

IN PRACTICE

IMMIGRATION LAW

Possibility of the E-Verify Program in New Jersey

Mandates employers confirm employment eligibility of workers

BY ALKA BAHAL

New Jersey has become the latest state to consider requiring employers to use the federal government's controversial E-Verify system to check the legal status of employees, with the presentation of legislation in the New Jersey State Senate barring the employment of unauthorized workers and requiring all employers with the presentation of legislation to impose civil penalties on noncompliant companies.

On May 10, Sen. Robert W. Singer (R) and Sen. Steven V. Oroho (R) introduced a bill (*S. 1842*) that would require New Jersey employers to verify the legal status of their new hires using the federal government's E-Verify program. The proposed bill would mandate that all employers in the state who employ 100 or more employees to verify the employment eligibility of all new workers through the E-Verify program beginning Jan. 1, 2011; employers with fewer than 100 employees would have until Jan. 1, 2012, to abide by the law.

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In addition, the bill would also require that the Commissioner of New Jersey's Department of Labor and Workforce Development develop and implement a statewide auditing program to randomly inspect employers for compliance with the E-Verify requirement and also to institute an investigation if the commissioner finds reasonable grounds exist that an employer allegedly violated the proposed bill's E-Verify requirement, in response to a written and signed complaint against a specific employer or based upon the agency's own examination for good cause.

Proposed penalties include fines ranging from \$100 and \$1,000 per violation and for employers found to have knowingly or intentionally employed unauthorized aliens, up to five years of a probationary period during which the employer will be required to submit quarterly reports for each new hire and file a sworn affidavit within three business days of the order with suspension of its business license until the affidavit is filed. Penalties for subsequent violations include suspension and permanent revocation of the employer's business license. The bill has been referred to the Senate Labor Committee.

E-Verify is an online database jointly administered by the Department of Homeland Security (DHS) and the Social Security Administration (SSA) that enables participating employers to verify the work authorization of newly hired employees by checking the information employees provide on their Form I-9 against both DHS and SSA databases. Although participation in E-Verify is voluntary in principal, certain federal contractors and their subcontractors are now obligated to participate.

In grappling with ways to make immigration laws enforceable, many policymakers believe that an effective, mandatory system to check work authorization would deter illegal immigration by making it harder for undocumented immigrants to find jobs in the United States, theoretically, more effectively than border enforcement and immigration raids alone. Although President Obama has called for it to become the law of the land as part of a comprehensive immigration overhaul, E-Verify remains the subject of heated debate. Much of the criticism of E-Verify has focused on whether U.S. citizens and legal immigrants with permission to work are being falsely flagged as unauthorized.

Supporters of E-Verify say the system is quick and easy and has become increasingly accurate in recent years, feeling it improves on the basic I-9 system in two ways. First, it successfully identifies (nonconfirms) unauthorized workers who present traditional false documents because the information in the false document does not match the records in

the database. Second, E-Verify may also serve to reduce some types of immigration-related employment discrimination by encouraging employers not to engage in “defensive hiring,” or avoiding workers who appear as if they might be unauthorized, and/or subjecting those individuals (typically people of color) to greater scrutiny.

But critics say that besides the fact that the database remains fraught with error and could lead to wrongful hiring decisions, electronic verification does not, by itself, prevent unauthorized employment. They claim that mandatory E-Verify without broader immigration reforms fails to substantially reduce illegal migration and may produce worse outcomes than are observed in the current system.

Oppositionists say that the negative outcomes of E-Verify include the false non-confirmations of legal workers, potential for encouraging discrimination against workers who appear foreign and promoting more ‘off-the-books’ hiring, thereby creating an underground economy where laborers are severely disadvantaged.

Those against mandatory use of E-Verify argue the system is limited in three respects. First is the persistence of database errors which result in false non-confirmations, negatively affecting both legal workers and employers. Although USCIS reports that ‘most’ appeals of tentative non-confirmations are resolved in a few days, many employers and workers have reported significantly longer delays as well as complained about the amount of effort required to resolve the false non-confirmation (typically involving appearing in person at SSA or another office multiple times). Because this can cause a relatively long period of uncertainty about the employees’ status, employers may prematurely draw conclusions as to that employee’s immigration status or work eligibility.

