



## **Compliance and Client Education: An Overview of E-Verify**

*The proceeding is not legal advice, either expressed or implied and is provided for educational purposes only. We recommend you seek the advice of your corporate legal counsel for all aspects of employment law.*

### **The Status of E-Verify**

The National Conference of State Legislatures has recently updated its site to include information that we felt would be relevant to our clients.

### **State Actions in 2011**

Thus far in 2011, nine states have enacted legislation with E-Verify provisions – Alabama, Florida (executive order), Georgia, Indiana, North Carolina, South Carolina, Tennessee, Utah and Virginia.

### **What is E-Verify?**

The E-Verify program was created as a voluntary Internet-based pilot program to help employers verify the work authorization of new hires. It applies to U.S. citizens and noncitizens. Originally known as the Basic Pilot/Employment Eligibility Verification Program, the program was renamed E-Verify in 2007. The program is administered by the U.S. Department of Homeland Security in partnership with the Social Security Administration.

### **When and how was it created?**

The Basic Pilot program was established by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), P.L. 104-208, signed September 30, 1996, citation: 8 U.S.C. 1324a. The program started in California, Florida, Illinois, New York and Texas (1997) with Nebraska joining in 1999. Congress authorized the expansion of the pilot program to employers in all 50 states in 2003.

### **When will E-Verify expire?**

Sept. 30, 2012. IIRIRA required the termination of the pilot program after four years (allowing for a one-year implementation). It was extended for two years in 2002 and five more years in 2003 (until November 30, 2008). See the Basic Pilot Program Extension and Expansion Act of 2003, Public Law 108-156. Congress passed a continuing resolution extending budgets of certain federal agencies until March 2009, including E-Verify (HR 2638). Congress then passed the Omnibus Appropriations Act of 2009 in March, extending the budget of E-Verify until September 2009 (Public Law 111-8). Another three-year extension was approved in the Department of Homeland Security appropriations in October 2009, P.L. 111-83.



### **How does E-Verify work?**

All employers must first complete an I-9 form for every new hire, within three business days of the date the employee starts work. Employers may not begin the I-9 process until after the individual is hired. The employer and newly-hired employee jointly complete the I-9 Employment Eligibility Verification form. The form asks for employee's name and date of birth; social security number; citizenship status; an A number or I-94 number if applicable; documentation to establish work authorization; and proof of identity and expiration date, if applicable. Employees may choose from several documents to prove identity and authorization to work, such as a U.S. passport or unexpired employment authorization card, or a combination of a driver's license and social security card. Documents must appear genuine.

An employer then enters information from the I-9 form into the E-Verify system, where it is compared against 455 million records in the Social Security Administration (SSA) database and 80 million records in the Department of Homeland Security's (DHS) immigration databases. Most inquiries are resolved within 72 hours. Some inquiries can't be confirmed instantly by DHS ("tentative nonconfirmation notices") due to changes in citizenship status, name changes (e.g., marriage/divorce), or typographical errors.

To resolve a tentative nonconfirmation notice, the employee must visit an SSA office or call DHS toll-free. The employee has eight federal workdays to start resolving the case. About one-half of those who receive a tentative nonconfirmation notice contest the notice. Of these, about half of the employees will follow up.

### **What is the current usage and capacity?**

The U.S. Citizenship and Immigration Services (USCIS) reports that as of December 11, 2010 more than 238,000 employers have registered with the program, with 16 million inquiries in FY2010. In FY2009, there were 8.7 million inquiries, in FY 2008, 6.6 million, and 3.27 million in FY2007. There are an estimated 7 million employers in the United States and 60 million new hires per year. The 2007 Westat evaluation estimated that 4 percent of newly hired workers are verified using the system.

### **How well does E-Verify work?**

A December 2010 GAO report found that USCIS has improved the accuracy of E-Verify, immediately confirming 97.4 percent of 8.2 million new hires in 2009, up from 92 percent in 2007. The report notes that E-Verify remains vulnerable to identity theft and employer fraud. Name mismatches (multiple or hyphenated names) can still lead to tentative nonconfirmation notices. GAO recommends that USCIS disseminate information to employees to consistently record names and to develop procedures to help employees correct inaccurate information. GAO also recommended that USCIS develop reliable cost estimates for E-Verify. The 81-page report, "Employment Verification: Federal Agencies Have Taken Steps to Improve E-Verify, but Significant Challenges Remain" can be found at <http://www.gao.gov/new.items/d11146.pdf>.

