Seven States Now Mandate the Use of E-Verify

Insights
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Across the country, states continue to enact their own employment-related immigration legislation, including legislation requiring certain employers to use E-Verify to electronically verify the employment eligibility of their newly hired employees. Currently, seven states have implemented laws requiring certain employers, and state contractors to use E-Verify. The seven states mandating the use of E-Verify are **Arizona, Arkansas, Colorado, Georgia, Mississippi, Oklahoma, and Rhode Island.**

The following is a description of the requirements for the states that have mandated the use of the E-Verify program.

Arkansas – Pursuant to Arkansas House Bill 1024 (Act 157)**,** Arkansas state agencies are prohibited from entering into contracts with businesses that knowingly employ or contract with illegal immigrants. Contractors are required to certify that they do not, at the time of certification, employ or contract with undocumented workers. If a contractor uses subcontractors, the subcontractors must also certify that they do not employ any unauthorized workers. Contractors who are found to have employed unauthorized workers may be found in breach of the contract and may be liable to the state for any actual damages incurred. The certification requirements apply to all contractors seeking to enter into a contract with a state agency for professional services, technical and general services, or construction where the value of the contract is $25,000 or more.

Arizona – The *Fair and Legal Employment Act* requires all businesses in the state to use E-Verify to verify the employment eligibility of newly hired employees. A business found to be employing undocumented immigrants would benefit from a rebuttable presumption that it did not violate another provision in the state law prohibiting intentionally or knowingly employing undocumented workers if the business was enrolled in E-Verify at the time of the alleged violation. The law stipulates that any company knowingly or intentionally hiring an illegal alien could face suspension of its business license for a first offense, and revocation of the license for a subsequent offense. On February 8, 2008, the law was upheld by the U.S. District Court for Arizona, but that ruling has been appealed.

Colorado – Colorado House Bill 06-1343, effective August 7, 2006 (C.R.S. 8-17.5-101 et seq.), affects contractors who provide services to state agencies and political subdivisions of the state, broadly defined to include most state and local governments, districts, and other public entities. Pursuant to

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this statute, public contracts for services must include provisions which: (1) prohibit the contractor from knowingly employing or contracting with illegal aliens, or using subcontractors who do so; (2) require the contractor to participate in the federal "E-Verify Program" to verify that it does not employ illegal aliens; and (3) require the contractor to take specified actions if it learns that a subcontractor is employing illegal aliens. Violation of these provisions will constitute a breach of contract, allowing the public entity to terminate the contract and recover damages. The Secretary of State will maintain a list of all terminated contractors. The Department of Labor and Employment is authorized to investigate compliance, and its web site provides a complaint form for reporting violations.

Georgia – Pursuant to the *Georgia Security and Immigration Compliance Act*, passed on April 18, 2006, public employers and contractors with the state of Georgia must use E-Verify to confirm the employment eligibility of newly hired employees. This law has three effective dates for public employers and contractors, including subcontractors, to participate in E-Verify: (1) effective July 1, 2007, for every public employer and contractor, including every subcontractor, who has 500 or more employees, (2) effective July 1, 2008, for every contractor, including every subcontractor, who has 100 or more employees, and (3) effective July 1, 2009, for every contractor, including every subcontractor, who has 99 or fewer employees.

Mississippi - On March 17, 2008 the Governor of Mississippi signed the *Mississippi Employment Protection Act*, which mandates a phased-in use of E-Verify for employers in the state. Beginning on July 1, 2008, all State agencies, public contractors and subcontractors, and all private employers with 250 or more employees must begin using E-Verify to check the employment eligibility of all new hires. Private employers with 100-249 employees have until July 1, 2009 to begin using E-Verify, and those with 30 to 99 have until July 1, 2010. All remaining employers must begin using E-Verify by July 1, 2011. Penalties for non-compliance with this law include cancellation of state or public contracts, ineligibility for state or public contracts for up to 3 years, and revocation of a business license for up to 1 year. However, the use of E-Verify does provide a safe harbor from non-willful violations of the Act. Finally, the law creates a cause of action for discharged employees if they can show that they were discharged at a time when an unauthorized worker was continued in employment by the employer. The statute expressly provides the individual has a cause of action against the employer for damages as a result of this "discrimination."

Oklahoma – The *Oklahoma Taxpayer and Citizen Protection Act of 2007* prohibits any public employer from entering into a contract for the physical performance of services within the state unless the contractor registers and participates in the E-Verify. The law includes a provision making it a discriminatory practice for an employer to terminate a work-authorized employee while retaining a non-work authorized employee, if the two employees had substantially similar job duties. An employer is indemnified under this provision, however, if it is properly using the E-Verify system.

Rhode Island – In accordance with *Executive Order 08-01*, signed on March 28, 2008, all agencies and departments within the executive branch of the State of Rhode Island government are required

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to use E-Verify to confirm the employment eligibility of all new hires. Furthermore, all persons and businesses (including contractors) doing business with the State must also use E-Verify.

While there are only seven states that currently mandate E-Verify, as shown by the chart below, there are numerous states with legislation or pending legislation relating to E-Verify.

