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**IMMIGRATION UPDATE
THE INS AND OUTS OF EMPLOYMENT
VERIFICATION: I-9/E-VERIFY
COMPLIANCE**

Webinar

February 17, 2010

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ABOUT LEHR MIDDLEBROOKS & VREELAND, P.C.

Lehr Middlebrooks & Vreeland, P.C. practices labor and employment law on behalf of management, with a focus on management rights and the actions that management can take, rather than those they can't. We pride ourselves on providing prompt, high-quality, creative legal services and solutions. Our philosophy is that labor and employment counsel is a collaborative process designed to meet our clients' business objectives.

We believe that our team of attorneys, our full support staff, and our nation-wide practice are our greatest strengths. We are committed to investing in state-of-the-art technology to provide our clients with the most responsive and efficient service possible.

Founded in 1993 by five attorneys and two staff, today the firm's staff includes Lyndel L. Erwin, who worked for the United States Department of Labor, Wage and Hour Division for thirty-six years, the last several of which as Area Director for Alabama and Mississippi; Jerome C. Rose, who joined the firm in 2001 upon retiring from the EEOC after working for twenty-two years as its Regional Attorney covering all EEOC litigation and enforcement matters in Alabama and Mississippi; and John E. Hall, who joined the firm in January 2002 after working for OSHA for twenty-seven years, the last several of which as Area Director for Alabama.

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ABOUT YOUR PRESENTER

Mike Thompson is a shareholder with the national labor and employment law firm Lehr Middlebrooks & Vreeland, P.C. The firm exclusively represents management throughout the United States in all aspects of the employment relationship, including the defense of employment disputes, counseling employers regarding problem avoidance strategies, conducting HR audits and supervisory training sessions and employee benefits issues. The firm's staff includes Jerome Rose, the former EEOC Regional Attorney for the region that includes Alabama; Lyndel Erwin, former Area Director for the Department of Labor, Wage and Hour Division; and John Hall, former Area Director for OSHA. The firm publishes and updates multiple state employer desk manuals which provide a comprehensive overview of the employment laws that impact a particular state's employers. Additional information regarding the firm is available at www.lehrmiddlebrooks.com.

Mike grew up on a family cattle farm in the Springhill community in Pike County. He attended Samford University on a Presidential Scholarship and graduated, *magna cum laude*. Mike received his law degree from Vanderbilt University School of Law and is admitted to practice before the state and federal courts of Alabama and Texas, the U.S. Supreme Court, as well as the U.S. Courts of Appeals for the Fifth, Seventh and Eleventh Circuits. Mike is a member of the Labor and Employment Sections of the American Bar Association and the Alabama State Bar and is a member of the American Immigration Lawyers Association. Mike has received Martindale-Hubbell's highest rating for professional excellence and serves as Alabama's contributing editor for several employment related publications of the American Bar Association. Mike and his wife, Sarah Hicks Thompson, live in Birmingham with their daughter and son.



Immigration Update – The Ins and Outs Of Employment Verification: I-9/E-Verify Compliance

February 17, 2010

- I. LEGISLATIVE UPDATE
- II. EMPLOYMENT AUTHORIZATION (I-9)
 - A. Purpose - verify
 - 1. The applicant/employee's identity and
 - 2. Employment eligibility
 - B. Current version issued August 7, 2009 (February 2, 2009 is also acceptable)
 - 1. Changes in latest version:
 - a) All documents must be unexpired
 - b) Outdated documents eliminated from lists
 - c) Foreign passports containing certain machine-readable immigrant visas to List A
 - d) Adds to List A as evidence of identity and employment authorization valid passports for citizens of the Federated States of Micronesia (FSM) and the Republic of the Marshall Islands (RMI), along with Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI
 - 2. *[2008 change]* Instructions regarding Section 1 of Form I-9 now indicate that the employee is not obliged to provide the Social Security Number in Section 1 of Form I-9, unless he or she is employed by an employer who participates in E-Verify.
 - 3. The Form I-9 is available in English and Spanish. However, only employers in Puerto Rico may have employees complete the Spanish version for their records. Employers in the 50 states and other U.S.

territories may use the Spanish version as a translation guide for Spanish-speaking employees, but must complete the English version and kept it in the employer's records. Employees may also use or ask for a translator/preparer to assist them in completing the form.

