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The Crackdown on Employment of Illegal Immigrants Spreads to California

Murrieta and Temecula Join Growing List of Southern California Cities Requiring Employers to Use E-Verify

In 2007, Arizona became the first state to pass legislation requiring employers to use the voluntary E-Verify¹ program to confirm the employment eligibility of new hires. Since then, Arizona has been the focal point for publicity and legal challenges on attempts by states and localities to crack down on the employment of illegal immigrants. However, Arizona is not the only place where we are seeing state and local action.



Behind the scenes, several Southern California cities have quietly followed Arizona’s lead enacting similar laws mandating use of E-Verify. On July 13, 2010, Temecula joined the growing list of Southern California cities requiring employers to use E-Verify as a condition for maintaining a business license, and on December 20, 2010, Murrieta’s city council moved forward with its plans to institute a similar ordinance. While the State of California has not jumped on the bandwagon, many of its localities are taking action and increasing the burden on companies doing business not only across state lines but across city and county lines.

Given the expansion of immigration laws at the state and local level, it is imperative that employers keep abreast of developments in this area and ensure that their hiring practices are legally compliant in each of the locations they employ workers.

The Trend Toward Making Use of E-Verify Mandatory

The growing trend of states and localities enacting their own legislation to police immigration related-activity has its roots in frustration over the federal government’s inability to effectively address illegal immigration and enact [comprehensive immigration reform](#). While the frustration may be justified, the federal government did not make use of E-Verify mandatory for many reasons. [A January of 2010 report](#)² conducted by Westat researchers found that E-Verify is not immune from identity theft. According to the report 4.1% of those passing E-Verify are not truly authorized workers. More specifically, 54% of unauthorized workers who were run through E-Verify were inaccurately identified as work authorized. The findings appear to support claims of various groups that have criticized E-Verify as being particularly vulnerable to identity theft and fraud. In addition, while

improving, there continues to be false positives – while the rate is low there are still U.S. citizens and work-authorized foreign nationals who are denied employment through E-Verify.

What is more alarming though is the opportunity for intentional or unintentional abuse and misuse of E-Verify by employers who violate program rules. There have been reports of employers restricting work assignments, delaying job training, reducing pay or simply not hiring non-U.S. citizens based on database errors. In March of 2010, USCIS posted a [fact sheet](#) outlining its agreement and plans to share information with the Office of Special Council³ (OSC) at the Department of Justice. The fact sheet notes that the purpose of the Memorandum of Agreement (MOA) “is to establish a streamlined process for referring E-Verify matters falling within the other’s jurisdiction. OSC will receive referrals of potential discrimination that come to USCIS; in turn, USCIS will receive from OSC referrals of potential employer misuse of E-Verify that does not fall within DOJ’s enforcement arena.” Potential misuse of the program is cause for concern for all employers and a discrimination suit waiting in the shadows for employers who are not well versed in the proper use of the program. These problems and pitfalls should serve as a warning to states and localities considering and instituting E-Verify mandates.

Regardless of the federal government’s reasons for not mandating the use of the program, many states and localities continue to march forward with their own E-Verify requirements. Employers failing to comply with these E-Verify laws can face substantial penalties, including monetary fines, preclusion from contracting with federal, state and local governments, and suspension or revocation of their business licenses.

While Arizona has been at the forefront of this trend since enacting the Legal Arizona Workers Act, which went into effect on January 1, 2008,⁴ Arizona simply paved the way for others. [Several other states](#) have since passed or adopted similar legislation. For instance, in 2008 Mississippi passed legislation requiring that all private employers participate in E-Verify, with a phase-in period beginning in 2008 and full participation by 2011. On March 31, 2010, Utah adopted the Private Employer Verification Act that requires employers with 15 or more employees to use E-Verify or another verification system approved by the Department of Homeland Security to confirm the employment eligibility of new hires. The South Carolina Illegal Immigration Reform Act, passed in 2008, requires all employers to use E-Verify to confirm the eligibility of new hires, or in the alternative, hire only workers who possess or qualify to obtain a South Carolina driver’s license or identification card. The South Carolina law goes even further by authorizing the state to scrutinize a businesses’ hiring records and cite or fine employers found to have unauthorized workers on their payrolls.

California Localities Join in With Their Own E-Verify Mandates

Currently, California does not have any statewide laws mandating the use of E-Verify. However, in the last few years, several cities in Southern California passed local ordinances requiring the use of E-Verify for some or all businesses. These cities and their respective E-Verify requirements include:

- **Mission Viejo:** Effective July 1, 2007, the city and employers with city contracts must verify the eligibility of new employees through E-Verify.
- **Palmdale:** Effective July 1, 2008, to be eligible for contracts with the city exceeding \$50,000, a contractor must be enrolled in E-Verify.
- **Lancaster:** Effective December 31, 2009, *all employers* in the city must use E-Verify to confirm eligibility of new hires. Failure to comply with this requirement can result in business license suspension.
- **Temecula:** Effective January 1, 2011, *all employers* in the city must use E-Verify to confirm the eligibility of new hires as a condition of receiving or maintaining a business license.
- **Murrieta:** The City Council is expected to approve an ordinance mandating that all locally operated enterprises use E-Verify. Code enforcement officers would have authority to confirm compliance with E-Verify. Enforcement tools will include fines and license revocation.

