

IMMIGRATION REFORM

## Nation looks to Arizona's experience with E-Verify

by Dinita L. James

*Reports out of the nation's capital indicate the time finally may be right for comprehensive immigration reform. The word "comprehensive" encompasses a lot of issues, including border security and what some call a "pathway to citizenship" and others call "amnesty."*

*Everyone describing the scope of comprehensive immigration reform seems to include in their plans a national mandatory system of employment verification. Arizona employers have been subject to a state law that mandates use of the federal E-Verify system for five years now. The Legal Arizona Workers Act (LAWA), which took effect on January 1, 2008, requires every business in the state to verify the legal status of new employees against the federal E-Verify database.*

*Because Arizona was the first state in the nation to adopt such a law, pundits and policymakers are looking to learn from our experience as Congress considers expanding employment verification nationwide.*

### **Is now the time?**

Arizona figures prominently in the so-called "Gang of Eight," a bipartisan group of U.S. senators who issued a five-page "framework" with four basic legislative pillars for immigration reform in late January. Senator John McCain (R-Arizona), who led the last national push for immigration reform in 2007 and then backed away from it when he ran for president in 2008 and reelection to his Senate seat in 2010, is one of the eight. So is Arizona's junior senator, Republican Jeff Flake. Four Democrats and two other Republicans complete the gang.

One of the pillars of the senators' plan is "[c]reate an effective employment verification system that will prevent identity theft and end the hiring of future unauthorized workers." In a February 13, 2013, editorial in the *Arizona Republic*, Flake identified a need for a "workable verification system that allows employers to check a new hire's legal status, whether it be E-Verify or a new system."

President Barack Obama has issued a "blueprint" for comprehensive immigration reform in an online

photo-illustrated white paper. Obama's plan calls for mandatory electronic employment verification that builds on E-Verify but with improved fraud detection.

A bipartisan group of congressmen reportedly are working on a House plan, but as of press time, it hasn't been released. It's a safe bet, however, that the House plan will require mandatory use of E-Verify. There appears to be a national consensus that employers all across the country ought to be required to use E-Verify, as Arizona employers already are.

### **LAWA's lessons**

The latest available figures from the U.S. Department of Homeland Security (DHS) show that Arizona employers accessed the E-Verify database 982,593 times in 2011, a year during which the state had 1.5 million new hires. That works out to a compliance rate of 66%.

It's clearly the larger employers in Arizona that are the most compliant. Only 43% of state businesses had enrolled in the system by the end of 2012. According to DHS and census statistics, it appears that only 19% of small businesses (those with four or fewer employees) are enrolled to use E-Verify.

While compliance is spotty, enforcement is virtually nonexistent. The Arizona attorney general's website reports only two cases since the LAWA took effect. In November 2009, the Maricopa County Attorney's Office

### **E-Verify step-by-step**

E-Verify can only be used to verify the eligibility of new hires. It should not be used for job applicants before an offer of employment is made and accepted or for existing employees.

E-Verify must be used in a nondiscriminatory manner and must be used for all new hires—not just new hires who are Hispanic. Employers that use E-Verify must display posters prominently stating that they do so.

Employers need to follow a step-by-step process:

- The employer enters the information from the I-9 form into the E-Verify system.
- If an online match occurs, the new hire is eligible to work without any additional confirmation. If a tentative nonconfirmation (TNC) is issued, the employer must notify the employee and, if the employee contests the TNC, provide a form letter stating his rights and how to contest the TNC.
- The employee has eight federal workdays to contest the TNC. If the employee fails to contest the TNC within that eight-day period, he must be fired.
- If a final nonconfirmation is issued, the employee must be fired.

A TNC must be kept confidential. The employee's pay and hours cannot be cut, training cannot be delayed, and the employee cannot be fired based on the TNC while he is awaiting a final determination.

entered into a settlement with Waterworld, suspending its certificate of limited partnership—its license to do business in the state—for 10 days. In March 2010, a Subway franchisee entered into a settlement in which it agreed to close a single location for two days in lieu of a three-day suspension of its business license. Those two days were Easter and Thanksgiving 2010.

The LAWAA is designed to encourage compliance because use of E-Verify is a defense to prosecution for knowingly hiring undocumented immigrants. There is no government agency with a budget to check up on businesses' compliance. Compare that with South Carolina, which followed Arizona's lead in mandating E-Verify, but then put its Department of Labor, Licensing and Regulation in charge of enforcing the law and gave the agency the money to do it. South Carolina audited more than 4,500 businesses in 2012, finding 94% compliance.

A Cato Institute report calculates the cost of a single E-Verify query at \$147, which includes labor, paperwork, and the risk of additional steps the employer might have to take if the new hire doesn't clear the E-Verify check immediately. E-Verify's critics point to both false positives and false negatives generated by the system. Nationally, 98.3% of people pass E-Verify immediately. Nevertheless, undocumented immigrants sometimes pass by using the identity of a legal worker.

A biometric identifier embedded in an ID card is the only sure way to provide perfect employment

verification, but that is years away. The Obama administration's proposal speaks only of "[p]iloting the development of a biometric identifier that could be potentially used for employment verification in the future."

### ***Bottom line***

The LAWAA and its mandate that Arizona employers use E-Verify is here to stay. Seven states have joined Arizona in the last five years in mandating E-Verify for all employers. Now it appears reasonably possible that E-Verify is going to become mandatory on a nationwide basis.

The majority of Arizona employers that aren't complying with the mandate may need to rethink their decision if it becomes a federal requirement. The feds seem much more interested in enforcing immigration laws against employers than Arizona's prosecutors have been under the LAWAA. Federal I-9 audits have skyrocketed under the Obama administration, with more than 5,500 conducted in the past two fiscal years. By contrast, there were only 757 such audits in the last two years of the George W. Bush administration. Federal enforcement appears likely to increase the risks of noncompliance.

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