



American Payroll Association

Government Relations • Washington, DC

August 7, 2015

Laura Dawkins
Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue NW
Washington, DC 20529-2140
Submitted via the Federal e-Rulemaking Portal (www.regulations.gov)

Re: OMB Control Number 1615–0092, Department of Homeland Security,
U.S. Citizenship and Immigration Services, Docket ID USCIS– 2007–0023

Dear Ms. Dawkins:

The American Payroll Association (APA)¹ thanks U.S. Citizenship and Immigration Services (USCIS) for the opportunity to comment on the proposed enhancements to the E-Verify system to reduce or prevent erroneous Final Nonconfirmations (FNC). The APA supports your proposals to streamline the Tentative Nonconfirmation (TNC) process, to establish a formal FNC review process, and to allow for Form I-9 reverifications through E-Verify. The APA believes that, while the proposed enhancements may increase the administrative burden for E-Verify employers and users, the enhancements will help protect the rights of individuals who are authorized to work and ensure employers maintain a legal workforce.

The proposal to streamline the TNC process, which allows for direct e-mail messages to employees through E-Verify, should help inform employees of a TNC and the actions necessary to correct a data mismatch. Employers must still notify employees of a TNC, but this enhancement provides a safety net to protect employees from misuse or forgetfulness on the part of the employer. Employers must continue to inform employees of E-Verify case-related information. The three planned E-Verify messages (a notice of a TNC, a reminder if the employee has not contacted DHS or SSA, and a courtesy reminder to update records with SSA) should help facilitate communications between the employer and employee. They will also help ensure that an employee is notified of a TNC and has the information as to

¹ The APA is a nonprofit association of over 20,000 payroll professionals in the United States. Our membership also includes representatives of large, medium, and small payroll service providers who are responsible for processing payroll for an additional 1.5 million employers. In total, the APA represents those professionals responsible for paying an aggregate total of one-third of the private sector workforce.

The APA's primary mission is to educate its members and the payroll industry regarding best practices associated with paying America's workers while complying with applicable federal, state, and local laws. In addition, the APA's Government Relations Task Force (GRTF) works with the legislative and executive branches of government to find ways to help employers satisfy their legal obligations, while minimizing the administrative burden on government, employers, and individual workers.

the actions the employee can take to resolve the TNC as well as a reminder to take such actions. These messages should help streamline the process for all involved.

The proposed formal FNC review will help protect the rights of the employee. Importantly, the review will be open to all employees, even if the employee did not contest the TNC. The burden is on the employee or employee representative to initiate the review, not the employer.

The expansion of the E-Verify capabilities to include the Form I-9 reverification process will increase the burden on employers, but will assist employers in ensuring a legal workforce. The employer remains responsible for updating and retaining the Form I-9.

While the APA generally supports the proposed enhancements to E-Verify, members of its Government Relations Task Force Subcommittee on Immigration noted some issues to be addressed. The APA also offers suggestions for additional enhancements to further streamline the processes in E-Verify, including greater use of myE-Verify and more accurate statistical recordkeeping.

Final Nonconfirmation Notice – Employer Instructions

The FNC notice instructs the employer to provide the information in an alternative format, such as Braille or audiotope, if the employee cannot read the document. Requiring employers to create and maintain such alternative formats is an unreasonable burden. This is especially true if the Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices considers the failure to provide the document in an alternative format to be discriminatory. The preferred approach is to have the employee use another individual (e.g., preparer/translator), a screen reader, or other software product to read the information.

Employee Status During FNC Review

The proposed e-mail message to an employee who is determined to be employment authorized following a FNC review states that "your employer may rehire you." APA proposes that the employee be allowed to work until the FNC review has been completed. This would be consistent with the TNC referral process, and would prevent the termination of an employee who should have been determined to be employment authorized.