Constitutional Challenge to State and Local Laws Requiring Use of E-Verify

The constitutionality of state and local governments requiring employers to use E-Verify to confirm employment eligibility is presently unresolved. On December 8, 2010, the United States Supreme Court heard arguments on *Chamber of Commerce v. Candelaria*, No. 09-115. The Supreme Court's decision is expected in Spring 2011 and will likely determine the fate of similar laws recently enacted throughout several Southern California cities. The lawsuit challenges the constitutionality of the Legal Arizona Workers Act (LAWA).

Arizona's law increased the level of state action by taking advantage of an exception to the preemption clause of the Immigration Reform & Control Act of 1986 (IRCA) relating to licensing laws. The law's bold move in authorizing Arizona state courts to suspend or revoke business licenses provides the state with an enforcement mechanism not used previously. One of the primary issues in that case is whether the preemption clause applies and if state and local governments – as opposed to only the federal government – can require participation in the E-Verify program. Those challenging Arizona's E-Verify requirement argue that immigration related legislation falls within the purview of the federal government, consequently laws like that enacted in Arizona conflict with, and are therefore preempted by, federal laws. In this instance referring to federal laws which contemplate that, except in limited circumstances, the use of E-Verify by employers would be voluntary. Prior to the Supreme Court granting review of the case, the Ninth Circuit [upheld Arizona's legislation](#), finding that it was not preempted by federal law. In light of the decision and arguments upholding the LAWA, it will be interesting to see the outcome of the pending Supreme Court case.

What These Developments Mean for California Employers

Pending the Supreme Court's decision on the Arizona law, the number of state and local governments enacting laws mandating use of E-Verify is expected to continue and increase. In light of the evolving nature of immigration compliance and the intricacies of E-Verify and the Memorandum of Understanding that employers must agree to and sign when enrolling in E-Verify, it is critical that employers remain apprised of relevant developments, understand the E-Verify laws applicable in each state and city where they employ workers, and ensure their hiring practices are legally compliant. If your company has not yet enrolled in E-Verify and it is being considered either because of legal mandate or as a best practice, it is critical that an internal review of the existing workforce and Form I-9s be conducted first and with experienced counsel. The "culture of compliance" is the theme of the Obama administration and it is spreading to cities and states across the nation. A few proactive steps will go a long way in limiting liabilities and exposure.

This *Business Immigration and Compliance Alert* was written by [Mahsa Aliaskari](#) and [Matthew Hayes](#). Questions regarding the subject matter of this *Alert* should be directed to Ms. Aliaskari (310.586.7713; aliaskarim@gtlaw.com), Mr. Hayes (310.586.3871; hayesm@gtlaw.com) or any Greenberg Traurig [Business Immigration & Compliance](#) or [Labor & Employment](#) practice team member.

Resources

- [Form I-9, Employment Eligibility Verification](#)
- [OSC's 10 Steps to Avoid Discrimination](#)
- [Form M-396, Guide to Selected U.S. Travel and Identity Documents](#)
- [Handbook for Employers M-274 - Instructions for Completing the Form I-9 \(revised July 2009\)](#)
- [E-Verify Memorandum of Understanding](#)
- [Federal Contractor E-Verify Memorandum of Understanding](#)
- [E-Verify User Manual for Designated Agents \(June 2010\)](#)
- [E-Verify User Manual for Employers \(June 2010\)](#)
- [E-Verify User Manual for Federal Contractors \(June 2010\)](#)
- [E-Verify Enrollment Quick Reference Guide \(March 2010\)](#)
- [E-Verify Federal Contractor FAQs](#)
- [E-Verify Federal Contractor Supplement](#)
- [E-Verify Dos and Don'ts](#)

Promoting a Culture of Compliance – Best Practices for your Business

- Establish a comprehensive immigration compliance policy
- Conduct in-house audits of Form I-9 documents and company policies, as well as E-Verify if applicable
- Establish policies, protocols and training for employment verification
- Diligently verify the identity of job applicants to ensure that they “are who they say they are”
- Consider use of E-Verify after consultation with experienced immigration compliance counsel
- Establish protocols for addressing Social Security No-Match letters
- Establish and maintain safeguards against the use of the I-9 process for unlawful discrimination
- Create a protocol for immigration compliance related to contractors and subcontractors

ICE utilizes various tools to target employers, particularly those involved with vital infrastructure and national security, as well as the usual suspects - unofficially “targeted” industries - food service, textile, meat/poultry plants and constructions. Employers must take steps *now* to ensure full compliance or face serious consequences. Actions taken *before* a government-initiated audit or investigation generally help mitigate damages, reduce exposure and save the company both time and money in the long-run.

¹ E-Verify is an Internet-based system operated by the Department of Homeland Security in partnership with the Social Security Administration. Its purpose is to enable participating employers to electronically verify the employment eligibility of their workforce. Under the system, employers fill out an online form with the information provided by new hires on the Employment Eligibility Verification Form (commonly referred to as the I-9 Form). That information is then cross-referenced with an assortment of government databases to confirm the worker's employment eligibility.

² The evaluation was conducted by Westat, a Rockville, Maryland-based social science research firm under contract to U.S. Citizenship and Immigration Services (USCIS). The evaluation was managed by the USCIS Office of Policy and Strategy, independent of the E-Verify program office, which is run by the USCIS Verification Division.

³ OSC is responsible for enforcing the anti-discrimination provisions of the INA. The antidiscrimination provisions include violations involving: (1) citizenship status discrimination, (2) national origin discrimination, (3) unfair documentary practices during the employment eligibility verification process (document abuse) and (4) retaliation.

⁴ That legislation requires all employers in Arizona to use E-Verify to confirm the employment eligibility of new hires. It penalizes employers who knowingly or intentionally hire illegal immigrants by suspending or revoking their business licenses.

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