that they are citizens or nationals of the United States, aliens lawfully admitted for permanent residence, or aliens authorized under the INA or by DHS to be hired, recruited, or referred for employment.² Employers are required to retain the completed Form I-9 and make it available for inspection by DHS or the U.S. Department of Labor ("DOL") for up to three years after the date of the individual's hiring or one year after the date the individual's employment is terminated, whichever is later.³

The problem with the paper Form I-9 process is, however, that few employers are trained to verify the authenticity of government-issued identification or work authorization documents, and must generally accept documents as valid when presented to them by recent hires. After the initial inspection, an incredibly few completed Form I-9's are ever revisited for audit compliance. This means that the Form I-9 verification process is vulnerable to fraud and abuse by both unauthorized workers and unscrupulous employers intending to exploit unauthorized labor.

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The E-Verify system, originally known as the “Basic Pilot Program”, is an internet-based system created by Congress and administered by DHS that addresses this issue by providing employers with an easy, quick, and simple way to verify the work authorization of new hires.⁴ The process requires employers to enter information provided by applicants on Form I-9.⁵ Regardless of whether an employer participates in E-Verify, federal law already requires all employees to complete Form I-9 within three days of beginning employment, and employers are required to retain a copy of this document.⁶ This information is entered into the E-Verify system through DHS’s free online portal. The program then validates applicant details by comparing them against millions of federal and state government identification, Social Security, and immigration records. The system typically provides a result within five seconds.⁷ The result will either say “employment authorized” or “DHS/SSA Tentative Nonconfirmation” (TNC).

If a new employee receives a TNC, the individual can contest the result with the Social Security Administration (SSA) or contact DHS within eight federal working days.⁸ Employers who use the system properly are generally protected from civil and criminal penalties regarding the hiring of an unauthorized worker who has been screened through E-Verify.⁹

Data Shows E-Verify Is Accurate and Doesn’t Impose a Significant Burden on Most Employers or Employees

E-Verify has a strong track record for accuracy. Data reported by the U.S. Citizenship and Immigration Services (USCIS) reveals a 99.87 percent accuracy rate for the program.¹⁰ Of the 42.5 million cases E-Verify processed in FY 2021, 98.48 percent of employees run through E-Verify were automatically confirmed as authorized to work either instantly or within 24 hours, requiring no further employee or employer action. E-Verify properly determined 1.39 percent of employees to not be authorized to work in the United States.¹¹ Of the 1.39 percent determined by the system to not be authorized to work, USCIS reported just 1.08 percent of cases as “unresolved”, either because the employer closed the case as “self-terminated” or because the case was awaiting further action by either the employer or employee at the end of FY 2021.

Concerns That E-Verify Will Erroneously Report Authorized Workers as Unauthorized Are Largely Unfounded. USCIS reported that in FY 2021, E-Verify flagged only 1.52 percent of cases with a TNC.¹² Of the 1.52 percent of cases not initially confirmed as work authorized, just 0.13 percent of these cases were determined to be inaccurately flagged and were later confirmed as work authorized after contesting the mismatch and resubmitting documentation to support their claim.¹³ A brief period of uncertainty for a very small percentage of cases that are initially flagged as TNC is, for many businesses, a relatively small price to pay to ensure that they are complying with federal law and not subjecting the business to serious civil and criminal liability.

Additionally, E-Verify imposes negligible burdens on participating employers, and the cost of running a new employee through the program is miniscule.¹⁴ The primary costs E-Verify imposes upon businesses are associated with the inputting of an employee’s Form I-9 information into the web-based system, which typically takes minutes to complete.¹⁵ Extra personnel should not be required to conduct this function because, as explained above, federal law already requires employers to conduct identity and work authorization verification regardless of participation in the program.¹⁶

Given the negligible administrative costs associated with E-Verify use and the benefits associated with participation, it is difficult to imagine an employer objecting to a mandate unless an employer purposefully violates or intends to violate Section 274A of the INA, or to otherwise discriminate against applicants on the basis of their citizenship or immigration status in violation of Section 274B of the INA.