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## **Previous study:**

An evaluation conducted by Westat in 2007 for DHS found that the accuracy of the USCIS database had improved substantially. However, the error percentage was still too high for it to become a mandated program. The report finds that “the database used for verification is still not sufficiently up to date to meet the IIRIRA requirement for accurate verification.” SSA estimated that 4.1 percent, or 17.8 million records, contained discrepancies related to name, date of birth or citizenship status; 12.7 million of these pertained to U.S. citizens. Westat reported that for the July-September 2008 quarter, 96.9 percent of employees attesting to be U.S. citizens were automatically confirmed as authorized to work instantly or within 24 hours (up from 96.1 percent in the previous quarter). Westat’s 2007 study noted significantly different rates between citizen and noncitizen cases. Only 72 percent of lawful permanent residents and 63 percent of immigrants authorized to work were confirmed automatically.

## **How is it enforced?**

The Immigration Reform and Control Act of 1986 established a prohibition on employers from hiring unauthorized workers and established criminal and civil sanctions (USC 1324a(h)(2)). USCIS is responsible for verification of documents and Immigration and Customs Enforcement (ICE) is responsible for enforcement. Both USCIS and ICE are part of DHS. To participate in E-Verify, employers sign a Memorandum of Understanding that sets out responsibilities for USCIS, SSA and the employer.

The law also created civil rights protections against unfair immigration-related employment practices. The Office of Special Counsel in the U.S. Department of Justice is the law enforcement agency charged with enforcement against discrimination on the basis of citizenship, immigration status or national origin discrimination. See section 274(b) INA. <http://www.justice.gov/crt/about/osc/>

## **What is required of federal contractors?**

As of Sept. 8, 2009, federal contractors or subcontractors are required to use E-Verify to determine employment eligibility of employees performing direct work on the contract and new hires. It applies to federal contracts that contain the Federal Acquisition Regulation E-Verify Clause. It exempts contracts of less than 120 days and valued at less than \$100,000 and subcontracts valued at less than \$3,000.

## **Background:**

President Bush amended Executive Order 12989 on June 6, 2008, requiring all federal contractors to verify the employment eligibility of all persons hired during the contract term and all persons performing work within the United States on the federal contract by using the employment eligibility verification system (E-Verify). It was scheduled to go into effect on January 15, 2009, but implementation was delayed subsequent to a lawsuit. The lawsuit filed by multiple parties, including the U.S. Chamber of Commerce, challenged the use of the Executive Order on the grounds that it circumvented the Congressional prohibition in mandating the use of E-Verify for federal contracts through IIRIRA.

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## What states currently address the use of E-Verify?

Seventeen states have required the use of E-Verify for public and/or private employers, fourteen through legislation and three through executive orders. (In 2011, Rhode Island rescinded its 2008 executive order requiring state agencies and contractors to use E-Verify.) One state, Illinois, enacted legislation to limit the use of E-Verify until the database accuracy is improved and also created privacy and antidiscrimination protections. At least two states, Pennsylvania and Tennessee, encourage its use through providing a safe harbor from state penalties for employers enrolled in E-Verify.

### *Require Use of E-Verify (17 states)*

**Alabama.** The Alabama Taxpayer and Citizen Protection Act (H56) prohibits business entities, employers or public employers from knowingly employing unauthorized workers. Every employer is required to use E-Verify effective April 1, 2012. As a condition of state contracts or grants, employers must use E-Verify, effective January 1, 2012. Business licenses can be suspended up to 60 days for a first violation and permanently revoked for a second violation. (Sections 9 and 15)

**Arizona.** The Arizona Fair and Legal Employment Act (HB 2779), enacted in 2007, prohibits employers from knowingly hiring unauthorized workers and requires all employers to use the Basic Pilot Program to verify employment eligibility. It establishes substantial penalties and threatens noncompliant employers with suspension and potential revocation of their business licenses. Effective date Jan. 1, 2008. Arizona HB 2745, enacted in 2008, prohibits government contracts to any contractor and subcontractor that fails to use E-Verify. It provides that companies can be punished only for unauthorized workers they hired after January 1, 2008 and that a violation at one location of a company shuts down only that location, not the entire corporation. The Arizona Attorney General is required to establish a Voluntary Employer Enhanced Compliance Program. Effective May 1, 2008.

