State Immigration Laws Add to Employers' Hiring Burdens

States have joined the immigration fray out of frustration over our porous borders and lack of federal enforcement of existing laws designed to keep illegal immigrants from being employed. Here's a survival guide for employers caught in the cross-fire of state and federal regulations.

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This chapter reviews state laws on employers' obligations for verifying employment eligibility. Enacted and proposed state laws vary widely, ranging from Arizona's requirement that all employers use the Department of Homeland Security's (DHS) Social Security E-Verify program, to the Illinois law that prohibits use of E-Verify until certain quality benchmarks are attained.

To provide context for the state-law overview, this chapter begins with a brief overview of federal regulations on verifying employee eligibility, with emphasis on recent developments. Readers also will learn about the new I-9 Form, the status of proposed DHS rules and the pros and cons of using E-Verify, DHS' Web-based system for employers. The chapter includes tips on compliance with the maze of state and federal regulations.

Federal Regulation of Employment Eligibility

Current federal regulation of employment eligibility consists of the Immigration Reform and Control Act of 1986 and other federal processes.

The Immigration Reform and Control Act of 1986 (IRCA)

IRCA prohibits employers from knowingly hiring, or continuing to employ, any person not authorized to work in the United States.

Within three business days, the employer must verify a new employee's identity and authorization to work. To conduct this verification, the employer completes a Form I-9 (Employment Eligibility Verification Form). Employers are not required to complete Form I-9 for independent contractors.

On the day of hiring or on the first day of work, the employee completes Section 1 of Form I-9 and provides documentation of identity and work eligibility. The presented documents must be originals and must include one document from the Form I-9's List A,

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OR one document from List B AND one from List C. In 1996, Congress revised the list of documents acceptable for establishing identity, and in 2007, DHS published a new Form I-9. Lists of acceptable documents are shown on page 2 of the new form, which has "Form I-9 (Rev. 05/07/07) N" printed on its lower right corner. (The English version of the new Form I-9 along with instructions on completing the form are shown in the Appendix to this chapter on page 155.)

The employer reviews the presented documents and completes information about them in Section 2, Employer Review and Verification. The reviewer must attest that the documents "appear to be genuine."

The forms are not submitted to any agency. Rather, they must be filed and made available during any audits the DHS, U.S. Immigration and Customs Enforcement (ICE), the U.S. Department of Labor or other federal agencies might conduct.

For years, there was minimal enforcement of IRCA. Perhaps the law's greatest impact was to create a cottage industry of document counterfeiting. Due to a federal crackdown in recent years on hiring illegal workers, employers that once considered modest administrative fines a cost of doing business are now complying to a greater degree.

Sanctions can be imposed on company officials for hiring unauthorized workers, improperly completing I-9 forms and failing to retain I-9 forms. Fines start at $110 for "paperwork" violations, but company officials can receive fines up to $16,000 for each unauthorized worker and jail sentences for engaging in a "pattern or practice" of knowingly hiring or continuing to employ unauthorized workers.

DHS' E-Verify Program

Originally called the Basic Pilot Program, E-Verify is a voluntary, Internet-based system that allows employers to verify electronically the employment eligibility of their newly hired employees. So far, participation in the program is free. By law, E-Verify cannot be used to pre-screen prospective employees.

Employers can opt to use E-Verify at some work sites and not others. However, each site that signs up to use E-Verify must use it for all new hires at that site.

To use E-Verify, employers log on to a DHS Web site. They enter information on a screen form, using information they already have from the I-9. The Social Security Administration (SSA) database then checks the validity of the name and Social Security number (SSN). For foreign-born employees, DHS' database checks the employee's legal work status.

Most new hires submitted with E-Verify – about 93 percent – are found to be work-authorized. Employers receive responses to most inquiries almost immediately, but some initial queries require DHS employees to confirm manually.

E-Verify can be a time-saver, especially for employers with high percentages of foreign-born workers. It identifies unauthorized workers long before annual W-2 forms trigger the SSA to send "no-match" letters.

DHS encourages employers to participate in the E-Verify program. While only a small fraction of U.S. employers currently participate in E-Verify, usage is expected to soar as more states require contractors, subcontractors or all private employers to enroll in eligibility verification programs.

According to U.S. Citizenship and Immigration Services (USCIS), about 52,000 employers were using E-Verify in January 2008, with about 1,000 additional employers signing up per week. DHS predicts 300,000 users in fiscal 2009. That amounts to only 5 percent of the 6 million U.S. employers – or 13 percent if you only consider companies with more than four employees (based on U.S. Census Bureau statistics for 2005).

Some states now require or give employers incentives to use E-Verify (see box on page 145).

However, critics claim the E-Verify system has serious flaws. According to a government-commissioned evaluation, the system is vulnerable to erroneous data employers submit. Something as simple as transposing two digits in an SSN or misspelling a name can lead to harsh consequences. If the employee cannot resolve the discrepancy, he or she must be dismissed.

Injunction Leaves New DHS Rules and Employers in Limbo

Even without the burdens of widely varying state regulations, federal processes for verifying employment eligibility confuse many employers. In some cases, an employer's staff must navigate a bewildering maze of rules, and make difficult choices and interpretations that presume a great deal of legal knowledge.

Much of the confusion centers on so-called Social Security "no match" letters. The SSA attempts to match E-Verify inquiries and W-2 forms, both of which contain a worker's name and SSN, with valid SSNs in its database so reported earnings can be posted to the right records. When information in an E-Verify inquiry or W-2 does not match the database, SSA sends the employer a "no match" letter.

