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FEDERAL E-VERIFY: WHY STATES SHOULD REFRAIN FROM REQUIRING ITS USE



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ABOUT THIS RESOURCE

This document provides an overview of the federal E-Verify program, its challenges, as well as state laws requiring employers to use the program. It discusses weaknesses in state E-Verify laws and offers alternatives for state lawmakers.

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ABOUT FEDERAL E-VERIFY

E-Verify is the second step of a two-step employment verification process. The first step, Form I-9, was created to implement the Immigration Reform and Control Act of 1986. Congress enacted Form I-9 to require U.S. employers to verify the identity and employment eligibility of newly hired individuals. In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act, creating the second step. This law mandated pilot electronic employment verification programs, one of which evolved to become E-Verify. Federal contractors are required to use E-Verify to confirm the work authorization status of new hires.¹ Federal law does not require any other employers to use E-Verify.

E-VERIFY EMPLOYMENT VERIFICATION PROCESS

All newly hired employees are required to complete a portion of the I-9 form and to present their employer with documents verifying their identity and authorization to work. The employer completes the remaining portion of the form. If an employer has chosen to enter into an agreement with United States Citizenship and Immigration Services, or USCIS, to participate in the E-Verify program, the employer enters the new hire's I-9 and additional information into the E-Verify system.

The E-Verify system searches databases within the Social Security Administration, or SSA, and USCIS to corroborate the information entered.² USCIS then notifies the employer that an employee's eligibility to work is either confirmed or Tentative Nonconfirmation, or TNC. If confirmed, the employer may continue the individual's employment.

If eligibility is tentatively not confirmed, the employer must inform the individual, who must contact the SSA or USCIS to contest the TNC. If the individual wishes to contest the TNC, the employer must open a case for the individual within the E-Verify system, which generates a deadline date for the individual to contact SSA, USCIS or both. While the employee is contesting the result, the employer may not take adverse action against the individual, including termination, suspension, denying pay or training, delaying the start date, or otherwise limiting the individual's employment."³ Failure of the employee to contact the SSA or USCIS by the deadline results in a Final Nonconfirmation, or FNC, which provides grounds for employment termination. An employee's failure to disprove a TNC also results in an FNC. Such a ruling requires employment termination because an employer is prohibited from employing an unauthorized worker.

CHALLENGES WITH THE FEDERAL E-VERIFY PROGRAM

The E-Verify System Continues to Issue Erroneous Results

Since its inception, E-Verify has experienced challenges, which have negatively affected businesses and U.S. workers, over 85 percent of whom are U.S. citizens.⁴ A significant challenge has been system-generated errors. USCIS reported 22,512 TNCs resulted solely from name mismatches in 2009, of which 76 percent, or 17,098, were for U.S. citizens.⁵ In 2016, 63,000 newly hired U.S. citizens and authorized workers had to prove their authorization to work.⁶ A recent study by the Cato Institute showed that, since 2005, more than 560,000 authorized employees received TNCs and successfully contested them.⁷ Erroneous TNCs can occur when employers, or staff at SSA or USCIS, enter erroneous information into E-Verify or the databases on which it relies. An error is typically caught after the system issues a TNC notice and an employee contests it.

In 2018, an estimated 70,000 new hires received FNC notifications in error.⁸ E-Verify will generate an erroneous FNC if an employer fails to inform an individual of a TNC, or if an employee fails to contact the SSA or USCIS by the specified deadline or is unable to disprove errors within federal agencies' databases.⁹

