



E-Verify Errors

The Pitfalls Employers Should Know About



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Utah employers with 15 or more employees must register with and use a status verification system to verify work authorization of any new employee. Currently, the only system that verifies work authorization is E-Verify, which is an internet-based system to confirm employment eligibility by comparing information from an employee's Form I-9 to data in the Department of Homeland Security's and Social Security Administration's records.

E-Verify does not replace the Form I-9 process. It is an additional employer responsibility with heightened documentation requirements. Some employers, especially those using an electronic I-9 system, integrate their E-Verify and I-9 processes for convenience.

Utah state law currently does not impose penalties for failure to register with or use E-Verify properly, and federal law generally does not require employers to use E-Verify, unless they employ international students in the STEM fields or hold certain federal contracts, nor does it impose penalties for E-Verify mistakes.

Employers should not get too comfortable, though. They remain subject to penalties under federal law for improperly completed I-9s and immigration-related discrimination in the hiring process.

U.S. Citizenship and Immigration Services (USCIS) gets a birds-eye view into an employer's I-9 process by tracking and documenting the employer's use of E-Verify. USCIS monitors use and notifies companies of patterns of noncompliance—

that is, failure to meet the terms of the employer's E-Verify memorandum of understanding or follow the procedures in the various E-Verify and I-9 manuals.

So how can an employer stay off the E-Verify radar screen? Here are a few of the most common E-Verify employer mistakes:

Error 1: Completing E-Verify without an I-9 Form

Remember, E-Verify does not replace the I-9. Employers run queries in E-Verify based on information they and the employee record on the I-9. Employers remain liable for I-9 penalties, even if they use E-Verify—although E-Verify use is a factor an employer could use to demonstrate good faith I-9 compliance in the event of an I-9 audit. Immigration & Customs Enforcement (ICE) is in full swing with I-9 audits, which have significantly increased over the past several years.

Error 2: Failing to Create a Case in Three Days

Employers know from experience that it's not easy to complete an I-9 by the third business day after the employee starts work for pay. Delays usually result when employees have misplaced a Social Security card or ID or otherwise fail to provide Form I-9 documents on time. Delays can be even worse in E-Verify, since employers enrolled in E-Verify must take the additional step of verifying that the employee's Form I-9 information matches government records.

To do this, employers have to request information above and beyond that required in a normal I-9 process, including obtaining a Social Security number, which is normally optional in an I-9 process, and a List A or B document with a photograph. Legal names on documents must also match, so employees with a new marital status must have already updated their names with Social Security and other government agencies.

If a newly hired employee has applied for but has not yet received his or her Social Security number—such as where the person is an international student or newly arrived

immigrant—employers can make a note on the employee's Form I-9 and set it aside, allow the employee to continue to work, and create the E-Verify case as soon as the new Social Security number is available. If the case was not created by the third day after the employee started work for pay, the employer must indicate the reason for this delay in the drop-down list in E-Verify or state a specific reason in the field provided.

Error 3: Immediately Terminating an Employee with a Tentative Nonconfirmation (TNC)

This is a serious error. In most cases, E-Verify will instantly verify the employee's work authorization and the employer can close the case. When E-Verify cannot immediately confirm the employee's work authorization, it may require the employer or employee to take action. If the employee information does not match government records, the employer will see a TNC response.

If E-Verify returns a TNC, the employer should carefully review all entered information for accuracy. If the employer spots a typographical error or entered incorrect data, the employer should close the case and create a new case for the employee with the correct information.

Employers cannot terminate an employee simply because E-Verify returned a TNC. They cannot take any other adverse action, including reducing scheduled hours, delaying or preventing training, or refusing to assign the employee to a federal contract or other job. Instead, employers must proceed as indicated on the E-Verify result screen—that is, promptly provide and review with the employee the TNC notice, which will ask if the employee wants to contest the result. If the employee wishes to contest, the notice will refer the employee either to the Social Security Administration or the Department of Homeland Security to resolve the issue. Employers cannot take adverse action until E-Verify returns a "final non-confirmation" or "no show" response for that employee. **UB**