E-Verify Participation Benefits Small and Large Businesses Alike

Importantly, E-Verify participation provides employers with a rebuttable presumption that the employer hasn’t employed an unauthorized worker in violation of Section 274A of the INA.¹⁷ (In the context of criminal and civil law, a rebuttable presumption is an assumption of fact accepted by the court unless explicitly disproven.) When compared to the civil and criminal penalties an employer may face as a result of engaging in the knowing employment of unauthorized workers, document fraud, tax fraud, Social Security fraud, conspiracy, or other immigration- and labor-related offenses, as well as opera-

tional costs businesses may incur by the sudden loss of needed employees, E-Verify provides participating employers with incomparable protection by allowing the government to verify that their workforce is authorized. There is no risk of legal consequences for using E-Verify properly.

E-Verify Continues to Be One of the Federal Government’s Highest User-Rated Programs

According to the 2020 American Customer Satisfaction Index (ACSI), E-Verify received a user satisfaction score of 87 out of 100,¹⁸ significantly surpassing the national average ACSI score of just 74, which includes both public and private sector programs.¹⁹ ACSI reports 2 percent of new enrollees and just 1.5 percent of existing E-Verify users contacted Technical Assistance in the past six months.²⁰ Additionally, the ACSI indicated that E-Verify received a score of 90 out of 100 for users’ likelihood to recommend, 93 out of 100 for user confidence in accuracy, and 95 out of 100 for continued user participation.²¹

Who Is Required to Use E-Verify?

Currently, federal law only requires the federal government, its contractors, and subcontractors to use E-Verify to confirm that their employees are authorized to work in the United States.²² As of July 2022, at least 20 states and numerous localities require all or some employers in their jurisdictions to use E-Verify, proving the feasibility of mass-implementation.²³ Just a handful of states require both public and private employers to use E-Verify, and almost all state laws that require E-Verify use include carve outs that allow some employers to avoid electronic verification of their hires’ work authorization statuses.

States Have the Legal Authority to Mandate E-Verify Participation

In 2011, the U.S. Supreme Court affirmed states’ authority to implement properly drafted E-Verify mandates. In *Chamber of Commerce of the United States of America v. Whiting*, the Court upheld Arizona legislation that requires all employers (public and private) to use the program.²⁴ In *Whiting*, the Court determined that the Legal Arizona Workers Act was valid and not preempted by federal law because its language mirrored federal requirements.²⁵ States, however, may not impose their own civil or criminal sanctions “other than through licensing and similar laws” upon those who employ, or recruit, or refer for a fee for employment, unauthorized aliens.²⁶

What About Employers Who Enroll in E-Verify, but Do Not Verify Everyone They Hire?

Critics of mandatory E-Verify laws often argue that mandates are ineffective at ensuring employers actually use the program to verify unauthorized workers when they are in fact *knowingly* hiring unauthorized workers, despite using the program to verify others. This type of large-scale improper (and usually criminal) E-Verify use is significantly easier for law enforcement to uncover than unlawful Form I-9 practices.

Employers who misuse E-Verify to hire unauthorized workers are subject to significant civil and criminal penalties,²⁷ including, but not limited to:

- Civil penalties for knowingly hiring unauthorized workers;²⁸
- Criminal penalties for making materially false, fictitious, or fraudulent statements or representation or false documents known to contain any materially false, fictitious, or fraudulent statements to the federal government;²⁹
- Criminal penalties for knowingly possessing identification documents with the intent to defraud the United States;³⁰

- Criminal penalties for using, obtaining, accepting, or receiving, any document prescribed by statute for the regulation for employment in the United States knowing it to be forged, counterfeit, altered, falsely made, or procured by fraud or unlawfully obtained;³¹
- Criminal penalties related to Social Security fraud;³²
- Criminal penalties related to tax fraud;³³ and
- Criminal penalties for conspiracy offenses.³⁴

Rather, this criticism underscores the need for an expansion of worksite enforcement efforts by the U.S. Immigration and Customs Enforcement (ICE) and rescission of policies, such as the October 12, 2021, policy memorandum “Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual”³⁵ and the October 27, 2021, policy memorandum “Guidelines for Enforcement Actions in or Near Protected Areas,”³⁶ that impede DHS’s ability to enforce immigration and labor laws.