**Colorado.** HB 1343 (signed 6/6/2006) prohibits state agencies from entering into contract agreements with contractors who knowingly employ illegal immigrants and requires prospective contractors to verify legal work status of all employees. The contractor must confirm that the Basic Pilot Program has been used to verify the status of all employees. If the contractor discovers that an illegal alien is employed, the contractor must alert the state agency within 3 days. Colorado SB 139 (Signed 5/20/2008) requires that employers be notified of the prohibition against hiring an unauthorized alien and the availability of and participation requirements for the federal E-Verify program. The Act requires the Department of Labor and Employment's website to provide this information. Effective August 6, 2008. Colorado SB 193 (Signed 5/13/2008) creates a program to allow a contractor to verify employment eligibility of all employees under a public contract and requires future participation in the Federal Electronic Employment Eligibility Program or the department program to verify the employment eligibility of certain employees. Effective August 6, 2008.

**Florida.** Executive Order 11-02 (signed 1/4/2011). All state agencies must verify the employment eligibility of all current and prospective agency employees through E-Verify. State contractors and subcontractors must use E-Verify. <http://www.flgov.com/wp-content/uploads/orders/2011/11-02-employment.pdf>

**Georgia.** The Georgia Security and Immigration Compliance Act, SB 529, covered employment, enforcement, and benefits and was signed by the Governor on April 17, 2006. The law requires public

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employers, contractors and subcontractors with 500 or more employees to participate in E-Verify for all new employees beginning July 1, 2007. The law is phased in for public employers, contractors and subcontractors with 100 or more employees effective July 1, 2008; and for all employers by July 1, 2009. Georgia HB 2 (signed May 11, 2009) requires every public employer, (including municipalities and counties), contractors and subcontractors to verify employment eligibility of all newly-hired employees with the federal work authorization program, effective January 1, 2010. No employer or agency or political subdivision shall be subject to lawsuit or liability arising from any act to comply with these requirements. Georgia SB 447 (signed May 20, 2010) requires public employers to retain, for five years, affidavits submitted by state contractors affirming their participation in the federal work authorization program. The law requires contractors to notify public employers of new subcontractors. SB447 requires the Commissioner to conduct 100 random audits annually of public employers and contractors and to seek funding from the U.S. Secretary of Labor. Violations convicted for false statements on affidavits shall be prohibited from public contracts for 12 months. HB87 (signed May 13, 2011) requires contractors to include in a bid for a publicly funded project an affidavit that the contractor and any subcontractor use E-Verify. Contractors can be barred from bidding on public contracts for 12 months for violations. Public employers must submit annual compliance reports. Funds for political subdivisions can be reduced 10 percent for noncompliance.

**Idaho Executive Order.** On December 13, 2006, Governor Jim Risch issued an executive order requiring that state agencies participate in the E-Verify system. Also, all workers employed to the state through contractors must also be from companies that have been verified to have eligible employees.

**Indiana.** SB590 requires state agencies, political subdivisions, contractors with public contracts and certain business entities to use E-Verify. It requires certain subcontractors to certify that they use E-Verify. State agencies or political subdivisions may terminate a public contract if the contractor knowingly employs an unauthorized alien.

**Minnesota Executive Order.** Governor Tim Pawlenty issued an executive order on Jan. 7, 2008, stating that all hiring authorities within the executive branch of state government as well as any employer seeking to enter into a state contract worth in excess of \$50,000 must participate in the E-Verify program. The Executive Order's effective date is January 29, 2008.

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**Mississippi.** SB2988 (signed 3/17/08) requires public and private employers to participate in E-Verify. The phase-in period is: all government agencies and businesses with more than 250 employees by July 1, 2008; companies with 100 to 250 employees by July 1, 2009; those with 30 to 100 employees by July 1, 2010; and all remaining companies by July 1, 2011. An employer violating the law is subject to the cancellation of public contracts, ineligibility for contracts for up to three years, and loss of business license for up to one year. The law also makes it a felony to accept or perform employment knowing or in reckless disregard of the immigrant's ineligibility to work, with penalties from one to five years of imprisonment and/or \$1,000 to \$10,000 in fines.

