IMMIGRATION IN EMPLOYMENT LAW

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A. EMPLOYMENT BASED IMMIGRATION

All employers are governed by the federal immigration statutes; therefore, requirements for employers do not differ from state to state.[1] Of particular importance to employers is the Immigration Reform and Control Act ("IRCA")[2], which requires employers to verify the identity and employment eligibility for all employees hired to work in the United States after November 6, 1986 and provides enforcement procedures and penalties for noncompliance. Generally, IRCA provides that employers may hire only persons who may legally work or who are authorized to work in the United States. The Department of Homeland Security[3] ("DHS") enforces the verification requirements in IRCA. Moreover, IRCA prohibits discrimination by most employers in the recruitment, hiring, employment eligibility verification process or discharge of persons

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[1] In 2011 alone, the following states are just a few that enacted immigration-related employment laws: (1) California: law prohibiting states and localities from mandating the use of E-Verify, except as required under federal law or as a condition to receiving federal funds; (2) Idaho: law providing that a person who knowingly makes false statements or provides a false social security card is guilty of misdemeanor for the first and second offense and a felony for any thereafter; (3) Louisiana: law requiring all employers who engage in public contract work to use E-Verify and stipulating that failure to do so subjects the employer to cancellation of the current public contract and ineligibility for any public contract for up to three years; (4) Missouri: an act stipulating that unemployment benefits are not payable based on work performed by an alien who was unlawfully present at the time the work was performed; (5) Oregon: act providing that if the worker is a person presently in violation of federal immigration laws, the insurer or self-insured employer can cease payments to worker's compensation for that employee; and (6) Tennessee: law mirroring the federal law and requiring employers to enroll in E-Verify.

[2] 8 U.S.C. §§1324a, 1324b; 29 U.S.C. §§1802, 1813, 1851.

[3] The Homeland Security Act of 2002 (5 U.S.C. §7701) served to create an executive department combining various agencies. The authorities of the former Immigration and Naturalization Service ("INS") were transferred to three agencies in the DHS: (1) U.S. Citizenship and Immigration Services ("USCIS"); (2) U.S. Customs and Border Protection ("CBP"); and (3) U.S. Immigration and Customs Enforcement ("ICE").

authorized to work in the United States.[4] The Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices ("Office of Special Counsel") enforces the anti-discrimination and anti-retaliation provisions of IRCA.

If an employer seeks the services of a foreign national that has "permanent resident" status, it may hire the individual, but must comply with the Verification Process discussed herein. If the foreign national does not have "permanent resident" status, the employer must file a petition so the person may obtain an immigrant or nonimmigrant classification. Employers should be generally familiar with the categories of employment-based immigration, which are as follows:

1. **First Preference/EB-1**: reserved for persons of extraordinary ability in the sciences, arts, education, business or athletics; outstanding professors or researchers; and multinational executives and managers;[5]

2. **Second Preference/EB-2**: reserved for persons who are in professions holding advanced degrees or the equivalent and those who because of their exceptional ability in the sciences, arts or business will substantially benefit the national economy, cultural, or educational interests or welfare of the United States;

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[4] 8 U.S.C. §1324b(a). All employers with more than three (3) employees are covered under IRCA and are prohibited from: (1) discriminating on the basis of citizenship or immigration status; (2) discriminating against individuals based on their place of birth, country of origin, ancestry, native language, accent or because they are perceived as looking "foreign"; and (3) retaliating against persons for asserting the rights protected under IRCA. The Office of Special Counsel has jurisdiction over national origin claims against employers with four (4) to fourteen (14) employees while the Equal Employment Opportunity Commission has jurisdiction over those employers with fifteen (15) or more employees. See 8 U.S.C. §1324b(a)(2)(A, B) and 8 U.S.C. §1324b(b)(2).

[5] On December 29, 2011, the USCIS Ombudsman issued a report and set of recommendations urging the USCIS to create steps to make sure clear and consistent standards are applied to those applying for a visa with the EB-1 classification. This report was issued after the office determined there was clear confusion and inconsistent adjudications in determining qualifications for this classification.