It is not a notification of any employee or employer wrongdoing. Innocent reasons for mismatches include misspellings, transpositions, unreported name changes and other inaccuracies or clerical errors.

The steps employers and employees should take to resolve no-match letters are found in DHS regulations issued on Aug. 15, 2007. In general, the rules gave employers 30 days to determine if the mismatch resulted from a clerical error; an employee had 90 days from the date the employer received the mismatch letter to clear up any discrepancy with SSA. The regulations also gave employers a "safe harbor" from immigration sanctions based on no-match letters if they followed certain procedures.

The DHS rules sparked an uproar from employers. Many feared that under the rules, the mere receipt of a no-match letter would constitute "knowing" employment of unauthorized workers, subjecting company officials to criminal liability and civil fines.

In October 2007, a U.S. district court found serious defects in the regulations. The court issued a preliminary injunction, rendering the rules unenforceable until DHS issues revised no-match rules. Meanwhile, SSA suspended its plans to issue no-match letters to 140,000 employers, based on 2006 W-2s, until revised DHS rules are issued.

As of March 2008, employers and their immigration attorneys, as well as the SSA and several other government agencies, are in limbo awaiting the final no-match rules. Some observers predict the DHS will issue new rules in 2008. Others feel that any changes are unlikely before Congress again tackles immigration reform, which may not happen until 2009 or later.

Prepare for Worst Case

Meanwhile, DHS' pre-Aug. 15, 2007, rules and polices remain in effect. For employers trying to decide what to do, that is a double-edged sword. On one hand, the old rules put employers under less onerous obligations than the new rules would have imposed. On the other hand, employers would be wise to use the waiting period to prepare for "the worst case" by setting up procedures for complying with the more rigid rules.

In any case, employers need to be diligent in completing Form I-9. Most human resources (HR) professionals take pride in their attention to detail – a trait that is definitely required for this task. Still, employers are advised to implement self-audit procedures to detect any problems (see box on next page).

Warn New Hires of Consequences From Misstatements

A suggested protection for employers is to warn applicants and new employees in writing that they can be fired for any falsehoods on their application or other employment forms. The warning should be among the first documents shown to a new employee. It can be a form the employee signs, or a paragraph that the HR professional points out in the company's employee handbook. Suggested text for the warning in an employment application:

> I understand and agree that the information I have provided on this application is true and complete to the best of my knowledge. Any misrepresentation or omission of any fact in my application, resume, or any other materials, or during any interviews, can be justification of refusal of employment, or, if employed, termination from [company name]'s employ.

An employer's obligation to ensure that employees are eligible to work does not stop with initial completion of the I-9 form. If the employer later believes that an employee's I-9 has false statements or was based on fraudulent documents, a new I-9 must be completed. Or the employee can be dismissed as part of a nondiscriminatory policy against false statements (see box above).

USCIS provides a helpful training aid for HR staff on using the new Form I-9. USCIS's "Handbook for Employers: Instructions for Completing the I-9" has answers to frequently asked questions and up-to-date explanations of employer obligations. The handbook for employers can be downloaded at http://www.uscis.gov/files/nativedocuments/m-274.pdf.

States Fill Perceived Void

Lack of immigration reform at the federal level prompted state legislatures to fill a widely perceived void in enforcement of existing U.S. laws. Even before Congress failed to pass immigration reform legislation in 2007, states began to act.

In the first half of 2006, 30 states had considered more than 75 bills targeting employers of illegal immigrants – and 44 of them were enacted, according to the July 11, 2006, edition of *The Christian Science Monitor*. The article quoted Mark Krikorian, director of the Center for Immigration Studies, a research group favoring stricter immigration measures:

> States are clearly not waiting around until Congress solves the impasse on legislation. They feel the federal government has abdicated its responsibility to enforce immigration laws so states and localities are picking up the slack wherever they can.

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11 Tips to Comply With Employment Immigration Laws

1) Keep I-9 records separate from other personnel records.
2) Purge records as soon as the law allows.
3) Be consistent in how you treat every new employee.
4) Use only a few well-trained staffers for I-9 processing.
5) Closely monitor expiration of temporary work authorizations.
6) Accept only original verification documents from employees.
7) Don't over-document or interrogate applicants or over-scrutinize their proof documents.
8) Complete I-9 forms on time.
9) Watch for new I-9 regulations, possibly in 2008.
10) Monitor proposed immigration legislation in states where you do business.
11) Implement self-audit procedures.

States feel they are "left holding the bag" to cope with the high burdens immigrants put on education, health care, social services and penal systems, the article added.

States also have enacted numerous immigration measures related to public benefits, minimum compensation, driver's licenses, gun permits, housing, identifying nationality of prisoners, human trafficking and other areas. A few examples are below.

Sampling of State Immigration Laws

- Alabama may require a state-issued ID card;
- Colorado's new laws impose hefty fines for making counterfeit identification documents;
- Oklahoma makes it a felony to transport, conceal or shelter illegal immigrants; and
- many states are requiring applicants for various state-funded benefits to prove they are in the U.S. legally.

We mention these only to emphasize the degree to which states have embraced their citizens' concerns over illegal immigration.

The Early State Models

Below is a further discussion of new immigration laws passed in Colorado, Georgia and Oklahoma, and Arizona's fending of a court challenge to its new immigration law.