**Missouri.** HB1549 (Signed 7/7/2008) requires E-Verify for public employers. All public employers must enroll and participate in a federal work authorization program. Any public contractor or subcontractor must, by sworn affidavit, affirm its enrollment and participation in a federal work authorization program. If a court finds that a business knowingly employed someone not authorized to work, the company's business permit and licenses shall be suspended for 14 days. Upon the first violation, the state may terminate contracts and bar the company from doing business with the state for 3 years. Upon the second violation, the state may permanently debar the company from doing business with the state. H390 (signed July 7, 2009) specifies that the requirement for certain businesses to participate in a federal work authorization program will not apply after the federal government discontinues or fails to authorize or implement the program. Public contractors are required to provide affidavits of participation in the federal work authorization program annually. Onsite employees of a contractor or subcontractor on a public works project must complete a 10-hour Occupational Safety and Health Administration construction safety program or similar program.

**Nebraska.** L403 signed April 8, 2009) requires every public employer and every public contractor to use a federal immigration verification system.

**North Carolina.** All state agencies, offices, and universities must use E-Verify, required by SB1523 in 2006. This applies to employees hired on or after January 1, 2007, except for employees of local education agencies hired on or after March 1, 2007. HB36, effective October 1, 2011, requires counties, cities and employers to use the federal E-Verify program to verify work authorization of newly hired employees. Private employers are required to complete and maintain federal employment eligibility verification forms. Employers who hire seasonal temporary employees who are employed for 90 or fewer days during a 12-consecutive-month period do not need to use E-Verify. The effective date is phased in: private companies with more than 500 employees must verify all employees on or after October 1, 2012; those with 100 to 499 employees on or after January 1, 2013; and those with 25 or more but less than 100 employees, on or after July 1, 2013. Employers with less than 6 employees will not have to use E-Verify. An employer who knowingly employs unauthorized workers will be penalized. On the first violation, the Commissioner will order the employer to file a signed sworn affidavit within 3 business days stating that the employer has, after consultation with the employee, requested a verification of work authorization through E-Verify. If an employer does not file an affidavit the North Carolina Commissioner shall order the employer to pay a civil penalty of \$10,000. For the second violation, the employer is required to pay a civil penalty of \$1,000, regardless of the number of required employee verifications the employer failed to make. On the third violation, the employer is ordered to pay a civil penalty of \$2,000 for each required employee verification the employer failed to make.

**Oklahoma.** The Oklahoma Taxpayer and Citizen Protection Act of 2007 (HB 1804) addressed multiple issues: transporting and harboring, driver's licenses, public benefits, law enforcement and employment. It

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made it a felony to transport or harbor unauthorized immigrants, with exceptions for health or benefits guaranteed by federal law. It requires public employers, contractors and subcontractors to participate in a federal electronic employment verification system and requires income tax withholding for independent contractors who do not have valid Social Security numbers. The law became effective Nov. 1, 2007.

**Rhode Island Executive Orders.** On March 27, 2008, Governor Carcieri issued an executive order requiring executive agencies to use E-Verify; and for all persons and businesses, including grantees, contractors and their subcontractors and vendors to use E-Verify. Governor Chafee signed a repeal of executive order 08-01 effective January 5, 2011.

