

Employment Verification

Employers Should Consider Using E-Verify, Prepare for New I-9 Forms, Speaker Says

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The federal government's electronic employment eligibility system, E-Verify, will likely remain in place, and employers should consider the advantages and disadvantages to participating in the program, a speaker told a Society for Human Resource Management conference March 10.

At a discussion on workplace immigration issues typically faced by HR professionals, including E-Verify and I-9 form compliance, Eric Bord, a partner in the Washington, D.C., office of Morgan, Lewis & Bockius LLP, said it was unlikely that E-Verify would be discontinued by the Obama administration.

Homeland Security Secretary Janet Napolitano "understands the good and bad of E-Verify," Bord said. He pointed out that she had issued a directive within the department to address problems with the system. "She's probably not going to scrap it if she's asking for cures and corrections," Bord said.

Bord also spoke about the changes to the I-9 employment verification form that were slated to take effect on April 3. Although the rule specifying the changes was originally slated to take effect Feb. 2, the date was pushed back by the incoming administration. Despite the delay, Bord said he believes the rule will be implemented without changes.

Expired Documents Invalid for New I-9

One of the changes to the I-9 form that will be most noticeable to employers will be that expired employment documents, such as passports or drivers licenses, will no

longer be acceptable to prove employment eligibility. The other changes are largely technical, Bord said.

Bord emphasized, however, that employers must continue to use the old I-9 forms until April 3. On top of it being forbidden to use the new form prior to that date, Bord said employers should continue to use the old form in order to avoid the possibility of rejecting a currently acceptable document.

Meanwhile, Bord outlined various advantages and disadvantages to using the E-Verify system. Although he stressed that participation in E-Verify was optional (except in Arizona, Mississippi, and South Carolina, which have mandated its use), he said employers should be at least "thinking about" its implementation.

Although E-Verify helps employers maintain a legal workforce and does not have any explicit costs associated with it, Bord said, the program also has some disadvantages.

Bord said DHS promotes E-Verify as a system that "assists in prevention of fraud and identity theft," but, Bord said, the system could actually encourage identity theft. Although the system could detect whether a worker had presented fake documents, it would not detect whether a worker had presented another person's legitimate identity documents, Bord said.

Although E-Verify does have a photo tool, Bord said, it is "profoundly weak." Currently,

the photo tool only contains photos of foreign nationals, Bord said, and while DHS has spoken of importing photos from U.S. passports or drivers licenses, such efforts would be "an enormous undertaking" and likely are "a long way off."

However, "The real problem with E-Verify is that it doesn't give employers any more defense," Bord said. Although an employer's use of E-Verify "creates rebuttable presumption that the employer has not violated the law prohibiting unlawful hiring," I-9 forms, when completed and maintained correctly, do the same thing, Bord said.

Bord also said it was "disingenuous" of DHS to say E-Verify was "free," because of the labor costs involved in learning the system. In addition, if an employer uses a commercial platform to complete I-9 forms which also includes E-Verify, such a system is not free, Bord said.

Bord also outlined certain steps employers should take to avoid violating discrimination laws as a result of using E-Verify and/or completing I-9 forms. For example, employers may not request or require that certain types of documents be presented with I-9 forms, or refuse to accept those that are permissible. Employers also should not "single out individuals or groups for special verification procedures based upon a characteristic," or discriminate in favor of U.S. citizens.