Resolving a TNC is Time Consuming and Costly

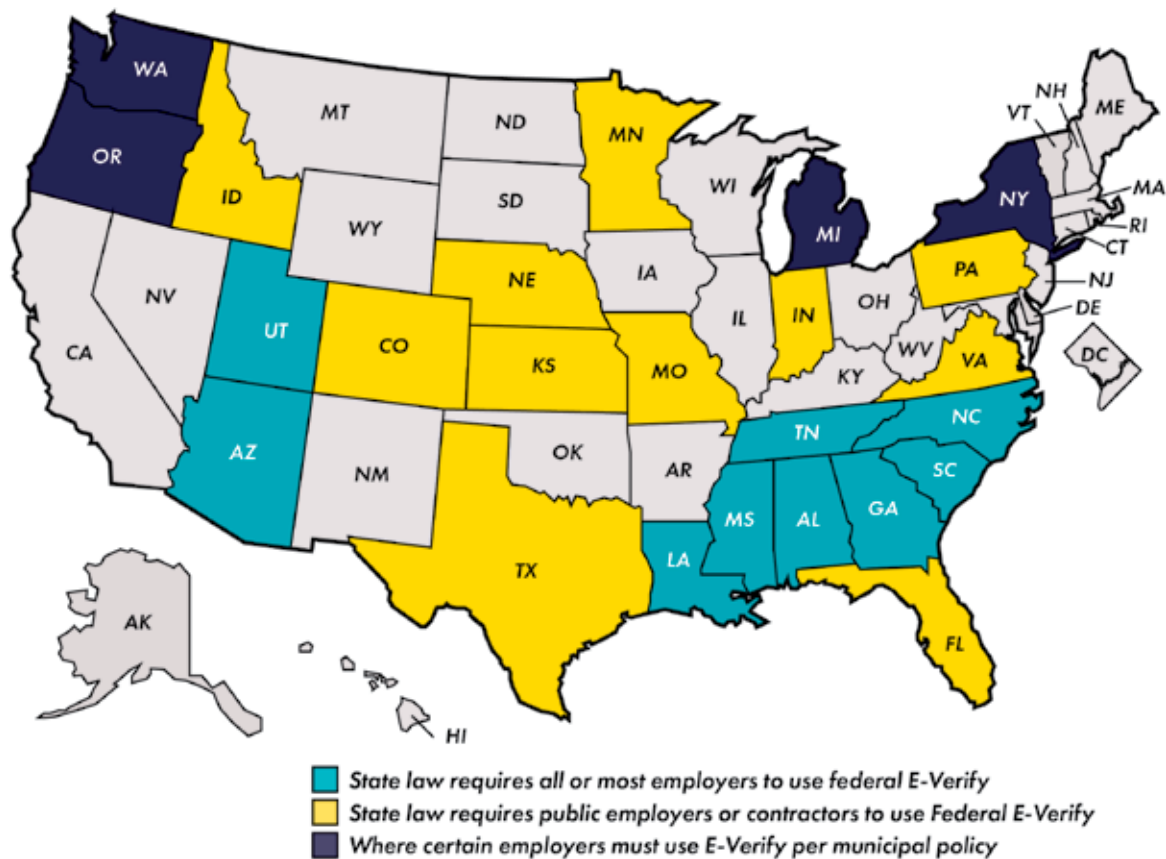
A newly hired employee receiving a TNC notice must contact SSA in person or the Department of Homeland Security, or DHS, as directed by the notice, to identify and contest errors. The employee must initiate contact within eight working days. Failure to act by this deadline results in an FNC, which may require the employer to terminate the individual's employment. An FNC cannot be appealed.

Once an individual contacts SSA or DHS to contest an erroneous TNC, the process can take several days, or in some cases weeks or months. If an employee does not know the specific records that are the source of the TNC, the individual may need to file the Federal Privacy Act requests with several government agencies to identify the inaccurate data. This process could take months to complete. In 2018, 58,362 of new hires who received TNCs contested and proved their work authorization, but over one-third of these contests took more than eight working days to resolve.¹⁰

Although the individual should still be employed, the process of contesting a TNC can cost the individual time and money, result in much aggravation and anxiety, and affect the person's ability to settle into their new role and focus on achieving their work goals. All employees who go through the contest gauntlet are likely U.S. citizens and other authorized workers.

Federal E-Verify Remains a Temporary Program

Federal E-Verify's future has never been assured. Unlike Social Security or Medicare, for example, E-Verify ceases to operate after its funding runs out. In addition, lapses in government funding for DHS, the agency responsible for the program, also disrupt E-Verify. During the recent government shutdown—which lasted 35 days—DHS lacked funding authority, causing E-Verify to become unavailable. Employers were unable to access the system to input employees' information to verify employment eligibility. Employees could not resolve TNCs during this time. The shutdown created a large backlog in E-Verify for businesses, employees and agency staff.¹¹



STATE LAWS ON E-VERIFY USE

Currently, laws in 24 states require all or select employers to participate in the program. Eight states require all or many employers to use E-Verify.¹² Louisiana’s private employers must use E-Verify or may alternately retain copies of specified documents for new hires.¹³ Public employers and contractors in Louisiana and other states are required by state law to use E-Verify.¹⁴

Several localities, such as Denver and Bonita Springs, Florida, have also adopted policies to require E-Verify participation for prospective city contractors.¹⁵ However, California enacted a law in 2011 to prohibit localities from adopting mandatory E-Verify ordinances.¹⁶

State E-Verify laws may impose a penalty on employers for failing to use E-Verify. The penalties may range from temporary suspension of business licenses for a first offense to revocation of licenses for subsequent violations. Penalties may also include civil fines for employers and, in some places, for an employee as well. A state law may call for random audits of businesses. Other state laws may allow residents to report violations.

