

Verifiably Complicated

The Controversial Impact of E-Verify on Small Business

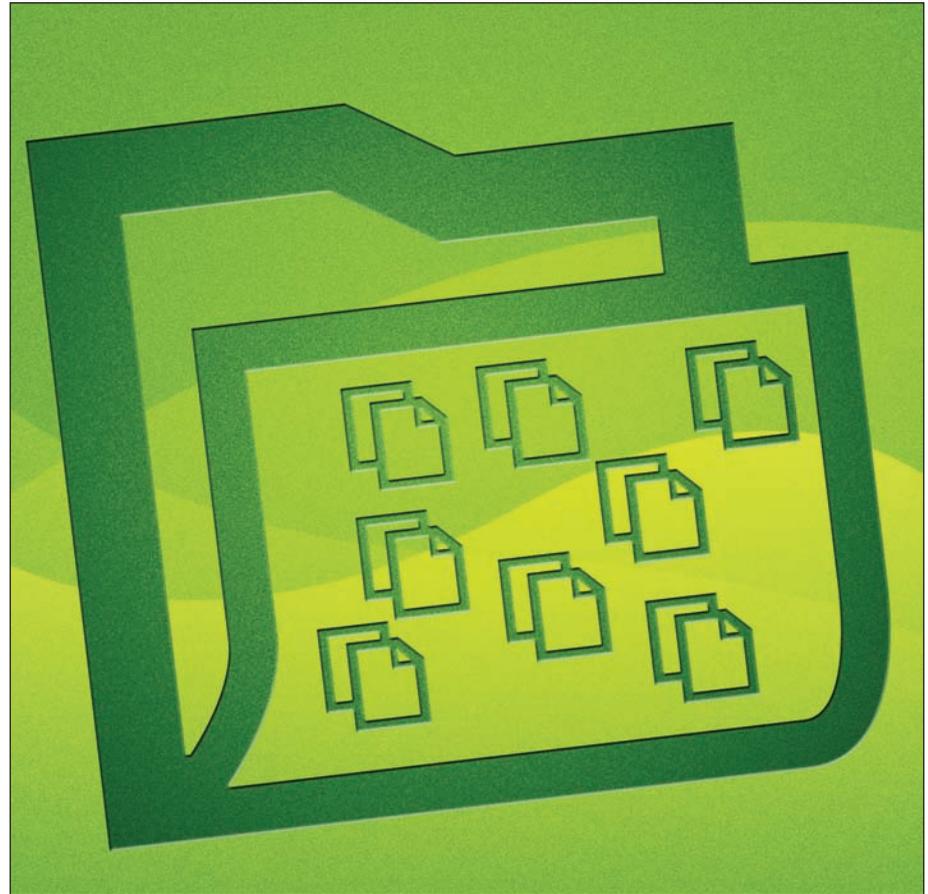


E-Verify is an Internet-based system operated by the Department of Homeland Security (DHS) in partnership with the Social Security Administration. It allows employers to electronically verify the employment eligibility of newly hired employees based on their immigration, naturalization or citizenship status. Simply stated, E-Verify is an immigration enforcement tool and, as with all issues related to immigration, there is hot debate both pro and con.

Because E-Verify can only be used once a worker is hired, employers have complained that they have hired and begun to train workers only to discover once they have performed the required database check that their new hires are ineligible to work.

Businesses utilizing E-Verify must display the DHS's E-Verify participation poster in both English and Spanish and the Department of Justice's "Right to Work" poster at their hiring sites. E-Verify is not yet universally mandatory and does not replace the requirement to complete and retain the Form I-9, Employment Eligibility Verification. Rather, it verifies employment authorization based on the information provided on the Form I-9. However, there currently is legislation before Congress, such as the Senate's "Accountability Through Electronic Verification Act" and the House's "Legal Workforce Act" and "Jobs Recovery by Ensuring a Legal American Workforce Act," that seeks to make the use of E-Verify mandatory for all businesses irrespective of size.

