E-Verify Legislation in the States

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With more than 11 million illegal aliens already in the U.S., and tens of thousands more unlawfully crossing the border and overstaying visas each year, states all around the country are subject to the problems caused by unchecked illegal immigration. Perhaps **the most pressing consequence of uncontrolled immigration is the immediate toll it places upon the American worker**. Illegal immigration dramatically increases competition in the labor market, particularly for low-skilled jobs, and depresses wages by perpetuating a class of workers willing to work for substandard wages.

Currently, the labor force participation rate, which measures the share of Americans of working age who are either employed or actively looking for work, is at its lowest rate in nearly four decades. At 62.6 percent, approximately **93 million potential American workers are out of work**. Both the unemployment rate and labor force participation rate, however, ignore the number of Americans who are under-employed or working part-time but seeking full-time work. When those workers are taken into account, the traditional unemployment rate, currently estimated to be around 4.9 percent, nearly doubles to 9.6 percent or roughly 14 million American workers.

With such high unemployment and low labor force participation rates, lawmakers around the country are interested in enacting legislation aimed at discouraging illegal immigration, protecting American workers, and decreasing the burden upon American taxpayers. As a result, E-Verify, the free, web-based system through which employers may verify the work authorization of new hires through existing federal records, has become state lawmakers' most critical tool for ensuring a legal workforce.

What is E-Verify?

Congress created the E-Verify program in 1996 (then called the "Basic Pilot" program) as a way to help employers comply with the federal ban on employing unauthorized aliens. E-Verify is a free, federally maintained program that can be used by employers to verify the work authorization of a new hire. E-Verify is easy to use and accessible to all employers with internet access, essentially acting as an electronic version of the Form I-9. While E-Verify usage is not required by federal law, many states and localities have passed legislation requiring all or some

employers in their jurisdictions to take advantage of the program and verify the work authorization of newly hired employees.

How Does E-Verify Work?

To use E-Verify, the employer takes a new employee's completed Form I-9 and enters the employee's name, date of birth, and Social Security number into the E-Verify system. E-Verify then checks the information against Social Security Administration and Department of Homeland Security records. The employer will quickly receive one of three responses: 1) a confirmation that the employee is authorized to work; 2) a "tentative non-confirmation" which indicates that the information entered differs from official government records; or 3) a response indicating DHS needs more time to verify the information.

If the employer receives a "tentative non-confirmation", the employee can choose to either contest or not contest the result. A "tentative non-confirmation" is not a final determination that the employee is unauthorized, but rather indicates that the employee's records differ from data possessed by the federal government and further communication is needed. While the new employee sorts out the discrepancy with the federal government, employers are prohibited from taking any adverse action against the employee (the majority of these discrepancies are resolved within 24 to 72 hours). If the employee fails to contest the E-Verify result, the non-confirmation is considered final. Every E-Verify case must be closed after the final results of verification have been given to the employer.

E-Verify also asks employers to compare a photograph displayed in E-Verify with the employee's Form I-9 photographic document if the employee submitted certain documents such as a U.S. Passport, Passport Card, Permanent Resident Card, or an Employment Authorization Document. Employers simply compare the photograph displayed by E-Verify to the photograph on the employee's actual document or a copy of the employee's document and determine if the photographs are reasonably identical.

Is E-Verify Reliable?

An audit by Verification Information System (VIS) Transaction Data revealed that between October 2015 and March 2016, 98.93 percent of all employees entered into the program were automatically confirmed as work authorized either instantly or within 24 hours, requiring no employee or employer action. This left 1.07 percent of employees with tentative non-confirmations. Of these, 0.16 percent were subsequently confirmed as work authorized after contesting and resolving the mismatch, and 0.92 percent were found not work authorized.

In addition to being reliable, E-Verify is also well liked by employers. In a 2014 survey of customer satisfaction with the program, it received a score of 87 (on a scale from 1-100) for all and existing users, and 86 for new enrollees.

Will E-Verify Complicate the Hiring Process?

E-Verify provides a fast, free, and effective way for an employer to verify that new hires are authorized to work in the U.S. using the same documents as required by the preexisting I-9 process. Because federal law already requires employers to verify the work authorization of

newly hired employees using the Form I-9, employers hardly have to spend any extra time to verify work authorization using E-Verify.

Furthermore, proper use of E-Verify provides employers with a "rebuttable presumption" that they are in compliance with federal employment authorization laws. Thus, just a little additional effort can save an employer a significant amount of time, money, and stress regarding compliance with federal and state employment laws.

Why Should I Support E-Verify Legislation in my State?

Requiring employers to use E-Verify is smart public policy because it protects American workers against unfair job competition and wage depression. A 2013 study by Harvard University's George Borjas concluded that illegal immigration reduced wages for the most economically vulnerable Americans, who primarily work low-wage jobs that require minimal levels of education. The study revealed that illegal immigration reduces the wages of native-born workers by an estimated $99 to $118 billion a year, and that any benefits of illegal labor are redistributed to business owners rather than workers.

In addition to protecting American jobs, requiring employers to use E-Verify can also dramatically reduce identity theft. E-Verify uncovers 100 percent of all Social Security number job-related identity theft because full name, SSN, date of birth, gender and photographic identification must match. If the information put into E-Verify does not match, E-Verify will catch it.

Will State E-Verify Legislation Be Upheld by the Courts?

Yes, states can enact legislation to require employers to use E-Verify. In 2011, the U.S. Supreme Court in *Chamber of Commerce of the United States of America v. Whiting* upheld Arizona legislation that requires all employers, public and private, to use the program. In *Whiting*, the Court determined that the Legal Arizona Workers Act was valid and not preempted by federal law because it mirrored the language of its federal counterpart. Therefore, state lawmakers can rest assured that properly drafted E-Verify legislation will withstand a legal challenge.

Which States Already Have E-Verify Legislation on the Books?

As of March 2017, 19 state legislatures have validly enacted laws that require all or some employers in the state to use E-Verify to confirm the work authorization of newly hired employees. These states are: Alabama, Arizona, Colorado, Georgia, Indiana, Louisiana, Michigan, Mississippi, Missouri, Nebraska, New Hampshire, North Carolina, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, and West Virginia. In addition, governors from Florida and Idaho have issued executive orders requiring state agencies to utilize the federally maintained system.

There is, however, still a lot work to be done. Of the states listed above, only Alabama, Arizona, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Utah require both public and private employers to use E-Verify. The remaining states primarily only require public employers or public contractors to confirm the work authorization of their employees with the program. And almost all states include carve-outs or loopholes in their laws that allow some employers with persuasive lobbyists to avoid electronic verification requirements all together.