Georgia

Seeking to discourage employers from hiring illegal immigrants, Georgia enacted its own employment verification law. On April 17, 2006, Gov. Sonny Perdue (D) signed into law the Georgia Security and Immigration Compliance Act (S.B. 529). The law was one of the first state laws requiring employers to verify the legal immigration status of new hires. Georgia's law became a model for subsequent legislation in other states.

The law requires all public employers – defined as any department, agency or instrumentality of Georgia or its political subdivisions – to verify that all newly hired employees are eligible to work in the United States. The same requirements apply to businesses

contracting with state, county or municipal governments. The law applies to all contractors and their subcontractors, including contract employees, staffing agencies and "any contractor regardless of tier."

The law's effective date phases in as follows:

- effective July 1, 2007, for public employers, contractors and subcontractors with 500 or more employees;
- effective July 1, 2008, for public employers, contractors and subcontractors with 100 to 499 employees; and
- effective July 1, 2009, for all other public employers, contractors and subcontractors.

To verify worker eligibility, Georgia requires the employer to register for and use a "federal work authorization program," meaning the E-Verify program operated by USCIS and the Social Security Administration.

For state income tax purposes, Georgia public employers, contractors and subcontractors may not claim wages of $600 or more as a deductible business expense for any ineligible employee hired on or after Jan. 1, 2008. State income taxes must be withheld on any payments to an individual to be reported on IRS Form 1099 if that person does not have federally approved identification or a valid license or identification card from the Georgia Department of Driver Services.

Rules necessary for administering and enforcing the law have been published on the Georgia Department of Labor's Web site (*http://www.dol.state.ga.us/pdf/rules/300_10_1.pdf*). Some of the key provisions follow (see box).

Key Provisions of Georgia's Immigration Law

- Public employers must include the law's requirements in their contracts for performance of services in Georgia.
- Companies holding public contracts must sign a compliance affidavit and must agree to secure affidavits of compliance from any subcontractors.
- Each public employer must certify its registration and participation in E-Verify with its agency head.
- Each public employer must designate an individual to monitor new employee work eligibility verification.
- The state Department of Labor is directed to review compliance through random audits of public employers, their contractors and subcontractors.
- Public employers and contractors are required to "keep true and accurate records of all documents utilized to accomplish and substantiate such compliance." This language has some ambiguities, but appears to require that the employer must keep copies of all documents the employee presented to establish identity and eligibility.

Colorado

After a special session of the Colorado legislature in July 2006, Gov. Bill Owens (D) signed a sweeping series of tough immigration laws. Among them is the Colorado Employment Verification Law (H.R. 1017), which requires employers to verify a new hire's legal status. Going further than the Georgia law it emulated, Colorado's law applies to all public and private employers transacting business in the state.

A separate law discussed below, the Colorado Illegal Aliens and Public Contracts for Services Law (Public Contracts Law; H.R. 1343), also applies to public employers and their contractors or subcontractors.

H.R. 1017 establishes penalties for employers that show "reckless disregard" by failing to submit required documents or submitting fraudulent documentation. The fines are up to $5,000 for the first violation and up to $25,000 for subsequent violations. The law applies to employees hired on or after Jan. 1, 2007. A special Employment Verification Complaint Form is available at the Colorado Department of Labor's Web site (http://www.coworkforce.com/lab/evr/); anyone desiring to report employers that are violating the law can use it.

Within 20 days of hiring a new employee, the employer must affirm in writing that it has:

1) examined the legal work status of the newly hired employee;
2) retained file copies of federally required identification documents;
3) not altered or falsified the identification documents; and
4) not knowingly hired an unauthorized alien.

At first, the state required no new paperwork for H.R. 1017 compliance, leaving the impression that the federal Form I-9 provided sufficient affirmation. Then the Colorado Department of Labor added a new "sample" form, called Affirmation of Legal Work Status, on its Web site (http://www.coworkforce.com/lab/AffirmationForm.pdf). Helpful fact sheets about both laws are also available on the Web site: H.R. 1017 at http://www.coworkforce.com/lab/FactSheet1017.pdf and the Public Contracts Law at http://www.coworkforce.com/lab/FactSheet1343.pdf.

H.R. 1017 requires employers to keep copies of the identification documents they use in complying with the federal Form I-9. The copies must be retained for the duration of the individual's employment.

Colorado, without the Georgia law's ambiguity, specifically requires employers to make copies of the documents a new hire provides to prove identity and employability. HR professionals should base their procedures on the fact that Colorado and, apparently, Georgia, go beyond the federal requirements of IRCA, which makes copying documents and retaining copies optional.

After a referendum was passed in November 2006, Colorado – like Georgia – now prohibits employers from deducting payroll expenses for workers whose status is not verified. In Referendum H, voters were asked, "Should employers who cannot verify an employee is a legal U.S. resident be prohibited from claiming that employee's wages as a deductible business expense?" Slightly over half of voters answered affirmatively. The deduction test is now effective for employees hired on or after Jan. 1, 2008, and who were paid $600 or more in one year.

The aforementioned Public Contracts Law (H.R. 1343) provides that state agencies and political subdivisions of the state cannot enter into contracts with any entity that hires unauthorized workers. The law applies to contracts executed or renewed on or after Aug. 8, 2006. A complaint form is available for anyone desiring to report contractors or subcontractors who may be violating the law.

The Public Contracts Law requires employers to certify that they are participating in the E-Verify program. H.R. 1017 does not require participation in E-Verify.

