

## New State Law Imposes Additional Obligations for E-Verify Employers in Illinois

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The new Illinois Senate Bill 0508 (Act), which will take effect January 1, 2025, contains numerous amendments to the existing Illinois Right to Privacy in the Workplace Act. Under the Act, Illinois employers enrolled in the federal E-Verify system will be subject to additional obligations and notice requirements.

The Illinois Department of Labor (IDOL) recently published a set of Frequently Asked Questions, to clarify some confusion regarding particular language in the Act. In these FAQs, IDOL confirmed that E-Verify is not mandatory in the state of Illinois, and also, employers may still choose to voluntarily use E-Verify in Illinois.

Some of the new requirements under the Act include the following:

### **Section 12 - New E-Verify Requirements**

- Prior to enrolling in E-Verify, employers are urged to consult the IDOL 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 E-Verify program.
- Upon initial enrollment in E-Verify, or within 30 days of the effective date of the Act, E-Verify employers must attest under penalty of perjury, on a certain form provided by the IDOL, that the employees who will administer E-Verify have completed the required E-Verify Computer Based Tutorial (CBT) training provided by the U.S. Department of

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Homeland Security (DHS) and have posted the required notices to include the DHS poster indicating that the employer is an E-Verify employer, and the U.S. Department of Justice anti-discrimination poster. The employer must maintain the original attestation form and the CBT training certificates.

- Employers are prohibited from using E-Verify to check the immigration status of current employees or to pre-screen prospective employees that have not yet been offered a position with the company.
- It is a violation of the Act for an employer enrolled in E-Verify:
  - To fail to display the required E-Verify notices/posters;
  - To fail to have users complete the required CBT training;
  - To fail to take steps to prevent users from circumventing the CBT training by using another's user ID/ password;
  - To use E-Verify as a pre-screening tool (pre-hire);
  - To terminate an employee prior to receiving a Final Nonconfirmation notice from E-Verify;
  - To fail to notify an employee in writing, of the employer's receipt of a tentative "nonconfirmation" notice, the individual's right to contest the "nonconfirmation" notice, and the contact information of the relevant government agency to resolve the tentative "nonconfirmation"; or
  - To fail to safeguard the information contained in the E-Verify system.
- Any claim that an employer refused to hire, or acted with respect to recruiting, promoting, employing, discharging or disciplining an individual without following the procedures of the E-Verify system, may be brought under the Illinois Human Rights Act.

### **Section 13 - New Notice Requirements (For Federal/State Agency Findings and Federal Agency Inspections)**

- If an employer contends there is a discrepancy in an employee's work authorization documents, the employer must provide to the employee:
  - The specific documents that the employer deems to be deficient, and the reasons why the documents are deficient, within 7 business days;
  - Instructions on how the employee can correct the alleged deficient documents if required to do so by law;
  - An explanation of the employee's right to have representation present during related meetings and discussions and any other rights;

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- If an employer receives notice from a federal or state agency regarding a discrepancy in an employee's work authorization documents (such as from the Social Security Administration or Internal Revenue Service), the employer must take the following steps:
  - The employer must not take any adverse action against the employee, including reverification, based solely on the agency notice;
  - The employer must provide notice to the employee not more than 5 business days after receipt of such notice, to include an explanation of the discrepancy and the time period the employee has to contest the agency's determination;
  - The employer must provide notice to the employee in person and deliver notification by hand, if possible. If not possible, then the employer shall notify the employee by mail and e-mail, and shall notify the employee's authorized representative (defined in the Act as an exclusive collective bargaining representative);
  - Upon request by the employee or the employee's authorized representative, the employer shall give to the employee the original notice from the federal or State agency within 7 business days; and
  - The employee may have a representative of the employee's choosing present during the related meetings and discussions.
- If an employer is subject to an inspection of I-9 Employment Eligibility Verification forms by an inspecting federal entity, such as the U.S. Immigration and Customs Enforcement, the employer must provide posted notice to all current employees (and employees' authorized representatives, if any), by posting in English and in any language commonly used in the workplace, within 72 hours. IDOL will develop a template posting to be used by employers for this notice, within six months of the effective date of the Act.
- If, during a Form I-9 inspection, an inspecting entity determines that an employee's documents do not establish that the employee is authorized to work in the U.S. and provides notice to the employer, the employer shall provide written notice to the employee within 5 business days, and follow additional notice requirements if the employee contests the findings. The employer shall notify the employee in person and deliver the notification by hand, if possible. If hand delivery is not possible, then the employer shall notify the employee by mail and e-mail, and shall notify the employee's authorized representative, if any.
- If the employee contests the inspecting entity's determination, the employer will notify the employee within 72 hours after receipt of any final determination by the inspecting entity related to the employee's work authorization status. Upon request by the employee or the employee's authorized representative, the employer shall give the employee the original notice from the inspecting entity within 7 business

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days.

- The Illinois Department of Labor shall administer and enforce the provisions of this Act. If a complaint is filed with the IDOL, the IDOL shall attempt to resolve the complaint by conference, conciliation or persuasion. If the complaint is not so resolved and the IDOL finds the employer has violated the Act, the IDOL may commence an action in the circuit court to enforce the provisions of the Act.
- Failure to comply with an order of the court may be punished as contempt and the court shall award an employee or applicant for employment prevailing in an action under this Act the following:
  - Actual damages plus costs;
  - For a willful and knowing violation of the Act, \$200 plus costs, reasonable attorney's fees and actual damages;
  - For a willful and knowing violation of Section 12 of the Act, \$500 per affected employee plus costs, reasonable attorney's fees and actual damages;
  - For a willful and knowing violation of Section 13 of the Act, a civil penalty of a minimum of \$2,000 up to a maximum of \$5,000 for a first violation, and a civil penalty of a minimum of \$5,000 up to a maximum of \$10,000 for each subsequent violation per affected employee plus costs, reasonable attorney's fees and actual damages.
- Any employer or prospective employer or his agent who violates the provisions of the Act is guilty of a petty offense.

Your Laner Immigration counsel is available to explain how this amendment will affect your use of E-Verify, and when you would like to question the acceptability of a document provided by an employee regarding work authorization, or if you received a "no-match" letter from the Social Security Administration that raises concerns about an employee's documentation.

Laner Muchin can also assist you with an audit of your I-9 practices to ensure your company's procedures comply with this new amendment.