The Elephant In The Room: E-Verify

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Today's Agenda

- Advantages/Disadvantages of E-Verify
- Is it really voluntary?
  - The Federal Contractor Rule
  - State requirements
- The E-Verify Process: How it works
- Other E-Verify Components & Considerations
- The IMAGE Program

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What is E-Verify?

- E-Verify: An electronic system to confirm employment authorization and legal status of employees
- Partnership between SSA and DHS, and administered by USCIS
- Access to employment eligibility information contained in databases of SSA (over 435 million records) and DHS (over 65 million records)
- E-Verify is completed in addition to Form I-9
- "Voluntary" and "Free" Federal program

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E-Verify – Why (why not) Participate?

Advantages	Disadvantages
•"Good Faith" compliance presumption •Identify undocumented workers •May put employer in positive light if investigated, or serve to mitigate fines/penalties •Deters document and identity fraud •Continuously improving system •Increased participation	•Employer must sign MOU with DHS subjecting itself to inspections •Requires allocation of administrative resources and training for inputting data and following up on tentative and final non-confirmations •System still not perfect

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Is E-Verify *really* Voluntary?

- The Federal Contractor Rule
- State Requirements

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E-Verify Federal Contractor Rule

- Many federal contractors and subcontractors are required to use E-Verify to check the legal status of all new hires and some existing employees (Sept. 8, 2009)
- Memorandum of Understanding Issues
- Failure to properly use E-Verify can lead to debarment from federal contracts
- U.S. District Court upheld mandatory E-Verify Rule (*U.S. Chamber of Commerce v. Napolitano* (S.D. MD 2009); Infonet Doc. No. 09082661).

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Types of Federal Contracts Covered:

- Awarded or modified on or after effective date to include FAR E-Verify Clause
- Value above $150k
- Period of performance of 120 days or more
- At least some contract work performed in U.S.
- Does NOT include commercially available off the shelf (COTS) items and related services

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Subcontractor Considerations

- If prime contract contains FAR E-Verify clause:
  - FAR E-Verify clause flows down to all tiers of subcontracts
  - Prime contractor responsible for ensuring that FAR E-Verify clause included in qualifying subcontracts

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Subcontractor Considerations

Covered Subcontracts:

- Value of more than $3,000
- Contract for commercial or noncommercial services or construction
- At least some of the contract work performed in U.S.
- Does not include contracts for COTS items and related services

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Indefinite Delivery/Indefinite Quantity Contracts (IDIQ)

- Existing Contract
- Period of performance extends at least six months after September 8, 2009
- Substantial amount of work or number of orders expected during remaining performance period
- Contract may be bi-laterally modified to include the FAR E-Verify clause

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The Challenge of "Existing Employees"

- Must confirm all existing "employees assigned to the contract" which is defined as:
  - Hired after November 6, 1986
  - Directly performing (or will perform) substantial work in U.S. under a covered contract
  - Includes short-term and temporary employees
  - Excludes: Employees who "normally perform support work such as indirect or overhead functions" and who "do not perform any substantial duties applicable to the contract"
- Exemption: Certain employees with *active* confidential, secret or top secret security clearance or HSPD-12 compliant credentials

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Complying with Federal Contractor Rule

Employer has choice to verify:

- entire workforce (all new hires and all existing employees throughout the organization)

OR

- All new hires organization-wide and existing employees assigned to the federal contract

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I-9 Considerations for Existing Employees

When to complete a new I-9:

- Employee presented expired document on previous I-9
- Employee presented *unexpired* Form I-551 or U.S. passport on a previous Form I-9 which has since expired and but copy of the document not retained
- The List B document did not have a photo
- Employee presented a document that was acceptable when previous I-9 completed, but s no longer acceptable
- Employee's immigration status has changed
- Employee's name has changed

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E-Verify & the I-9 Process

I-9 Process	I-9 process with E-Verify
Employee completes Form I-9, Section I.	Employee must include Social Security Number when completing Form I-9, Section 1.
Employee chooses which acceptable document(s) to present.	Employee chooses which acceptable document(s) to present. If a List B document is chosen, it MUST have a photo. If an employee decides to provide a photo matching document, the employer must make a photo copy and retain with the Form I-9.
Employer completes Form I-9, Section II.	Employer completes Form I-9, Section II.
If necessary, employer updates or reverifies employee's work eligibility in Section III.	E-Verify Case Status will prompt employer to update or reverify in Section III of Form I-9.

