

1. What is E-Verify?

E-Verify is a web-based system that compares employees' I-9 data with the Department of Homeland Security (DHS), Social Security Administration (SSA), and Department of State (DOS) records to confirm employment eligibility. To use E-Verify, employers submit information provided on an employee's Form I-9 to the E-Verify website.

2. Is E-Verify mandatory?

For most employers participation in E-Verify is voluntary. However, it is mandatory for all federal employees and all companies operating under federal contracts that include the Federal Acquisition Regulation (FAR) clause.

When registering as a federal contractor, employers must decide whether to verify their entire workforce or only do so going forward for employees who are hired for or are assigned to the federal government contracts.

In certain states E-Verify is required for new hires when contracting with the state and/or local government. There are other states where E-Verify is required for all or some employers. Each state has passed legislation to enforce their E-Verify state law(s). The major enforcement tool for violations is the loss of the business license for a set period of time.

3. Should my company enroll in E-Verify or not?

There are many factors to consider when determining if E-Verify is right for your business.

For certain employers, the E-Verify system is mandatory. For those employers where E-Verify is voluntary, potential drawbacks and benefits should be considered.

The E-Verify system extends and adds responsibilities to the onboarding process. The employer is also essentially committing to real-time I-9 audits as the E-Verify data is entered.

Here are a few questions to consider:

a. ***Does my company have the staff to handle E-Verify?***

If your company has a hard time getting the I-9 form right, then generally, you might not want to undertake adding E-Verify, which can be more complex.

E-Verify will change and lengthen the onboarding process. Additionally, there are many government agencies that have access to the E-Verify data. USCIS Verification Division, the Monitoring and Compliance branch analyzes the information received from E-Verify participating employers in real-time and monitors compliance.

*This material is not intended to substitute as legal advice.

b. How will E-Verify impact my particular workforce?

E-Verify has a disparate impact on non-citizens and certain races, in part, because of potential spelling mistakes and more complex verification process.

c. What is my potential exposure?

Employers walk a fine line to comply with Section 274-A, the I-9 verification and compliance requirement, and Section 274-B, the nondiscrimination provisions.

USCIS does not share the characteristics of the E-Verify system's backend, so you must do what you can on the front end to avoid a perception of discrimination or other wrongdoing and have a defense ready for when law enforcement investigates.

d. Are there special considerations if my company employs union workers?

Yes. E-Verify must be bargained with the union.

4. How do I enroll in E-Verify?

To participate in E-Verify, an employer must register online at the DHS E-Verify page and accept the applicable electronic Memoranda of Understanding (MOU) that details the responsibilities of the SSA and the DHS, and the employer.

5. How can an immigration attorney help with the process?

An immigration attorney can help ensure you have the proper process in place. Part of the process involves evaluating the following:

- How many employees do you have?
- How many hiring sites do you have?
- Who does hiring? Is it HR, a foreman, someone else?
- What states do you work in? Where do you need to E-Verify?
- Do you have federal contracts that contain the FAR clause?

From there, your attorney can help you strategize the best way to implement the system from an operational standpoint. This will include:

- A written policy
- A plan for annual training
- An I-9/E-Verify "czar," the go-to person for all related questions at the company
- A script for self-audits

Training is particularly important. If you are under investigation, the OSC will ask you to identify the training you do, including what kinds of training materials you use. The USCIS website has training materials, so you do not necessarily have to develop all the training materials yourself; you can start with those documents.

The "czar" is important, because even with training, there will be questions that arise for both the I-9 and E-Verify. The I-9 form may only be two-pages, but it has a lengthy handbook to guide the form's completion. E-Verify is similarly complex with many quirks. Once a plan is in place, you should revisit it after a year.

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6. What results should I expect from E-Verify?

After the employers submit the information provided on an employee's Form I-9 to the E-Verify website, the E-Verify system will return one of seven results:

- a. "Employment authorized": The employee is employment authorized.
- b. "SSA Tentative Nonconfirmation" (TNC): The employee's information does not match the records in the SSA database.
- c. "DHS Tentative Nonconfirmation" (TNC): The employee's information does not match the DHS database.
- d. "DHS Verification in Process": DHS will usually respond within 24 hours, though it may be up to three federal government workdays, with a reply of "Employment Authorized," "DHS Case in Continuance," or "DHS Tentative Nonconfirmation."
- e. Case in Continuance: The employee has visited an SSA field office or contacted DHS, but more time is needed to determine a final case result.
- f. Close Case and Resubmit: SSA or DHS requires that you close the case and create a new case for this employee. This result may result from the employee's information being incorrect.
- g. Final Nonconfirmation: E-Verify cannot confirm the employee's employment eligibility after the employee visited SSA or contacted DHS.

7. How should my company prepare for government visits?

You should have an action plan in place for visits by law enforcement. Have a policy that requires: if a law enforcement official visits your worksite, to call the designated individuals immediately.

Everyone who is front-facing at the worksite should know this policy. This can prevent employees from inadvertently exposing you to potential lawsuits or violations.

8. What if I do business across the country but am only required to use E-Verify in certain states?

You may choose to only E-Verify employees working in those particular states and continually monitor which states adopt mandatory E-Verify legislation. However, many companies find that it is too difficult to stay on top of these changes and simply choose to use E-Verify nationwide.

9. What should I look at when considering different electronic I-9 systems?

You should always look at screenshots and go through a demo of the software. You should also have IT personnel look at it from a technical standpoint. Here are a few things to consider during the evaluation process:

- Does it include easy access to instructions for each section?
- Does it include the lists of accepted documents?
- How does the software let employers know when there are updates or changes?
- How much will they indemnify for in the case of a data breach?
- What liability provisions are in place to minimize your exposure and risk?
- Do you have access to your data in the case of an audit?
- Who owns that data – you or the software provider?
- How is that data protected?

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10. What should I do if my company is subject to an E-Verify audit?

Companies are best advised to retain outside counsel. This can provide privilege and protection from certain data collected during the course of an audit.

Information that is collected or prepared and advice that is given in reasonable anticipation of litigation is protected under attorney work product privilege. When the documents are prepared, they can be marked “In Anticipation of Litigation” when applicable in order to protect the privilege.

11. What should be considered in the case of a merger or acquisition (M&A)?

For M&A, you should look at who holds liability for the I-9s and obtain the existing E-Verify data.

If you change E-Verify accounts, you lose access to the old one, and thus won't be able to show compliance for the old E-Verifications. You should pull all the E-Verify information you need prior to making the change.

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