According to the *Rocky Mountain News* (Dec. 12, 2006), that apparent contradiction arose because lawmakers heard reports of E-Verify's accuracy shortcomings after the Public Contracts Law had already been passed. Consequently, when lawmakers wrote H.R. 1017, they replaced E-Verify provisions with the affirmation requirements.

Arizona Wins Twice in Federal Court

Arizona was the first state to make revocation of an employer's business license a penalty for knowingly or intentionally hiring unauthorized workers. Like Colorado, Arizona also requires that every employer must enroll in and use the E-Verify employment verification system for all new hires. So far, Arizona's law has survived legal challenges.

The Legal Arizona Workers Act (LAWA) was effective for employees hired on or after Jan. 1, 2008, but the state promised no enforcement until March 1, 2008. The E-Verify requirement was placed on hold following a lawsuit by various organizations, including the Arizona Chamber of Commerce, contesting LAWA's legality.

A federal judge refused to grant an injunction for the plaintiffs in December 2007. Two months later, the same judge rejected other aspects of the legal challenge. The judge ruled that LAWA's E-Verify mandate does not conflict with Congress' objectives.

In a landmark decision, Judge Neil Wake wrote:

> Because E-Verify remains voluntary at the national level, the I-9 process is still the main employment verification process used by employers. However, the I-9 system has been thoroughly defeated by document and identity fraud, allowing upwards of 11 million unauthorized workers to gain employment in the United States labor force, with the number increasing at about a half a million a year. [LAWA] is a conscious attempt to address this problem at the state level by imposing sanctions by 'licensing and similar laws' upon those who employ unauthorized aliens, as expressly permitted by IRCA. Under the Act, county attorneys may bring suit in the Superior Court of Arizona against employers for intentionally or knowingly employing unauthorized aliens. An employer found liable faces possible suspension or revocation of its business licenses, and it can be ordered to file quarterly reports of new hires and to file an affidavit that it has terminated all unauthorized aliens.
>
> Federal policy encourages the utmost use of E-Verify. The Act effectively increases employer use of the system with no evidence of surpassing logistical limits, and it does so in the context of a licensing sanction law that is within the police power of the states as expressly recognized by IRCA.

Plaintiffs are appealing this decision in the 9th U.S. Circuit Court of Appeals.

Arizona's law has separate penalties for "knowing" versus "intentional" violators. First-time violators who knowingly employ unauthorized workers will be subject to a three-year probationary period and may have their business licenses suspended for up to 10 days. For intentional violators, the penalties escalate to five years' probation and suspension of business license for a minimum of 10 days.

Oklahoma

The Oklahoma Taxpayer and Citizenship Protection Act of 2007 consolidated provisions on a variety of immigration topics into one legislative package. It is considered one of the nation's toughest immigration laws.

The law became effective on May 7, 2007, with the employment provisions going into effect July 1, 2008. Oklahoma's employment verification provisions are quite similar to Georgia's. The law requires public employers, their contractors and subcontractors to use a "status verification system," such as E-Verify or the SSN Verification System. The law applies only to contracts signed and employees hired after Nov. 1, 2007.

Oklahoma also allows a U.S. citizen who an employer has fired to file a discrimination suit if he or she can show the employer was employing an undocumented worker in a similar job at the time of discharge. But use of E-Verify gives the employer "safe harbor" from such suits.

State E-Verification Laws

The table below provides a snapshot of which states, as of March 2008, are considering or have enacted legislation requiring employers to use a status verification system. Developments in this arena occur almost daily, so to determine the status of legislation in specific states, employers are advised to consult with immigration attorneys.

States With Enacted or Proposed Legislation

	State requires or incentivizes use of E-Verify or similar system for state agencies, contractors and subcontractors	State requires or incentivizes use of E-Verify or similar system for private-sector employers
Alaska	Proposed	
Arizona	Enacted	Enacted
Arkansas	Enacted	
Colorado	Enacted	Enacted
Florida	Proposed	
Georgia	Enacted	
Idaho	Enacted	
Indiana		Proposed
Kansas		Proposed
Kentucky	Proposed	
Louisiana	Proposed	
Maryland	Proposed	
Minnesota	Enacted	
Missouri	Enacted	Proposed
North Carolina	Enacted	
Oklahoma	Enacted	
Pennsylvania	Proposed	

States With Enacted or Proposed Legislation *(continued)*

Rhode Island	Proposed	Proposed
South Carolina	Proposed	Proposed
Tennessee	Proposed	Enacted
Texas	Proposed	
Utah	Enacted	
Virginia	Proposed	Proposal killed

Illinois Prohibits the E-Verify

Frustrated with reports of E-Verify's error rates, Illinois lawmakers chose to prohibit employers in the state from using E-Verify until its accuracy rate reaches a threshold defined in the Illinois Right to Privacy in the Workplace Act (Workplace Act). Specifically, employers cannot enroll in E-Verify until the state is satisfied that, in 99 percent of cases, employers will receive notices of employee ineligibility (called tentative non-confirmations) within three days.

Once the standard has been met, an Illinois employer can use E-Verify, but it must complete a standard Illinois Department of Labor form. In addition, the employer must prominently post a notice to all applicants that the employer is enrolled in E-Verify.

The Workplace Act also directs the Illinois Department of Human Rights to establish an advisory council that will study the effects of E-Verify and other eligibility verification systems on the state's employers and employees. Using E-Verify before the benchmark has been met may subject the employer to penalties.