I-9 Reverification

The description of the proposed E-Verify enhancements indicates that an employee's work authorization cannot be reverified before the employee's previous employment authorization expires, but must be reverified "no later than three days after the expiration of the previous employment authorization." This puts an additional, unnecessary burden on employers since Form I-9 reverifications must be completed on or before the expiration date. The APA proposes that the E-Verify reverification process be consistent with the initial E-Verify case creation requirements allowing a reverification to be submitted to E-Verify when the Form I-9 reverification is completed as well as within three days after the expiration date of the employee's employment authorization. Also, E-Verify should allow for a late reverification by collecting the reason for a late case creation, which is consistent with the procedures for creating an initial case in E-Verify.

In addition to the timing of the reverification, the APA has identified several technical situations that E-Verify should be able to handle.

- A. The current reverification process allows employers to complete an entirely new Form I-9, update just Section 3 of the employee's current Form I-9, or just Section 3 of a new Form I-9. The proposed E-Verify reverification process for an employee with an existing employment authorized case seems to require that the employer complete Section 3 rather than a new Form I-9. If true, this is in conflict with the Form I-9 requirements as well as with the current reverification process and the reverification policies of many employers.
- B. It does not appear that E-Verify allows an employee's citizenship to be updated during the reverification process of an existing case. If the employee's citizenship or immigration status has changed, how should the employer process the reverification? Must the employee complete a new Form I-9 or update the existing Form I-9? Should the employer then process the reverification in E-Verify as a new case rather than an update to an existing employment authorized case?
- C. If the employee presents a List A or List C document that is not consistent with the employee's citizenship or immigration status, such as an alien presenting a U.S. passport or the employer selects the wrong document, does E-Verify indicate a mismatch and allow the employer to correct the error?
- D. When updating an existing case, E-Verify prompts the employer to re-enter certain Section 1 information. This information should already be stored in E-Verify from the existing case, allowing the data to be pre-populated with the option for the employer to update it. This should reduce data entry errors as well as the time required for the employer to process the reverification.
- E. If any of the Section 1 information has changed since the existing case was created, should the employee update Section 1 and the employer enter the updated information as part of the existing case reverification in E-Verify? Will Section 1 information that is different from what was entered for the existing case cause any issues in E-Verify?
- F. If any of the Section 1 information has changed since the existing case was created and the employer enters the updated information as part of the existing case reverification, will this cause any issues in E-Verify?
- G. Is the employer required to complete Section 3 of Form I-9 when creating a new reverification case? What if the employer's process is to create a new Form I-9 for reverifications?
- H. Is a new Form I-9 required when creating a new reverification case for an employee who was not submitted to E-Verify when hired? What if the employee's information in Section 1 has changed?
- I. Employers using an electronic Form I-9 and/or E-Verify system (in-house or with an E-Verify employer agent) are likely to incur some significant additional costs due to the reverification requirements. The reasons are as follows:

1. The employer does not have access to the E-Verify website as E-Verify transactions are processed through the system using the E-Verify Web Services interface. The employer does have the option of signing a new MOU for the purpose of processing reverifications manually, but then transactions would be stored under different E-Verify Company IDs making it more difficult to manage.
2. One of the benefits of using an electronic system is that it automatically tracks expiring work authorizations. In order for the system to provide this benefit to the employer, the employer will need to have paper Forms I-9 converted to an electronic format and stored in the system. This can be a costly project, especially for large employers with decentralized hiring sites. The employer can control costs to some degree by only converting Forms I-9 for employees eligible for reverification.
3. The employer can control costs by completing a new Form I-9 for an existing employee with expiring work authorization and having the system submit it to E-Verify. However, this requires a complete Form I-9 to be created, which may not be consistent with the reverification procedures in the M-274. It also would require system enhancements, which may require more time than the six months currently provided to employer agents using Web Services, to address such issues as;
 - i. Prohibiting E-Verify transactions for employees hired prior to the employer's participating in E-Verify using Web Services.
 - ii. Determining if the Form I-9 is for an employee requiring reverification or to correct a missing Form I-9 situation.
4. Timeliness is another issue to consider since it could be a significant project for an employer to collect existing paper Forms I-9 from all decentralized hiring sites and have them converted into an electronic system. Therefore, APA proposes that USCIS allow for a reasonable implementation period between the approval of the requirements and the start date as well as a grace period to allow employers to comply. In order for employers and employer agents to properly comply with these new requirements, they will need more time to: understand the new E-Verify requirements; design and implement software updates; gather and convert paper Forms I-9; update company policies, procedures, and training programs; and implement them in decentralized environments.
5. An additional timeliness issue to consider is the lag between updates implemented in the E-Verify website and then subsequently in the Web Services interface. Unless these enhancements are released together or employers are allowed a reasonable grace period to comply, employers using the E-Verify website will have to comply before employers using an electronic system with Web Services. Therefore, it would seem to make sense to allow employers to begin using the new features when they are available in the E-Verify website, but to set a future date by which all employers (website and Web Services) must use the new features. APA suggests that employers and agents be afforded at least a six month grace period to implement new E-Verify features in their electronic systems using Web Services. However,