Additionally, DHS should expand its collaboration with SSA and the Internal Revenue Service (IRS) to prioritize enforcement audits on employers who are most likely to be knowingly employing unauthorized workers. While DHS already possesses information about those aliens who are authorized to work in the United States, both the SSA and IRS possess information highlighting individuals who are likely to have committed identity theft in order to obtain a job unlawfully in the United States.

For example, the SSA has a long-held practice of sending “no-match” letters to employers that indicate possible instances of employment-related identity theft.³⁷ A no-match letter is a “written notice issued by the SSA to an employer, usually in response to an employee wage report, advising that the name or SSN reported by the employer for one or more employees does not ‘match’ a name or SSN combination reflected in SSA’s records.”³⁸ Additionally, the Treasury Department’s Inspector General for Tax Administration reported in 2020 that IRS is aware of hundreds of thousands of instances of employment-related identity fraud, where an individual is using or has used another person’s SSN for the purpose of obtaining employment.³⁹

Widespread E-Verify use, combined with adequate worksite enforcement, are two of the most effective tools DHS has to execute its mission (as determined by Congress), improve labor conditions in the United States, and address the root causes of illegal immigration into the United States.

DHS Should Allow Employers to Accept Only Identification Documents that DHS Can Authenticate

E-Verify can be even more resilient to identity fraud to protect against cases in which unauthorized employees “borrow” documents that belong to authorized workers. DHS should reform the verification process by allowing employers to accept licenses and identification cards only from states that provide DHS access to data sources that will allow them to validate the authenticity of the document. Making such a policy change will encourage more states to join the Records and Information from DMVs for E-Verify (RIDE) program or otherwise provide DHS access to their driver’s license and identification card data sources for verification purposes. RIDE helps to reduce document and employment eligibility verification fraud in E-Verify.⁴⁰ Expanding participation would ensure that DHS is able to increase photo-matching and weed out, penalize, and discourage document fraud and identity theft through E-Verify use.

DHS Should Modernize the Work Authorization Process with “G-Verify”

Second, the federal government could modernize the work authorization verification process by implementing a reform known as “G-Verify” (for “government verification”). G-Verify was originally proposed by William Chip, a senior counselor to the secretary of Homeland Security in the Trump administration and a member of the Center for Immigration Studies board of directors, as a means to simplify employer’s on-boarding obligations while simultaneously strengthening the integrity of the work authorization verification process. A G-Verify rule was drafted but not published in the Federal Register.

Congress or the executive branch could enact G-Verify by imposing a single online filing requirement through legislation or regulatory changes, respectively, to replace employers' Form W-2, Form I-9, and E-Verify obligations. By simply requiring employers to submit the same information already required for these forms to the government electronically, G-Verify would relieve employers of the need to store the paper copies of the forms for future audits and, like E-Verify, would provide employers with nearly instant confirmation that a new hire may lawfully be employed in the United States. G-Verify reforms could also deter identity theft and make unlawful employment schemes easier for DHS to uncover.

Why Do E-Verify Mandates Matter Now?

Since March 2020, since the Covid pandemic, DHS has permitted many employers to defer the physical examination of identity and work authorization documents by inspecting such documents remotely (e.g., over video or email) within three days of the employee's first day of employment.⁴¹ Remote document examination increases these vulnerabilities by increasing the likelihood that an employee will present fraudulent documents to support their claim of work authorization. Equally troubling, the remote verification flexibilities will give corrupt employers additional cover to knowingly hire unauthorized workers in violation of statute.

