

My Employee Was Not Confirmed in E-Verify – Now What?

E-Verify is an internet-based system that helps employers determine the employment eligibility of new hires. Online employment authorization checks are run against Social Security Administration, Department of Homeland Security, and Department of State databases using social security numbers, alien registration numbers, passport numbers, and other data entered on the U.S. Department of Homeland Security's Form I-9. It does not replace the required I-9 process, but instead is an additional complementary tool.

E-Verify has been an option for employers nationwide since December 1, 2004. And since July 1, 2013, all employers in the State of Georgia with more than 10 employees are required to use E-Verify. Nationally, as of December 2013, approximately 500,000 employers use E-Verify.

Good faith participation in E-Verify protects employers from civil and criminal penalties regarding the hiring of undocumented workers. Its use establishes a rebuttable presumption that the employer has not knowingly employed an unauthorized worker. E-Verify is not to be used on prospective employees, employees who need to be re-verified, or existing employees – those hired prior to the date the employer signs the E-Verify Memorandum of Understanding with the DHS.

To run a check through E-Verify, the company and employee must first complete the Form I-9, which is required within 3 days of the employee's hire date. The company enters the information from the I-9 into E-Verify. In some circumstances, the employer may have to compare a photo displayed in E-Verify to the photo on the employee's documents to ensure they match.

Once the information is submitted, E-Verify will compare it against information included in the SSA and DHS databases. If the information matches, E-Verify will return an "Employment Authorized" result, which confirms the employee, is authorized to work. The employer prints the results page and attaches it to the employee's Form I-9, and the employer closes the case in E-Verify.

But what if the employee's information doesn't match? What actions does the employee have to take? What are the employer's options and obligations?

If there's a mismatch, E-Verify will return a "Tentative Nonconfirmation" (TNC). This doesn't necessarily mean that the employee is not authorized to work in the U.S., but rather that additional action is required. It is important to note that the employer may not terminate, suspend, delay training, withhold or lower pay, or take any other adverse action against an employee because the employee received a TNC, until the TNC become a Final Nonconfirmation.

There are two types of Tentative Nonconfirmations. One is the Social Security Administration TNC where the information entered into E-Verify does not match SSA

records. And the other is the Department of Homeland Security TNC where the information entered into E-Verify does not match records available to DHS. SSA handles 92% of all TNCs, and only 8% are passed along to DHS, which is responsible for verification of noncitizens.

There are numerous innocent reasons why mismatches may occur. The employee's citizenship or immigration status may not have been updated with SSA. An employee's name change, perhaps through marriage, was not reported to SSA. The employee's name, SSN or DOB is incorrect in SSA's records. The employee's name, "alien" number, I-94 number and/or foreign passport number are incorrect in the DHS records. An employee's US Passport, Passport Card, driver's license, foreign passport, or state ID card couldn't be verified. Or, very commonly, the employer did not enter the employee's information correctly into the E-Verify system.

In either type, employers that receive a Tentative Nonconfirmation should take the following actions:

Print and Review Notice: The employer should print the SSA or DHS TNC "Further Action Notice" and confirm that all the information listed at the top of the notice is correct. If there are mistakes, the E-Verify case must be closed and a new case created for the employee.

Close Case if Employee No Longer Working: If the employee is no longer employed at the time of TNC receipt, the case should be closed in E-Verify, with an indication that the employee either voluntarily quit or was terminated for reasons other than E-Verify.

Notify Employee: Assuming the information listed on the top of the Further Action Notice (FAN) appears correct, the employer should discuss the TNC result with the employee in a private setting, and confirm whether the information on the notice is correct. If the employee does not read, the employer should read the FAN to the employee. If the employee does not speak or read English, the employer should provide the employee with a translated version of the FAN - the E-Verify website has it available in several languages. The employer should indicate within the E-Verify system that the employee has been notified by selecting the "Confirm Employee Notification" box.

Confirm Employee Decision: The employer must confirm the employee's decision to contest or not contest the Tentative Nonconfirmation. The employee must acknowledge his or her decision on the Further Action Notice, and sign and date the notice. After confirming the employee's decision, the employer also signs and dates the FAN. The original is attached to the Form I-9 and a copy is given to the employee (along with a translated version, if applicable).

Close Case in E-Verify if Employee Chooses Not to Contest TNC: If the employee chooses not to contest the TNC, the employer should close the case in E-Verify as detailed further below.