NOTE: All documents must be unexpired. Names should appear on Form I-9 exactly as they appear on documents. (*source: USCIS*)

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E-Verify Practice Pointer

Updating a Previous Form I-9

- Employers must treat all employees consistently when updating a previously completed Form I-9.
- Requesting specific documents on the basis of someone's citizenship status or national original may violate the anti-discrimination provisions of the IRCA or Title VII of the Civil Rights Act of 1964.

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Timing Considerations

Ensure contract has the FAR E-Verify Clause before verifying existing employees

Note contract award and enrollment dates

- Remember:
  - 30 calendar days from contract award date to enroll/update
  - 90 calendar days from enrolling or updating the company profile to enter Form I-9 information for new and existing employees
  - 180 calendar days from choosing Entire Workforce to verify entire workforce

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Federal Contractor Rule: Practice Pointers

- Ensure tight communications between contract administrators/legal department and H.R. E-Verify administrators
- Encourage joint, annual or bi-annual training on nexus between contract and E-Verify issues
- E-Verify Administrators should institute/ensure calendaring systems to meet all required deadlines

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States Requiring E-Verify

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States Requiring E-Verify

- All or Most Employers – AL AZ, GA, LA, MS, NC, SC, TN, UT
- Public Employers and/or Contractors – FL, IN, MO, NE
- Public Employers – ID, VA
- Contractors – CO, MN
- Requirement Rescinded or Expired – CA, RI, IL
- Pending Litigation - OK

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E-Verify: How it works?

- Registration
- DHS/SSA Memorandum of Understanding
- Training
- Implementation

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The E-Verify Process Requirements

- May not use the system to pre-screen applicants
- Employee must complete the Form 1-9 before verification is made
- Required documents
  - Note: "List B" documents must contain a photograph
  - Photo Tool option
- Verification query must be made within 3 business days from commencement of employment
- Must post appropriate notices to prospective employees that company is an E-Verify participant

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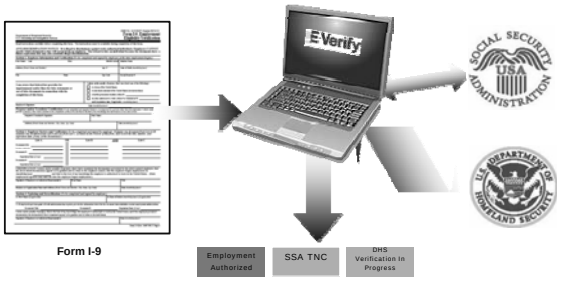
E-Verify: How it works



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E-Verify: How it works

Initial verification will return one of three results in just seconds.

Employment Authorized	SSA Tentative Nonconfirmation	DHS Verification in Process
The employee is authorized to work.	There is an information mismatch.	DHS will usually respond within 24 hours with either: **Employment Authorized** or **DHS Tentative Nonconfirmation.**

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E-Verify: Statistics show….

- 98.3% of verifications are work authorized instantly
- 1.7% of verifications issues a TNC
  - .3% initial mismatch confirmed later
  - 1.4% desire to contest and then fail to do so.
- 2011 ACSI Report shows high customer satisfaction

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Tentative Non-Confirmations (TNCs)

- TNC= Could not determine a final status based on records available
- Does not mean employee is not eligible for employment
- Employee keeps working until final status is available
- Steps to resolve TNC
- Issuance of a Final Non-Confirmation

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E-Verify Recent Developments

- Public List of E-Verify Employers
- New I-9 Proposal and CBP I-94 Automation
- Quick Audit Report for Employers
- Potential App for Remote E-Verify Queries in the field
- Self-Check
- *U.S. v. Whiting* case and proposed legislation

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What is Self Check?

- Requested by Congress in late 2009
- Self Check is a voluntary, fast, free and simple online service that allows an individual to check his or her employment eligibility
- Implemented in three phases, beginning with an initial launch to 5 states plus the District of Columbia in March 2011, and a second implementation to 16 additional states in August of 2011
- Self Check is now available nationwide
- Since launch of Self Check in March 2011, over 65,000 individuals have used Self Check to verify their employment eligibility *(source: USCIS)*

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Benefits of Self-Check

For the Employee:

•Provides individuals an opportunity to learn about the employment eligibility verification process

- Insight into employment eligibility
- If necessary, guidance to resolve a mismatch between the information provided and the data in records

For the Employer:

•Allows U.S. workers to confirm their employment eligibility is accurate *before* being checked by an employer

(source: USCIS)

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Proper Use of Self-Check

- Does not give users a work authorization credential. All employers must still verify the employment eligibility of new hires using the Form I-9
- E-Verify employers must still verify the employment eligibility of new hires using the Form I-9 *and* run new hires through E-Verify
- Cannot require the use of Self Check
  - Abuses may be reported to Department of Justice, Office of Special Counsel for Immigration-Related Unfair Employment Practices at (800) 255-7688 (*source: USCIS)*