3. **Third Preference/EB-3**: reserved for individuals with at least two (2) years experience as skilled workers, professionals with a baccalaureate degree, and others with less than two (2) years experience, such as an unskilled worker who can perform labor for which qualified workers are not available in the United States;

4. **Fourth Preference/EB-4**: reserved for "special immigrants," which includes certain religious workers, employees of U.S. foreign service posts, retired employees of international organizations, alien minors who are wards of courts in the United States, and other classes of aliens; and

5. **Fifth Preference/EB-5**: reserved for business investors who invest $1 million or $500,000 (if the investment is made at a targeted employment area) in a new commercial enterprise that employs at least ten (10) full-time United States workers.[6]

Persons in these classifications are permanent workers who have been issued an immigrant visa authorizing them to live and work permanently in the United States. Moreover, there are temporary (nonimmigrant) worker classifications, which allow persons to enter the United States for a set period and for a specific purpose. A common example of a temporary classification is the H-2A visa (temporary agricultural/seasonal workers). Finally, if authorized by a designated official, exchange students and visitors may be allowed to work in the United States.[7]

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[6] *See* Katherine Baer, "Immigration & Employment," *The People's Law Library of Maryland* (August 6, 2010).
[7] See 8 C.F.R. §274a.12.

B. I-9 FORMS, NEW AND OLD

1. THE "VERIFICATION PROCESS"[8]

Under IRCA, all employers must verify the identity and employment eligibility of any person hired, including a U.S. citizen, by completing the current version of the Form I-9.[9] In doing so, the employer must make the instructions to the form and the List of Acceptable Documents available to the employee. The newly hired employee must complete Section 1 of the Form I-9 no later than the first day of work for pay. An employee does not need to provide his social security number unless the employer uses E-Verify, which will be discussed later. After the employee signs Section 1, the employer is required to review the information provided making note of the date that the employee's employment authorization will expire, if applicable. If an employee's employment authorization is set to expire, an employer may be required to reverify the employee's work authorization. If applicable, the deadline to reverify is no later than the date the employment authorization expires. When reviewing Section 1, the employer should confirm that all required information has been completely filled out by the employee timely to ensure compliance with the Verification Process.

Employers must complete Section 2 of the Form I-9 within three (3) business days of the employee's first day of work for pay unless the job lasts less than three (3)

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[8] See 8 U.S.C. §1324a and 8 C.F.R. §274a.1, et seq. for authority regarding assertions in this section of the paper.

[9] The Current Form is 03/08/13 N. It is the only form that can be used for employees hired after May 7, 2013 See Attachment. Moreover, although employers may use the Spanish version of the I-9 to assist in completing the form, all employers in the United States must fill out the English version of the form to satisfy the Verification Process. Only employers in Puerto Rico may fill out and keep the Spanish version of the I-9.

days, which would require the employer to complete Section 2 by the first day of work for pay. In order to complete Section 2, the employee must provide the employer with unexpired original documentation that satisfies the List of Acceptable Documents on the I-9. Specifically, the employee must present: (1) any of the unexpired original documentation from List A[10] on the I-9, which demonstrates identity and employment authorization;[11] or (2) any of the unexpired original documentation from List B on the I-9, which demonstrates identity[12] and any of the unexpired original documentation from List C of Form I-9, which demonstrates employment authorization.[13] If an employee presents a receipt for any of these documents, said receipt only temporarily satisfies the documentation presentation requirement under Section 2.[14] Upon receipt of these

[10] When an employee presents a document from List A, no other documentation should be requested from the employee unless the employee is a nonimmigrant student or exchange visitor. In that case, students should present an unexpired foreign passport, a Form I-20 with the designated school official's endorsement and a valid Form I-94 or I-94A. An exchange visitor should present an unexpired foreign passport, a Form DS-2019, a valid form I-94 or I-94A and a qualifying document from the official program sponsor. See Attachment for acceptable documents from List A.

[11] 8 U.S.C. §1324a(b)(1)(B). Importantly, employers should note that the USCIS redesigned Form I-766, the Employment Authorization Document, in the Fall of 2011 to enhance security. The employee's alien registration number, formerly known as the A#, is now found under the USCIS# heading on the front of the card. The older version of the EAD is still acceptable.

[12] 8 U.S.C. §1324a(b)(1)(D); see Attachment or acceptable documents from List B.

[13] 8 U.S.C. §1324a(b)(1)(C); see Attachment, page for acceptable documents from List C.