Second, E-Verify cannot detect identity fraud or the use of legitimate (work-authorized) name and ID data by someone other than its true owner. This creates the unintended consequence of encouraging identity theft.

Third, privacy experts warn that the system currently has no safeguards in place to ensure that entities enrolling in E-Verify are legitimate employers that will

only use the system for employment verification and that the system also allows for better access to data (including employees’ Social Security number which is not currently required to be entered on a paper I-9 form for non-E-Verify participants) in an electronic format, with lower barriers to copying and transmission.

Westat, an independent research company which evaluated the E-Verify system for the DHS, indicates that in approximately 96 percent of cases an employee’s work authorization status was accurately identified and remaining 4 percent resulted in a finding that was inconsistent with the worker’s true employment-authorized status. The report estimates that the total inaccuracy rate is approximately 4.1 percent and results from identity fraud, out-of-date or inaccurate database records and data input errors. The report goes on to explain, however, that the inaccuracy rate for unauthorized workers is approximately 54 percent, primarily due to identity fraud.

The report points out that employment-authorized foreign-born workers were more than 20 times more likely to incorrectly receive nonconfirmations than are U.S.-born workers, largely due to out-of-date SSA and USCIS database information, potentially contributing to a discriminatory impact on foreign-born workers.

The report also outlines multiple issues with the system, including employers’ failure to follow procedures (including not terminating employment when there is no confirmation, failing to inform employees of findings in private, failing to inform them at all and taking adverse actions against employees during the appeal process, thereby denying them their rights to due process under E-Verify).

Bills of this nature have never before progressed very far in the New Jersey legislature. In June 2009, there was an earlier version of the bill prohibiting the employment of unauthorized workers and requiring verification. As early as November 2007, an even earlier version appeared which did not require verification, but penalized employers for hiring unauthorized workers by barring it from any public contract, grant, loan or tax incentive for seven years. The success or failure of similar laws in other states may influence how much traction this bill will get in New Jersey’s state’s legislature, and

ultimately before Gov. Christie.

As the first U.S. state to successfully mandate the use of E-Verify, Arizona offers some evidence, most of it anecdotal thus far, on the effects of E-Verify. The law, dubbed “The Legal Arizona Workers Act,” was challenged by business and civil rights groups in federal district court on the grounds that it conflicted with federal law, violated constitutional due process rights, increased discrimination against foreign-born workers and would cause severe economic hardship to the state. Ultimately, however, the Ninth Circuit Court of Appeals rejected the claims and the law has been in effect since January 1, 2008, despite continuing concerns over a possible negative impact on Arizona workers and employers, and the state’s economy.

Arizona’s law requires that all employers in the state use E-verify for new hires and imposes state penalties on employers who “knowingly” or “intentionally” employ undocumented workers, including the possible suspension or revocation of business licenses, and additional reporting and compliance requirements. As of February 2009, fewer than 30,000 out of more than 110,000 businesses in the state had signed up for E-Verify. Arizona employers feel that currently the law’s impact is minimal because the economic downturn in the state has limited the number of new hires, but they fear that they will be at a disadvantage relative to employers in neighboring states when the economy recovers.

Reportedly, the law has encouraged a movement from a formal to an informal economy, increased the prevalence of identity fraud and resulted in cases of U.S. citizens and other legal workers being denied employment because of false non-confirmations.

Gov. Chris Christie has not spoken directly on the topic of E-Verify, but prior public statements indicate that he may have a more nuanced appreciation for the “immigration issue” than many of his colleagues. The New Jersey State Legislature and the Governor will have to carefully analyze the potential impact to the state as well as remain attuned to the federal government’s activities in this area in order to make any decisions regarding an E-Verify-related bill in New Jersey. ■