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## Is Pennsylvania Next to Require Verification Through E-Verify?

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*Special to the Legal*

As the federal government has stalled in its efforts to pass comprehensive immigration reform, states have stepped in to fill the void. According to the National Conference of State Legislatures, as of Nov. 16, 2007, no fewer than 1,562 immigration-related bills have been introduced in various states and about 244 of those bills have become law. State legislatures have introduced almost three times more bills in 2007 than in 2006.

Key among this legislation are bills that seek to address employment of illegal immigrants by requiring employers to use E-Verify. E-Verify is a voluntary Internet-based employment eligibility verification system run by U.S. Citizenship and Immigration Services (USCIS) that allows employers to electronically verify the employment eligibility of newly hired employees. E-Verify allows an employer to electronically compare employee-provided information from I-9s against records in the Social Security Administration (SSA) and Department of Homeland Security (DHS) databases.

A growing number of states have recently enacted legislation requiring the use of E-Verify. At this point, Georgia, Colorado and Oklahoma only require E-Verify for employers who have public contracts with state agencies or political subdivisions. Arizona's law, which became effective Jan. 1 of this year, is the most far-reaching of current legislation, as it requires all employers within the state to use E-Verify.

While the vast majority of states are currently introducing legislation that requires the use of E-Verify, because of concerns regarding inaccuracies in both the SSA and DHS databases, Illinois has enacted legislation prohibiting employers from enrolling in E-Verify until such problems are resolved.

Like the vast majority of states, the Pennsylvania General Assembly has been pushing for immigration reform, including measures to reduce illegal employment. While there is no current legislation requiring private employers or government contractors to use E-Verify, legislation has been passed in Pennsylvania prohibiting employment of unauthorized workers. Pennsylvania HB 2319 was signed into law in May 2006. The act prohibits the use of labor by illegal immigrants on projects financed by grants or loans from the state government. Penalties include full repayment of any grant and the payment of penalty interest on any loans.

Bills have been introduced in Pennsylvania that require the use of E-Verify. For example, Pennsylvania Senate Bill 979 requires all business entities, as a condition for initial and renewal "registration" (defined as any license, permit, registration or certificate granted or provided by a government entity), to submit not only an affidavit that the entity does not knowingly employ any person who is an unauthorized alien, but also that the entity has enrolled in and is an active participant in E-Verify. In addition to requiring government entities to enroll in E-Verify, the bill also requires, as a condition to the award of any Pennsylvania contract or grant valued over \$10,000, that



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the employer provide documentation affirming the employer's enrollment and participation in E-Verify. Senate Bill 979 was referred to the Labor and Industry Committee on June 25, 2007.

In addition, Pennsylvania state Rep. Harry Readshaw is preparing to introduce sweeping legislation that would give state agencies authority to make up for what he sees as a failure of the federal government to adequately enforce illegal immigration laws. In an article that appeared in the *South Pittsburgh Reporter* on Jan. 3, Readshaw was quoted as saying: "We simply cannot allow the problem of illegal immigration to continue unabated ... and if we aren't going to get the protection from Washington that we deserve, then we must seek action on state level."

Readshaw plans to include in the legislation a provision requiring all public employers and companies contracting with public employers to use E-Verify. He is currently gathering co-sponsors for the legislation, which he expects to introduce shortly.

There are clearly a number of supporters for legislation requiring the use of E-Verify within Pennsylvania. Pennsylvania

state Rep. Daryl Metcalfe has founded an organization, State Legislators for Legal Immigration. His organization has entered into a working partnership with the Immigration Reform Law Institute (IRLI) to create a comprehensive package of model legislative solutions that any state lawmaker can introduce "to effectively shut off all economic attractions and incentives for illegal aliens."

This model legislation includes mandatory employer enrollment in the federal E-Verify employee identification program and termination of the professional license of any employer that knowingly hires an illegal immigrant. The State Legislators for Legal Immigration Web site reports that IRLI played a major role in the recent immigration reform legislation passed in Georgia, Arizona and Oklahoma. Therefore, a statute requiring the use of E-Verify in Pennsylvania may very well be on the near horizon.

The statutes have been subject to litigation on preemption grounds. Challengers argue that such laws are inconsistent with the federal scheme of legislation that governs immigration. The focus has been on the Immigration Reform and Control Act of 1986 (IRCA) that prohibits the employment of unauthorized workers. IRCA provides that "the provisions of this section preempt any state or local law imposing civil or criminal sanctions upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."

The IRCA requires employers to complete Form I-9 for employees hired after Nov. 6, 1986. Once this form has been completed and maintained for required periods, the employer's responsibility to verify the employee's authorized work status under IRCA is complete.

Much of the current litigation against the state statutes focuses on whether the legislation is an impermissible interference with federal law or whether the legislation qualifies as a "licensing or similar law" that is not preempted by the IRCA. Opponents also argue that many of the state statutes, which require E-Verify impermissibly make a program that is clearly voluntary under federal law into a mandatory program.

