

## States consider federal E-Verify program

For several years, the Texas Legislature has debated the state's role in restricting illegal immigration, including by considering proposals designed to ensure employers hire only people legally authorized to work in the United States.

Some proposals would require Texas employers to participate in a federal program called E-Verify to determine whether new employees could legally work in the United States. Some would require only public employers, such as the state and political subdivisions, to use the system, while others would include contractors and subcontractors doing business with public employers. Other proposals would impose the requirement on all employers.

During the 2011 regular session of the 82nd Texas Legislature, several filed bills would have required use of E-Verify. None of the bills was enacted. However, other states have enacted such laws, with 17 states requiring the use of E-Verify by either public or private employers or both, according to the National Conference of State Legislatures (NCSL).

### Current workplace requirements

**Federal law.** Under federal law, employers are prohibited from knowingly hiring or continuing to employ aliens not authorized to work in the United States (8 U.S.C. sec. 1324a). Employers must verify the identity and employment eligibility of new employees by examining certain documents and must fill out and keep a paper form, the Employment Eligibility Verification Form (I-9) form, for each new employee.

Federal law specifies documents that employees may present to prove legal status. On the I-9 form, employers

attest that they have examined documents presented by employees, that the documents appear to be genuine, and that to the best of their knowledge the employees are authorized to work in the United States. Employers are considered to have met this requirement if a document presented by an employee reasonably appears on its face to be genuine.

Employers must complete an I-9 for each new employee within three business days after the employee starts work and must keep the forms. The form includes the employee's name, birth date, Social Security number, and citizenship status and requires information about the documents used to establish work authorization and proof of identity.

U.S. Immigration and Customs Enforcement, part of the federal Department of Homeland Security, is authorized to conduct investigations to determine whether employers are complying with the law. Employers who do not comply may be subject to civil fines, and some violations may be prosecuted criminally. The state of Texas currently has no role in sanctioning employers who hire illegal workers or who do not follow the requirements for I-9 forms.

**Optional use of E-Verify.** In addition to filling out I-9 forms, employers may participate in a federal, Internet-based electronic employment eligibility program called E-Verify. To use E-Verify, employers and employees first complete the paper I-9 form. Information from the I-9 form then is entered into the E-Verify system and compared with information in the Social Security Administration database and the Department of Homeland Security's immigration databases. In response, employers receive either a confirmation of an employee's authorization to work or a tentative nonconfirmation (TNC), which workers may contest. If the nonconfirmation is not contested

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or resolved within a specific amount of time, E-Verify sends employers a final nonconfirmation notice.

In federal fiscal year 2010, 98.3 percent of employees submitted to the E-Verify system were automatically confirmed as authorized to work, instantly or within 24 hours, according to U.S. Citizenship and Immigration Services. Of the 1.7 percent of initial mismatches, 0.3 percent were later confirmed as work authorized. The remaining 1.43 percent were not found to be authorized to work.

Use of E-Verify has increased since it was created in 1996. As of December 2011, more than 307,000 employers were enrolled, and in federal fiscal 2011, more than 17 million queries were made through the system.

## State and federal E-Verify requirements

Certain federal contractors are required to use E-Verify, and some states require certain employers to use the system. There is no such law requiring use of E-Verify in Texas. Several bills dealing with E-Verify have been filed in recent Texas legislative sessions, but none has been enacted. Some past proposals would have required the state and political subdivisions or state contractors to use E-Verify, while other proposals would have imposed the requirement on all Texas employers.

In 2007, the 80th Legislature enacted HB 1196 by Kolkhorst (Government Code, ch. 2264), which requires certain businesses to go beyond the requirements of the I-9 paper form. The law requires public agencies, state or local taxing jurisdictions, and economic development corporations to require businesses submitting applications for public subsidies used for economic development to certify in their application that they do not employ illegal workers. Public subsidies include grants, loans, loan guarantees, enterprise or empowerment zone benefits, fee waivers, land price subsidies, matching funds, tax refunds, tax rebates, and tax abatements. The statute does not specify that employers must use the federal E-Verify program,

but employers convicted of certain federal offenses involving hiring unauthorized aliens must refund to the state any public subsidies received, with interest.

**Congressional proposals.** Proposals to require all U.S. employers to use E-Verify have been introduced in the current Congress. One proposal, H.R. 2885 by U.S. Rep. Lamar Smith (R-Texas), would phase in the use of an employment eligibility verification system such as E-Verify, exempt some seasonal agricultural workers, require federal, state, and local governments to verify the work eligibility of existing employees, and preempt state and local laws. The Senate proposal, S.1196 by Grassley (R-IA), would require all U.S. employers and the federal government to use E-Verify, require employers to verify the work eligibility of existing employees within three years, and ban state and local governments from prohibiting employers from using the program.

