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# MANDATORY USE OF E-VERIFY BY FEDERAL CONTRACTORS: BENEFITS, BURDENS, AND IMPLICATIONS

*by* CHRISTINA McMAHON

In March 2008, Fernando Tinoco – a Mexican immigrant and legal U.S. citizen as of 1989 – began his first day of employment at a Chicago meatpacking plant for Tyson foods.<sup>1</sup> Only two hours later, security guards escorted him to the door.<sup>2</sup>

The company terminated Tinoco because E-Verify— an internet-based system that checks identification information against Department of Homeland Security (DHS) and Social Security Administration (SSA) databases— identified his immigration status as “tentative non-confirmation,” meaning that he might be working in the U.S. illegally.<sup>3</sup>

Non-confirmed workers have eight days to present themselves at federal government offices for review of their status before they are issued “final non-confirmation” status, barring them from their jobs.<sup>4</sup> However, by the time Tinoco obtained confirmation that he was indeed a U.S. citizen, security would not allow him back into the plant.<sup>5</sup> “I went back and the security guard chased me away, told me not to come back to the company because I was fired,” Tinoco stated.<sup>6</sup>

Stories of misidentification like Tinoco’s run at the forefront of debates surrounding a recently enacted government regulation mandating that federal contractors use E-Verify. Supporters tout the regulation as a safeguard to legal employment, while opponents fear that widespread use of the system could bring about racial profiling and potential mistreatment of legal immigrant workers.<sup>7</sup>

#### *CHAMBER OF COMMERCE OF U.S. v. NAPOLITANO*

For now, the government mandate remains due to a recent decision in *Chamber of Commerce of U.S. v. Napolitano*. On June 12, 2008, the Bush Administration issued Executive Order 13,465 (Order), requiring federal contractors to use E-Verify as a term of each federal contract.<sup>8</sup> The Order, originally to take effect on Jan. 15, 2009, was delayed four times after the U.S. Chamber of Commerce Business Coalition (Business Coalition) filed suit for injunctive relief against Janet Napolitano, Director of Homeland Security.<sup>9</sup>

The Business Coalition argued that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) prohibits the Executive Branch from ordering employers to use E-Verify.<sup>10</sup> However, on Aug. 25, 2009, the U.S. District Court for the Southern District of Maryland denied the injunction. The court relied on the defense’s argument that “government contractors are not required to use E-Verify because entities can simply choose not to be a

government contractor.”<sup>11</sup> The Court noted that “nobody has a right to be a government contractor.”<sup>12</sup>

Though the Business Coalition is appealing the Court’s ruling, the decision cleared the way for implementation of the Order on Sept. 8, 2009.<sup>13</sup> This rule, mandating the usage of E-Verify, applies to all contractors working on federal contracts worth at least \$100,000 and any subcontractors whose share is more than \$3,000.<sup>14</sup> Therefore, almost all federal contractors are now required, not merely encouraged, to use E-Verify when hiring new employees.<sup>15</sup>

#### THE E-VERIFY DEBATE

Opponents to government-mandated use of E-Verify cite fears over the cost of implementation, and the rule’s ability to turn employers into an arm of immigration agents.<sup>16</sup>

Angelo Amador, the U.S. Chamber of Commerce’s Executive Director for immigration policy, states that the rule “will cost millions of dollars for some employers to implement. . . costs that will ultimately be borne by the American people, which pay the taxes used for federal contracts.”<sup>17</sup> According to the U.S. Government Accountability Office (GAO), implementation will cost the U.S. Citizenship and Immigration Services (USCIS) approximately \$838 million and the SSA over \$281 million.<sup>18</sup>

However, supporters of the legislation feel that the cost of the program is warranted. Supporters argue that E-Verify will make it easier for businesses to comply with U.S. immigration law while protecting American jobs for American citizens, especially in light of the recent economy.<sup>19</sup> According to recently appointed USCIS Director Alejandro Mayorkas, E-Verify “assists employers in abiding by the law and it also protects the workforce.”<sup>20</sup>

Supporters are also impressed with the program’s ease of use.<sup>21</sup> According to the GAO, 92 percent of inquiries confirm whether an employee is eligible within seconds.<sup>22</sup> Bob Dane, a spokesman for the Federation for American Immigration Reform in Washington, opines “if you’re an employer, you’re no longer required to be a document expert. With E-Verify, you can tap into an automated Internet database that runs against almost 500 million records. It’s fast, easy, and free to use. What’s not to like?”<sup>23</sup>

Chicago-based federal electrical contractor, Jim Boyd, agrees, indicating that his day-to-day operations “ha[ve] not changed” under the new regulations.<sup>24</sup> He states, “the [E-Verify] system is easy and quick to use. . . it’s better than having no resources available to help confirm eligibility.”<sup>25</sup>

However, opponents worry that E-Verify may often result in misidentifications.<sup>26</sup> A DHS study asserts that 0.5 percent of workers whose names were submitted to E-Verify were initially deemed ineligible but later found to be eligible.<sup>27</sup> According to the Cato Institute, a think tank headquartered in Washington, D.C., “With 55 million new hires each year, that is approximately 11,000 tentative non-confirmations per workday in the U.S.”<sup>28</sup> In response to these rates of misidentification, the American Civil Liberties Union (ACLU) stated that the expansion of E-Verify without correcting defects in the system “could lead to discrimination against workers who are perceived to be foreign born.”<sup>29</sup>

However, the ACLU has also expressed that they would not be opposed to E-Verify provided that certain safeguards of immigrant rights are enacted. “Currently there is no recourse for a citizen or legal resident who is improperly identified as ineligible to work. No appeal process has been developed,” states the ACLU.<sup>30</sup> Perhaps an appeal process might alleviate some opponents’ fears.

Despite the objections raised and the pending *Napolitano* appeal, the government is still pressing ahead with mandated use of E-Verify. The ACLU-recommended safeguards have not yet been enacted, but the SSA is currently working on system revisions to help eliminate misidentifications.<sup>31</sup> Unfortunately, these revisions come too late for Tinoco and other individuals mislabeled by E-Verify.

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## NOTES

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