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Labor & Employment ADVISORY ■

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# Department of Homeland Security Using Data-Mining Techniques to Monitor Employers' E-Verify Data for Potential Violations of U.S. Immigration Laws

The United States Citizenship and Immigration Services (USCIS), a component of the United States Department of Homeland Security (DHS), has recently begun using data-mining techniques in an effort to flag potential violations of the immigration laws through an analysis of the information that employers have submitted as participants in the E-Verify program. To that end, the USCIS Verification Division Monitoring and Compliance Branch (M&C Branch) has quietly developed a set of internal standards for certain "behaviors" associated with the use of E-Verify that it has deemed indicative of noncompliant activity. Moreover, unbeknownst to employers and their employees, USCIS has been sharing employers' data—as well as its presumptions—with other government agencies for use in investigations and other law-enforcement proceedings.

The vast majority of employers who participate in E-Verify do so in an effort to enhance their ability to verify the identity and employment authorization of their employees. However, the E-Verify program has grown increasingly complex over the years through various technological changes to its interface and the addition of numerous program features. As communications regarding such changes have not always been sent directly to every registered E-Verify user, confusion and innocent improper processing on the part of employers has not been uncommon. The M&C Branch, then, was initially established to assist employers and their employees with the compliance process by alerting employers when a compliance issue arose. Ideally, USCIS could then work with the employer to resolve the problem through various means.

More recently, however, the M&C Branch has used the availability of new technologies to carefully track each employer participating in the E-Verify program. In doing so, the agency has developed an extended list of "behaviors" that purportedly give rise to a presumption of noncompliant activity. Although USCIS has not been readily forthcoming about its guidelines, through a series of Freedom of Information Act requests and a Complaint for a Writ of Mandamus, Alston & Bird attorney Eileen Scofield has been able to ascertain a list of "compliance" issues, the analytical and statistical bases for USCIS's current presumptions and some pertinent details regarding the agency's procedures for sharing employers' E-Verify data with other federal and state agencies.

To provide a sense of what types of behaviors USCIS is flagging, the following is a partial list of the M&C Branch's current areas of focus for the detection of allegedly noncompliant activities, followed by some additional discussion with respect to the data that employers submit to E-verify and the potential consequences associated with employers' use of the program:

- **Use of invalid Social Security numbers (SSNs)** – USCIS has created a list of five invalid SSN combinations (000-xx-xxxx, xxx-00-xxxx, xxx-xx-0000, 9xx-xx-xxxx, and 666-xx-xxxx) that it uses as red flags if a company inputs them into E-Verify. Specifically, the M&C Branch looks to see if multiple entries containing these invalid SSNs have been created in any given month. USCIS's rationale is that E-Verify participants who create cases with such SSNs may be deliberately using fake numbers as "place-holders" for either employees awaiting receipt of their social security number or for hiring non-authorized employees who do not have a valid SSN from the Social Security Administration (SSA).

- **Non-use (or little use) of E-Verify** – If a company is registered for E-Verify but never uses the program, or has not used it within a specified time period (based on the size of the employer's workforce), then USCIS views such behavior as suggestive of noncompliance. While USCIS acknowledges that infrequent use could be attributed to "simple administrative issues" (e.g., the employer has two accounts, one active and one inactive, or has not hired any new employees), it also notes that such non-use could be a sign that the employer is intentionally avoiding using E-Verify to commit fraud or discrimination.

- **Verifying existing employees** – If an employer verifies employees with a reported hire date that predates the signing of the employer's Memorandum of Understanding with DHS, such activity can trigger a red flag. USCIS considers such activity to indicate that the employer may be improperly running existing employees through the E-Verify program.

- **Failing to verify within three days of hire** – USCIS runs reports to identify employers who fail to verify newly hired employees within three days of the reported hire date, as is required by statute. The report excludes federal contractors with the E-Verify clause, as well as cases that are closed as "Invalid."

- **More than one "EA" result returned for the same SSN** – If an employer runs the same SSN through E-Verify two or more times within a given month and receives a result of "Employment Authorized (EA)" for each attempted verification, such behavior will be flagged. USCIS, however, does indicate that such patterns could reflect simple administrative failures, IT errors with the application itself, errors in the user guidance provided by the web-services provider or lack of proper training by the employer.

- **Failing to print TNC notices** – If an employer fails to print a Tentative Non-Confirmation notice (TNC) or a referral letter for a contested TNC, and there is a "disproportionate number" of citizen versus non-citizen employees, then the M&C Branch takes the view that such failure to print means the employer did not allow the employee to contest or resolve the TNC, as required, and indicates employer discrimination.

- **Case closed as invalid before final agency determination** – In cases where an employee receives a TNC and contests it, is referred to either SSA or DHS, and then the E-Verify case is closed as invalid before the final determination is made by either SSA or DHS, USCIC considers such activity to suggest that the employer is closing cases incorrectly or not following the proper procedures for TNCs.

- **Employer requests specific documents of lawful permanent residents (LPRs)** – If the percentage of newly hired employees who have (a) identified themselves on Section 1of the Form I-9 as an LPR, and (b) volunteered or provided a List A document to the employer in order for the employer to complete Section 2 of the form, is "too great" according to USCIS's standards, then "discrimination" in the hiring practice is presumed. Notably, USCIS has not been forthcoming with regard to either the established cutoff for an acceptable percentage or the basis on which such a line has been drawn.
- **Other triggers** that may suggest noncompliance include closing a case before the verification is complete, deliberately delaying verification of suspected unauthorized workers, terminating an employee who contests a TNC or closing TNC cases without proper resolution.

When the M&C Branch determines that a company has been engaging in one or more of the "suspicious" behaviors noted above, a variety of consequences can result. For instance, USCIS may call the company to discuss the activity and the employer's use of E-Verify, or possibly initiate a site visit during which time USCIS may request the company's E-Verify records and Forms I-9. Being flagged may also lead to a referral to other governmental agencies, such as the U.S. Department of Justice Civil Rights Division, Office of Special Counsel for Unfair Immigration-Related Employment Practices ("OSC"), if the data "suggests" discriminatory practices in the employment eligibility verification process. Moreover, the matter may be referred to DHS Immigration & Customs Enforcement ("ICE") if unauthorized workers are suspected, or even to the U.S. Attorney for a review of potential criminal activity. Such actions, even when unfounded, can have devastating and long-lasting consequences for employers, regardless of whether the allegedly "suspicious" behaviors that led to their being flagged by USCIS were the result of innocent errors in the use of the E-Verify program.

Clearly, no employer or employee should knowingly engage in an improper use the E-verify system. However, because some of the inferences and presumptions made via data-mining could potentially result in "false positives" and other unintended consequences, employers need to be aware of these practices when considering their participation in the E-Verify program. Further, for employers that do choose to participate, an understanding of USCIS's current practices can improve their ability to properly train employees who use the E-Verify system, so as to ensure compliance with the immigration laws while avoiding innocent mistakes that could lead to unwarranted enforcement proceedings. Indeed, with knowledge of the new data-mining and data-sharing element of E-Verify, employers will be better able to assess their decision to use, or not to use, the E-Verify program.

If you have any questions or would like to discuss these matters further, please contact **Eileen Scofield** at Alston & Bird. The firm would be happy to review and provide input on your employment eligibility verification requirements and processes, as well as other immigration-related matters.

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