

# Employment Law

## Commentary

### Ready or Not, Here They Come: State E-Verify Laws and What Employers Should Know

By **Monica Castillo and Janie Schulman**

Just as the nation's unemployment rate has risen to new levels, so has public pressure on the government to curb employment of undocumented workers. Several states have responded to illegal employment by passing laws that require employers to use a federally created Internet-based program called E-Verify. This electronic verification system allows employers to verify that new hires are authorized to work in the United States by comparing information from employees' Form I-9s with records maintained in federal databases.

While employer participation in E-Verify is voluntary under federal law, the recent United States Supreme Court decision in *Chamber of Commerce of the United States v. Whiting* has given states the green light to make E-Verify<sup>1</sup> participation mandatory for employers. In the 5-3 decision, the Court upheld an Arizona law that, in addition to imposing licensing sanctions on businesses that hire unauthorized workers, requires Arizona businesses to check the work authorization status of new employees through E-Verify. Given this unequivocal endorsement from the High Court, employers should now expect to see a proliferation of state laws requiring mandatory E-Verify participation. Not only will the hiring process change for many employers who hire employees within a state that has passed E-Verify legislation, but multistate employers will be forced to navigate an ever-changing and sometimes contradictory patchwork of state laws.

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### Development of the E-Verify Program

Sanctions against employers for hiring unauthorized aliens were first created at the federal level in 1986 when Congress passed the Immigration Reform and Control Act (IRCA).<sup>2</sup> IRCA prohibits employers from knowingly or intentionally hiring or continuing to employ an unauthorized alien.<sup>3</sup> It also established the I-9 system, which requires employers to complete a Form I-9 for every new hire as a way to demonstrate employer compliance with IRCA.<sup>4</sup> Form I-9 requires employees to attest to their eligibility to work, and employers to certify that the documents presented reasonably appear on their face to be genuine and relate to the individual.<sup>5</sup> Employers who act in good faith compliance with the I-9 system are entitled to an affirmative defense to federal employer sanctions.<sup>6</sup>

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which created three pilot programs to improve the efficiency and accuracy of the I-9 verification process.<sup>7</sup> Of those three programs, E-Verify, formerly called the Basic Pilot Program, is the only program still in existence. A free Internet-based program, E-Verify is administered by the Secretary of Homeland Security.<sup>8</sup> It allows employers to compare employees' Form I-9 information with records in the Social Security Administration database and the Department of Homeland Security's immigration databases. E-Verify does not replace the I-9 system, and employers who elect to participate in E-Verify must still complete Form I-9 for every new employee.<sup>9</sup> While employers who in good faith comply with the I-9 system are entitled to an affirmative defense to sanctions, those who use E-Verify are entitled to a rebuttable presumption that they did not knowingly hire an unauthorized employee.<sup>10</sup>

With limited exceptions for certain federal government entities and IRCA violators, participation in E-Verify is voluntary under federal law. "Except as specifically provided in subsection (e), the [Secretary

of Homeland Security] may not require any person or other entity to participate in a pilot program."<sup>11</sup> In addition, the Federal Acquisition Regulation<sup>12</sup> requires many federal contractors to use E-Verify to verify the employment eligibility of certain new and current employees.

While federal law still makes E-Verify voluntary for most employers, the Supreme Court decision in *Chamber of Commerce of the United States v. Whiting* now authorizes state governments to mandate participation by all employers.

### Supreme Court Decision in *Chamber of Commerce of the United States v. Whiting*

The issue before the *Whiting* Court was whether federal immigration laws preempted the controversial Legal Arizona Workers Act (LAWA).<sup>13</sup> Enacted in 2007, LAWA authorizes the Arizona Attorney General and county attorneys to bring legal actions against employers who knowingly or intentionally employ unauthorized aliens. Under LAWA, the Arizona superior court may suspend or revoke an employer's business license after repeated violations of the statute. LAWA also mandates that all employers within Arizona must use E-Verify to verify the immigration status of new employees.