[14] Only three (3) receipts are acceptable: (1) a receipt showing the employee applied to replace a document that was lost, stolen or damaged (valid for 90 days); (2) the arrival portion of Form I-94/I-94A with a temporary I-551 stamp and a photograph of the person (valid until the expiration date on the stamp or one year after the issuance date if no expiration date is shown); or (3) the departure portion of Form I-94/I-94A with a refugee admission stamp (valid for 90 days). When a receipt is obtained, the word "receipt" should be noted in Section 2 along with the last day that the receipt is valid. After the

documents, the employer must physically examine the documentation to determine if it reasonably appears to be genuine and if it relates to the employee presenting it.[15] If an employer rejects any documentation provided by the employee, it should allow the employee to present other documentation from the Acceptable List of Documents. If the employee cannot produce any acceptable documents, the employer may terminate the employee. When acceptable documentation is produced, the employer should complete and sign Section 2 of the form, including the date the employee began employment for pay[16] and the date the employer examined the documentation.[17]

The Form I-9 also includes a Section 3, which an employer is required to complete under certain circumstances. Specifically, when an employee's employment authorization expires, the employer must reverify that the employee is authorized to work by completing Section 3.[18] The only documents the employer should reverify are the documents under List A and List C. Importantly, an employer should NOT reverify U.S. citizens or lawful permanent residents, who presented a Form I-551, Permanent Resident Card, for Section 2. Additionally, if an employer rehires an employee within three (3)

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receipt expires, the employer should cross out the word "receipt" and any accompanying number, and write the number of the required documentation and initial/date the change.

[15] 8 U.S.C. §1324a(b)(1)(A). The standard used for determining whether a document is genuine is whether a reasonable person would know the document is fraudulent. If the name on the documents differs than the name inserted in Section 1, ask the employee for clarification and make a note of the discrepancy in the file if the document appears genuine and to relate to the person.

[16] Employers should ensure that this date matches the payroll records.

[17] As noted, the employer should do so within three (3) business days of the employee's first day of work for pay or on the first day if the job is for a period of less than three (3) days.

[18] If the version of the form used for a previous verification is no longer valid, the employer must complete Section 3 of the most recent version of the Form I-9 and attach it to the completed Form I-9.

years of the date the previous Form I-9 was completed, the employer can complete a new Form I-9 or may complete Section 3 of the previously completed Form I-9.

In order to avoid an immigration-related discrimination complaint, employers should implement the following practices:

1. Use the same procedures and requirements for all applicants;

2. Do not limit jobs to U.S. citizens unless U.S. citizenship is required by law or government contract;

3. Remember U.S. citizenship, or nationality, belongs to: (a) persons born within the borders of the fifty states; (b) persons born in Puerto Rico, Guam, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, American Samoa or Swains Island; and (c) persons who have completed the naturalization process;

4. Do not demand employment authorization documents before an employee is hired or is required to complete the Form I-9;

5. Use the same verification process for all new hires;[19]

6. Accept originals, that appear to be genuine and related to the employee, of those documents listed on the back of the I-9 form and do not demand others;

7. Do not demand specific documents from the Accepted Documents List from an employee;[20]

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[19] For example, on December 28, 2011, the Justice Department announced a settlement with BAE Systems Ship Repair Inc. regarding allegations that one of its subsidiaries imposed different requirements on lawful permanent residents as compared to U.S. citizen employees by requiring all newly hired lawful permanent residents to present Permanent Resident Cards as a condition for employment. The DOJ began its investigation of BAE after one of its employees was suspended for failing to present the requested documentation even though he had provided the required documents from the Acceptable Document List on the Form I-9. Pursuant to the settlement agreement, BAE agreed to ensure that its verification process complied with the law, provide training to its employees, produce its records for inspections for three (3) years and pay $53, 9000 to the United States. Moreover, the employee that was suspended was reinstated and fully compensated.

8. Do not refuse to accept original documents that appear to be genuine and relate to the employee;

9. Do not refuse to hire or terminate an employee because his documents expire in the future;

10. Do not refuse to accept a receipt from the list of acceptable receipts;

11. If an employer must reverify an employee's status, accept any valid documents the employee provides even if they are not the same documents presented at the time of the initial verification process; and

12. Do not retaliate against persons who contact the enforcing agencies, complain about discrimination or participate in an investigation or lawsuit on behalf of an alleged victim.

