

THE IMMIGRATION CIVIL WAR: DIFFERENCES BETWEEN THE STATES ON E-VERIFY AND WORKER PROTECTION

Publication
Jul 6, 2021

When most employers think about immigration compliance, they usually assume that employment-based immigration is solely a federal concern. While many are familiar with federal programs that in effect “deputize” local law enforcement to enforce federal immigration laws, employers are often surprised to learn many states have found ways to insert themselves into the employment-based immigration discussion. Some states have developed more restrictive protocols, while others have created more employee-protective systems. What does your organization need to know about this tug-of-war and how might it affect your business?

Mandating the Use of E-Verify

The implementation of E-Verify within the hiring process is one popular way in which states became involved in workplace immigration enforcement. E-Verify is an online system that allows employers that have enrolled into the program to confirm the employment eligibility of its employees in the United States. The system uses information from the I-9 and records available from the Social Security Administration and the Department of Homeland Security.

Service Focus

Counseling and Advice

Immigration

E-Verify requirements vary by state to state, which is important to keep in mind if you have locations in multiple states or employ workers across the country – particularly as remote work gains in popularity following the COVID-19 pandemic. The application of E-Verify requirements may even vary within those states that have some sort of verification requirement in place. For example, some states only require E-Verify for certain types of employers or employment in the state, while others require it for all employers regardless of the nature of the employment.

Even if the law does not require it in every state, it may make sense for businesses operating in multiple regions to implement E-Verify across the board. This can ensure consistency across the board and to help avoid the appearance of discriminatory practices or lax standards based on the location.

States that require all or most employers to use E-Verify

- Alabama
- Arizona
- Georgia
- Mississippi
- North Carolina
- South Carolina
- Tennessee
- Utah

States that require E-Verify for public employers and/or contractors with the state

- Florida ([note: this was added at the beginning of 2021](#))
- Indiana

- Missouri
- Nebraska
- Oklahoma
- Pennsylvania
- Texas

States that require E-Verify for public employers only

- Idaho
- Virginia

States with local municipality E-Verify requirements

- Michigan
- New York
- Oregon
- Washington

States that require E-Verify for contractors only

- Colorado
- Louisiana
- Minnesota

Florida Joins the Ranks

[Florida joined the list of states with an E-Verify requirement in January 2021.](#) The state now requires every public employer, as well as contractors and subcontractors working on public projects, to enroll and begin to use E-Verify to confirm the eligibility of all new employees. Private employers are not required to use E-Verify unless they have a contract with a public employer and/or if they apply to receive taxpayer-funded incentives through the Florida Department of Economic Opportunity. In addition to adding E-Verify

requirements, Florida modified the Federal Form I-9 retention rule for private employers if they do not use E-Verify. The federal retention rule requires that Form I-9s, along with copies of documents used to complete them, must be maintained for three years from the date of hire or one year from the date of termination, whichever is later. Private employers who do not use E-Verify must maintain copies of the documents used to complete Form I-9 for three years.

Federal Contractors Face E-Verify Requirements

Regardless of state requirements, there are some situations where federal contractors are required to use E-Verify. Employers with federal contracts or subcontracts that contain the Federal Acquisition Regulation (FAR) E-Verify clause are required to use E-Verify to determine the employment eligibility of:

- Employees performing direct, substantial work under those federal contracts; and
- New hires on an organization-wide basis, regardless of whether they are working on a federal contract.

A federal contractor or subcontractor who has a contract with the FAR E-Verify clause also has the option to verify the company's entire workforce.

Additional Protection for Employees

Employers that use E-verify are required to follow the program's rules, including privacy and nondiscrimination protections for employees. But in addition to the existing I-9 nondiscriminatory requirements, some states have tacked on additional protections for workers.

California, for example, has enacted several protections. Unless required by federal law, an employer or someone acting on their behalf is not allowed to provide consent to immigration enforcement officers to enter areas of a workplace that are not open to the public unless the agent has a warrant. Similarly, an agent cannot access, review, or obtain employees'

records without a subpoena or court order (subject to an exception). Employers in California must also provide current employees with a notice of an inspection of I-9 forms within 72 hours of receiving the notice of inspection as well as provide affected employees with a copy of the notice of inspection. After the inspection, employers must provide a copy of the notice that provides the inspection results to the affected employees within 72 hours of receipt.

When performing I-9 eligibility verification, California employers are prohibited from requesting additional and/or alternative documents than those listed by the federal government. Employers also cannot refuse to honor documents that reasonably appear to be genuine or based on the status or terms of status that accompany the authorization to work. Employers are also prohibited from using E-Verify to check employment authorization status, unless required by federal law, or to reverify employment eligibility of a current employee, unless permitted by law. Lastly, an employer cannot threaten to contact the government or police regarding an employee's immigration status.

In Oregon, employers are required to notify workers of a federal inspection of records or documentation that is used to identify workers and their employment eligibility. Employers there are also required to notify employees within three business days of receiving notice, by posting a notice to employees in a conspicuous area in English and the language typically used to communicate with employees. Employers must also attempt to individual distribute notice to employees in the workers' preferred language.

Use of State Law to Enforce Immigration Compliance

Some states have resorted to the use of state laws addressing identity theft to insert themselves into the employment immigration discussion. A few years ago, Arizona made it a crime for an unauthorized alien to work in the state. In *United States v. Arizona*, the United States Supreme Court upheld that the decision to regulate who gets to work or not regardless of their

immigration status rests solely with the federal government, not the state and struck down that law. In other words, the federal government is the only entity that can restrict employees based on their immigration status.

More recently, in the case of *Kansas v. Garcia*, the Supreme Court was asked to decide whether a state could criminally prosecute individuals for the state crime of identity theft where individuals used social security numbers that were not assigned to them to gain employment. The defendants in the case used the same social security number for their I-9s, W-4s and K-4s (the state equivalent of the W-4). Key to the case: the federal statute that governs the Form I-9 clearly states that information contained in I-9s may not be used for purposes other than those set out in the statute. Criminal prosecution for identity theft under state law is not one of them. The defense argued that because the defendants had used the same Social Security numbers in their I-9s as they had on other employment-related forms, they could not be prosecuted under state law.

The State of Kansas argued that just because a piece of information was included in a Form I-9, that did not prohibit state and local law enforcement from using that information in a criminal prosecution where that same information was contained in other documents – in this case, the individuals' W-4s and K-4s. The Supreme Court sided with Kansas, holding that because the information contained in I-9s – names, addresses, email addresses, dates of birth – could be found in other personnel documents, the mere fact that an employee's Social Security number is contained in an I-9 does not mean that state law enforcement cannot use that information to prosecute the defendants for state crimes relating to identity theft.

Conclusion

There is no question that immigration enforcement remains a hot-button topic, and federalism complicates things even more. State legislatures will remain under

pressure to pass legislation requiring the use of E-Verify. States like California and Oregon will undoubtedly seek additional protections for undocumented workers whereas states like Arizona and Kansas will continue to look for ways to target undocumented noncitizens using state laws.

We will continue to monitor the push-and-pull between the states and the federal government on immigration compliance and provide updates as warranted. Make sure you are signed up for [Fisher Phillips' Insight system](#) to receive the latest information directly in your inbox. For further questions, contact your Fisher Phillips attorney, the authors of this Insight, or any member of our [Immigration Practice Group](#).