



white paper

USCIS CANNOT ENSURE ACCURATE EMPLOYMENT VERIFICATIONS

Department of Homeland Security's Inspector General
Identifies Systemic Failures within the E-Verify Program



A recent Department of Homeland Security (DHS), Office of Inspector General (OIG) report (“the report”) found numerous systemic issues vulnerabilities with E-Verify’s business processes that undermine E-Verify’s reliability. Here, we will briefly discuss the report’s findings and provide general recommendations.

E-Verify is a partnership between the Social Security Administration (SSA) and the United States Citizenship and Immigration Services (USCIS) created in response to a Congressional mandate to administer an electronic employment verification system.¹ E-Verify is intended to allow “any U.S. employer to electronically confirm the employment eligibility of its newly hired employees.”²

E-Verify has been touted by USCIS as a tool to ensure a legal workforce, protect jobs for authorized workers, and deter

document and identity fraud.³ For some employers, use of E-Verify is mandated by state statute or because they are the beneficiary of a federal grant or contract.⁴

The report identifies several areas of concern, only some of which impact employers. The entire report can be accessed [here](#) and the salient areas of concern for employers are discussed below:

E-Verify Lacks the Ability to Ensure that Employer-Petitioned Visa Holders are Working for the Petitioning Employer

Some employees, such as those who are H-1B visa holders, are only authorized to work for the employer who sponsored them or a subsequent employer who has petitioned for them by filing a Form I-129.⁵ The Form I-9 itself requires no special notation when an employee begins work for the initial sponsoring employer; notations are only required when the employee continues

¹ Illegal Immigration Reform and Responsibility Act of 1996, signed September 30, 1996; codified at 8 U.S.C. § 1324a.

² Form M-775 at § 1.1 ([E-Verify User Manual](#)).

³ USCIS, *E-Verify Overview*, at 6, available at: <https://www.e-verify.gov/sites/default/files/everify/presentations/EVerifyPresentation.pdf>

⁴ Exec. Order No. 12989, 73 C.F.R. 33285, 33283-33287 (2008); FAR case no. 2007-013; [https://portal.mybig.net/documents/State_Summary_of_E-Verify_Laws_\(updated_Nov_2020\) - BIG.pdf](https://portal.mybig.net/documents/State_Summary_of_E-Verify_Laws_(updated_Nov_2020) - BIG.pdf).

⁵ 8 C.F.R. § 214.2(h)(2)(H); Form M-274 at § 6.5 ([Form I-9 Handbook for Employers](#)).

employment past the initial duration of the H-1B status or when the employee begins work for a second employer (the porting process).⁶ Similarly, E-Verify does not verify whether the employee is authorized to work for the employer; instead it only verifies that the visa is valid and matches the employee.⁷ As a result, E-Verify deemed employees authorized to work even though they may not have met sponsoring employer requirements.⁸ USCIS initially believed that the cost outweighed the benefit of this feature, but has agreed to conduct a feasibility study by December 31, 2022.⁹

E-Verify Does Not Ensure Individuals Present Their Own Driver's Licenses for Verification

In fiscal year 2019, approximately 54% of all employees used a driver's license to prove identity.¹⁰ USCIS only has access to databases that confirm whether a driver's license exists and is valid, not whether the photograph in the state driver's license database matches the driver's license on the document presented to the employer.¹¹ This presents a vulnerability because driver's licenses are susceptible to photo-substitution.¹² Additionally, OIG reviewed system results from fiscal year 2019 and found that nearly 613,000 individuals were deemed 'work authorized' without ever confirming the existence and validity of the driver's licenses and state identification cards at all.

E-Verify's Current Photo-Matching Capabilities Create Compliance Risks

Photo-matching is not consistently required. If USCIS cannot locate the necessary documents in its initial search, the system bypasses the photo comparison step altogether.¹³ Further, when photo-matching is required, E-Verify relies on employers and authorized agents to conduct photo-matching, which creates a compliance risk because USCIS does not have a mechanism to monitor whether the employer is accurately completing the photo-matching tasks.¹⁴

Participation in E-Verify does not create a safe harbor from worksite enforcement and Form I-9 audits conducted by Immigration and Customs Enforcement (ICE).¹⁵ However, it does create a rebuttable presumption that your company has not knowingly hired an unauthorized alien.¹⁶ Use of E-Verify may create a safe harbor from enforcement of state E-Verify laws.¹⁷ The bottom line is that employers must do all they can to protect themselves from charges of knowingly hiring unauthorized workers, Form I-9 audits, and all of the associated business issues. Below is a list of recommendations for best protecting yourself from liability for E-Verify or Form I-9 violations:

- Have a written plan or policy in place for how your human resources staff completes the Form I-9 and E-Verify processes. This should include

6 8 C.F.R. § 212.14(h)(1)(i); Form M-274 at § 6.5.

7 Department of Homeland Security, Office of Inspector General, *USCIS Needs to Improve Its Electronic Employment Eligibility Verification Process*, OIG-21-56 (August 23, 2021) (OIG Report) at 17.

8 *Id.*

9 OIG Report at 20.

10 *Id.* at 13.

11 *Id.*

12 In 2009, USCIS estimated that nearly 90% of "false positive" employment authorizations were the result of identity theft or identity substitutions, including the use of fraudulent, stolen, or altered documents. See OIG Report at 9.

13 OIG Report at 8.

14 *Id.* At 7-8.

15 USCIS, *Frequently Asked Questions: Federal Contractors and E-Verify*, 2008 WL 4903656.

16 *Id.*

17 This topic is out of the scope of the current White Paper and will be discussed more fully in a forthcoming publication.

recordkeeping policies, such as keeping an employee's photocopied documents with their Form I-9,¹⁸ keeping signed copies of any Tentative Non-Confirmations with the employee's Form I-9,¹⁹ and recording the E-Verify case number in the "additional information" field in Section 2 of the Form I-9.²⁰

- Ensure that an E-Verify case is created for each new hire.²¹
- Complete an annual review or audit to determine whether the policies are being followed and correct any errors or omissions in your Forms I-9 or E-Verify cases.
- Provide biannual training to anyone who works with Forms I-9 or E-Verify. This training should include reviewing the anti-discrimination and document abuse provisions of the Immigration and Nationality

Act,²² required photocopying of documents if E-Verify is used,²³ timely creation of cases in E-Verify,²⁴ timely employee notification of Tentative Non-Confirmations (TNC),²⁵ refraining from taking adverse action against employees until a TNC is resolved,²⁶ and not using E-Verify to prescreen employees.²⁷

- Frequently check back with E-Verify to determine the outcome of any Tentative Non-Confirmations (TNC) and [timely close cases](#).²⁸

For those employers who use E-Verify as part of the onboarding process, either voluntarily or because it is mandated, the notion that E-Verify may not accurately report whether an employee is authorized to work is unsettling at best. However, a proactive and organized Form I-9 and E-Verify process can prevent the hire of employees who lack work authorization and provide adequate defenses in the event of an ICE audit. ■



¹⁸ Form M-775 at § 2.1.

¹⁹ Form M-775 at § 3.3.1.

²⁰ Form M-274 at § 4.0.

²¹ Form M-775 at § 1.5.

²² See INA § 274B.

²³ Form M-775 at § 2.1.

²⁴ Form M-775 at § 1.5.

²⁵ *Id.*

²⁶ Form M-775 at § 3.3.

²⁷ Form M-775 at § 1.5.

²⁸ Form M-775 at § 4.1.