**Other states.** The use of E-Verify is required for public or private employers in 17 states, according to a November 2011 report by the National Conference of State Legislatures (NCSL) (*see chart, page 4*). Some states impose the requirement only on public employers or employers contracting with public entities, while other states require all employers to use the system. Fifteen states used legislation to establish a requirement to use E-Verify, and two states, Florida and Idaho, used executive orders issued by the governor.

Two states, California and Illinois, take a different approach and prohibit both localities and the state from requiring employers to use E-Verify. NCSL has compiled detailed information on the use of E-Verify by states, which can be found at <http://www.ncsl.org/issues-research/immigration/e-verify-faq.aspx>.

In May 2011, the U.S. Supreme Court, in *Chamber of Commerce of the United States v. Whiting*, 131 S.Ct. 1968 (2011), by 5-3 upheld Arizona's 2007 law requiring all employers to use E-Verify to determine whether employees are legally authorized to work in the United States. The law also prohibits employers from knowingly or intentionally hiring unauthorized aliens.

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Proof of having verified an employee's authorization to work in the United States through E-Verify creates a rebuttable presumption that an employer did not knowingly make an illegal hire. The penalty for violating the requirement to use E-Verify is loss of the rebuttable presumption, and the penalty for violating the hiring prohibition is revocation of the employer's state business license.

The U.S. Supreme Court said that the Arizona law was a state licensing law permissible under federal immigration law and not preempted by federal law. For more on the Arizona law, *see below*.

## Debate about mandating use of E-Verify

Debate about whether the state should require Texas employers to use E-Verify centers on the effect

a mandate would have on jobs and employers, as well as the accuracy of the system and whether it would increase identity theft.

Some say any mandate to use E-Verify should be enacted on the federal level so that states would be equally affected and so that large companies with a multi-state presence would operate under one set of rules. Others say that absent a national requirement, Texas should take what action it can and mandate E-Verify.

**Supporters of mandating use of E-verify** say it would strengthen the effectiveness of immigration law by making it more difficult for illegal workers to be hired, thereby reducing incentives for workers to come to Texas illegally. They say the importance of upholding immigration law and ensuring that only legal workers are hired justifies a statewide requirement. Although

## Arizona law prohibits hiring of unauthorized workers

A 2007 law enacted by the Arizona legislature prohibits employers from knowingly or intentionally hiring unauthorized aliens. A first offense requires a business to terminate the employment of the unauthorized aliens and be subject to a three-year probationary period during which the employer must file quarterly reports about new employees. During this period, courts also may order agencies to suspend an employer's business licenses. For second violations, courts must order the revocation of the licenses.

Arizona law defines a license as "any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business in this state." The definition includes articles of incorporation, certificates of partnerships, and grants of authority to foreign corporations. It also includes the state's "transaction privilege tax license," which is a tax on the privilege of doing business in Arizona. The definition does not include professional licenses or certain licenses relating to water or the environment.

Under the Arizona law, state, county, or local officials may not attempt independently to make final determinations about whether a worker is authorized. When state courts decide whether the state penalties for hiring illegal workers should be enforced, they must consider only a determination made by the federal government about a worker's status.

The U.S. Supreme Court has said that because the Arizona law is a licensing law, it does not violate a federal immigration law provision that preempts "... any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ ... unauthorized aliens" (8 U.S.C. sec. 1324a(h)(s)).

federal, comprehensive immigration reform is needed, the state should do what it can to address the effects of illegal immigration on the workforce.

**Effect on jobs and workers.** Supporters of requiring everyone to use E-Verify say it would protect and open up jobs for U.S. citizens and other legal workers by reducing the employment of those who were undocumented. Mandating E-Verify would be a job

killer only for illegal workers. The system identifies unauthorized workers, but it also deters others from coming to or taking jobs in the United States.

Treating all workers equally by subjecting everyone to a check through E-Verify would reduce verification-related discrimination, in which employers may treat certain potential hires differently from others if they think they may not pass E-Verify.

## States requiring use of E-Verify by employers

### *Required for*

<b>Alabama</b>	All employers (phase-in)
<b>Arizona</b>	All employers
<b>Colorado</b>	State agencies, contractors
<b>Florida</b>	State agencies, contractors, and subcontractors
<b>Georgia</b>	Public employers, contractors, subcontractors Private employers with more than 10 employees (phase-in)
<b>Idaho</b>	State agencies
<b>Indiana</b>	State agencies, contractors
<b>Louisiana</b>	State contractors, option for private employers
<b>Mississippi</b>	All employers (phase-in)
<b>Missouri</b>	Public employers, contractors, and subcontractors
<b>Nebraska</b>	Public employers, contractors
<b>North Carolina</b>	All employers (phase-in)
<b>Oklahoma</b>	Public employers, contractors, subcontractors
<b>South Carolina</b>	Public employers, contractors (phase-in), private employers
<b>Tennessee</b>	All employers with more than 6 employees (phase-in)
<b>Utah</b>	Public employers, contractors, subcontractors, private employers with more than 15 employees
<b>Virginia</b>	State agencies, public contractors, subcontractors with more than 50 employees

Most U.S. employers are law abiding and want to hire legal workers. These employers would rather comply with a state law on E-Verify than take their businesses to the underground economy by paying only cash wages or purposefully misclassifying employees as contract workers.