The Arizona statute is being challenged in federal court. Opponents argue that it is preempted by federal law and that it vio-

lates the constitutional rights of employees and employers. There is an injunction hearing scheduled for today. The Department of Homeland Security (DHS) has also brought an action to enjoin enforcement of the Illinois law prohibiting the use of E-Verify. Illinois has agreed not to enforce the law until the litigation is resolved.

In order to use E-Verify, an employer must register online with DHS and accept the electronic memorandum of understanding (MOU), an agreement between the employer, the SSA and DHS that details the responsibilities of each with regard to E-Verify. By entering into the MOU, the employer agrees to process all employees hired after enrollment through E-Verify. Employers may also have another company or "designated agent" complete the E-Verify process for the company's employees. There are a number of such companies that advertise this service for employers.

An employer must screen the employee through E-Verify after an offer of employment is accepted and after the Form I-9 is completed. E-Verify must be completed no later than three business days after the employee's actual start date unless there is no Social Security number available for the employee, in which case the employer must wait until that number is available. If an employer screens prior to the start date, especially where there is no written evidence of an offer, there is a risk of allegation that an employer unlawfully used E-Verify to pre-screen applicants.

Employers should carefully consider whether to participate in E-Verify. Even where there are state statutes mandating E-Verify, there has been reluctance by employers to enroll. In Arizona, for example, although the statute requiring E-Verify was effective Jan. 1 and widely publicized, Arizona newspapers reported that only about 7,000 of Arizona's 150,000 employers had enrolled.

Due to ongoing litigation and problems with the current data underlying E-Verify, many employers are adopting a "wait and see" approach. There are serious concerns regarding the databases of both the SSA and DHS that are used by E-Verify. During a Congressional hearing on Feb.

16, 2006, DHS Assistant Secretary Stewart A. Baker testified that the DHS database was 12 to 18 months out of date and could not provide accurate reports.

Finally, the research teams recommended "against a major expansion of this program." According to a report commissioned by USCIS and issued in November 2007 by Westat Inc., the E-Verify program uses databases that do not meet standards set by Congress. In addition, SSA estimates that 17.8 million of its records contain discrepancies related to name, date of birth or citizenship status with 12.7 million of those records pertaining to U.S. citizens. Indeed, because of these inaccuracies, a federal court has currently enjoined enforcement of the recent SSA no-match regulations.

The use of E-Verify does not provide full protection from claims of discrimination. Although the MOU provides that "no person or entity participating in E-Verify is civilly or criminally liable under any law for any action taken in good faith on information provided through the confirmation system," this provision does not fully insulate an employer against claims and charges of discrimination. In fact, as part of its participation in the program, an employer must post an anti-discrimination notice issued by the Office of Special Counsel for Immigration — Related Unfair Employment Practices, Department of Justice (DOJ) in an area visible to prospective employees.

In addition, the MOU language does not fully insulate an employer, as such claims are often heavily based upon facts. Thus, an employer may be faced with fighting a discrimination charge or claim and incur substantial attorney fees in defending itself to show that its actions were based in good faith upon E-Verify, rather than upon some other discriminatory basis alleged by the complainant. The likelihood of such actions also increases when one considers the database errors referenced above.

In addition, the provisions in the MOUs, which allow for the federal government and designees to conduct site visits, to have full access to employment records, and to interview employees cause concern among many. By entering into such an MOU, the employer is waiv-

ing its Fourth Amendment rights and allowing the government free access to employment records.

Although an employer who verifies work authorization under E-Verify is presumed to have not knowingly hired an unauthorized alien, participation in E-Verify does not provide a safe harbor from worksite enforcement. An example of protection afforded to an employer by participation in E-Verify is the Dec. 12, 2006, worksite-enforcement action by the U.S. Immigration and Customs Enforcement (ICE) at Swift meatpacking plants around the country.

Although ICE raided the company and found more than 1,000 illegal workers, ICE did not pursue any criminal actions against

Swift or its management. Because E-Verify had actually confirmed that the employees were authorized, Swift and its management did not face the now-common criminal charges and the government instead proceeded against the individual employees on criminal grounds. New photo tool enhancements to E-Verify have been instituted in an effort to deal with the situation that occurred at Swift. It is unclear, however, whether employers will be able to effectively use this tool and whether they will continue to be afforded the same treatment and protection from criminal action that those at Swift received.

It is also important to emphasize that to the extent that E-Verify provides any greater protection than that afforded by an

employer following the standard I-9 process, such protection only extends to those employees queried under the E-Verify system. E-Verify only allows employers to verify the employment of hires following enrollment and it does not allow for verification of contractors or reverification of current employees.

Lastly, in considering whether to enroll, employers must review the ever-changing landscape of legislation regarding E-Verify. This includes the particular legislation that applies to its worksites, challenges to such legislation and the impact of either participation or nonparticipation in E-Verify under that legislation. •