2. RECORDKEEPING

The Form I-9s are not filed with any federal agency. Rather, employers must keep the Form I-9 on file for at least three (3) years from the employee's first day of work for pay, or one (1) year after employment ends, whichever is longer.[21] Although not required, if the employer makes copies of the original documents presented by the

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[20] In December 2011, the DOJ announced a settlement with Garland Sales, Inc., a Georgia rug manufacturer, regarding allegations that it engaged in discrimination by imposing unnecessary document requirements on persons of Hispanic origin when establishing whether they were eligible to work in the United States. Specifically, the charging party alleged that he provided an unexpired driver's license and social security card, but that Garland required a Permanent Resident Card ("green card") even though naturalized citizens do not hold "green cards." Eventually, the worker objected and Garland withdrew its job offer. The complaint also included allegations that Garland required newly hired non-U.S. citizens and foreign-born U.S. citizens to present specific documents beyond those required under IRCA. Garland agreed to pay $10, 000 in back pay and civil penalties as well as complete training on implementing a proper verification process.

[21] 8 U.S.C. §1324a(b)(3).

employee to satisfy the Acceptable List of Documents, the employer should maintain the copies with the Form I-9.[22]

The Form I-9s may be stored on paper, microfilm, microfiche or electronically and must include the sections completed by the employee (Section 1) and employer (Section 2 and Section 3 if applicable).[23] Since the I-9 records contain private information, the employer must take steps to ensure that the information is properly stored. If the employer chooses to maintain paper records, it is recommended that they be kept separate from personnel files so that it is easier to produce them for inspection if necessary. If the employer stores the records on microfilm/microfiche, the microfilm/microfiche must: (1) exhibit a high degree of legibility and readability when displayed on a reader or printed; and (2) include a detailed index of all data so that any record can be accessed quickly. If an employer chooses to store the documents electronically, the electronic system must: (1) include controls to ensure the integrity, accuracy and reliability of the system; (2) include controls to detect and prevent the unauthorized or accidental creation of, addition to, alteration of, deletion of or deterioration of an electronically stored Form I-9; (3) include controls to ensure an audit trail so that any alteration or change to the form since its creation is electronically stored and can be accessed; (4) include a program that regularly evaluates the system; (5) include a detailed index of all data so that any record can be accessed when needed; and

[22] 8 U.S.C. §1324a(b)(4).
[23] 8 U.S.C. §1324a(b)(3).

(6) produce a high degree of legibility and readability when displayed on a video terminal or printed.[24]

The Form I-9s for all employees must always be available for inspection by authorized U.S. officials from the DHS, the Office of Special Counsel and the Department of Labor. Generally, an employer will receive a written Notice of Inspection, via hand-delivery or certified mail, from one of these agencies at least three (3) days before the inspection, which will include the location for inspection. Importantly, IRCA also permits the use of subpoenas or warrants to obtain the documents without providing three (3) days' notice. If any of these agencies makes an inspection request, the employer must make the requested records available. If the employer uses microfilm/microfiche to store the records, the employer must provide a microfilm/microfiche and reader that: (1) provides safety features; (2) is in clean condition and good working order; and (3) is able to display and print a complete page of information. If the employer stores the information electronically, the employer must provide the officer with any existing electronic summary of the information. If an employer refuses to permit the inspection or delays the inspection, it will be in violation of IRCA.

During the inspection, ICE agents or other qualified auditors conduct an inspection to determine compliance. Employers are considered to have complied with the Verification Process if there was a good faith attempt to comply.[25] If technical or procedural violations are found, an employer is given ten (10) business days to make

[24] 8 U.S.C. §1324a(b)(3) and 8 C.F.R. §274a.1 et. seq.
[25] 8 C.F.R. §274a.1

corrections.[26] If the employer fails to do so, the employer cannot rely on the good faith defense.[27] An employer may receive a monetary fine for all substantive and uncorrected technical violations. If it is determined that an employer knowingly hired or continued to employ persons unauthorized to work, the civil or criminal penalties discussed below may result.

3. PENALTIES

IRCA added sanctions to be imposed on violating employers to the Immigration and Nationality Act. Moreover, the Immigration Act of 1990 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") further changed the sanction provisions. As discussed previously, employers are prohibited from: (1) discriminating against persons on the basis of national origin, citizenship or immigration status; and (2) hiring, recruiting for a fee, or referring for a fee persons it knows to be unauthorized to work in the United States. Employers, and all persons involved, who fail to comply with these requirements are subject to civil fines, criminal penalties, disqualification from government contracts and/or court orders related to lawsuits filed. For example, in December 2011, the owner of and a manager for French Gourmet, a San Diego restaurant, were sentenced to serve probation and pay a fine for pleading guilty to knowingly hiring undocumented workers. The owner was sentenced to five (5) years of probation and ordered to pay $396, 575 in fines and the manager was sentenced to three (3) years of probation and ordered to pay $2, 500 for his role in the illegal hirings.