DHS initially applied this guidance only to employers and workplaces that were operating remotely, but has permitted remote document verification for any recent hire who worked exclusively in a remote setting due to Covid-19-related precautions until they undertook non-remote employment on a regular, consistent, or predictable basis, regardless of whether the workplace was operating entirely remotely.⁴² DHS extended these leniencies repeatedly through FY 2022. The most recent announcement expired October 31, 2022.⁴³

On August 18, 2022, DHS issued a notice of proposed rulemaking ("NPRM"), titled "Optional Alternatives to the Physical Document Examination Associated with Employment Eligibility Verification (Form I-9)", to provide the secretary of Homeland Security regulatory authority to impose alternate work authorization verification procedures.⁴⁴ The department cites the "rapid shift to telework and remote work" in response to the Covid-19 pandemic as the primary incentive for proposing the rule, stating that the department recognizes that many employers have maintained these flexibilities with their staff "by choice rather than necessity".⁴⁵ As a result, DHS reported that it is exploring "making permanent some of the COVID-19 pandemic-related flexibilities" to examine employees' identity and employment authorization documents for the Form I-9, as well as other alternatives.⁴⁶

Eradicating unauthorized employment is also essential to enforcing both immigration and labor laws as a whole. For this reason, the Jordan commission concluded "that both employer sanctions and enhanced labor standards enforcement are essential components of a strategy to reduce the job magnet."⁴⁷ Additionally, by reducing incentives to enter or remain in the United States illegally, effective worksite enforcement likewise allows ICE to focus its resources on its stated enforcement priorities: criminal aliens and aliens who pose threats to border or national security.⁴⁸

As many American workers understand too well, employers who hire unauthorized workers often violate other employment and labor laws, including those related to antidiscrimination, health, and safety. DHS itself acknowledged in its October 12 memorandum that, "These employers engage in illegal acts ranging from the payment of substandard wages to imposing unsafe working conditions and facilitating human trafficking and child exploitation. Their culpability compels the intense focus of our enforcement resources."⁴⁹ Equally important, unchecked unauthorized employment causes substantial economic hardship to U.S. workers who may face unfair labor competition, wage suppression, and reduced working conditions as a result of contending against an illegal and unregulated labor market.

Conclusion

By requiring employers to use E-Verify to confirm the work authorization of their new hires, employers with limited resources are able to quickly and easily confirm that the documents provided by a new employee have been issued to them, have not been altered, and match government data systems. Since using the E-Verify system is free, the personnel costs associated with data-entry are the only burden it imposes on businesses.

E-Verify is the best means available to verify employment authorization of newly hired employees because it virtually eliminates Social Security mismatches, improves wage and tax reporting accuracy, and helps employers maintain a legal workforce, thereby protecting U.S. workers from unfair employment competition.⁵⁰ Mandating E-Verify use and resuming widespread worksite enforcement operations will strengthen the integrity of the work verification process and eliminate a primary pull-factor for illegal immigration into the United States.

End Notes

¹ Barbara Jordan, chairwoman, U.S. Commission on Immigration Reform, [testimony before the U.S. Senate Committee on the Judiciary, Subcommittee on Immigration and Refugee Affairs](#), August 3, 1994.

² INA § 274A(b)(2).

³ INA § 274A(b)(3).

⁴ *Ibid.*

⁵ [“E-Verify overview”](#), U.S. Citizenship and Immigration Services, April 2018.

⁶ INA § 247A(a)(1)(B).

⁷ [“E-Verify Overview”](#), U.S. Citizenship and Immigration Services, July 2022.

⁸ [“Employee Rights and Responsibilities”](#), U.S. Department of Homeland Security, April 2018.

⁹ [“E-Verify User Manual for Employers”](#), U.S. Citizenship and Immigration Services, April 2018.

¹⁰ [“E-Verify Performance”](#), U.S. Department of Homeland Security, January 2021.

¹¹ *Ibid.*

¹² [“E-Verify Performance”](#), U.S. Department of Homeland Security, July 2021.