As of Oct. 1, 2007, all federal government agencies were required to utilize E-Verify. Beginning Sept. 8, 2009, employers with federal contracts or subcontracts containing the Federal Acquisition Regulation became subject to mandatory utilization to determine



eligibility of employees performing direct, substantial work under those federal contracts and of new hires organization-wide, whether or not working on those contracts. In 2011, the U.S. Supreme Court decided that states may constitutionally mandate the use of E-Verify and a number of states already have done so. Other states, however, have specifically prohibited the use of E-Verify in certain situations where its use is not specifically pre-empted by federal law.

Many critics of E-Verify cite its inaccuracy in finding unauthorized workers, but many of the reported errors have been found to arise from

individuals' failure to report name changes after marriage or changes in citizenship status. In addition, because of their reliance on immigrant workers, the construction, service and farming industries have strongly opposed E-Verify, fearing that they wouldn't be able to recruit enough workers if immigration laws were more strictly enforced.

Data compiled by Bloomberg shows that small businesses would have had to spend upwards of \$2.5 billion in 2010 had E-Verify been mandatory – businesses comprising 99.7 percent of American companies responsible for 64 percent of new jobs created during the past 15 years.

The GAO has called DHS's estimated \$800 million four-year cost of running mandatory E-Verify as "minimally credible," meaning that the actual figure could be substantially higher.

The range of first-year costs to a small business for implementing E-Verify has been estimated at \$1,254 to \$24,422 (with each subsequent year costing approximately \$435). The Government Accountability Office has called DHS's estimated \$800 million four-year cost of running mandatory E-Verify as "minimally credible," meaning that the actual figure could be substantially higher. Moreover, the required tutorial to enroll in E-Verify takes between five and six hours, after which the employer must be tested on the information before being registered in the program. For

small businesses without designated human resources departments, this will place an additional burden upon owners and staff already shouldering multiple responsibilities.

Employers will have to abide by various administrative requirements including posting notices, becoming familiar with the 68-page E-Verify manual, and issuing specified written "right to appeal" notices to employees who receive tentative "non-confirmation" notices. In addition, employers will require either high-speed Internet connections and possible

computer upgrades, or the services of a rash of "designated agents," springing up with promises to handle the verification process on a third-party basis for a substantial fee. Employers operating in multiple states may face a series of conflicting laws and regulations that will add to their administrative burden and increase the possibility of unintentional violations carrying substantial penalties. And although federal law protects employers from liability for "good faith reliance on information provided" by E-Verify, they remain potentially liable for any federal discrimination claims

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Small businesses complain that the cost of E-Verify will be enormous.

or violations of the various procedural requirements that must be followed in using the system.

South Carolina presents a microcosm of the E-Verify debate. Small businesses in South Carolina soon will have to use E-Verify to check the eligibility of all their workers. Non-complying small businesses could lose their license to operate in the state. This has placed an added responsibility on the South Carolina Department of Labor to monitor compliance and educate employers, which effort is expected to be ongoing through the end of 2012. In the view of many conservatives in the state E-Verify is desirable, whereas in areas of limited broadband connectivity – principally rural areas – using the system promises to be problematic. Further, the ACLU in the state has expressed concerns with the system’s inaccuracy. Farmers,

in particular, will be hard-hit by the requirement to use E-Verify and they seem to embody the adage that “change imposed is change opposed.”

The Main Street Alliance, a national network of small business owners committed to speaking out on the important issues facing their businesses’ local economies, has submitted a letter to the House Judiciary Committee outlining the job-killing impact of E-Verify upon small business, its workforce and the economy. The Main Street Alliance views E-Verify as a litmus test to determine which legislators are truly in favor of small business and which are against it. Small businesses complain that the cost of E-Verify will be enormous both in terms of employer compliance and lost productivity as workers take time off to correct mistakes caused by the system.

Certain groups advance the argument that comprehensive immigration reform, including a path to citizenship, would reduce the underground economy, adding \$1.5 trillion to the economy over 10 years.

In light of the continuing debate over comprehensive immigration reform, the lobbying efforts of opposing factions and the sharp divisions within Congress, the fate of mandatory E-Verify utilization by small businesses is uncertain. What is certain, however, is that it will impose additional costs and burdens and ultimately may not eliminate the ills it was designed to cure. ■

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