[26] 8 U.S.C. §1324a(b)(6)(A).
[27] 8 U.S.C. §1324a(b)(6)(B).

Generally, the civil and criminal fines are as follows:

CIVIL VIOLATIONS	**PENALTIES**
(1) Hiring or continuing to employ a person, or recruiting or referring for a fee, knowing that the person is not authorized to work in the United States; or (2) unlawful discrimination against an employment authorized individual in hiring, firing or recruitment or referral for a fee	**FIRST OFFENSE**: \$375-\$3,200 for each worker **SECOND OFFENSE**: \$3,200-\$6,500 for each worker **THIRD OFFENSE**: \$4,300-\$16,000 for each worker[28]
Failing to comply with Form I-9 requirements or committing document abuse	\$110-\$1,100 for each form regardless of the number of offenses[29]
Committing or participating in document fraud	**FIRST OFFENSE**: \$375-\$3,200 for each worker **SECOND OFFENSE**: \$3,200-\$6,500 for each worker **THIRD OFFENSE**: \$3,200-\$6,500 for each worker[30]
Asking an employee for money guaranteeing that the employee is authorized to work in the United States ("Indemnity Bond")	• Pay \$1,100 for each bond the employee paid the employer • Refund the employee the full amount of the bond or the U.S. Treasury if the employee cannot be found[31]
CRIMINAL VIOLATIONS	**PENALTIES**
Engaging in a pattern or practice of hiring, recruiting or referring for a fee persons that are not authorized to work in the United States	Up to \$3,000 for each unauthorized alien and up to 6 months in prison for the enter pattern or practice[32]

[28] 8 U.S.C. §1324a(e)(4) and 8 C.F.R. §274.10(b).
[29] 8 U.S.C. §1324a(e)(5) and 8 C.F.R. §274.10(b).
[30] 8 U.S.C. §1324c and 8 C.F.R. §270.3.
[31] 8 U.S.C. §1324a(e)(6) and 8 U.S.C. §1324a(g).
[32] The "good faith defense" is not applicable when a pattern and/or practice have been established. 8 U.S.C. §1324a(b)(6)(c).

In determining the penalty amounts for document violations, the following factors are considered: (1) the size of the business; (2) good faith effort to comply; (3) seriousness of the violation; (4) whether the violation involved unauthorized workers; and (5) the history of previous violations.[33]

C. E-VERIFY

In 1996, Congress created three (3) experimental complements to the Verification Process as part of the IIRIRA. Only one of those programs remains in operation today, E-Verify. E-Verify is an internet-based electronic system that uses the Form I-9 as its base and compares information from the Form I-9 to government records to determine whether a person is authorized to work in the United States.[34] Until E-Verify, there was no way for employers to verify that the information they received from an employee was valid. The program is administered by the DHS, the USCIS Verification Division and the Social Security Administration ("SSA"). "In the absence of a prior violation of certain federal laws, IIRIRA prohibits the Secretary of Homeland Security from 'requir[ing] any person or . . . entity' outside the Federal Government 'to participate in' the E-Verify program."[35] To encourage use of the program, IIRIRA provides that an employer that uses E-Verify, and obtains confirmation of employment authorization, establishes a rebuttable presumption of compliance.[36] If an employer uses E-Verify, it must notify applicants that it uses E-Verify.

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[33] 8 C.F.R. §274.10(b).

[34] Chamber of Commerce of the United States v. Whiting, 131 S. Ct. 1968, 1975 (2011).

[35] Id. Moreover, as noted previously, some states have enacted legislation requiring E-Verify be used by employers. Currently, Texas does not mandate the use of E-Verify.

[36] Id.

Prior to using E-Verify, an employer must enter into a Memorandum of Understanding with the DHS that provides that the employer will follows strict procedures designed to ensure that an individual's due process right are protected. Thereafter, an employer must enroll by providing information such as the type of employer and what employees will have access to the system. When using the system, employers submit information taken from the employees' Form I-9, which is sent to the DHS, the USCIS and SSA to determine work eligibility.[37] Importantly, E-Verify must not be used to reverify an employee. Moreover, unlike the standard verification process, an employer must obtain an employee's social security number to use the E-Verify system.

