

New Illinois Law Places Obligations on Employers Using Federal E-Verify Program

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E-Verify is a voluntary, Internet-based system, operated by the U.S. Department of Homeland Security (DHS) in partnership with the Social Security Administration (SSA), that allows employers to electronically verify the employment eligibility of newly hired employees by submitting information provided on Form I-9 into the online system. E-Verify then checks that information against the SSA and DHS databases and verifies the identity and work authorization of the submitted names.

In 2007, the Illinois legislature passed amendments to the Illinois Right to Privacy in the Workplace Act that would have prohibited private employers from using E-Verify until the federal government made specific improvements to the accuracy of the databases so as to decrease the number of work authorization denials to people who in fact are eligible to work in the United States. However, the DHS challenged that legislation and eventually secured a federal court decision striking down the portion of the law that prohibited Illinois employers from using E-Verify.

Not to be denied, the state legislature has passed another amendment to the Illinois Right to Privacy in the Workplace Act. The new law, which took effect January 1, 2010, places statutory obligations on employers that use E-Verify. Illinois employers are now required to complete a sworn attestation at the time of E-Verify enrollment, in a [form available from the Illinois Department of Labor](#), affirming the following:

- That the employer has received the requisite E-Verify training materials from the DHS
- That all employees with access to the company's E-Verify account have completed mandatory online tutorials
- That the employer has posted the required legal notices regarding its enrollment in E-Verify and certain non-discrimination requirements and procedures
- That the employer is maintaining the original attestation form, as well as computer-based tutorial certificates of completion, and making them available for copying and inspection at the request of the Illinois Department of Labor

The new law also prohibits Illinois employers that enroll in E-Verify from:

- Failing to display the required notices related to E-Verify
- Allowing an employee who has not been trained to use the E-Verify system

- Failing to take reasonable steps to prevent an employee from using another's user ID and password in lieu of completing his or her own E-Verify training
- Using E-Verify as a screening mechanism prior to hiring, or prior to completing the Form I-9 process
- Terminating or otherwise taking adverse action against an employee prior to receiving a final non-confirmation notice
- Failing to notify an employee in writing of a tentative non-confirmation notice and his or her right to contest it
- Failing to safeguard the information contained in the E-Verify database and the means of access to it

The new Illinois law gives employees and applicants a private right of action when an employer violates the provisions of the legislation. The employee or applicant must file a complaint with the Illinois Department of Labor before he or she can file a lawsuit in state court. If the court finds that the violation is willful and knowing, it may award \$500 per affected employee plus costs, reasonable attorneys' fees and actual damages. Failure to comply with a resulting court order may be punished as contempt and the employer (or its representative) may be found guilty of a petty offense, which carries a maximum penalty of \$1000.

If an employee or applicant claims that the employer refused to hire, promote or renew employment, or discharged or disciplined him or her without following the procedures of the E-Verify system, the matter may be referred to the Illinois Department of Human Rights for review and possible investigation under the Illinois Human Rights Act.

Illinois is currently the only state that has tried to block and regulate the voluntary use of E-Verify by private employers. In fact, some states actually *require* the use of E-Verify. What does this mean for companies in Illinois? Unless this latest attempt by the state to police the use of E-Verify is overturned, Illinois employers should be careful to adhere to the statutory requirements of the new law when using the E-Verify system.

If you have questions about the E-Verify system, please contact your attorney.

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