

E-Verify Is Now Mandatory For Some North Carolina Employers When Hiring New Employees

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North Carolina law now requires certain private employers with 25 or more employees to use the federal E-Verify system when hiring new employees. North Carolina employers must understand the limits on legal use of the system, know how to proceed based on the confirmation or nonconfirmation received from E-Verify, and be aware of the possible penalties if they fail to use E-Verify, or fail to use it correctly.

Background

"E-Verify" is an Internet-based system of the United States Citizenship and Immigration Services ("USCIS") that compares information from an employee's Form I-9 (Employment Eligibility Verification) to data from records of the United States Department of Homeland Security ("DHS") and Social Security Administration ("SSA"). Until recently, use of E-Verify has been voluntary for most private employers who are not government contractors.

New legislation in North Carolina now requires many employers to participate in the federal E-Verify system. This expanded use of E-Verify in North Carolina requires employers to be aware that if they are required to use E-Verify, failure to comply can result in monetary penalties and misuse of the E-Verify system can lead to a charge of employment discrimination.

Sections 64-25, *et seq.*, of the North Carolina General Statutes ("Act") make use of E-Verify mandatory for any North Carolina employer that has 25 or more employees. The effective date of the Act is staggered, based on the number of employees employed in North Carolina. Employers with 500 or more employees were required to begin using E-Verify on October 1, 2012; employers with 100 or more employees were required to begin using E-Verify after January 1, 2013; and employers with 25 or more employees are required to begin using E-Verify after July 1, 2013. Employers with less than 25 employees, state and local government agencies or municipalities, and employers that hire only temporary seasonal workers for fewer than 90 days are exempt from the Act.

How The New North Carolina System Works

If you are a covered North Carolina employer, you must enroll in the federal E-Verify system through the USCIS website (www.uscis.gov). As part of E-Verify enrollment, you will be required to sign a "Memorandum of Understanding" ("MOU") which includes the permitted and prohibited uses of the system.

The required use of E-Verify is in addition to, and does not replace, your obligation to obtain a completed Form I-9 from each new employee within three days after hiring. Providing a social security number on Form I-9 is usually voluntary; however, once you are enrolled in e-Verify, employees that you hire are required to supply a social security number on the Form I-9. While you must complete Section 2 of Form I-9 after examining documents that the newly hired employee supplies to you to establish identity and employment eligibility, you may not specify which document from a list of acceptable documents the employee may

provide, and you may not require that the document contain a photo. However, during the E-Verify process, you will receive a photo of your employee, and if your employee did supply a document with a photo, you must report through E-Verify if the photos do not match.

You must input Form I-9 information into E-Verify no later than the third business day after each employee begins working for you for pay. After comparing your employee's Form I-9 information with information on file with the SSA and DHS, the E-Verify system will then provide you with an initial result: either a confirmation that employment is authorized or a "tentative nonconfirmation" ("TNC"). A TNC results when the information you submitted through E-Verify does not initially match the information in the SSA or DHS records. A TNC, however, is only tentative and does not necessarily mean that your employee is not authorized to work in the United States.

What Happens If You Get A TNC?

If the E-Verify process returns a TNC, you must first check for transaction errors (i.e., input error). If none is discovered, you must print out the TNC and supply it to your employee. Discussions with your employee about a TNC must take place in a private setting. When notified of the TNC, your employee will have the choice of whether or not to contest the TNC. Your employee then acknowledges his or her decision on the "Notice to Employee of Tentative Nonconfirmation," also called a TNC notice. If you have followed the steps to notify your employee, but your employee does not notify you within ten business days of the employee's decision regarding contesting the TNC, you may consider the TNC to be final and must terminate the employee's employment. Similarly, if your employee chooses not to contest the TNC, the TNC automatically becomes a final nonconfirmation, and you must terminate the employee's employment.

If your employee chooses to contest a TNC, you must supply your employee with an E-Verify generated referral letter, and your employee must visit an SSA field office or contact DHS within eight federal government workdays. You will then receive notice, through the E-Verify system, of the determination following the agency investigation of the TNC. When E-Verify cannot verify your employee's employment eligibility after your employee has visited or contacted the appropriate agency, you will receive a final nonconfirmation indicating that your employee's authorization to work cannot be verified and, therefore, that you must terminate the employee's employment. If your employee indicates a desire to contest a TNC, but does not contact the appropriate agency within the required eight federal government workdays, you will receive a "No Show" result which is also considered a final nonconfirmation, and you must terminate the employee's employment.

Misuse Of E-Verify Information

Even if you are a covered employer and required to use E-Verify, you should be cautious about misuse of any information received through E-Verify because you could be subject to a charge of unlawful discrimination against an applicant or employee based on national origin, citizenship, or immigration status. Accordingly, you should be careful not to use the E-Verify system on only select newly-hired employees or to use E-Verify to discriminate against any job applicant or new hire on the basis of his or her national origin, citizenship, or immigration status. Further, you are prohibited from prescreening applicants with E-Verify or using E-Verify to check the employment eligibility for any employee hired before you signed the E-Verify MOU. Also, you may not terminate, suspend, delay training, withhold pay, lower pay, or take any other adverse action against an employee based on the employee's decision to contest the TNC before E-Verify issues a final nonconfirmation.

Required Notice To Employees

As an employer who uses E-Verify, you will be required to display a notice, supplied by DHS, in a prominent

location that is clearly visible to your prospective and current employees who will be verified through the E-Verify system. North Carolina law requires you to retain the record of the E-Verify verification of work authorization the entire time you employ your employee and for one year after the employee leaves. As a best practice, you should attach the result of the E-Verify transaction to each new employee's Form I-9.

Enforcement

The North Carolina Department of Labor ("NCDOL") is charged with investigating complaints regarding employers' failure to use E-Verify to verify an employee's authorization to work. NCDOL has a form for reporting, and anonymous reporting of an employer's failure to verify work authorization is also allowed. However, anyone who knowingly files a false and frivolous report under the Act will be guilty of a Class 2 misdemeanor.

After receipt of a nonfrivolous complaint against you, the NCDOL will conduct a hearing, and if you are found to have violated the Act by not using E-Verify, you will be assessed monetary penalties after your second violation. Additionally, during the course of the hearing, if the North Carolina Commissioner of Labor concludes that there is a reasonable likelihood that your employee is an unauthorized alien, the Act requires the NCDOL to notify local law enforcement agencies and the USCIS.

Conclusion

North Carolina employers must be aware of the new obligation to use E-Verify, understand the limits on legal use of the system, and know how to proceed based on the confirmation or nonconfirmation received from E-Verify. Finally, employers should be aware of the possible investigation and penalties if they fail to use E-Verify or use it incorrectly.

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