given the magnitude of the reverification change, additional time is recommended and probably warranted.

- J. What are the potential penalties for employers who are not able to comply with the new reverification requirements within the timeframe provided by USCIS?
- K. Will ICE and/or OSC consider an employer's late compliance with the new reverification requirements as knowingly continuing to employ an unauthorized worker?
- L. What will be the role of E-Verify Monitoring & Compliance in analyzing an employer's E-Verify transactions regarding reverification?
- M. Will the employer be required to indicate to E-Verify when an employee with temporary work authorization terminates employment? This type of information is required for M&C, ICE, and/or OSC to determine from E-Verify data if an employer is complying with the reverification requirement.
- N. What impact is this requirement and the new E-Verify data anticipated to have on M&C reviews and ICE and/or OSC Form I-9 audits?

Updated MOUs

Because the proposed enhancements will require extensive changes to the functionality of the E-Verify system, the Memorandums of Understanding (MOU) must also be updated. There is some confusion concerning the training requirements for Web Services Agents and employers. There are some who interpret the training requirements in the MOU to only apply to employees of the agent. However, there are others who interpret the intent of these training requirements to be that the users of an employer's and/or agent's system (such as an electronic Form I-9/E-Verify system) processing E-Verify cases be trained on E-Verify processes. APA requests that USCIS clarify the training requirements in the MOU to avoid any possible confusion.

Additional Enhancements Through myE-Verify

While there are numerous technical issues that should be addressed before implementation of the proposed E-Verify enhancements, the APA supports the proposed changes. One factor in the proposed streamlined TNC process, that could limit its effectiveness, is the reliance upon individual employees to provide their e-mail address on Form I-9. The APA suggests using data in the myE-Verify system to augment the data provided to E-Verify.

For instance, if an employee's email address is not entered in Section 1 of Form I-9, but the employee has a myE-Verify account, E-Verify should use the e-mail or phone data from the myE-Verify account to notify the employee of changes in their case status. This would also have the added benefit of notifying the employee of potential identity theft if the employee has not recently been hired or reverified. E-Verify information could also be posted to the myE-Verify account. When the individual account holder logs into their account they could have access to the documents that are relevant to their current case. Using data from myE-Verify would further the USCIS goal of streamlining the TNC process.

Improved Data Collection

With the proposed new E-Verify enhancements for FNC reviews, such cases could be included in the overall statistics reported by E-Verify in the same manner that TNC results are reported. This should increase the percentage of E-Verify cases that result in employment authorized. The FNC review cases could be reported separately to show the value of the E-Verify enhancements.

Conclusion

The APA supports your effort to reduce or prevent erroneous FNCs and to allow for reverifications through E-Verify. While there are some technical issues that need to be addressed, the enhancements to the E-Verify system should create a TNC/FNC process that benefits employers, employees, and USCIS.

If you have any questions, please contact Curtis Tatum, whose contact information is provided below.

Sincerely,

Dave Fowler
Chair, Immigration Subcommittee
Government Relations Task Force
American Payroll Association

Curtis Tatum, Esq.
Senior Manager, Payroll Information Resources
American Payroll Association
(202) 248-4650
ctatum@americanpayroll.org