**South Carolina.** HB 4400 (Signed 6/4/2008) requires public employers and public contractors to register and participate in the federal work authorization program E-Verify to verify all new employees. All public employers, private employers with more than 100 employees and public contractors with more than 500 employees must comply with the law's provisions on or after January 1, 2009; contractors with more than 100 employees on July 1, 2009; and all other contractors on January 1, 2010. The penalty for knowingly hiring unauthorized immigrants is a felony and punishable with up to five years in prison. The law provides for a private cause of action for an authorized employee, if he or she is discharged and replaced with an unauthorized employee. S.20, effective January 1, 2012, requires all private employers to complete and maintain federal employment eligibility verification forms. After being hired, an employer has 3 days to check an employee's verification in E-Verify. Public contractors may not knowingly employ unauthorized aliens. If a private employers is caught knowingly hiring illegal workers, the employer must pay a reasonable civil penalty of no more than \$15,000 for each violation. If a private employer fails to pay the penalty within 10 days, a private employer's license is suspended and must remain suspended for at least 10 days but not more than 30 days. During the period of suspension, a private employer may not engage in business, open to the public, employ an employee, or otherwise operate. For a second occurrence, the private employer must pay a penalty of not more than \$30,000 for each violation. If an employer fails to pay the penalty within 10 days, their license is suspended, and must remain suspended for at least 30 days but not more than 60 days. For a third violation, the private employer must pay a civil penalty of not more than \$50,000 for each violation. Failure to pay the penalty within 10 days will result in the employer's business licenses being revoked. After 5 years, the labor director may grant reinstatement of licenses if the private employer goes on probation for 3 years, terminated the unauthorized alien, and pays a reinstatement fee equal to the cost of investigating and adjudicating the matter.

**Tennessee.** The Lawful Employment Act (HB1378), enacted on June 6, 2011, prohibits employers from knowingly hiring unauthorized workers and requires all state and local government employers to use E-Verify to verify employment eligibility. The effective date is phased in: private companies with more than 500 employees must verify all employees on or after January 1, 2012; those with 200 to 499 employees on or after July 1, 2012; those with 6 to 199 employees, on or after January 1, 2013. Employers with less than 6 employees will not have to use E-Verify. This act requires that employers maintain records for three years after the date of the employee's hire or for one year after the employee's employment is terminated. For non-employees who are paid directly by the employer in exchange for the individual's labor or services, employers must request and maintain one form of identification. This could be a copy

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of a valid Tennessee driver's license, photo identification from another state, birth certificate, an unexpired U.S passport, or other proof of employee's immigration status.

**Utah.** SB 81 (signed 3/13/08) requires public employers, public contractors and subcontractors to register and use the federal work authorization program. It is unlawful to discharge a lawful employee while retaining an unauthorized alien in the same job category. Effective July 1, 2009. SB 39 (signed 3/23/2009) redefines a contract to mean an agreement for the procurement of goods or services that is awarded through a request for proposals process with a public employer, and includes a sole source contract. Utah S.251 (signed March 31, 2010) requires private employers with more than 15 employees to verify the legal status of new employees via a federally approved employment verification system. Utah HB 116 (signed March 7, 2011) requires the Utah department created to administer the new guestworker permit to establish a verification requirement substantially similar to E-Verify. Employers with more than 15 employees must verify employment eligibility through E-Verify, an equivalent federal electronic verification system, the Social Security Administration or an independent third-party system with equal reliability.

**Virginia** H737 requires state agencies of the Commonwealth to enroll in the E-Verify program by December 1, 2012, and to use the program for each newly hired employee who will work in Virginia. HB 1859/SB 1049 (signed March 25, 2011) requires public contractors with more than 50 employees in contracts worth more than \$50,000 to participate in E-Verify or be debarred for one year. State agencies shall deny prequalification to contractors who fail to participate.

## *Encourage the Use of E-Verify (2)*

**Pennsylvania.** HB 2319 (signed 5/11/2006) prohibits the use of illegal immigrant labor on projects and provides an affirmative defense if the contractor certifies compliance with Section 274A of the Immigration Reform and Control Act of 1986.

**Tennessee.** HB 729, signed into law on June 26, 2007 and effective January 1, 2008 states that employers who "knowingly employ, recruit or refer for a fee for employment an illegal alien" are subject to a temporary suspension of their business license; repeat offenders are subject to a one-year suspension. Employers who comply with the requirements of the current I-9 process or who verify new hires through the E-Verify within 14 days of employment are shielded from sanctions.

**Tennessee.** The Tennessee Lawful Employment Act, HB1378, (signed into law June 7, 2011), requires all employers to 1) request and maintain a copy of one of 11 identification documents or 2) enroll and maintain active participation in the E-Verify program. On or after January 1, 2012, the law would apply to governmental entities and private employers with at least 500 employees. On or after July 1, 2012, the above provisions would apply to private employers with between 200 and 499 employees. On or after January 1, 2013, the above provisions would apply to private employers with between six and 199 employees.



