IMMIGRATION

Expert says E-Verify presents employers with impossible choice: discriminate or risk substantial loss

Since its inception, US Citizenship and Immigration Services (USCIS), an agency of the Department of Homeland Security (DHS) has touted E-Verify, its free web-based program that "verifies" whether an individual is legally permitted to work in the United States, as "the best means available to determine the employment eligibility of new employee hires," and "a smart, simple and effective tool." Originally required only for federal contractors, E-Verify is now mandated for use by all employees in Arizona, Mississippi, Alabama, and South Carolina. Recently, Congressmen Lamar Smith (R, TX) introduced the Legal Workforce Act of 2011 which would require all employers throughout the United States to use E-Verify during the onboarding process. E-Verify's meteoric rise in popularity is apparently attributable to a United States citizenry that is increasingly concerned about access to a scarcity of jobs. The eagerness to find the "magic bullet" that will help solve intractable immigration problems has perhaps inhibited any debate over the negative externalities associated with E-Verify — specifically the burden it places on employers.

E-Verify cross-checks an employee's name and social security number against the databases kept by the Social Security Administration (SSA) and DHS, to determine an employee's eligibility to work in this country. E-Verify's regulations stipulate that the program can only be used once an employee has been hired, and all the necessary paperwork has been filed. Prescreening job applicants, or use of the program at any time prior to the completion of the I-9 form is expressly prohibited. If an employee is cleared through E- Verify, the employer garners a rebuttable presumption that it has not "knowingly" employed an illegal worker in violation of the Immigration Reform and Control Act of 1986 or any applicable state law. If an employee is not cleared, a tentative noncomfirmation, or TNC, is issued.

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The rules and procedures governing the issuance of a TNC process are well established in the memorandum of agreement which all users of E-Verify are required by law to follow. An employee who receives a TNC is entitled to eight working days to contest the SSA's finding during which time the employer is barred from terminating, suspending, delaying training, withholding/lowering pay or taking any other adverse action against an employee. Even after the eight day period, no action can be taken if a final ruling is still pending with SSA. Thus, the employer is left with an anxious and confused employee whom it must continue to pay and train with little hope of keeping employed.

Hiring and onboarding employees is a time-consuming and expensive process, and the use of E-Verify carries the additional risk of losing the employee after the lengthy process. After a job applicant is selected from a large (especially in today's economy) pool of applicants the employee must fill out W-2 and I-9 forms and then must meet with a company representative to be cleared, using E-Verify.

According to USCIS's own study, a TNC is erroneous 18 percent of the time, and "the average time from case initiation to completion for cases found work authorized after a TNC was 7.6 calendar days for USCIS cases and 12.5 days for SSA cases." While the average resolution of all cases is far lower (including those not contested), employers have almost a 1 in 5 chance of having to wait *on average* 12.5 days for the SSA to correctly resolve a contested case.

If a TNC is received on the third day and is subsequently challenged, the employer is likely handcuffed by the costs of training and paying an employee it probably will not be able to use. If the TNC is confirmed, the employee is fired, backdating any work that could have been performed until after the completion of a new hiring process, the filing of new I-9's and W-2's, the verification process, and additional training. Moreover, even if an employee is subsequently cleared, his/her work product and/or ability to absorb the training is likely diminished by anxiety, fear, absence from work, or preoccupation with securing or assembling documentation. With the already widespread adoption and proposed adoption of E-Verify, both the United States Supreme Court and Homeland Security predict that the time between the issuance of a TNC and resolution of the case is likely to become far longer.

A green card holder named Rosalita Delgado represents a more realistic possibility that a TNC will be issued than does the case of a natural born citizen.

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But employers are not legally allowed to ask whether an applicant is a citizen or not, removing the possibility of protecting themselves against the burdens of a TNC. Yet, human faculties can use any combination of one's accent, surname or skin color to discern the likelihood of citizenship — such is illegal under Title VII, but often inevitable. Few employers may wish to stomach the sunken cost of a TNC employee if they can otherwise opt for a white employee without a foreign (or at least not Spanish) sounding accent. While it is true that any racial discrimination is both illegal and reprehensible, it is understandable that businesses, especially small businesses, cannot afford the risk. Even for those courageous enough to take the gamble once, one bad experience with a TNC may preclude even reviewing an application belonging to one named "Rosalita" or "Delgado."

