

Verifying Aliens: It's Not Science Fiction — It's the Law

This Law Review was written by Timothy A. French and edited by Jed Mandel, both of whom are founding members of Chicago Law Partners, LLC. CLP serves as the Association Forum's general counsel.



Q I plan to hire a foreign national. What do I have to do to make sure I don't run afoul of immigration laws?

A Employers must comply with the Immigration Reform and Control Act of 1986, which prohibits knowingly hiring illegal workers. Under the Act, employers must collect information regarding an employee's identity and employment eligibility, and must record that information on U.S. Citizenship and Immigration Services (USCIS) Form I-9 within three days of hiring a new employee. All new employees must provide certain information on the Form I-9, and also must provide the employer supporting documents (e.g., passports or resident cards, or social security cards and state-issued IDs). The employer must examine the employment and eligibility documents to determine whether the documents reasonably appear to be genuine. The employer also must retain the completed Form I-9 for three years after the date of hire or for one year after the employment is terminated, whichever is later. Also, know that independent contractors are not considered employees for Form I-9 purposes and do not need to complete Form I-9.

In order to avoid potential discrimination issues, employers must accept any document from the USCIS list of acceptable documents, as long as the document reason-

ably appears to be genuine and employers may not: (i) demand that an employee show a specific document (e.g., a U.S. passport); (ii) ask to see employment authorization documents before an individual accepts a job offer; or (iii) refuse to accept a document or hire an individual solely because a document is set to expire in the future.

Interestingly, while Form I-9 requires employers to collect information, it does not allow employers to verify that the employee's information and supporting documents are valid. To address that issue, the USCIS instituted the voluntary "E-Verify" system in 2007 based on an earlier pilot program that started in 2001. E-Verify is an Internet-based system that compares information from an employee's Form I-9 to data maintained by the Department of Homeland Security (approximately 80 million records) and the Social Security Administration (approximately 455 million records). If the information "matches" (a process that can take a matter of seconds), the employer receives a confirmation notice and the employee is duly eligible to work in the United States. If the data does not match, E-Verify sends an alert (a "tentative nonconfirmation" or "TNC") to the employer, and the employee may continue to work while the mismatch is resolved. The employee has eight work days to work out the problem. If the employee decides to contest the TNC,

the employer refers the case to the appropriate federal agency along with a form letter generated by the E-Verify system. If the employee successfully resolves the TNC, E-Verify notifies the employer. If not, E-Verify sends final non-confirmation result to the employer, and the employee must be terminated from employment.

Unlike the Form I-9 process, participation in the E-Verify program is voluntary. For the more than 400,000 employers that participate in E-Verify, their employees need to supply Social Security numbers and photo-IDs to facilitate the matching process.

The voluntary nature of the E-Verify process may change in the future. More specifically, on June 27, the Border Security, Economic Opportunity and Immigration Modernization Act of 2013 passed the U.S. Senate by a vote of 68 to 32. Among the elements of the Immigration Reform bill is a provision implementing an enhanced electronic Employment Verification System (EEVS) on a mandatory basis. EEVS would operate much like E-Verify, but would be linked to Immigration and Customs Enforcement as well, such that "non-confirmed" employees could be processed for deportation and other penalties on a more expedited basis. Under the bill, larger employers (with more than 5,000 employees) would need to use EEVS within two years of the adoption of implementing reg-

ulations; employers with more than 500 employees would have three years to become integrated with EEVS; all other employers would have four years.

The likelihood of an Immigration Reform bill being adopted this year is uncertain. Nevertheless, all employers, large and small, should continue to monitor their employment verification obligations.



The answers provided here should not be construed as legal advice or a legal opinion. Consult a lawyer concerning your specific situation or legal questions.