The federal government challenged Illinois in a suit it filed in September 2007, contending that the Illinois law seeks to override a federal law and prevent 750 existing E-Verify users in the state from further use of the program. The suit also claims that E-Verify already has a 93-percent success rate of delivering tentative non-confirmations within just one day.

Illinois suspended enforcement of the Workplace Act until April 15, 2008, to allow time for resolution of the suit. Meanwhile, the Illinois legislature is considering bills to amend the law, and employers can continue to enroll in and use E-Verify.

Other Enacted State Requirements on Employment Eligibility

- **Arkansas**: Requires businesses with public contracts exceeding $25,000 to provide certification that all employees are legally authorized to work in the United States.
- **Hawaii**: H.B. 1750 requires states and counties to hire only citizens, nationals or permanent resident aliens, or those eligible for unrestricted employment in the United States.
- **Iowa**: S.B. 562 requires businesses receiving economic development aid from the state to provide periodic assurances that workers are legally employed.
- **Louisiana**: Any state agency can investigate the hiring practices of a contractor suspected of employing unauthorized workers, if that contractor employs more than 10 people. Once notified of violations by a state agency or a private party,

the state attorney general or a district attorney can order the employer to fire undocumented workers. An employer that does not comply within 10 days can be fined up to $10,000.

- **Massachusetts**: By executive order, any business seeking a contract with state agencies in the executive branch must certify that it will not use unauthorized workers.
- **Michigan**: Requires state agencies to consider legal residency status of workers, among other factors, in awarding state contractors.
- **Minnesota**: Requires executive branch employers and contractors with state contracts of $50,000 or more to use E-Verify. By executive order issued in January 2008, any state agency hiring executive-branch employees and all companies with public contracts worth more than $50,000 in the state must use E-Verify.
- **Tennessee**: H.B. 729, which went into effect Jan. 1, 2008, penalizes employers who knowingly hire illegal immigrants. The law does not require E-Verify, but has a strong incentive for companies to use it by providing a "safe harbor" from sanctions for E-Verify subscribers. H.B. 0111 is another series of requirements, effective Jan. 1, 2007, for state agencies and contractors prohibiting use of unauthorized workers in the performance of state contracts for goods and services. Any employer of illegal workers can be fined, imprisoned or lose its business license. H.B. 0111 prevents any person from contracting, or bidding a contract, for a period of one year after being caught hiring illegal workers. The law also requires those who contract or bid on contracts with the state to attest that they will not knowingly use the services of illegal immigrants. H.B. 0111 provides for random checks of contractor compliance.
- **Texas**: Effective Jan. 1, 2008, the state penalizes employers that employ illegal immigrants by disallowing deductions of any compensation as a business expense for state income tax purposes. Texas also requires a business receiving public subsidies to certify that it does not employ unauthorized workers.
- **West Virginia**: S.B. 70 prohibits any employer from knowingly employing an unauthorized worker and requires employers to verify the employment eligibility of new hires. Penalties for violators include fines, imprisonment and revocation of business licenses.

States to Watch

Tracking state-level immigration employment reforms nationwide is difficult because proposed laws are a moving target in many states. Here is a sampling of bills that legislatures in several states considered in the early months of 2008.

- **Alabama**: S.B. 426 appears to be even more comprehensive and stricter than Oklahoma's Taxpayer and Citizenship Protection Act of 2007. Among S.B. 426's requirements: Beginning Jan. 1, 2010, employers must verify that all new employees have either a valid Alabama driver's license, a valid Alabama non-driver ID card or a newly created "Alabama verified employee identification card."
- **Florida**: Bills in the Florida House and Senate would prohibit awarding state construction contracts to contractors that do not use E-Verify.
- **Kansas**: A bill is being considered that would mandate use of E-Verify by all employers, with violators subject to business licenses revocation.
- **Kentucky**: House bills being considered include H.B. 95 and H.B. 304. H.B. 95 would prohibit employers from employing illegal aliens, impose graduated penalties up to the loss of business

States to Watch *(continued)*

licenses for violators after Jan. 1, 2009, and require using a federal work authorization verification system. H.B. 304 would prohibit intentional employment of illegal aliens by contractors for any public entity. First-time violators could be ordered to fire illegal workers and file quarterly reports during a probationary period; further violations during a probationary period could result in the employer losing its business license.

- **Indiana**: Several bills are being considered, including a House bill with a three-tiered penalty system for employers that hire illegal immigrants after July 1, 2009. S.B. 335, which requires the use of E-Verify, applies to all employers. Some of the bills may end up with a provision to revoke the business license of any company that knowingly hires illegal immigrants.
- **Missouri**: Several bills have been introduced requiring employers to use E-Verify. One bill provides for "safe harbor" incentives, rather than a mandate, to use the program.
- **South Carolina**: A House bill requires businesses contracting with state or local governments to use E-Verify. The Senate's bill would apply to all employers. Senators are debating an amendment to include E-Verify as one of the options employers have for verifying employment eligibility. (Other proposed verification options include a South Carolina driver's license and a new S.C. I-9 Form.)

Compliance for Multi-state Employers

A company with employees in multiple states, or contracts in multiple states, should determine how it can comply with a bewildering, ever-changing labyrinth of state and federal regulations.

The greater the variety and number of state laws with which one must deal – even if it is just for sporadic hiring needs in distant branches – the more complex the compliance burden will be. Large companies operating in many states probably will not find a straightforward eligibility verification process that can minimize risk, startup effort, training needs and administrative costs.