Refer Employee to SSA or DHS if Employee Chooses to Contest TNC: If the employee chooses to contest the TNC, the employer must refer the employee to either the SSA or DHS, as appropriate, and print the Referral Date Confirmation from the E-Verify system. This confirmation will specify the date by which the employee must visit SSA or contact DHS. The employee must visit an SSA field office or contact the DHS within 8 Federal Government working days to begin resolving the TNC

For SSA issues, the employee must carry the Further Action Notice to the field office, along with the applicable original documents listed on Page 2 of the FAN. And for DHS issues, the employee must call DHS E-Verify (1-888-897-7781). The employee will be required by DHS to either upload the applicable supporting documents to the E-Verify system, or send them to DHS by overnight courier (at employer expense).

Take Follow-Up Action Based on Next Case Result in E-Verify: SSA and DHS have 10 Federal Government working days to update the case result in E-Verify, and the employer should check E-Verify for case updates.

The following are possible SSA results:

- Employment Authorized
- SSA Final Nonconfirmation (FNC)
- SSA Case in Continuance – The employee has visited an SSA field office, but more time is needed to determine a final case result. If more than 60 days passes without an updated status, the employer should contact E-Verify customer support at 1-888-464-4218 or E-Verify@dhs.gov.
- DHS Verification in Process; or
- Review and Update Employee Data - SSA has found a discrepancy in the information it received in E-Verify. This may occur for a number of reasons including typographical errors or incorrect information in the I-9

Cases referred to DHS will be updated with one of the following results:

- Employment Authorized
- DHS Final Nonconfirmation (FNC)
- DHS Case in Continuance; or
- DHS No Show – The employee did not contact DHS within the 8 days. In this case, the employer must treat the result as a Final Nonconfirmation and close the case in E-Verify.

Close Case in E-Verify: Ultimately, the employer must close every case in E-Verify, selecting one of the following case closure statements:

- *Employee continues to work for employer after receiving an Employment Authorized result.* E-Verify has confirmed that the employee is eligible to work, and the employee continues to work for the employer.

- *Employee continues to work for employer after receiving a Final Nonconfirmation result.* The employer has decided to allow the employee to continue to work, even though employment authorization couldn't be confirmed through E-Verify.
- *Employee continues to work for employer after receiving a No Show result.* The employer has decided to allow the employee to continue to work, even though the employee contested the TNC but did not take action to resolve it.
- *Employee continues to work for employer after choosing not to contest a Tentative Nonconfirmation.* The employer has decided to allow the employee to continue work, even though the employee chose not to contest TNC.
- *Employee was terminated by employer for receiving a FNC result.* The employee challenged the TNC, but was unable to resolve it.
- *Employee was terminated by employer for receiving a No Show result.* The employee contested the TNC, but did not take action to resolve it.
- *Employee was terminated by employer for choosing not to contest a TNC.* The employer notified the employee of the TNC and the employee chose not to contest the TNC.
- *Employee voluntarily quit working for employer.*
- *Employee was terminated by employer for reasons other than E-Verify.*
- *Case is invalid because another case with the same data already exists.* In this instance, a duplicate case was created. The original case stays open and needs to be resolved.
- *Case is invalid because the data entered is incorrect.* The employer must open new case using correct information.

An employer who receives an FNC from either SSA or DHS on an employee may terminate the employee, and cannot be civilly or criminally liable for the termination, provided the action was taken in good faith reliance on the information provided through E-Verify.

If an employer continues to employ a worker after a FNC, a No Show result, or after the employee chose not to contest a TNC, the employer must notify DHS through E-Verify. Failure to do so is considered a paperwork violation, which may result in a fine for each individual whose continued employment is not reported. Furthermore, continued employment creates a rebuttable presumption that the employer has engaged in the knowing employment of an unauthorized worker for purposes of civil proceeding under the Immigration & Nationality Act. However, no such presumption is created for purposes of criminal penalties under the Act for employers engaged in a pattern or

practice of knowingly hiring unauthorized workers.

While most employers in the State of Georgia don't have the ability to opt out of the E-Verify program and its administrative burdens and costs, the good news is that the reliability, accuracy and efficiency of the system has steadily increased over the years. According to DHS, one of every eight new hires in the U.S. is checked through E-Verify, and 98.8% of them are automatically confirmed as authorized to work, usually within seconds. The push is on with DHS and Congress to make E-Verify mandatory for all employers in the U.S., and frankly, this author sees it as an eventuality. By entering the employee's information into E-Verify carefully up front, and diligently taking the prescribed follow up actions in the event of a TNC, employers should be confident their workforce is authorized and that the employer is free from any potential civil or criminal liabilities.

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