¹³ *Ibid.*

¹⁴ [“E-Verify is Business Friendly”](#), U.S. Citizenship and Immigration Services, April 2018.

¹⁵ *Ibid.*

¹⁶ INA § 274A.

¹⁷ [“Why Should I participate in E-Verify”](#), U.S. Citizenship and Immigration Services, April 2014.

¹⁸ [“Annual Customer Satisfaction Survey 2019 E-Verify”](#), U.S. Citizenship and Immigration Services, June 2020.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² [“E-Verify and Form I-9”](#), U.S. Citizenship and Immigration Services, July 2022.

²³ [“E-Verify: History and Milestones”](#), U.S. Citizenship and Immigration Services, July 2022.

²⁴ *Chamber of Commerce v. Whiting*, 563 U.S. 582 (2011).

²⁵ *Ibid.*

²⁶ INA § 274A(h)(2).

²⁷ Andrew Arthur, [“Proof E-Verify Works”](#), Center for Immigration Studies, September 9, 2019.

²⁸ INA § 274A(e)(4).

²⁹ 18 U.S.C. § 1001(a).

³⁰ 18 U.S.C. § 1028.

³¹ 18 U.S.C. § 1546.

³² 42 U.S.C. § 408.

³³ 26 U.S.C. § 7206(1).

³⁴ 18 U.S.C. § 371.

³⁵ Memorandum for Tae Johnson, acting director, U.S. Customs and Immigration Enforcement, et al., from Alejandro Mayorkas, secretary, U.S. Department of Homeland Security, “Re: Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual”, October 12, 2021.

³⁶ Memorandum for Tae Johnson, acting director, U.S. Customs and Immigration Enforcement, et al., from Alejandro Mayorkas, secretary, U.S. Department of Homeland Security, “Re: Guidelines for Enforcement Actions in or Near Protected Areas”, October 27, 2021.

³⁷ SSA began sending employers “no-match” letters in 1993. The practice was terminated by the Obama administration in 2012, but restarted by the Trump administration in 2019.

³⁸ [“Frequently Asked Questions About Name/Social Security ‘No-Matches’”](#), U.S. Department of Justice, October 16, 2022.

³⁹ [“Taxpayer First Act: Implementation of Identity Theft Victim Assistance Provisions”](#), Reference Number: 2020-45-070, Treasury Inspector General for Tax Administration, September 10, 2020.

⁴⁰ [“Tips for Entering Driver’s Licences and ID Cards in E-Verify”](#), U.S. Department of Homeland Security, undated.

⁴¹ [“DHS announces flexibility in requirements related to Form I-9 compliance”](#), U.S. Customs and Immigration Enforcement, last updated March 31, 2021.

⁴² See [“ICE announces extension, new employee guidance to I-9 compliance flexibility”](#), U.S. Customs and Immigration Enforcement, April 1, 2021; [“DHS Extends Form I-9 Flexibility \(Effective Mar. 31, 2021\)”](#), U.S. Citizenship and Immigration Services, March 31, 2021; [“ICE announces extension, new employee guidance to I-9 compliance flexibility”](#), U.S. Immigration and Customs Enforcement, April 1, 2021.

⁴³ See [“DHS Extends Form I-9 Requirement Flexibility \(Effective May 1, 2022\)”](#), U.S. Citizenship and Immigration Services; [“ICE announces extension to I-9 compliance flexibility”](#), U.S. Customs and Immigration Enforcement, April 25, 2022, update.

⁴⁴ 87 Fed. Reg. 50786 (August 18, 2022).

⁴⁵ 87 Fed. Reg. 50786, 50789 (August 18, 2022).

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Memorandum for Tae D. Johnson, acting director, U.S. Immigration and Customs Enforcement, et al., from Alejandro Mayorkas, secretary, U.S. Department of Homeland Security, “Re: Guidelines for the Enforcement of Civil Immigration Law”, September 30, 2021.

⁴⁹ *Ibid.*

⁵⁰ See [“What is E-Verify”](#), U.S. Department of Homeland Security, December 2020.