Within a month of LAWA's enactment, the Chamber of Commerce of the United States, along with several businesses and civil rights groups, filed a lawsuit against Arizona state officials to challenge the constitutionality of LAWA.<sup>14</sup> The Chamber of Commerce argued that LAWA should be invalidated because IRCA expressly and impliedly preempts LAWA. Both the district court and appellate court disagreed. Affirming the lower court, the Ninth Circuit held that LAWA was a "licensing or similar law" exempted from IRCA's preemption clause and that Arizona's licensing sanctions and E-Verify requirement escaped implied preemption because they were consistent with congressional intent.<sup>15</sup>

On May 26, 2011, in *Chamber of Commerce of the United States v. Whiting*, the Supreme Court affirmed the Ninth

Circuit's decision. The Court held that: (1) Arizona's licensing law was not expressly preempted by federal law; (2) Arizona's licensing law was not impliedly preempted by federal law; and (3) Arizona's requirement that employers use E-Verify was not impliedly preempted.

First, the Court held that LAWA falls within the authority Congress left to the states and therefore is not expressly preempted. The Court reasoned that although states may not impose civil or criminal sanctions on businesses that employ unauthorized aliens, they may impose sanctions "through licensing and similar laws." These sanctions may include revocation of a business's state-issued authorization to conduct business within the state. "Licenses" subject to revocation under Arizona's law include "any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued . . . for the purposes of operating in the business in this state," including "articles of incorporation, certificates of partnership, foreign corporation registrations, and transaction privilege licenses."

Second, the Court held that LAWA's unauthorized worker provision is not impliedly preempted because it implements the sanctions Congress expressly allowed the states to pursue through licensing laws. When Congress reserved this authority for the states, the Court reasoned, it must have intended for the states to use appropriate tools to exercise the authority. Furthermore, LAWA follows all of IRCA's material provisions, including using the same definition of "unauthorized alien." LAWA does not disrupt the careful balance Congress struck in enacting IRCA because federal and state laws protect against employment discrimination, LAWA only covers knowing and intentional violations, and LAWA provides a safe harbor for employers who use E-Verify as required by the law.

Third, the Court concluded that LAWA's requirement that employers use E-Verify is not impliedly preempted because it does not conflict with the federal requirements.

The fact that the federal government may only require its use in limited circumstances says nothing about when the states may do so. The consequences of an employer's failure to use E-Verify are the same under the Arizona and federal law — the employer loses the benefit of the rebuttable presumption of compliance with the law. Furthermore, LAWA does not obstruct the goal of IIRIRA, as Congress has expanded and encouraged the use of E-Verify and directed that it be made available in all 50 states.

### State E-Verify Laws

Even before the *Whiting* decision, several states made E-Verify participation mandatory for employers located within those states as well as those who contract to provide services to those states. Of the 17 states with E-Verify mandates in place today, the following eight states require employers, both public and private, to participate in E-Verify depending on the number of employees: Alabama, Arizona, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Utah. While the remaining states limit mandatory E-Verify participation to public employers or contractors, it may only be a matter of time before these and new laws will extend to private employers as well.

As new laws surface, employers may find themselves forced to comply with state E-Verify laws that facially contradict federal requirements or the requirements of the laws of other states. For example, on January 4, 2011, Florida Governor Rick Scott signed Executive Order 11-04, mandating that all Florida state agencies, as a condition of awarding a state contract, use the E-Verify system to verify the employment eligibility of “(a) all persons employed during the contract term by the contractor to perform employment duties within Florida; and (b) all persons [including subcontractors] assigned by the contractor to perform work pursuant to the contract with the state agency.” Based on a plain reading of the language, the Executive Order required the use of E-Verify to check the employment status of current employees in violation of federal

rules prohibiting the use of E-Verify for current employees. Indeed, under a “Memorandum of Understanding” that employers must sign to enroll in E-Verify, employers who use E-Verify for current employees risk being terminated from the program altogether. Luckily, Florida evidently realized the conundrum it created for employers and on May 27, 2011, Governor Scott signed a new Executive Order superseding his original order which clarifies E-Verify is to be used only for new hires. The fix may not always be so simple. If placed in an E-Verify Catch 22, employers should first seek clarification from the state authority responsible for enforcing the E-Verify requirement and consult legal counsel.

