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E-Verify: Presenting a Hobson's Choice to Employers

By Michael Wildes

Since its inception, the Department of Homeland Security (DHS), has promoted E-Verify, a 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 established as a voluntary pilot program required only for federal contractors, E-Verify is now mandated for use by all employees in Arizona, Mississippi, Alabama and South Carolina and for many employees in about a dozen other states.

The program is bolstered by the Supreme Court's ruling in *Whiting v. Chamber of Commerce,* which holds that Arizona's requirement of E-Verify was not preempted by federal law. Recently, Congressman Lamar Smith 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 — most specifically, the burden it places on employers.

E-Verify cross-checks an employee's name and Social Security number with the admittedly error-laden databases kept by the Social Security Administration (SSA) and the DHS to determine an employee's eligibility to work in this country. E-Verify's regulations stipulate that the program can be used only after 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 TNC (tentative nonconfirmation) is issued.

The rules and procedures governing the issuance of a TNC are well established in the memorandum of agreement which all users of E-Verify are lawfully bound to follow. An employee who receives a TNC is entitled to eight working days to contest the SSA's findings, 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, even though the employee is more than 80 percent likely to be ineligible to work.

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. Because foreign-born workers, whether noncitizens or naturalized citizens, are far more likely to be issued an erroneous TNC (0.3 percent for workers attesting to being U.S. citizens, compared to 1.0 percent for lawful permanent residents and 5.3 percent for other noncitizens with authorization to work), many job seekers, especially Hispanic

Wildes is managing partner of Wildes & Weinberg P.C., an immigration law firm serving international and domestic corporate and individual clients. The firm has offices in Englewood and New York City.

applicants, may never know why they were not hired. Unsurprisingly, the use of E-Verify to illegally prescreen employees has had a tremendously discriminatory impact on foreign workers.

According to a USCIS report, a quarter of the surveyed employers admit that they have run at least one employee through the database prior to completion of the form I-9. Among the 42 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 employer took an adverse action against them, one third 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.

While noting these statistics, USCIS obscures this data when reporting 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.

Some employers have even violated E-Verify in a completely 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. USCIS attempts to explain the appallingly high number of cases where employees were not notified by claiming that: "[I] t 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."

Such an explanation is grossly insufficient; it is almost impossible to believe that such a large number of workers would simply forget that the United States government declared them tentatively unable to work, or that large numbers of workers quit between the time they were given the TNC and the time they were notified. While 91 percent of employers are satisfied with [the way *they* use] E-Verify, 66 percent criticize it foremost for disallowing prescreening. This criticism, in and of itself, is a telltale sign that employers simply do not want to risk the possibility that a TNC will be issued.

Perhaps understanding that this widespread abuse is frequently occurring, the chief recommendation of the USCIS report was to allow prescreening of job applicants — rendering a bad problem much worse. Such a proposal ignores that these regulations compensate for a faulty system. Staff of the DHS (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 nonnative 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 or her TNC, and it is hardly realistic to expect employer compliance.

To be sure, the current system that disallows prescreening is also untenable. E-Verify, as currently constituted, presents businesses with an impossible choice: either discriminate or risk substantial loss. Not surprisingly, many will choose to discriminate. Given that roughly 78 percent of all undocumented immigrants in the United States are Latino, Latino candidates are likely to be disproportionately affected.

Constructively aware of this problem, the federal and various state governments are somewhat complicit in E-Verify's misuse. As various states continue to replace statutory punishment for employing illegal immigrants with far more draconian penalties, scarcely any punishment exists for prescreening, selective screening or adverse employment actions. A search through USCIS's website, E-Verify videos, Supreme Court opinions and statutory law, reveals only that violations of E-Verify will bar an employer from the privilege of its use, and "may subject [it] to civil penalties." Though USCIS acknowledges that it "is a powerful tool," leadership in Congress and most states are remarkably apathetic to the role that E-Verify can play in discriminating against foreign workers, and even foreign-born United States citizens.

It is also unfair to force employers to bear the cost of that protection by creating laws that handcuff cash-strapped businesses behind bureaucratic red tape. It should also not be surprising when businesses seek to circumvent those laws and insulate themselves against its externalities by discriminating against Hispanics at the interview, or protecting themselves by preemptively firing or cutting the wages of one who receives a TNC. In today's economy, employers can ill afford to accommodate delays. Without improvements to E-Verify, employers who are unable to withstand a TNC are left with a Hobson's choice: violate Title VII by discriminating against likely candidates for employment, or ignore E-Verify's explicit regulations. ■