

Employers: Make Sure Your Agreement with Electronic I-9 Providers Is Adequate For Peace of Mind

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As most employers know, Immigration and Customs Enforcement (ICE) is increasing its efforts to stop illegal employment. Short-staffed and lacking resources to perform a lengthy stake-out and raid at an employer's premises, ICE is using a softer, but no less chilling, method. A simple letter from ICE, called a Notice of Inspection, notifies an employer that it has 72 hours to produce its I-9s for ICE's inspection. As fines are substantial and ICE now has the capability of shipping thousands of I-9s to its new inspection center in Virginia, established to handle large numbers of I-9s, employers are frequently turning to external electronic providers for I-9 storage, usually linked with E-Verify, as a cost-effective and secure alternative to paper I-9s. This may be an excellent solution, particularly in view of pending federal legislation, but there are some considerations to take into account when choosing an electronic I-9 provider, as LexisNexis discovered.

In June 2011, LexisNexis filed a complaint alleging breach of contract against USVerify, an I-9 and E-Verify service provider under a five year reseller agreement, wherein LexisNexis would resell USVerify services to its customers. USVerify agreed to provide LexisNexis with services that would permit an end user to complete an I-9 online, with USVerify providing storage, maintenance and tracking services. The end user could also conduct a right to work verification through E-Verify, and USVerify was to maintain the end user's historical E-Verify data.

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When LexisNexis notified USVerify of its intent not to renew its contract upon expiration and requested that its I-9 information be returned in a format for another I-9 service provider to access it, USVerify refused, maintaining it should be compensated for this additional work, and that it would contact LexisNexis customers informing them of the need to make arrangements for replacement services. LexisNexis filed an injunction requiring the service provider to return all customer information, produce all I-9 information in a usable and readily accessible format, maintain all I-9 information during the transition period, provide the government, if requested, with ready access to the same in the event of an ICE inspection, and to cease and desist from using any information about LexisNexis' customers.

LexisNexis was granted a preliminary injunction and USVerify was ordered to return all information LexisNexis' customers needed to comply with I-9 retention, maintenance and E-Verify. Despite USVerify maintaining that the I-9s, audit trails and results were produced by proprietary software and therefore its intellectual property and not LexisNexis' or its customers' to access, the court disagreed. It decided that all information had to be turned over by USVerify, regardless of whether the request came from LexisNexis, its customers, or the Department of Homeland Security. The time and expense for LexisNexis to reach that point was probably unnecessary if its agreement with USVerify had been clearer. Optimally, the agreement between an electronic I-9 provider and an employer should identify not only who owns the information but also spell out what that data is exactly. The I-9s are much more than PDF documents, and must include information such as electronic signatures and audit trails. Moreover, to avoid the situation where the electronic provider demands a fee for a customer to retrieve its data, the agreement should specify that all data be returned promptly gratis in a readily accessible and useable format.

The Legal Workforce Act (H.R. 2164), sponsored by House Judiciary Committee Chairman Lamar Smith, is now before the Senate. When this bill becomes law, it will be mandatory for all employers nationwide to run all new hires through E-Verify by a gradual phasing in based upon

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its number of employees. Fines would increase between two- and ten-fold, with a possible waiver for violators who can establish they acted in good faith. With this bill pending and various states like North Carolina requiring E-Verify's use, contracting with an electronic I-9 provider that combines I-9 storage with E-Verify capability is not a bad idea. However, the agreement must protect the employer by adequately defining subject matter, ownership, and rights and obligations upon termination, including the prompt, free return of data in an accessible and useable format.



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