### States with Mandatory E-Verify Laws

At the end of this article Table 1 summarizes E-Verify legislation that has been passed in several states; it does not include proposed legislation. Its purpose is to provide employers with a snapshot of today's E-Verify landscape, but note that it is not a comprehensive summary of individual state laws. Moreover, state E-Verify legislation is a dynamic area of law, and increased activity in the wake of the *Whiting* decision is a virtual certainty. Accordingly, employers should refer to state legislature websites for the most up-to-date information on state E-Verify requirements to ensure compliance. In case of doubt, employers should consult counsel for guidance.

### Life After E-Verify: What Should Employers Do Now?

With momentum building for state E-Verify mandates, employers should expect to see stricter enforcement nationwide. In several states, failure to use E-Verify could result in suspension of business licenses, termination of contracts, civil fines, or debarment from contracting with the state altogether. To avoid these harsh sanctions, employers should thoroughly review each state's E-Verify requirements, and take proper measures to ensure compliance.

To start, employers new to E-Verify (or even those who have been participating in the

program for some time) should consider adopting some of the following useful hiring practices:

- For multistate employers obligated to use E-Verify in one state, consider adopting E-Verify companywide to avoid conflicting standards within the company (not to mention confusion for Human Resources and employees).
- Do not use E-Verify on current employees. Unless the employer has been awarded a federal contract on or after September 8, 2009, this is prohibited by federal guidelines.
- Require uniform verification of new employees. Even if an employer is required to use E-Verify for certain employees only, selective use of E-Verify may be perceived as discriminatory.
- Never use E-Verify on a job applicant prior to hiring. If the candidate is not hired, the candidate may later bring charges of discrimination against the employer.
- If available in the employer's state, inform all job applicants about the E-Verify Self Check service. Self Check is available in Idaho, Arizona, Colorado, Mississippi, Virginia, and the District of Columbia. Because E-Verify is not yet bug-free, prospective employees could save their employers precious time and money by resolving erroneous results before starting employment.

Again this is a changing area of the law that is highly politicized and fraught with minefields. Employers should proceed carefully in this area and seek guidance from experienced counsel when necessary.

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Table 1: State E-Verify Laws

State	Legislation	Effective Date	Affected Employers
Alabama	H.B. 56	January 1, 2012	<b>Business entities and employers</b> must provide proof of enrollment in E-Verify before receiving the award of any state contract, grant, or incentive. During the performance of the contract, business entities and employers must participate in E-Verify and verify each employee required to be verified under applicable federal rules and regulations.
		January 1, 2012	<b>Subcontractors</b> on a project funded by a state contract, grant, or incentive must enroll in E-Verify before performing any work on the project, and provide a sworn affidavit attesting to their enrollment.
		April 1, 2012	<b>Business entities and employers</b> must enroll in E-Verify, and thereafter verify the employment eligibility of employees according to federal statutes and regulations governing E-Verify.
Arizona	H.B. 2279	January 1, 2008	<b>Employers</b> must verify the employment eligibility of newly hired employees through E-Verify.
	H.B. 2745	October 1, 2008	<b>Employers</b> must provide proof of registration with and participation in E-Verify before receiving an economic development incentive from a government entity.
		October 1, 2008	<b>Contractors and subcontractors</b> must verify the employment eligibility of newly hired employees through E-Verify to receive an award for a government contract.
Colorado	H.B. 1343, as amended by H.B. 1073	August 7, 2006	<b>Contractors</b> awarded a public contract for services must verify the work eligibility status of new employees performing work under the contract either through E-Verify or a program administered by the Colorado Department of Labor and Employment.
Florida	Executive Order 11-02	January 4, 2011	<b>Contractors</b> who enter into a contract with state agencies must use E-Verify to verify the employment eligibility of (1) persons employed during the contract term by the contractor to perform employment duties within Florida and (2) all persons, including subcontractors, assigned by the contractor to perform work under the contract.
	Executive Order 11-116	May 27, 2011	<b>Contractors and subcontractors</b> subject to Executive Order 11-02 must use E-Verify only for newly hired employees during the term of the state contract. The E-Verify requirement is limited to "contracts for the provision of goods and services to the state in excess of a nominal value."
Georgia	S.B. 529	July 1, 2007	<b>Public employers, contractors, and subcontractors with 500 or more employees</b> must use E-Verify for all new hires.
		July 1, 2008	<b>Public employers, contractors, and subcontractors with 100 or more but less than 500 employees</b> must use E-Verify for all new hires.
		July 1, 2009	All <b>public employers, contractors, and subcontractors</b> must use E-Verify for all new hires.
	H.B. 87	January 1, 2012	<b>Private employers with 500 or more full-time employees</b> must use E-Verify for new hires.
		July 1, 2012	<b>Private employers with 100 or more but less than 500 full-time employees</b> must use E-Verify for all new hires.
		July 1, 2013	<b>Private employers with 10 or more but less than 100 full-time employees</b> must register and participate in E-Verify.
Indiana	S.E.A. 590	July 1, 2011	<b>State agencies or political subdivisions</b> must use E-Verify to verify the work eligibility status of all newly hired employees.
		July 1, 2011	<b>Contractors</b> awarded a public contract must verify the work eligibility status all newly hired employees through E-Verify.

