

DEPARTMENT OF HOMELAND SECURITY & AMERICAN IMMIGRATION LAWYERS ASSOCIATION
E-VERIFY QUESTIONS & ANSWERS

E-Verify Program Administration and the MOU

Item number 15 of Section C of the MOU – Responsibilities of the Employer - reads as follows:

“The Employer agrees to allow the Department of Homeland Security and SSA, or their authorized agents or designees, to make periodic visits to the Employer for the purpose of reviewing E-Verify - related records, i.e., Forms I-9, SSA Transaction Records, and Department of Homeland Security verification records, which were created during the Employer's participation in the E-Verify Program. In addition, for the purpose of evaluating the E-Verify, the Employer agrees to allow the Department of Homeland Security and SSA or their authorized agents or designees, to interview it regarding its experience with E-Verify, to interview employees hired during E-Verify concerning their experience with the pilot, and to make employment and E-Verify related records available to the Department of Homeland Security and the SSA, or their designated agents or designees.”

We ask that you confirm the following:

1. You do not share your database with ICE for the purpose of enforcement.

ICE does not have direct access to the E-Verify database. ICE does make specific requests for information from E-Verify from time to time that we may grant on a case by case basis.

2. Employer records are accessed only for the purpose of determining that there is compliance with the program – that the employer is following the guidelines and is not undermining the integrity of the process.

Employer records are accessed only for program monitoring purposes to maintain system integrity, ensure compliance, and ensure that discrimination or unfair hiring practices are not taking place.

3. We understand that on-site visits may involve interviewing the employer, employees, and reviewing I-9s, but seek your confirmation that only those hired since the signing of the MOU fall within the scope of such a review.

The scope of our monitoring & compliance review is limited to records associated with the E-Verify program.

Elements of the MOU that conflict with or appear to contradict the positive, non-enforcement aspects of E-Verify

Section B, Item number 6 of the MOU states the following:

“The Department of Homeland Security agrees to safeguard the information provided to the Department of Homeland Security by the Employer, and to limit access to such information to individuals responsible for the verification of alien employment eligibility and for evaluation of the E-Verify, or to such other persons or entities as may be authorized by applicable law. Information will be

used only to verify the accuracy of Social Security Numbers and employment eligibility, to enforce the INA and federal criminal laws, and to ensure accurate wage reports to the SSA.”

The expansive nature of this statement and emphasis on enforcement highlight the elements of E-Verify that deter employers from participation. We ask that you consider eliminating the highlighted portions of this MOU provision.

The E-Verify program is not intended or used as a primary means of enforcing immigration law. However, it is important that the MOU informs participating employers that program information may be used to assist in enforcing the INA and federal criminal laws as needed, including those violations of law involving the integrity of the E-Verify program such as employees’ false claims of identity or work-authorized status made through the system.

Employer Registration & Program Resources

1. At the current time, what is the approximate turnaround time for an employer to be able to access the E-Verify system, once they have completed the online registration process?

An employer can access E-Verify and begin the online tutorial for program training immediately after they have registered to use the system and created a user id and password.

2. Many F-1 students employed under Optional Practical Training will want to apply for the recently announced 17-month extension of status and work authorization, but will only be able to do so if their employer participates in E-Verify. Is the program currently prepared to handle a significant increase in usage?

The E-Verify system has recently gone through testing on its ability to handle increased registration and query volume and is confident that the workload increase due to the OPT extension will be easily handled by the system.

3. Are there plans for an expanded tutorial that will provide guidance for entering data in circumstances such as H-1 portability, automatic extension of work authorization under TPS or for extensions of stay for certain non-immigrants (e.g. H-1B, L-1, TN), F-1 OPT gaining an automatic 180 days of work authorization with participating E-Verify employers, or refugees with unlimited right to work?

The E-Verify tutorial and training program is being reformulated and will address many of the issues mentioned above. In the cases mentioned above, the data entry requirements of the employer will not change at all. However, the E-Verify program will develop for employer users additional training and FAQs to address these issues.

4. The MOU states that in order to provide the appropriate assistance with operational problems that may arise during the employer’s participation in E-Verify, both the Department of Homeland Security and the Social Security Administration agree to provide the employer names, titles, addresses, and telephone numbers of representatives to be contacted during E-Verify. How is this information made available to employers?

The E-Verify customer service line is made available to employers through the E-Verify website, the E-Verify user manual, and is in the online resources section of the E-Verify program. The program’s dedicated customer support staff is able to answer all basic

employer questions and elevate any higher level policy questions to E-Verify program experts.

Tentative Nonconfirmations

1. We recommend that you work with the SSA offices to prioritize the processing of workers with tentative non-confirmation letters and that they be assigned at SSA to separate priority queues.