State E-Verify Legislation	
Mandates the use of E-Verify	AZ, AR, MS, GA, CO, OK, RI
Encourages the use of E-Verify	TN, MO
Requires state agencies to use E-Verify	ID, NC, PA, MN, UT, RI
Legislation is still pending	CA, MN, PA, SC, TN, WV, IL, IN, IA, MO, RI, KS, NJ, CO, FL

E-VERIFY OVERVIEW

The E-Verify program is administered by the U.S. Department of Homeland Security's Citizenship and Immigration Services (USCIS) and the Social Security Administration (SSA). E-Verify is a web-based program administered by DHS and SSA to verify SSNs for employment authorization for all newly hired employees. (E-verify cannot be used for current or past employees.) DHS created this online verification system that allows registered employers to verify employment eligibility. E-Verify (formerly known as Basic Pilot) has grown from December 1, 2004 for only five states, to an option for employers nationwide.

In 2007, the number of employers participating in E-Verify soared from 14,000 to 52,000. President George W. Bush has requested $100 million to support the expanded usage of E-Verify program for fiscal year 2009. The government has stated that E-verify participation is evidence of good-faith compliance with IRCA.

"A rebuttable presumption is established that the Employer has not violated section 274A(a)(1)(A) of the Immigration and Nationality Act (INA) with respect to the hiring of any individual if it obtains confirmation of the identity and employment eligibility of the individual in compliance with the terms and conditions of E-Verify." E-Verify Memorandum of Understanding, art. II.C.6.

E-Verify can only be used for new hires and is not allowed to be used by an employer to verify work authorization for existing employees. Employers must still complete the I-9 form and if presented with a List B document can only accept one that contains a photograph. Employers must submit the employee's information to E-Verify within three days of the hire date. The information may only be done online, since there are no fax or phone alternatives.

The new hire's basic information is submitted to both the SSA and DHS databases to process the queries. If the SSA and DHS cannot confirm work authorization within 24 hours, the employer will receive a tentative nonconfirmation response. The employee can contest the nonconfirmation and has eight federal workdays to follow-up with SSA or DHS. Otherwise a final nonconfirmation will be issued. If the employer continues to employ the worker after a final nonconfirmation, a rebuttable

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presumption is created that the employer has knowingly employed an unauthorized individual. The employer could face fines from $550 to $1,100 for each individual. Some concerns have been raised regarding what constitutes constructive knowledge and if a nonconfirmed worker can continue to work if they provide additional non-SSN related Employment Authorization Documents.

Timeliness and Accuracy of E-Verify:
The majority of secondary verifications by USCIS are normally resolved in 24 hours, however some queries have taken several weeks. E-Verify is still undergoing growing pains as more employers register, especially in the secondary verification process. In the 2008 fiscal budget, an additional $30 million was approved to support and expand the E-Verify program.

Weaknesses in E-Verify:
"The E-Verify system is not fraud-proof and was not designed to detect identity fraud." USCIS Director Emilio Gonzalez. E-Verify cannot detect when workers are using another person's name and SSN. In September 2007, USCIS launched photo capabilities to display the identity photo of 15 million EAD and green-card holders. E-Verify participation will not make employers immune from I-9 compliance audits or possibility of raids.For example, on April 16, 2008, ICE raided Pilgrim's Pride poultry plants and arrested more than 300 foreign nationals working in its plants in Texas, Florida, Tennessee, Arkansas and West Virginia for suspicion of committing identity theft and other criminal violations in order to obtain employment. Pilgrim's Pride participates in E-Verify but the E-Verify system did not detect the identity theft. Thus far, 91 workers have been charged with criminal violations, including false use of a Social Security number and document fraud. Pilgrim's Pride, which has been cooperating with the ICE's investigation, knew about the raids in advance and has not been charged with any civil or criminal violations. Julie Myers, Assistant Secretary for DHS stated, "this case is a good example of our efforts to prosecute identity theft that harms credit and the good name of U.S. Citizens."

Verification data can be used as a means of targeting employers for I-9 audits. In 2005, employers made over 900,000 queries into E-Verify and GAO has stated that this data could be used for worksite enforcement. ICE has the ability to request and receive program data from USCIS on specific employers who participate in E-Verify and are under investigation. (GAO Worksite Report, July 13, 2006.)

Please contact us if you have any questions about the E-Verify or the Fisher Phillips I-9 Solution product, which incorporates E-Verify for companies in states that mandate its use. Click here for more information about our I-9 Solution.

EXTENDING OPT FOR F-1 STUDENTS
The Department of Homeland Security has issued a new rule that allows F-1 visa students to extend their Optional Practical Training (OPT). Normally, OPT is valid for 12 months; however, the new rule provides two situations in which a F-1 visa student's OPT can be extended beyond 12 months. First, the OPT of F-1 visa students who are the beneficiary of an H-1B petition and request a change of

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the OPT of F-1 visa students who are the beneficiary of an H-1B petition and request a change of status will be automatically extended until October 1, 2008. If the H-1B petition is rejected, denied or revoked, the automatic extension of status and work authorization will immediately terminate. This extension will allow F-1 visa students whose OPT will expire before the start date of their H-1B status to remain in the United States and work through the beginning of their H-1B employment on October 1. F-1 visa students who have not been granted OPT will have their lawful status automatically extended but will not be authorized to work until the H-1B petition takes effect. Second, graduates in science, technology, engineering and math (STEM) who are employed by businesses enrolled in the E-Verify program will be eligible for a 17-month extension of OPT for a total of 29 months of OPT. The STEM graduate's employer must be registered in the E-Verify program and must be in good standing in the E-Verify program in order for the OPT extension to be granted.

Please contact your Fisher Phillips attorney if you have any questions about whether an applicant qualifies for an OPT extension.

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