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Avoiding Self – Check Mismatches

- Have identity and work authorization documents in order before using system
- Use unexpired, up-to-date identification documents
- Enter information accurately
- Update name changes with DHS and SSA
- If recently naturalized or changed immigration status, update records with SSA
- Avoid using aliases or nicknames and use only official name as reflected on government records

(*source: USCIS*)

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U.S. v. Whiting

- U.S. Supreme Court (5-3) upheld Arizona's 2007 law (May 2011)
- Mandates use of E-Verify for all AZ employers
- Proof of use of E-Verify under AZ law creates rebuttable presumption of not knowingly hiring unauthorized alien
- Penalties for violations:
  - Loss of rebuttable presumption
  - Revocation of business license

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E-Verify Proposed Legislation

- HR 2885 (Rep. L. Smith - TX) - New EEVS, staged roll-out, mandatory reverfication certain workers, permits voluntary reverfication of an employee, good faith protection for de minimus errors, preemption of state and local laws (9/21/11 – approved by House Judiciary)
- S. 1196 (S. Grassley –IA) – Mandates use of E-Verify, reverify existing employees within three years, ban state and local governments from prohibiting use

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Potential Consequences of E-Verify Mandate

- Costs - Training, Implementation, and Oversight
- Erroneous Non-Confirmations
- Loss of Workforce
- Potential Increase in Use of Fraudulent Documents/Identity Theft
- Presently no Good Faith Harbor provisions
- Potential Increase in Discriminatory Use and Discrimination
- Delays in SSA
- Business Relocation Abroad

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Costs of E-Verify

- If mandated, E-Verify would have cost 2.7 billion in FY2010. Small businesses account for 99.7 percent of employers. (Bloomberg News 1/27/11).
- Although E-Verify does not charge for use of database, employers' costs included training and certifying staff or hiring vendors to conduct the searches.
- Employers spent about $43 million in FY 2007 to interact with the E-Verify site.

Jason Arvelo, "Free E-Verify May Cost Small Business $2.6 Billion: Insight," Bloomberg Government, January 27, 2011.

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Burden on SSA

- If E-Verify made mandatory for new hires, SSA would have to process 50 to 60 million queries per year in addition to its current workload.
- In 2007, SSA testified that if E-Verify were mandatory, 3.6 million citizens and lawful immigrants would have to visit an SSA office or lose their jobs.
- Currently, 30% of SSA cases wait more than 270 days and as of Feb. 2011, SSA had 774,000 pending initial disability cases.

(Source: Immigration Policy Center – *E-Verify and the Social Security Administration: A Rocky Road Ahead for U.S. Seniors* - April 15, 2011)

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IMAGE

- ICE Mutual Agreement between Government and Employers (IMAGE)
- On July 26, 2006, the Department of Homeland Security introduced the IMAGE program as a comprehensive solution to the many challenges facing an employer in the area of employment eligibility verification.
- ICE recognizes that the highest level of employment compliance can only be achieved through close coordination with industry partners. IMAGE was developed as an innovative concept for enhanced employer self-compliance. *(source: DHS HSI)*

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IMAGE Requirements

Employers must agree to:

- Complete the IMAGE Self-Assessment Questionnaire
- Enroll in the E-Verify program within 60 days
- Establish a written hiring and employment eligibility verification policy that includes an internal Form I-9 audit at least once a year
- Submit to a Form I-9 Inspection by ICE
- Review and sign an official IMAGE partnership agreement with ICE

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IMAGE Membership

- 116 Charter Members
- 19 Companies Completed Process
- Additional 35 Companies in Process (as of March 2012)

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IMAGE Benefits

- Employer not subject to subsequent ICE I-9 audit for two years from the date of completion of IMAGE audit
  - Notwithstanding the existence of specific intelligence of unlawful employment.
- Mitigate/waive fines if substantive violations are discovered on fewer than 50% of the I-9s. If more than 50% of the I-9s contain substantive violations, fines will be at statutory minimum of $110 per violation.
- Allow employer ample time to resolve discrepancies discovered during the I-9 inspection regarding employees' documentation of identity and work eligibility.

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Changes to IMAGE

- Employers will now be IMAGE-certified
- Current IMAGE Partners are designated as Charter Members
- IMAGE Twelve Best Employment Practices are still highly encouraged, although not all Twelve Best Practices are required for IMAGE certification
- Agreement is signed *prior to the Form I-9 audit and not at the end of the IMAGE process*
- Agreement is not indefinite (two years)
- Recertification opportunity after two years

(source: DHS HSI)

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Questions & Answers

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