Over 95% of SSA tentative non-confirmations are resolved on the same day that SSA was contacted by the employee. Naturalized citizens who have not yet updated their records with the Social Security Administration (SSA) are the largest category of work-authorized persons who initially face an SSA mismatch in the E-Verify program. To help reduce mismatches within this population, on May 5, 2008, the E-Verify program launched the inclusion of citizenship data into the initial E-Verify query, which will help instantly confirm the citizenship status of naturalized U.S. citizens hired by E-Verify employers. Additionally, a naturalized citizen who receives a citizenship mismatch with SSA can call USCIS directly to resolve the issue (in addition to the option of resolving the mismatch in person at any SSA field office.) USCIS also plans to initiate citizenship status records information sharing with SSA to further help prevent tentative nonconfirmations from occurring. This effort will improve the efficiency of E-Verify by providing to SSA with the most accurate and timely citizenship status information.

2. We further recommend that you work with DHS to resolve tentative non-confirmations when the employee contests the discrepancy and the problem is not resolved within the 8 days allotted, through no fault of the employee.

Over 99% of DHS tentative nonconfirmations are addressed on the same day that the employee contacts DHS to contest. If a case is not resolved within the 8 days allotted, the case is put into continuance and the employer is directed to take no action against the employee until the matter is resolved.

- Temporary Protected Status (TPS) Automatic Extensions: TPS members are typically granted automatic extensions of work authorization in increments of six months while waiting for new EADs to be issued. Such an individual can begin new employment during this period of automatic extension and the expired EAD would be used for the I-9, accompanied by a copy of the Federal Register which confirms the grant of extension. When the employee's A# and document expiration date are transmitted to DHS for verification, will they produce a tentative non-confirmation due to the expired EAD?

In the aforementioned situation, those with TPS extensions should not receive a tentative non-confirmation when they are entered into the E-Verify system. In most cases, employees may receive a 'Verification in Process' response at which time USCIS status verifiers will validate that the TPS in their case was extended and return a work authorized response to the employer within an average processing time of 24 hours.

- H-1 Portability: An individual with current H-1B work authorization can “port” to a new employer once a petition for this change is filed with USCIS. He does not have to wait for the approval to be processed. For I-9 purposes, the employer can accept a List B document and the H-1 filing receipt from USCIS for List C. Since the I-94 number that will be entered in Section 1 relates to the former employer, will this trigger a tentative non-confirmation?

The above mentioned situation will not lead to a tentative non-confirmation, since the E-Verify program checks only that the I-94 number has work authorization, and does not currently validate that the employee is working for the correct employer.

- Non-Immigrant Categories which experience delays in securing SSA cards include individuals who enter under the Blanket L-1 and TN non-immigrants. Recently, it took over six weeks for a blanket L-1 entrant in Los Angeles to secure a Social Security card. In fact, quite a few of the high-tech employer-sponsored non-immigrants experience delays in securing social security cards – the delay is worse for these two categories. How will E-verify assist these employers who will be unable to complete the E-verification process within three days of hire without a social security number?

The E-Verify program is aware that some classes of non-immigrants have had delays in securing Social Security cards. E-Verify guidance on this issue is for employers to wait until these immigrants have secured Social Security numbers before running an E-Verify query, and note the reason for the delay in querying for this employee on their Form I-9.

Final Nonconfirmations

1. Item number 6 in Section C of the MOU states that the employer must notify DHS if it continues to employ an alien after receiving a final non-confirmation; it provides for civil money penalties for failure to do so, and concludes: “The Department of Homeland Security reserves the right to conduct Form I-9 compliance inspections during the course of E-Verify, as well as to conduct any other enforcement activity authorized by law.”

Please clarify how this would be handled. Is this information shared with ICE for the purpose of triggering enforcement activities?

USCIS and ICE are currently working on finalizing a MOA for purposes of establishing a referral process. Currently, information requests from ICE for E-Verify related data are handled on an ad hoc basis. Form I-9 compliance inspections are handled by ICE Worksite Enforcement.

2. Generally, the reason an employer would continue to employ an individual after receipt of a final non-confirmation is an inability to resolve the discrepancy within the allotted time frame, and a belief that the employee has the right to work.

To accommodate the employer in such a situation, we recommend a system for necessary extensions of time in limited increments in order to accommodate a resolution of the

confirmation process. A threat of DHS enforcement rather than interim provisions for difficult resolutions deters employers from participation.

The E-Verify system currently grants extensions in situations where an individual's work authorization status could not be determined in the allotted time frame. The status verification unit will place the case in a "Case in Continuance" status, and the employer will be informed when more time is needed and that no adverse actions should be taken against the employee during this time.