Table 1: State E-Verify Laws (continued)

State	Legislation	Effective Date	Affected Employers
		July 1, 2011	<b>Subcontractors</b> employed under a public contract must certify to the contractor that they have enrolled and are participating in E-Verify.
		July 1, 2011	<b>Business entities</b> awarded a public grant of more than \$1,000 must sign an affidavit and show documentation that they enrolled in and participate in E-Verify.
<b>Louisiana</b>	H.B. 342	January 1, 2012	<b>State contractors</b> must submit an affidavit attesting they will use E-Verify before bidding or contracting on state work. <b>Contractors</b> must also obtain sworn statements from <b>subcontractors</b> stating that they use E-Verify.
	Executive Order 08-01	January 29, 2008 – April 4, 2011	Hiring authorities within the <b>executive branch of the state government</b> must use E-Verify for new hires.
		January 29, 2008 – April 4, 2011	<b>Vendors</b> and <b>subcontractors</b> that receive a state contract in excess of \$50,000 must certify that, as of the date services on behalf of the state will be performed, the vendor and all subcontractors have implemented or are in the process of implementing the E-Verify program for all newly hired employees in the United States who will perform work on behalf of the state of Minnesota.
	Appropriations Bill 11-3590	July 21, 2011	<b>Vendors</b> and <b>subcontractors</b> that receive a state contract in excess of \$50,000 must certify that, as of the date services on behalf of the state will be performed, the vendor and all subcontractors have implemented or are in the process of implementing the E-Verify program for all newly hired employees in the United States who will perform work on behalf of the state of Minnesota.
	S.B. 2988	July 1, 2008	All <b>state agencies</b> and <b>political subdivisions, public contractors, and public subcontractors</b> must use E-Verify to verify the employment authorization status of new hires.
		July 1, 2008	<b>Private employers with 250 or more employees</b> must use E-Verify to verify the employment authorization status of new hires.
		July 1, 2008	<b>Third-party employers</b> must provide proof of registration and participation in E-Verify to any Mississippi employer with whom they do business.
		July 1, 2009	All <b>employers with at least 100 but less than 250 employees</b> must use E-Verify to verify the employment authorization status of new hires.
		July 1, 2010	All <b>employers with at least 30 but less than 100 employees</b> must use E-Verify to verify the employment authorization status of new hires.
		July 1, 2011	All <b>employers</b> must use E-Verify to verify the employment authorization status of new hires.
<b>Missouri</b>	H.B. 1549	January 1, 2009	<b>Business entities</b> awarded a public contract or grant in excess of \$5,000 must use E-Verify for employees “working in connection with the contracted services.”
		January 1, 2009	All <b>public employers</b> must use E-Verify to verify the work eligibility status of new hires.
<b>Nebraska</b>	L.B. 403	October 1, 2009	All <b>public employers</b> and <b>public contractors</b> must use E-Verify to verify the work eligibility status of new employees physically performing services within the state.
<b>North Carolina</b>	S.B. 1523	January 1, 2007	All <b>state agencies, offices, and universities</b> must use E-Verify for employees hired on or after January 1, 2007.
	H.B. 36	October 1, 2011	<b>Counties and cities</b> must participate in E-Verify for new hires.
		October 1, 2012	<b>Private employers with 500 or more employees</b> must use E-Verify for new hires.