This reality is especially troubling because E- Verify was supposed to mitigate discrimination through its requirement that *all* new hires be run through the system. But inadequate safeguards exist to ensure that employers will not try and game the system by covertly running only certain suspicious sounding names through E- Verify. Since foreign born naturalized citizens and foreign born non-citizens are far more likely to be issued an erroneous TNC, (0.3 percent for workers attesting to being US citizens, compared to 1.0 percent for lawful permanent residents and 5.3 percent for other noncitizens with authorization to work), many applicants, especially Hispanic applicants, may never know why they were not hired. Thus, use of E- Verify to illegally prescreen employees has a tremendously discriminatory impact on foreign workers — and it is shockingly widespread.

Abuse of the system

According to a USCIS report, a quarter of the surveyed employers admit that they had run at least one employee through the database prior to completion of the form I-9. Amongst the forty-two employers who said they had not done so, their employees contradicted that testimony over 85 percent of the time. Of those employees that were asked if their employee took an adverse action against them, 1/3 of them (59 out of 161) reported that as a result of a TNC they were subject to at least one of the following adverse employment actions: dismissal from work, disallowed from using work time to contest the TNC, not hired (if they were prescreened and told about it), or saw a decrease in wages, training, or start time.

However, the current system that disallows prescreening is also untenable. E-Verify, as currently constituted, presents businesses with an impossible choice: discriminate or risk substantial loss.

While noting these statistics, USCIS then reports, perhaps contradictorily, that only 13 out of 87 employers felt burdened by a TNC. Indeed, in its over 250 page analysis of E- Verify, the effect of noncompliance with E- Verify's clear regulations is never mentioned, even as a caveat to its conclusion that employer satisfaction corroborates that the product is effective. Widespread violation of E-Verify's regulations should at least constitute an asterisk next to any conclusions drawn from the responses of surveyed employers.

Some employers have even violated E- Verify in a vastly different manner by not informing their employees that USCIS has sent back a TNC. Of the 401 surveyed employees who received a TNC only 233 of them reported ever being notified, a strikingly large number of cases. In its report, the USCIS writes "it is likely that some of these workers do not remember being notified or were notified but did not understand what the employer meant, and others may be workers who quit before being notified." Query, for example, the number of employees that would "forget" the US government declared them tentatively unable to work. Though possible, such a conclusion would be surprising.

While 91 percent of employers are satisfied with [the way *they* use] E-Verify, 66 percent criticize it foremost for disallowing prescreening, a telltale sign in and of itself, that employers simply do not want to risk the possibility that a TNC will be issued.

USCIS has suggested that prescreening of job applicants would limit the abuse of E-Verify. However, such a proposal ignores that these regulations compensate for a faulty system. Members of the DHS (the ones who created and monitor E-Verify) testified before congress in 2007 that the Social Security records contain errors that would result in a 4.1 percent erroneous TNC rate, a figure much higher for non native born citizens, and one even higher for those without citizenship. Until the Social Security records are improved, rules that prohibit prescreening and adverse actions are needed to protect vulnerable citizens from an extremely faulty system. Because foreign born workers are exponentially more likely to be given an erroneous TNC, it is hardly fair to ask an employer to wait until an applicant resolves his/her TNC, and thus it is hardly realistic to expect employer compliance.

However, the current system that disallows prescreening is also untenable. E-Verify, as currently constituted, presents businesses with an impossible choice: discriminate or risk substantial loss. Given that 78 percent of all illegal immigrants in the United States of America are Latino, Rosalita Delgados everywhere may be prescreened by illegal use of E-Verify, or other discriminatory behavior. ❑

Source: *Expert commentary provided to CCH, a Wolters Kluwer Company, by Michael Wildes, a managing Partner at Wildes & Weinberg PC, a prominent immigration law firm since 1960 (wildesweinberg.com).*