Consider, for example, a hypothetical company headquartered in Colorado, with plants in Oklahoma and Illinois; with sales offices in Alabama, Arizona, Indiana, Texas and West Virginia; and with state contracts in Arizona, Florida, Georgia, Kentucky and North Carolina.

To frame its options, management first will need to analyze the legislative landscape of all states where the company has public contracts or may hire new employees. Some of the states will require use of E-Verify; others may forbid it. Some states will require the company to maintain copies of worker-supplied verification documents, thereby increasing administrative costs and opening the door to audit violations. And states will have their own compliance requirements and forms for public contractors.

Obviously, employers that need a state-by-state approach to compliance face a difficult situation. Even if an employer strives to stay up to date on laws in all states in which it hires employees or bids on public contracts, there may be pitfalls and consequences, such as:

- vulnerability to legal technicalities and vague, yet-to-be interpreted areas of the various laws;
- potential delays due to capacity limitations of E-Verify;
- impaired ability to compete with less-restricted employers in other states;
- potentially heavy and unexpected administrative burdens;

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- risk of process errors and inconsistencies; and
- conflicting statutes.

Next Steps

Given the unsettled situation in many states, employers throughout the United States have a number of issues to consider regarding the E-Verify program.

Should Your Company Sign Up for E-Verify?

Under what circumstances should a company implement E-Verify company-wide, use it only for some sites or not use it at all? Different factors will apply to any company's decision. Here are some of the pros and cons to be considered:

Pros:

1) Most employers find that E-Verify is easy to use and does not overburden their staff.
2) Using E-Verify is free for employers.
3) E-Verify eliminates most no-match letters.
4) Correct use of E-Verify gives employers a "safe harbor" from being prosecuted for hiring illegal workers.
5) Upgrades are expected to improve E-Verify's rate of automated confirmations.
6) Employers can opt to use E-Verify at selected sites instead of company-wide. For example, an employer might decide to use E-Verify only at locations with high turnover, high employment or high numbers of no-match letters.
7) Society benefits from widespread use of electronic verification. It is a cornerstone in efforts to keep U.S. employment opportunities from being a "magnet" for more illegal immigrants.

Cons:

1) Data errors can have tragic consequences. A survey revealed that 52 percent of E-Verify users experienced at least one case where a data error caused a "tentative non-confirmation." Since the onus is on workers to resolve non-confirmations, a simple data mistake can force an employer to terminate an eligible worker. Unlike SSA no-match letters, which give workers 90 days to resolve errors, E-Verify allows only eight days for employees to visit the appropriate government office to contest a non-confirmation.
2) E-Verify's "safe harbor" doesn't necessarily protect employers from discrimination or wrongful termination claims.
3) An unacceptably high percentage of queries involving non-citizens cannot be answered automatically.
4) E-Verify adds another layer to the employer's training and administration burdens.
5) Government efforts to increase E-Verify usage, if successful, could undermine the system's capacity to respond quickly and accurately.
6) For some queries, E-Verify gets information from the USCIS database, which still does not meet accuracy standards Congress set.

7) From a societal perspective, success with electronic verification raises the value of efforts to circumvent the system, leading to more identity theft, better ID counterfeiting, and greater incentives to pay workers "off the books."
8) Civil liberty advocates warn that using E-Verify, even though it is not currently mandatory, can potentially undermine the privacy of law-abiding citizens and the security of their personal data.

Will Form I-9 and E-Verify Ultimately Be Replaced?

Industry and professional associations are fighting the state-mandated use of E-Verify. The National Association of Manufacturers, National Association of Home Builders, National Franchisee Association and Society for Human Resource Management are among the organizations trying to stop the trend of states enacting a hodgepodge of different employment verification requirements. These and other organizations have joined together to lobby against uncoordinated state regulations, which they feel are hurting their ability to use consistent, efficient and lawful hiring policies.

These business and HR groups are supporting bills in Congress to replace E-Verify. The proposed New Employee Verification Act (NEVA), H.R. 5515, would mandate a universal electronic verification system that would not only replace E-Verify, but also eliminate the I-9 Form.

"Under the NEVA legislation, a new Electronic Employment Verification System would be based on the new hires registry database operated in each state," stated *Information Week*, Feb. 28, 2008. "The registry was established more than a decade ago as part of federal welfare reform and is already used by 90 percent of U.S. employers," according to a spokeswoman for Rep. Sam Johnson, (R.-Texas), sponsor of NEVA and ranking member of the House Social Security Subcommittee.

NEVA has opposition. Rep. Ken Calvert (R-Calif.), the sponsor of legislation that created the original Basic Pilot Program, contends that E-Verify is already working well, with instant responses to 93 percent of employer queries, and is continually being improved. A bill Calvert introduced (H.R. 5596) would make E-Verify mandatory and would require the largest businesses to be in compliance within one year.

Be Careful Swimming in Murky Waters

For employers with a relatively small, stable workforce located in one or a few states, compliance may be easy to achieve.

Large, multistate employers trying to navigate or monitor the labyrinth of federal and state employment laws and regulations will soon be mired in a legal minefield of enacted legislation – some with provisions now in effect, others with provisions scheduled to take effect at various future dates, and still others in limbo pending judicial decisions. Compounding the confusion, employers must deal with contradictory provisions of the various laws, unclear or yet-to-be-issued regulations, unanswered questions and unforeseen pitfalls. And that's before a multitude of proposed laws are brought into the picture.