- C. Requirements - Employee must present either (1) one document from List A or (2) one document from List B and one document from List C to verify identity and eligibility for employment.
1. List A documents verify both employment eligibility and identification.
 2. List B documents verify only identity.
 - a) List C documents verify only work authorization.
 - (1) The employer cannot require that the employee produce a particular document from either list. To do so, could violate the anti-discrimination provisions found in IRCA. As long as the employee produces the materials required by the list, it is sufficient.
 - (2) Documents must be originals.
 - b) Certified copies of birth certificates.
 - c) Lost documents - receipt demonstrating the employee has applied for a replacement is acceptable (replacement must be presented within 90 days). Also, note that the document that is sought to be replaced must be one from the list enumerated on the I-9.
 3. Electronic signature is permitted. No procedures have been established but ICE guidance states that various technologies, including electronic signature pads, personal identification numbers, biometrics and "click to accept" dialog boxes are acceptable.
- D. Employer Responsibility and Liability
1. Employers are liable for knowingly hiring or continuing to employ an unauthorized alien.
 - a) "Knowingly" is a common sense standard - no requirement that employers be professional investigators or document experts.
 2. How do employers "know"?
 - a) Actual Notice
 - b) Constructive Notice

- (1) Regulation "...knowledge which may be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition."
 - (2) Examples:
 - (a) Fails to complete or improperly complete I-9.
 - (b) Information that would indicate the alien is not authorized to work.
 - (c) "Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf."
3. Must complete I-9 within 3 days of employment for each new employee.
4. When work authorization expires during term of employment, the employer must re-verify eligibility.
5. *Tip:* Do not include the I-9 as part of the application process as it includes certain identifying information that is unnecessary (and prohibited from consideration in the hiring process). Include the I-9 as part of an employee's orientation on the first day of employment.
 - a) At this point, all employment eligibility verification requirements are federal in Alabama although there are efforts periodically to enact state requirements.
6. The "No-Match" Letter
 - a) Social Security Administration or DHS provides notification to employer that Social Security number listed on W-4 does not match what the SSA has on file.
 - b) "No Match" letter does not establish employee is illegal just puts employer on notice that further investigation is warranted - i.e., not permitted to hide head in the sand upon receipt.
 - c) Provide identified no-match employees with documented and reasonable opportunity to explain discrepancy.
 - d) Typically, illegal employees will not reappear for work.
7. The proposed but withdrawn Safe Harbor Regulations (2007) - 4 Steps (withdrawn but since they were proposed by the entity that will enforce in

the vent of a violation, we recommend compliance with the proposed process).

- a) **Employer Records.** Promptly check your records to determine if the discrepancy resulted from an error in your records or your communications with the Social Security Administration. If so, correct your records, inform the SSA, and verify the with the agency that the discrepancy has been resolved. Document your efforts. This must be completed within 30 days of receipt of the no match letter.
- b) **Employee Records.** If this does not resolve the discrepancy, promptly request that the employee confirm that your records are correct. If your records are correct, direct the employee to personally deal with the SSA to resolve the discrepancy. This must be completed with 30 days of receipt of the no match letter. The discrepancy will be considered resolved only if you confirm with the SSA that the employee's name matches SSA records and the number is valid for work. The number may be the same one as was subject to the no match letter or a different one. You may verify the SSN by calling 1-800-772-6270 or going to www.ssa.gov/employer/ssnv.htm. You must document the date, time and method of verification.
- c) **Employee Correction.** If not resolved within 90 days of receipt of the no match letter, the regulations provide a verification procedure under which you will not be found to have constructive knowledge. If you do not follow this procedure, you risk being found to have constructive knowledge that the employee is not authorized to work.
- d) **New I-9.** The verification procedure requires the completion of a new I-9 form within 93 days of receipt of the no match letter. The employee cannot use any document to establish employment authorization which contains the bad SSN from the no match letter. Identify must be established with a photo ID.

The same procedure must be applied to all employees subject to no match indicators.

E. Document Retention

1. Employer must maintain completed I-9 for 3 years from the date of hire or 1 year after the termination of employment, whichever is longer.
2. An employer may, but is not required to, retain copies of the supporting documentation.

- a) If the employer elects to maintain copies of the supporting documentation, the employer **MUST**
 - (1) Staple the copies to the I-9
 - (2) Copy ALL employee's supporting documents, not just the ones with the uncommon papers (i.e., aliens) to avoid violating the anti-discrimination provisions
 - b) An employer may elect not to copy the supporting documents because the documents might provide DHS with evidence to use against the employer.
3. *Tip:* An employer should, but is not required to, retain I-9s in a file or binder separate from other personnel materials to be able to quickly prepare for an audit (only required to receive 3 days notice)
 4. Employers are permitted to retain I-9s in electronic format. Regular document retention/document destruction protocols should be established.

F. Compliance Issues

1. An employer who knowingly hires or continues to employ an unauthorized alien is subject to civil and criminal penalties.
 - a) First offense \$375 - \$3200/alien
 - b) Second offense \$3200 - \$6500/alien
 - c) Additional offense \$4300 - \$16,000/alien
2. An employer is also subject to civil penalties recordkeeping violations.
3. IRCA's anti-discrimination provision would provide employment-related damages (back pay, reinstatement, etc.) for any act of prohibited discrimination under IRCA. Similar to Title VII, IRCA contains an anti-retaliation provision prohibiting any action against the employment for asserting a complaint under IRCA.
4. Further, note that authorized and, in some cases, unauthorized workers, are also protected by and eligible to benefit from the various employment laws including the Family and Medical Leave Act, Title VII and the Fair Labor Standards Act.

