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Immigration

AILA Panel Weighs Pros, Cons to Employers Of Extra Government Scrutiny Under E-Verify

NASHVILLE, Tenn.—The federal government's electronic employment eligibility verification program—E-Verify—is the ''elephant in the room,'' seen as a rapidly expanding system in which almost 2,000 employers enroll each week, many of whom struggle to grasp its monitoring and compliance requirements, speakers at the American Immigration Lawyers Association's national conference said June 16.

Employers that join E-Verify by signing a memorandum of understanding with the Department of Homeland Security must be aware of their obligations under the program, which is here to stay and has departed from its purely ''voluntary'' beginnings, speakers said.

On the surface, the program ''seems like a user-friendly corporate reputation program that may finally be ready for prime time,'' said Peter Schiron Jr. of professional services firm Deloitte LLP in New York.

''But really, make no mistake. E-Verify is about compliance, and it's about enforcement.''

E-Verify Puts Employers in Positive Light. E-Verify participants can take comfort that by complying with the program's requirements and using it in good faith, they will establish a presumption that they have not knowingly hired undocumented workers, said Susan Cohen of law firm Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo in Boston. But she added that it is important for attorneys to advise employers that this presumption is not a safe harbor and does not amount to complete protection from potential fines and penalties.

Other benefits of an employer's participation in E-Verify include that it might serve to mitigate those fines or penalties and that it could curb document and identity fraud by deterring ''savvy'' undocumented workers from applying with the employer, Cohen said.

Panelists also identified recent government efforts to improve the system. For instance, former AILA president Kathleen Walker of Cox Smith in El Paso, Texas, pointed to E-Verify Self Check, an online service for employees to assess their employment authorization status before starting work for a new employer and undergoing the E-Verify process.

Program Enrollment Has Its Drawbacks. On the other hand, Cohen said, the disadvantages of participation in E-Verify include that it requires the employer's allocation of resources and training for inputting program data and subjects the employer to government inspections. Panelists also expressed their concerns that government officials might mishandle sensitive information they receive from enrolled employers.

Cohen advised employers and attorneys to read the E-Verify memorandum of understanding closely. In particular, she spotlighted the document's stipulation that an enrolled employer agrees to allow DHS and the Social Security Administration, ''upon reasonable notice, to review Forms I-9 and other employment records and to interview it and its employees regarding the Employer's use of E-Verify, and to respond in a timely and accurate manner to DHS requests for information relating to their participation in E-Verify.''

An employer might be opening a ''Pandora's box'' through this agreement, Cohen said. She added that despite ''all of the statements to the contrary by DHS,'' there is room in the E-Verify process for employers to make significant mistakes.

In filling out the E-Verify memorandum of understanding, an employer might be opening a "Pandora's box," Cohen said.

For example, she said, an employer might run afoul of a requirement that it not fire an employee or otherwise take an adverse employment action based on the employee's perceived employment authorization status while the employee is contesting a tentative nonconfirmation, which is issued when the employee's E-Verify information does not match either DHS or SSA records.

Employers also must ensure that they do not use E-Verify for pre-employment screening of job applicants, which the memorandum of understanding bars, Cohen added.

Program Mandatory Under Certain Circumstances. Schiron pointed out that E-Verify is not voluntary for certain employers. The panelists discussed the rule under which an employer must use the program for new hires and ''existing employees''—with exceptions—who directly perform work under a federal contract that is performed at least partially in the United States and has both a period of performance exceeding 120 days and a value above $100,000.

Such a contract must include a Federal Acquisition Regulation E-Verify clause, as must any related subcontract for services or construction with a value above

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$3,000. Federal contracts for commercially available off-the-shelf items are exempt from the rule.

''We on this panel are in agreement that the prime contractor doesn't need to be a policeman of its subcontractor, but it's very important to have the signed subcontract and proof that the subcontractor has actually enrolled with E-Verify,'' Cohen said.

''If the prime contractor learns independently that the subcontractor is not in compliance, that is a different issue and needs to be investigated very carefully and remedied, because the prime contractor's entire livelihood could be affected by the failure of the subcontractor to comply.''

Walker said it might be easier for an employer subject to the federal contractor rule to use E-Verify for its entire workforce and to avoid the potential complexity of pinpointing new hires and existing employees who work on a covered contract.

The federal contractor rule is not the only thing undermining E-Verify's ''voluntary'' characterization, Schiron said, as 18 states currently have mandatory E-Verify laws. He noted that several of those states have required all or most employers to use the program, while other states have mandated its use by public employers and/or contractors.

Panelist Criticizes IMAGE Program. Meanwhile, Walker called the Immigration and Customs Enforcement Mutual Agreement between Government and Employers (IMAGE) compliance program ''much more invasive'' than E-Verify.

To become IMAGE certified, employers must agree to enroll in E-Verify within 60 days, submit to a Form I-9 inspection by ICE agents, and implement a written hiring and employment eligibility verification policy that includes an internal Form I-9 audit at least once per year, among other things.

The program is enticing because ICE waives potential fines for a certified employer if substantive violations are discovered on fewer than 50 percent of the Forms I-9 the employer is required to submit, Walker said. She noted that if substantive violations are found on more than 50 percent of the forms, ICE will either mitigate or issue fines at the statutory minimum. The agency will hold off on conducting another Form I-9 inspection for at least two years following the initial inspection, she added.

Despite these benefits, Walker said she generally would strongly recommend against an employer's joining IMAGE.

''In certain circumstances, it might be attractive,'' she said. ''But they'd have to be pretty dire circumstances to me.''

''Indeed, what you're asking the government to do is to come in and review your I-9s,'' she said.

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