Using E-Verify to determine employment eligibility is a three-step process.[38] First, the employer creates a case, which occurs after the employer completes Section 2 of the Form I-9. As noted previously, an employer is required to complete Section 2 of the Form I-9 no later than three (3) business days after the employee begins work for pay. The deadline to create a case via E-Verify is the same. The employer uses the written Form I-9 as a base for completing the electronic case.

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[37] See Whiting, 131 S.Ct. at 1975-76.

[38] 8 U.S.C. 1324a notes "Pilot programs for employment eligibility confirmation", Act Sept. 30, 1996, P.L. 104-208, Div C, Title IV, Subtitle A, 110 Stat. 3009-655; Jan. 16, 2002, P.L. 107-128, § 2, 115 Stat. 2407 (effective on enactment, as provided by § 3 of such Act); Dec. 3, 2003, P.L. 108-156, §§ 2, 3, 117 Stat. 1944; Oct. 28, 2009, P.L. 111-83, Title V, §§ 547, 551, 123 Stat. 2177.

Next, the employer gets a response. Specifically, if the employer receives an "Employment Authorized" response, then it can proceed to the third step, which is to close the case. If E-Verify cannot confirm authorization, the employer will be notified: (1) that DHS Verification is in Process, which can take 24-72 hours longer; or (2) of a Tentative Nonconfirmation ("TNC"). Employers should not take adverse actions against the employee as a result of receiving either of these responses.

A TNC notification means that the SSA and/or DHS could not confirm the person's information in government records. It does not necessary mean that an employee is not authorized to work. If the employer receives a "SSA Tentative Nonconfirmation" that means that the SSA was not able to verify the information. If an employer receives this response, it must notify the employee and refer him to the SSA. If the employer receives a "DHS Tentative Nonconfirmation" in response, the response means that the DHS was unable to verify employment eligibility, which requires that the employee be instructed to call DHS to find out how to fix the discrepancy.[39]

An employee has the right to challenge a TNC response. If the employee chooses to do so, the employer refers the case in E-Verify to either the SSA or DHS depending on the response and provides the employee with a referral letter spelling out what needs to be done to contest the response. Thereafter, the employee has eight (8) federal government work days from the date the case was referred to the appropriate

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[39] 8 U.S.C. 1324a notes "Pilot programs for employment eligibility confirmation", Act Sept. 30, 1996, P.L. 104-208, Div C, Title IV, Subtitle A, 110 Stat. 3009-655; Jan. 16, 2002, P.L. 107-128, § 2, 115 Stat. 2407 (effective on enactment, as provided by § 3 of such Act); Dec. 3, 2003, P.L. 108-156, §§ 2, 3, 117 Stat. 1944; Oct. 28, 2009, P.L. 111-83, Title V, §§ 547, 551, 123 Stat. 2177.

governmental agency in E-Verify to contact the agency to contest to the response. During this time frame, an employer is required to allow the employee to continue working and may not delay training, reduce hours or take any adverse action against the employee. The employer will be notified of an update in the case. If the issue is resolved, the employer will receive an "Employment Authorization" response. If the TNC is not resolved, the employer will receive a Final Nonconfirmation ("FNC") and can terminate the employee.[40]

Finally, the employer closes the case after the employee indicates he will not contest a TNC, or when an Employment Authorized or FNC is obtained. Closing the case is essential so that the DHS can maintain statistics on the program. Once the case is closed, the employer must record the case verification number on the Form I-9 or print the verification receipt and maintain it with the I-9.[41]

Just as with the standard Verification Process, an employer using E-Verify should implement the following practices to avoid a discrimination complaint:

1. Notify all applicants of the use of E-Verify;
2. Use E-Verify only for new hires not to reverify an employee;
3. Use E–Verify for all employees;
4. Use E-Verify after the person is hired and/or has accepted employment;
5. Do not prescreen applicants;
6. Notify the employee immediately upon receipt of a TNC and give instructions on how to proceed with contesting the TNC;

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[40] Id.
[41] Id.

7. If the employee decides to contest the TNC, provide the employee with a referral letter that contains specific instructions and contact information;

8. Do not take adverse actions (reduce hours, failure to train, suspend, terminate, etc.) against an employee because of a TNC response;

9. Provide the employee with no less than eight (8) federal working days to contact the government agency and contest the TNC response; and

10. Terminate an employee only upon receipt of an FNC or confirmation that the employee will not contest a TNC.