G. Golden Rule - Once you know, you know

1. Absolutely cannot continue to employ unauthorized worker once employer becomes aware that the worker is not authorized.

2. Rule applies without regard to what position the employee holds or how exceptional an employee he or she has been.
3. No duty to report - only a duty not to employ.

III. E-Verify – the “fancy” way to I-9 your employees

A. History

1. Program began in 1996 as Basic Pilot program
2. 2007 – became E-verify
3. 184,000 employers enrolled in E-Verify as of February 2010

B. What is it?

1. E-Verify is an internet-based program that allows U.S. employers to electronically verify the work authorization of all new employees, U.S. citizens and foreign workers alike.
2. Free
3. Partnership between DHS and SSA
4. The E-Verify system can be used in addition to, not in place of, Form I-9 completion. Once the Form I-9 is complete, the employer enters certain information from the Form into the E-Verify system. The Social Security Administration (SSA) and Department of Homeland Security (DHS) databases then compare this information to millions of existing records to determine whether the information supplied by the employee matches the information in the SSA and DHS databases.
5. E-Verify creates a rebuttable presumption that the company has not hired an unauthorized alien.

C. Who must participate?

1. Voluntary for most employers
2. Mandatory for **Government Contractors** (amends Federal Acquisition Regulations or “FAR”) where:
 - a) **Prime Contract** - Awarded/modified after September 8, 2009 to include the FAR E-Verify Clause
 - (1) Value over \$100,000
 - (2) Period of Performance of 120 days or more

- (3) Work performed in United States
 - (4) Excludes contracts for commercially available off-the-shelf (COTS) items and related services
 - b) All **Subcontracts** under Prime Contract (prime Contractor responsible for including FAR E-Verify clause in qualifying subcontracts) where
 - (1) Value over \$3,000
 - (2) Contract is for commercial or noncommercial services or construction
 - (3) Work performed in United States
 - (4) Excludes contracts for commercially available off-the-shelf (COTS) items and related services
 - (5) Prime contractor responsible for subcontractor compliance
 - c) COTS item defined: A COTS item is a commercial off the shelf item that is sold in substantial quantities in the commercial marketplace and is offered to the government in the same form that is available in the commercial marketplace, or with minor modifications.
 - (1) Contracts for food and agricultural products are generally COTS items
 - d) Other exemptions apply to state and local governments and Native American Tribes
 - e) Contractor has 30 days from date of contract award to begin using E-Verify
- 3. State Requirements
 - a) Arizona (all)
 - b) Colorado (public contractors and state agencies)
 - c) Georgia (public contractors and state agencies)
 - d) Idaho (state agencies)
 - e) Minnesota (state agencies)
 - f) Mississippi (all)

- g) Missouri (public contractors and state agencies)
- h) Nebraska (public contractors and state agencies)
- i) North Carolina (state agencies)
- j) Oklahoma (public contractors and state agencies)
- k) Rhode Island (public contractors and state agencies)
- l) Utah (public contractors and state agencies)

D. Who can be verified using E-Verify?

- 1. Non-FAR Clause Government Contracts > New Employees Only
- 2. FAR Clause Government Contracts (note: only applies to contracts that contain the clause)
 - a) All **new hires** employed by the contractor in the United States during the term of the contract
 - b) All **existing employees** assigned to work on the contract in question
 - (1) Limited exception to general prohibition to using E-Verify on existing employees
 - (2) Exception: employee hired prior to November 6, 1986
 - (3) Employees must be directly performing work under the contract (indirect overhead and support employees are excluded)
 - (4) Dual status: could use E-Verify for both federal contract employees and all new hires
 - (a) STEM example
 - c) Permissible to, but not required to, verify all existing employees even if they are not on the contract

E. E-Verify Mechanics

- 1. Registration
 - a) Before an employer can start using the E-Verify system, the employer needs to enroll in the program. When registering, the employer will be asked to provide basic contact information and

must agree to follow the rules of the program. At the end of the registration process, the employer is required to sign a **Memorandum of Understanding (MOU)** that provides the terms of agreement between the employer, the SSA and U.S. Citizenship and Immigration Services (USCIS).

- b) Federal contractors awarded FAR clause contracts must update their Maintain Company page to designate company as Federal Contractor with E-Verify clause.