With such complicated issues, clear answers to your specific circumstances may require counsel from experts in employment and immigration law.

New Form I-9

OMB No. 1615-0047; Expires 06/30/08

Department of Homeland Security
U.S. Citizenship and Immigration Services

Form I-9, Employment Eligibility Verification

Instructions

Please read all instructions carefully before completing this form.

Anti-Discrimination Notice. It is illegal to discriminate against any individual (other than an alien not authorized to work in the U.S.) in hiring, discharging, or recruiting or referring for a fee because of that individual's national origin or citizenship status. It is illegal to discriminate against work eligible individuals. Employers **CANNOT** specify which document(s) they will accept from an employee. The refusal to hire an individual because the documents presented have a future expiration date may also constitute illegal discrimination.

What Is the Purpose of This Form?

The purpose of this form is to document that each new employee (both citizen and non-citizen) hired after November 6, 1986 is authorized to work in the United States.

When Should the Form I-9 Be Used?

All employees, citizens and noncitizens, hired after November 6, 1986 and working in the United States must complete a Form I-9.

Filling Out the Form I-9

Section 1, Employee: This part of the form must be completed at the time of hire, which is the actual beginning of employment. Providing the Social Security number is voluntary, except for employees hired by employers participating in the USCIS Electronic Employment Eligibility Verification Program (E-Verify). **The employer is responsible for ensuring that Section 1 is timely and properly completed.**

Preparer/Translator Certification. The Preparer/Translator Certification must be completed if **Section 1** is prepared by a person other than the employee. A preparer/translator may be used only when the employee is unable to complete **Section 1** on his/her own. However, the employee must still sign **Section 1** personally.

Section 2, Employer: For the purpose of completing this form, the term "employer" means all employers including those recruiters and referrers for a fee who are agricultural associations, agricultural employers or farm labor contractors.

Employers must complete **Section 2** by examining evidence of identity and employment eligibility within three (3) business days of the date employment begins. If employees are authorized to work, but are unable to present the required document(s) within three business days, they must present a receipt for the application of the document(s) within three business days and the actual document(s) within ninety (90) days. However, if employers hire individuals for a duration of less than three business days, **Section 2** must be completed at the time employment begins. **Employers must record:**

1. Document title;
2. Issuing authority;
3. Document number;
4. Expiration date, if any; and
5. The date employment begins.

Employers must sign and date the certification. Employees must present original documents. Employers may, but are not required to, photocopy the document(s) presented. These photocopies may only be used for the verification process and must be retained with the Form I-9. **However, employers are still responsible for completing and retaining the Form I-9.**

Section 3, Updating and Reverification: Employers must complete **Section 3** when updating and/or reverifying the Form I-9. Employers must reverify employment eligibility of their employees on or before the expiration date recorded in **Section 1**. Employers **CANNOT** specify which document(s) they will accept from an employee.

A. If an employee's name has changed at the time this form is being updated/reverified, complete Block A.

B. If an employee is rehired within three (3) years of the date this form was originally completed and the employee is still eligible to be employed on the same basis as previously indicated on this form (updating), complete Block B and the signature block.

C. If an employee is rehired within three (3) years of the date this form was originally completed and the employee's work authorization has expired **or** if a current employee's work authorization is about to expire (reverification), complete Block B and:

1. Examine any document that reflects that the employee is authorized to work in the U.S. (see List A **or** C);
2. Record the document title, document number and expiration date (if any) in Block C, and
3. Complete the signature block.

Form I-9 (Rev. 06/05/07) N

What Is the Filing Fee?

There is no associated filing fee for completing the Form I-9. This form is not filed with USCIS or any government agency. The Form I-9 must be retained by the employer and made available for inspection by U.S. Government officials as specified in the Privacy Act Notice below.

USCIS Forms and Information

To order USCIS forms, call our toll-free number at **1-800-870-3676**. Individuals can also get USCIS forms and information on immigration laws, regulations and procedures by telephoning our National Customer Service Center at **1-800-375-5283** or visiting our internet website at **www.uscis.gov**.

Photocopying and Retaining the Form I-9

A blank Form I-9 may be reproduced, provided both sides are copied. The Instructions must be available to all employees completing this form. Employers must retain completed Forms I-9 for three (3) years after the date of hire or one (1) year after the date employment ends, whichever is later.

The Form I-9 may be signed and retained electronically, as authorized in Department of Homeland Security regulations at 8 CFR § 274a.2.

Privacy Act Notice

The authority for collecting this information is the Immigration Reform and Control Act of 1986, Pub. L. 99-603 (8 USC 1324a).

This information is for employers to verify the eligibility of individuals for employment to preclude the unlawful hiring, or recruiting or referring for a fee, of aliens who are not authorized to work in the United States.

This information will be used by employers as a record of their basis for determining eligibility of an employee to work in the United States. The form will be kept by the employer and made available for inspection by officials of U.S. Immigration and Customs Enforcement, Department of Labor and Office of Special Counsel for Immigration Related Unfair Employment Practices.

Submission of the information required in this form is voluntary. However, an individual may not begin employment unless this form is completed, since employers are subject to civil or criminal penalties if they do not comply with the Immigration Reform and Control Act of 1986.