CONCERNS WITH STATE-MANDATED E-VERIFY USE

State E-Verify Laws Are Punitive, Rather Than Solely Screening Out Unauthorized Workers

Although the intent of E-Verify is to confirm the identity and work status of an individual, most state E-Verify mandates tend to identify whom the state should punish for a violation, which is often the worker. Federal law requires employers to notify an employee of a TNC so the individual may take action to correct errors. However,

there is no penalty for the employer's failure to inform the worker; state E-Verify laws do not address this gap. A USCIS-commissioned study found that 83 percent of erroneous FNCs occurred because an employer failed to notify an employee of a TNC.¹⁷

If an employee fails to contact SSA or USCIS to contest a TNC notice within eight days, an FNC is issued and the employee faces termination without having recourse against the employer. In mandatory E-Verify states, an FNC could also lead to substantial civil penalties for an employee who is deemed an "unauthorized worker." In addition, states require only that employers make a "good faith effort" to verify a new hire's employment eligibility, who might later be found to be unauthorized to work. However, the same benefit is not given to those who may be victims of an erroneous FNC.

Hence, E-Verify use disproportionately affects individuals with legal work status, including U.S. citizens, through error notices and employer misuse of the system.¹⁸ Erroneous FNCs exclude individuals who are otherwise eligible for work, causing much frustration to contest errors in the system. For some authorized workers, being less proficient in English or managing a bureaucracy can be additional barriers to correcting system errors.

E-Verify Enforcement Laws Decrease State Revenue

Undocumented immigrants contribute to states' economic vitality as consumers and workers. In 2014, undocumented immigrants in Florida contributed more than \$400 million in state and local taxes, and possessed more than \$9 billion in spending power.¹⁹ Immigrants in Iowa contributed \$390 million in state and local taxes and held \$3.4 billion in spending power in 2017.²⁰ Recognizing immigrants' immense contributions to Iowa's economy and workforce, more than 40 business leaders gathered to develop the Iowa Compact on Immigration, which listed recommendations for bipartisan immigration reforms to provide opportunities for undocumented Iowans to contribute to the state's economy.²¹ An accompanying fact sheet pointed out that immigrants in Iowa made up just five percent of its population but comprised 6.8 percent of its working-age population; 89.5 percent of immigrants were working age, compared to 61.5 percent of U.S.-born Iowans.²²

In analyzing the consequences of adopting proposed legislation intended to drive at least some undocumented immigrants from Virginia, New American Economy analyzed the one-year losses to the state's economy and revenues. In one year, if five percent of undocumented immigrants were to leave Virginia—translating to nearly 8,000 workers concentrated in construction, restaurant and food services, and building services—Virginia's GDP would likely decrease by \$718 million, and state and local tax revenues would decline by \$7.7 million. Double the number of undocumented immigrants to leave within the same period, Virginia's GDP would decrease by \$1.4 billion, and state and local tax revenues would decline by \$15.5 million.²³

A Rand Corporation study in 2016 sought to measure the economic and fiscal impacts of various state immigration policies. In summary, the authors found generally larger consequences from restrictive state laws, like mandatory E-Verify laws, for states "heavily dependent" on unauthorized workers.²⁴

E-Verify Use Is Expensive For a State, Employers and Workers

State enforcement of a mandatory E-Verify law would require legislators to divert state resources away from critical local priorities, including fighting crimes and improving education and health care to implementing a law that removes much-needed participants in the local workforce and contributors to the local economy. In addition, a mandatory E-Verify law significantly affects business operations, especially for small businesses and those that provide seasonal work, for example, construction and tourism. Due to the recurring nature of seasonal industries, employers have to verify new hires' employment eligibility multiple times a year, which is time consuming and delays on-boarding.

If E-Verify issues an erroneous TNC, an employee may need to take time off work to contact SSA or DHS to contest the error, thus missing training—and for an hourly employee losing income. For small businesses that lack administrative personnel, daily operations fall on the employer; hence, compliance becomes an added burden that affects business income and impedes business expansion.