Table 1: State E-Verify Laws (continued)

State	Legislation	Effective Date	Affected Employers
		January 1, 2013	<b>Private employers with 100 to 499 employees</b> must use E-Verify for new hires.
		July 1, 2013	<b>Private employers with 25 to 99 employees</b> must use E-Verify for new hires.
	H.B. 1804	November 1, 2007*  *H.B. 1804 was enjoined by a federal district court on June 4, 2008. On February 2, 2010, the Tenth Circuit lifted the injunction on the law's E-Verify provisions.	<b>Public employers</b> must use E-Verify to confirm the work eligibility status of new employees.
		July 1, 2008	<b>Contractors and subcontractors</b> who enter into a contract for the physical performance of services within the state must use E-Verify to verify the work eligibility status of new employees.
<b>South Carolina</b>	H.B. 4400	January 1, 2009	<b>Public employers</b> must use E-Verify to verify the employment authorization of all new employees.
		January 1, 2009	<b>Contractors</b> who enter into a services contract with a public employer must agree to register and participate in E-Verify to verify the employment authorization of all new employees. Contractors must also require agreement from its subcontractors, and through the subcontractors, the sub-subcontractors, to register and participate in E-Verify for all new employees; or to employ only workers who (1) possess a valid South Carolina driver's license or identification card, (2) are eligible to obtain a South Carolina driver's license or identification card, or (3) possess a driver's license or identification card from another state where license requirements are at least as strict as those in South Carolina.  Compliance from contractors was expected in three phases depending on the number of employees: <ul style="list-style-type: none"> <li>• January 1, 2009: Contractors, subcontractors, or sub-subcontractors of 500 or more employees</li> <li>• July 1, 2009: Contractors, subcontractors, or sub-subcontractors of 100 or more employees but less than 500 employees</li> <li>• January 1, 2010: All contractors, subcontractors, or sub-subcontractors</li> </ul>
		July 1, 2009	<b>Private employers of 100 or more employees</b> must participate in E-Verify to verify information of all new employees, and verify the work authorization of new employees within five business days after employing a new employee; or employ only workers who (1) possess a valid South Carolina driver's license or identification card, (2) are eligible to obtain a South Carolina driver's license or identification card, or (3) possess a driver's license or identification card from another state where license requirements are at least as strict as those in South Carolina.
		July 1, 2010	All <b>private employers</b> must participate in E-Verify to verify information of all new employees, and verify the work authorization of new employees within five business days after employing a new employee; or employ only workers who (1) possess a valid South Carolina driver's license or identification card, (2) are eligible to obtain a South Carolina driver's license or identification card, or (3) possess a driver's license or identification card from another state where license requirements are at least as strict as those in South Carolina.