Paperwork Reduction Act

We try to create forms and instructions that are accurate, can be easily understood and which impose the least possible burden on you to provide us with information. Often this is difficult because some immigration laws are very complex. Accordingly, the reporting burden for this collection of information is computed as follows: **1)** learning about this form, and completing the form, 9 minutes; **2)** assembling and filing (recordkeeping) the form, 3 minutes, for an average of 12 minutes per response. If you have comments regarding the accuracy of this burden estimate, or suggestions for making this form simpler, you can write to: U.S. Citizenship and Immigration Services, Regulatory Management Division, 111 Massachusetts Avenue, N.W., 3rd Floor, Suite 3008, Washington, DC 20529. OMB No. 1615-0047.

EMPLOYERS MUST RETAIN COMPLETED FORM I-9
PLEASE DO NOT MAIL COMPLETED FORM I-9 TO ICE OR USCIS

OMB No. 1615-0047; Expires 06/30/08

Department of Homeland Security
U.S. Citizenship and Immigration Services

Form I-9, Employment Eligibility Verification

Please read instructions carefully before completing this form. The instructions must be available during completion of this form.

ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate against work eligible individuals. Employers CANNOT specify which document(s) they will accept from an employee. The refusal to hire an individual because the documents have a future expiration date may also constitute illegal discrimination.

Section 1. Employee Information and Verification. To be completed and signed by employee at the time employment begins.

Print Name: Last	First	Middle Initial	Maiden Name
Address *(Street Name and Number)*		Apt. #	Date of Birth *(month/day/year)*
City	State	Zip Code	Social Security #

I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.

I attest, under penalty of perjury, that I am (check one of the following):
- ☐ A citizen or national of the United States
- ☐ A lawful permanent resident (Alien #) A ______
- ☐ An alien authorized to work until ______
  (Alien # or Admission #) ______

Employee's Signature	Date *(month/day/year)*

Preparer and/or Translator Certification. *(To be completed and signed if Section 1 is prepared by a person other than the employee.) I attest, under penalty of perjury, that I have assisted in the completion of this form and that to the best of my knowledge the information is true and correct.*

Preparer's/Translator's Signature	Print Name
Address *(Street Name and Number, City, State, Zip Code)*	Date *(month/day/year)*

Section 2. Employer Review and Verification. To be completed and signed by employer. Examine one document from List A OR examine one document from List B and one from List C, as listed on the reverse of this form, and record the title, number and expiration date, if any, of the document(s).

	List A	OR	List B	AND	List C
Document title:					
Issuing authority:					
Document #:					
Expiration Date *(if any)*:					
Document #:					
Expiration Date *(if any)*:					

CERTIFICATION - I attest, under penalty of perjury, that I have examined the document(s) presented by the above-named employee, that the above-listed document(s) appear to be genuine and to relate to the employee named, that the employee began employment on *(month/day/year)* ______ **and that to the best of my knowledge the employee is eligible to work in the United States. (State employment agencies may omit the date the employee began employment.)**

Signature of Employer or Authorized Representative	Print Name	Title
Business or Organization Name and Address *(Street Name and Number, City, State, Zip Code)*		Date *(month/day/year)*

Section 3. Updating and Reverification. To be completed and signed by employer.

A. New Name *(if applicable)*	B. Date of Rehire *(month/day/year) (if applicable)*

C. If employee's previous grant of work authorization has expired, provide the information below for the document that establishes current employment eligibility.

Document Title: ______ Document #: ______ Expiration Date (if any): ______

I attest, under penalty of perjury, that to the best of my knowledge, this employee is eligible to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.

Signature of Employer or Authorized Representative	Date *(month/day/year)*

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LISTS OF ACCEPTABLE DOCUMENTS

LIST A Documents that Establish Both Identity and Employment Eligibility	OR	LIST B Documents that Establish Identity	AND	LIST C Documents that Establish Employment Eligibility
1. U.S. Passport (unexpired or expired)		**1.** Driver's license or ID card issued by a state or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, gender, height, eye color and address		**1.** U.S. Social Security card issued by the Social Security Administration *(other than a card stating it is not valid for employment)*
2. Permanent Resident Card or Alien Registration Receipt Card (Form I-551)		**2.** ID card issued by federal, state or local government agencies or entities, provided it contains a photograph or information such as name, date of birth, gender, height, eye color and address		**2.** Certification of Birth Abroad issued by the Department of State *(Form FS-545 or Form DS-1350)*
3. An unexpired foreign passport with a temporary I-551 stamp		**3.** School ID card with a photograph		**3.** Original or certified copy of a birth certificate issued by a state, county, municipal authority or outlying possession of the United States bearing an official seal
4. An unexpired Employment Authorization Document that contains a photograph (Form I-766, I-688, I-688A, I-688B)		**4.** Voter's registration card **5.** U.S. Military card or draft record		**4.** Native American tribal document **5.** U.S. Citizen ID Card *(Form I-197)*
5. An unexpired foreign passport with an unexpired Arrival-Departure Record, Form I-94, bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, if that status authorizes the alien to work for the employer		**6.** Military dependent's ID card **7.** U.S. Coast Guard Merchant Mariner Card **8.** Native American tribal document **9.** Driver's license issued by a Canadian government authority		**6.** ID Card for use of Resident Citizen in the United States *(Form I-179)* **7.** Unexpired employment authorization document issued by DHS *(other than those listed under List A)*
		For persons under age 18 who are unable to present a document listed above: **10.** School record or report card **11.** Clinic, doctor or hospital record **12.** Day-care or nursery school record		

Illustrations of many of these documents appear in Part 8 of the Handbook for Employers (M-274)

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