### *Limits on the Use of E-Verify (1)*

**Illinois.** Illinois enacted HB 1744, which bars Illinois companies from enrolling in any Employment Eligibility Verification System until accuracy and timeliness issues are resolved. Illinois also enacted HB 1743, which creates privacy and antidiscrimination protections for workers if employers participating in E-Verify don't follow the program's procedures. On August 24, 2009, Illinois enacted S1133 amending the Right to Privacy in the Workplace Act and urges employers, before enrolling in E-Verify, to consult the State Department of Labor's website for current information on the accuracy of E-Verify and to review and understand an employer's legal responsibilities relating to the use of the voluntary program. It prohibits the state or localities from requiring employers to use an employment eligibility verification system.

Note: The California legislature passed CA A 1288 in 2009 that would have prohibited states, localities or special districts from requiring employers to use E-Verify except when required by federal law or as a condition of receiving federal funds. The law was vetoed by the governor on Oct. 11, 2009.

### *Preemption Issues and Court Challenges*

The Immigration Reform and Control Act of 1986 (IRCA) preempts any state or local law from imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens. Citation: 8 U.S.C. 1324a(h)

**Arizona.** Arizona's 2007 law (HB 2779) was challenged as unconstitutional by plaintiffs representing the business and immigrant communities. Plaintiffs allege that the 1986 Immigration and Control Act expressly preempts the state because the Act was not a "licensing or similar law" within the meaning of IRCA; it is impliedly preempted because its sanctions provisions and E-Verify requirements conflict with federal law; and the Act violated employers' due process rights. In September, 2008, the 9th Circuit Court of Appeals upheld the Arizona law, determining that the law was a licensing law. Plaintiffs appealed and the U.S. Supreme Court accepted the case. The court heard *Chamber of Commerce v. Whiting* (09-115) on December 8, 2010. On May 26, 2011, the Supreme Court upheld Arizona's 2007 law that required the use of E-Verify by Arizona employers.

**Oklahoma.** The employment provisions of the 2007 law (HB1804) were challenged by the U.S. Chamber of Commerce and Oklahoma business associations for interfering with federal law, alleging that Sections 7(B), 7(C) and 9 of the Oklahoma act were expressly and impliedly preempted by federal law and unconstitutional under the Supremacy Clause. See U.S. Const. art. VI, cl. 2; 8 U.S.C. § 1324a(h)(2). Section 7B would require businesses to use E-Verify. Section 7C makes it a discriminatory practice for an employer to fire a worker while retaining an employee that the employee knows or reasonably should know is unauthorized to work. Section 9 would require contractors to verify employees or withhold taxes from them. In June, 2008, the Federal District Court for the Western District of Oklahoma postponed enforcement of these sections of the law, including the E-Verify mandate. On February 3, 2010, the 10th Circuit federal appeals court upheld the injunction, finding that federal law preempted Sections 7C and 9, but were split on Section 7B relating to the E-Verify mandate.

**Illinois.** The provision of HB1744 limiting use of E-Verify was challenged by the U.S. Department of Homeland Security on the grounds that it conflicts with federal law and is preempted by the Supremacy

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Clause of the U.S. Constitution. Enforcement of this provision, scheduled to begin in 2008, has been delayed until the lawsuit is decided.

## ***Cities in California***

California currently has no statewide E-Verify law but the State legislature is pushing for a State law 2011 mandate. However, some cities have already adapted the federal program in several city ordinances such as Mission Viejo (2007), Temecula (ordinance 5.06.030) (2010), Murrieta (ordinance Chapter 5.04) (2010), Riverside, Santa Maria (only for city employees), Lake Elsinore (Ordinance No. 1279) (2010), Wildomar (only for contractors) (2010) and Lancaster (Ordinance No. 934).

Cities considering E-Verify ordinances for businesses for 2011 are Costa Mesa, San Luis Obispo, Santa Maria (for all businesses) Santa Barbara, San Jose however Costa Mesa is the only city that as adapted the same State law as Arizona's SB-1070 allowing the City to arrest under suspicion on no proper identification of resident status.