Large corporations take on financial and administrative burdens when they use E-Verify. Companies with dozens or hundreds of employees must hire a team to administer the employment verification process and factor in their salaries, benefits, and cost of training to stay abreast of regulatory changes. An USCIS estimate revealed that employers spend more than 13 million hours annually just managing I-9 forms.²⁵

These Laws Create Opportunities For Unlawful Discrimination

Mandatory E-Verify participation has increased the likelihood that employers prescreen job applicants to avoid spending time and resources to interview those they perceive to possibly be unauthorized to work. Although federal law prohibits such actions, tracking violations is nearly impossible and is costly.²⁶ Expanding E-Verify mandates at the state level provides incentives for employers to subject employees to unnecessary documentary demands based on employees' citizenship or national origin or employers' perceptions about ethnicity.²⁷ In 2018, for example, the Department of Justice settled a claim against Rose Acre Farms Inc., one of the largest egg producers in the country, for unlawfully discriminating against non-U.S. citizen employees with work authorizations. The company agreed to pay \$70,000 for routinely requiring immigrant workers to present permanent resident cards or employment authorization documents to prove their work status, while at the same time not requiring specific documents from U.S. citizen workers.²⁸

Studies Show That Mandatory E-Verify Laws Did Little to Improve Employment Opportunities For Authorized Workers in a State

E-Verify laws do not improve employment opportunities for authorized workers. In fact, mandating E-Verify participation negatively affects a state's workforce. In a study on the impact of Arizona's E-Verify law, researchers found that mandatory use of the system hardly increased employment for competing authorized workers in the state.²⁹ Notably, after enactment of the state law, the employment rate for low-skilled workers eligible for employment was estimated to have decreased between 2007 and 2009 from about 70 percent to 66 percent, suggesting that there were not enough workers willing to take the jobs that unauthorized workers were leaving.³⁰ A New American Economy study in 2017 documented immigrants' employment in the agricultural sector of the Great Lakes states in filling the gap for employers unable to recruit sufficient numbers of authorized workers.³¹

State E-Verify Increases Workers Vulnerability to Exploitation by Employers

When employers cannot find enough authorized workers to fill job vacancies, they turn to unauthorized individuals—those who will work as day laborers, independent contractors, self-employed, to work “off the books.”³² As a result, employers can take advantage of their employees' undocumented status by paying them below minimum wage, withholding benefits and avoiding paying applicable taxes. Unauthorized individuals who work under such arrangements are at a higher risk of labor violations, including wage theft, coerced or forced labor, and threats by employers to disclose their unauthorized status to immigration officials.³³



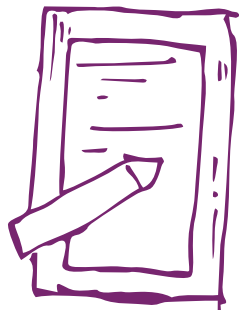
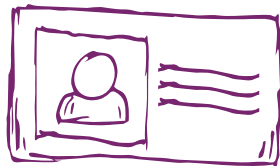
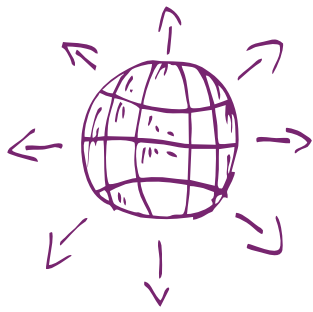
“Where there is no work, there is no dignity.” **Pope Francis**

THE CHURCH’S TEACHINGS ON THE DIGNITY OF WORK

- “Work — I repeat, in its many forms — is proper to the human person. It expresses the dignity of being created in the image of God. Thus, it is said that work is sacred. And thus, managing one’s occupation is a great human and social responsibility, which cannot be left in the hands of the few or unladen onto some divinized “market”. Causing the loss of jobs means causing serious harm to society.” **Pope Francis, 2015.**
- “The problem is not being able to bring bread to the table at home: this is a serious problem, this takes away our dignity. And the most serious problem is not hunger, even though the problem exists. The most serious problem is that of dignity. For this reason we must work and defend the dignity that work gives us.” **Pope Francis, Mass during a pastoral visit to the Italian region of Molise, July 5, 2014.**
- “At the dawn of creation, God made man the steward of his handiwork and charged him to cultivate and protect it. Human labor is part of that creation and continues God’s creative work. This truth leads us to consider work as both a gift and a duty. Indeed, labor is not a mere commodity but has its own inherent dignity and worth.” **Pope Francis, May 28, 2014.**
- “Work is fundamental to the dignity of a person. Work, to use an image, “anoints” us with dignity, fills us with dignity, makes us similar to God, who has worked and still works, who always acts...” **Pope Francis, May 1, 2013.**
- “Persons have the right to migrate to support themselves and their families. The Church recognizes that all the goods of the earth belong to all people. When persons cannot find employment in their country of origin to support themselves and their families, they have a right to find work elsewhere in order to survive. Sovereign nations should provide ways to accommodate this right.” **Strangers No Longer Together on the Journey of Hope, Issued by United States Conference of Catholic Bishops and Conferencia del Episcopado Mexicano.**