2. Form I-9 Requirement

- a) All new hires are required to complete the Form I-9 before an E-Verify query is conducted. Note that E-Verify users are subject to additional Form I-9 requirements. For example:

- (1) Employees of an E-Verify participating employer must include a social security number on his or her Form I-9. Normally, a social security number is not required for proper Form I-9 completion.
- (2) E-Verify employers can only accept List B documents which contain photos; non E-Verify employers can accept a List B document for Form I-9 purposes, even those documents without photos.
- (3) E-Verify employers must make a copy of any Employment Authorization Documents (EAD) or Permanent Resident Cards (“Green Card”) presented by employees during their Form I-9 processing. Generally, employers are not required to make or retain copies of the employee documents presented as part of the Form I-9 process.

- b) May obtain a new I-9 if information is incomplete

3. Query Information and Response

- a) Contractors enrolled in E-Verify must submit a query into the E-Verify system that includes information from sections 1 and 2 of the Form I-9, including:

- (1) Employee’s name and date of birth
- (2) Social Security Number (SSN)
- (3) Citizenship status (U.S. Citizen, Lawful Permanent Resident, or Alien Authorized to Work)

- (4) Alien number or I-94 number (if applicable) e) Type of I-9 document(s) presented to establish identity and/or work eligibility status
 - (5) In some cases, the document number and expiration date
- b) After inputting the information, the E-Verify system will respond with an “**employment authorized**” response, a “**SSA tentative non-confirmation**” response, or “**DHS verification in process.**”
- (1) If “employment authorized” is indicated, the employer must record the system-generated verification number on the employee’s Form I-9.
 - (2) If “DHS verification in process” is indicated, DHS will usually provide an “employment authorized” or “tentative non-confirmation” response within 24 hours.
 - (3) If a “tentative non-confirmation” (“TNC”) response is received, the employer must immediately notify the employee in writing about how to contest the determination and resolve the mismatch with the SSA or DHS. If the employee wishes to challenge the non-confirmation, the employee must contact the appropriate federal agency within 8 federal work days.
 - (a) E-Verify system produces TNC notice to provide to employee (failing to do so violates MOU and could be grounds for suspension or debarment)
 - (b) Must allow employee to continue to work during TNC process (failing to do so could violate IRCA)
 - (c) Cannot terminate employment until E-Verify provides a “final non-confirmation” or “DHS no show”

4. Photo Tool

- a) If an employee presents an EAD or Green Card as an I-9 document, E-Verify’s Photo Screening Tool requires the employer to check the photo on the employee’s EAD or Green Card against the images stored in DHS immigration databases. If the photo on the EAD or Green Card does not match the photo in the E-Verify system, the employer must treat the query as a “tentative non-confirmation” and follow appropriate, required steps.

5. Timing

- a) The employer cannot initiate an E-Verify inquiry for a new hire until the new hire has completed a Form I-9. The employer must initiate an E-Verify query for a new hire no later than the end of three business days after the new hire's actual start date. An employer can initiate the query before a new hire's actual start date but may not pre-screen applicants based upon a tentative non-confirmation or a delay in the receipt of a confirmation of employment authorization.

6. Postings/Notice

- a) All employers using E-Verify must notify applicants of their use of the program by posting the notice provided by DHS indicating the company's participation in the E-Verify program, as well as an anti-discrimination notice issued by the Office of Special Counsel for Immigration-Related Unfair Employment Practices.
- b) The postings must be placed in an area where they can be viewed by applicants and new hires. Once an employer is enrolled and able to log into the E-Verify online system, these notices can be found in the "On-line Resources" section of the system.

F. Statistics

1. DHS 4th Quarter 2008:
 - a) 96.9% Work Authorized w/in 24 hours
 - b) .3% Tentative Non-Confirmations (TNC) Resolved as Work Authorized
 - c) 2.8% Employees are not confirmed (Final non-confirmations)

G. Resources

1. USCIS E-Verify Homepage:

<http://www.uscis.gov/portal/site/uscis>

(select "E-Verify Homepage" on right hand menu bar)

or

<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=75bce2e261405110VgnVCM100004718190aRCRD&vgnnextchannel=75bce2e261405110VgnVCM1000004718190aRCRD>

2. E-Mail:

E-Verify@dhs.gov

a) Federal Contractor FAQs:

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=30edde1d67ee4210VgnVCM10000082ca60aRCRD&vgnextchannel=75bce2e261405110VgnVCM1000004718190aRCRD>

IV. Action Points

- A. Self-Assessment: Are your I-9's in good order and is the employment verification process sound?
- B. Is someone designated to be responsible for I-9's? Cross-training?
- C. Perform a spot audit.
- D. Are document retention policies in place? Are they followed?
- E. Assess whether E-Verify is required
 - 1. Careful with multi-state operations
- F. Assess whether E-Verify is desirable
- G. If required, what is your deadline for compliance (i.e., when will the next contract be renewed)
- H. Plan Ahead: Register for E-Verify and train employees to use E-Verify in advance.