Industries and the Texas economy should not be built on illegal labor. As more states mandate the use of E-Verify, labor markets will stabilize and legal workers will remain in Texas to fill jobs.

**Effect on employers.** Supporters say mandating the use of E-Verify statewide would put all Texas employers on equal footing by holding them to the same standard. None would benefit from taking just a cursory look at employees' documents or from looking the other way when presented with false documents. Because employers would be forced to verify information presented by all new hires, undocumented workers no longer could seek out employers who did not use the system.

Requiring the use of E-verify, which is free, quick, and simple to use, would help employers, not burden them. Employers would be safeguarded from relying on false information presented by employees. The E-Verify program got high marks in customer satisfaction in a 2011 survey by a consulting group for the U.S. Citizen and Immigration Service.

**Accuracy.** Supporters of requiring the use of E-Verify say improvements in the system have reduced errors and solved problems reported in the past. The percentage of tentative nonconfirmations has been reduced, steps have been taken to ensure employer compliance, and safeguards for employee information have been put in place, according to a December 2010 report from the U.S. Government Accountability Office (GAO).

A system exists for workers to correct inaccuracies that surface with an E-Verify check. They receive mandatory notification of a nonconfirmation and a time period to correct errors. Workers may even check the database themselves through a self-check system so that errors can be identified and corrected before the worker applies for a job. Employers would use this system to

verify a worker's authorization, rather than resort to discrimination.

**Identity theft.** While some have expressed concern about unauthorized workers trying to obtain stolen names and other information in order to be verified and hired, supporters of requiring E-Verify say any increase in identity theft could be dealt with by enforcing Penal Code provisions covering that crime.

**Opponents of mandating use of E-Verify say** employers should be able to decide how to comply with federal immigration law without micromanagement from the state. Current law gives employers the option of using E-Verify if they choose, and this flexibility should not be replaced by an unfunded state mandate for all public or private employers to use the program.

**Effect on jobs and workers.** Changes to state law on immigration issues should not occur absent comprehensive immigration reforms that address Texas employers' need for workers, opponents say. Mandating E-Verify would not eliminate illegal hiring of workers but instead would drive workers to employers who paid cash or misclassified them as independent contractors rather than employees. When workers join the underground cash economy, their income, payroll, and unemployment taxes can go unpaid, and law-abiding employers can be put at a disadvantage.

Certain industries, such as agriculture, which depend to some extent on undocumented workers, could be hit hard by a mandate to use E-Verify. This is especially true if the economy heats up and more workers are needed for jobs not attractive to legal workers. Texas could be hurt if workers are discouraged from applying for jobs because of E-Verify or if they move to other states that do not require the program.

**Effect on employers.** Opponents of requiring the use of E-Verify say that rather than putting all employers on equal footing, mandating E-Verify would impact only those employers who follow the law. Employers who chose not to use the system and to operate in the underground economy might gain an advantage over employers using E-Verify.

Requiring use of E-Verify would be an unfunded mandate that could be costly and burdensome for employers. This would be especially hard to justify in the current economic climate. Employers would be required to follow certain procedures and would bear the costs of setting up and running the E-Verify system and training employees to use it. A mandate would consume employers' time and increase red tape when hiring and would expand the role of government in the workplace. Using E-Verify could be especially difficult for small- to medium-sized businesses without enough employees or infrastructure to implement the system. Workers and employers could have to spend significant time and money trying to correct information in the databases.

**Accuracy.** Opponents say the state should not require employers to use a system that relies on databases with errors and that can deny jobs to legal workers. Legal workers can be flagged by E-Verify as unauthorized to work for several reasons, including inaccurate information due to name changes after marriage, divorce, naturalization, or other events or due to misspellings and other errors made when inputting multiple surnames or other name variations.

E-Verify also can be ineffective in identifying illegal workers, opponents say. A study of 2008 data done by the research company Westat estimated that almost half of unauthorized workers are correctly identified as such but just over half are incorrectly found to be authorized to work. Inaccuracies can undermine confidence in the system and result in discrimination if employers refuse to hire workers based on ethnic profiling or the anticipated results of an E-Verify check or if workers are fired because employers receive tentative non-confirmation of a legal worker's status.

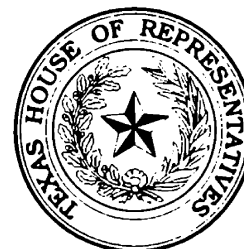
**Identity theft.** Mandating E-Verify could increase identity theft as more unauthorized workers try to obtain stolen names and other information to get jobs. Legal workers whose identities were stolen would be harmed, and workers assuming the identity of the legal worker most likely would not be identified by E-Verify.

— by **Kelle Dworaczyk**



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