Recommendations: Alternatives To State E-Verify Mandates

In 24 states all or select employers must use the federal E-Verify system to confirm the identity and work eligibility of new hires. However, the system faces tremendous challenges that undermine its overall objective. Lack of commitment by Congress to provide permanent funding to sustain the program and address gaps in protections for workers are a few critical issues that must be resolved before requiring nationwide use. States should refrain from adopting E-Verify laws and instead use their resources to stimulate their economies and expand opportunities for business development.



Invest state resources in preparing new employees for the workforce. Assess gaps in the local industries and expand access to higher education, vocational, and apprenticeship programs for all residents, including immigrants, so they can improve their talents and skills for new employers, as well as replace those retiring from the workforce. Equipping these new employees with the necessary skills would also maximize their work and pay potential, and increase their spending power.

Increase opportunities for entrepreneurship and job creation. Allowing immigrants to obtain professional licenses would promote self-sufficiency and encourage entrepreneurship. Residents would also feel more confident to explore business ideas and models that generate new industries in the state, which would expand the business community and increase diversity in goods and services. Such changes can only help decrease the state's unemployment rate and boost the local economy.

Expand mobility within the state through inclusive driver's licenses laws. Expanding access to driver's licenses for immigrants would improve their access to job training programs and higher-paying jobs that are not accessible with public transportation. Having such mobility would also encourage entrepreneurs to expand their businesses to reach a new customer base.

Adopt policies that ensure equal protection for noncitizen workers. State officials should adopt laws that strengthen protections for immigrants against employment violations. Lawmakers should invest in public education campaigns and resources to inform immigrants of their employee rights, and empower them to not fear retaliation and report unlawful actions by their employer. Furthermore, states should adopt inclusive workers' compensation laws that extend benefits to undocumented workers who are injured at work.

ENDNOTES

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- ⁴ Doris Meissner and Marc R. Rosenblum, “The Next Generation of E-Verify: Getting employment Verification Right,” Migration Policy Institute, July 2009, <https://www.migrationpolicy.org/research/next-generation-e-verify-getting-employment-verification-right>.
- ⁵ U.S. Government Accountability Office, “Employment Verification: Federal Agencies Have Taken Steps to Improve E-Verify, but Significant Challenges Remain,” December 2010, p. 19
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- ⁹ *Id.*
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- ¹² Arizona, Alabama, Georgia (10+ employees), Mississippi, North Carolina (25+ employees), South Carolina, Tennessee (6+ employees) and Utah (15+ employees).
- ¹³ Louisiana Workforce Commission, Department of Labor, Employee Citizenship/Work Authorization Verification Status Requirements, http://www.laworks.net/E_Verify.asp.
- ¹⁴ Colorado, Florida, Idaho, Indiana, Louisiana, Michigan, Missouri, Nebraska, Oklahoma, Texas, Virginia, and West Virginia. Minnesota and Pennsylvania mandatory E-Verify laws apply only to certain public contractors.
- ¹⁵ Confirmation of Lawful Employment Status By City Contractors, City of Denver, https://www.denvergov.org/content/dam/denvergov/Portals/741/documents/PW_General/E-Verify_Ordinance.pdf; and City of Bonita Springs, Florida, Ordinance 09-04, <http://www.cityofbonitasprings.org/documents-archive/ordinances/2009/ORD-09-04-FINANCE.pdf>.
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²⁸ Octavio Blanco, “In Arizona, the mandated use of E-Verify has had mixed results,” *CNNMoney*, February 28, 2017, <https://money.cnn.com/2017/02/28/news/economy/e-verify-immigration/index.html>. See also Sarah Bohn and Magnus Lofstrom, “Employment Effects of State Legislation against the Hiring of Unauthorized Immigrant Workers,” Public Policy Institute of California for the Institute for the Study of Labor, Bonn, Germany, IZA DP No. 6598, May 2012, <http://ftp.iza.org/dp6598.pdf>.

²⁹ *Id.*

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