**Table 1: State E-Verify Laws (continued)**

State	Legislation	Effective Date	Affected Employers
	H.B. 1378	January 1, 2012	<p><b>Public and private employers</b> must use E-Verify to verify the work authorization status of new employees. As an alternative to E-Verify, employers may request from employees and retain a copy of one of several enumerated documents.</p> <p>Compliance from employers is expected in three phases depending on employer size:</p> <ul style="list-style-type: none"> <li>• January 1, 2012: Government entities and employers with 500 or more employees</li> <li>• July 1, 2012: Employers with 200 or more but less than 500 employees</li> <li>• January 1, 2013: Employers with more than 5 but less than 200 employees</li> </ul>
<b>Utah</b>	S.B. 81	July 1, 2009	<p><b>Public employers</b> must register with and use E-Verify or the Social Security Number Verification System (SSNVS) to verify the employment authorization status of new employees.</p>
		July 1, 2009	<p><b>Contractors</b>, regardless of tier, that enter into a contract for the physical performance of services within the state with a public employer must use E-Verify or SSNVS to verify the employment eligibility status of new employees.</p>
	S.B. 251	July 1, 2010	<p><b>Private employers with 15 or more employees</b> must use E-Verify or SSNVS to verify the work eligibility status of new employees. Exempt from verification requirements are foreign nationals that hold either an H-2A or H-2B visa.</p>
<b>Virginia</b>	H.B. 737	December 1, 2012	<p><b>Agencies</b> of the Commonwealth must enroll in and use E-Verify for new employees who perform work within the Commonwealth.</p>
	S.B. 1049	December 1, 2013	<p><b>Employers with more than an average of 50 employees for the previous 12 months</b> entering a contract in excess of \$50,000 with any agency of the Commonwealth to perform work or provide services under such contract must register and use E-Verify to verify the information and work authorization status of new employees performing work under such public contract.</p>

### The Second Edition of *Global Employee Privacy and Data Security Law* Is Hot Off the Press!

With the updated edition of *Global Employee Privacy and Data Security Law*, employers can successfully navigate the waters of international data security law. This treatise is designed specifically to help privacy professionals, human resources professionals, and attorneys understand international workplace privacy and data security laws and their relation to U.S. law, as well as to help ensure compliance with all requirements.

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- **Background Checks and Investigations.** When employers expand operations into different countries, background checks and investigations likely will be the first challenge they encounter. This treatise covers background check and investigation regulations in a number of different countries throughout the Americas, Europe, and Asia.
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- **Data Security.** Laws and regulations are increasingly focusing on data security and the steps organizations need to take to prevent unauthorized access and acquisition of personal information. Taking appropriate steps with employees to safeguard personal information is essential for every organization, and this treatise helps employers ensure compliance.

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For more information about this treatise or to purchase a copy from BNA Books, please [click here](#).

1. *Chamber of Commerce of United States v. Whiting*, 563 U.S. \_\_\_\_ (2011) (09-115).
2. IRCA, Pub. L. 99-603, 100 Stat. 3359 (1986).
3. 8 U.S.C. § 1324a(a)(1).
4. *Id.* at 1324a(b).
5. U.S. Citizenship & Immigration Servs, *Handbook for Employers: Instructions for Completing Form I-9 (Employment Eligibility Verification Form)* 11, <http://www.uscis.gov/files/form/m-274.pdf>.
6. *Id.* § 1324a(b)(6).
7. IIRIRA, Pub. L. 104-208, §§ 401-405, 110 Stat. 3009, 3009-655 to 3009-666 (1996).
8. *Id.* at 403.
9. *Id.* at 403(a)(1); see U.S. Citizenship & Immigration Servs., *E-Verify User Manual for Employers* 13, <http://www.uscis.gov/USCIS/E-Verify/Customer%20Support/E-Verify%20User%20Manual%20for%20Employers%20R3%20-%20Final.pdf>.
10. IIRIRA § 402(b)(1).
11. *Id.* at 402; see *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 768 (10th Cir. 2010) (internal citations omitted).
12. See Federal Acquisition Regulation, 48 C.F.R. pts. 1-53 (2010).
13. Ariz. Rev. Stat. Ann. §§ 23-211, 212, 212.01.
14. *Ariz. Contractors Ass'n v. Candelaria*, 534 F.Supp.2d 1036 (D. Ariz. 2008).
15. *Chicanos Por La Causa, Inc. v. Napolitano*, 544 F.3d 976 (9th Cir. 2008).

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