Vetting E-Verify

Quick-serve operators should delay using the work-eligibility technology E-Verify until federally mandated

BY NICK DIULIO
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Like most small-business owners, Rolf Wilkin wants to do right by the law. He wants to make sure his Arkansas-based pizza chain is in compliance, and this means making sure people who apply for jobs at any of his nine locations are legally permitted to work in the U.S.

But when it comes to employee eligibility, compliance is not as easy as it sounds.

"Like many businesses, you sometimes get a letter from the IRS that says they have several employee records from you that don't match any Social Security numbers," says Wilkin, who has owned and operated Eureka Pizza since it opened in Fayetteville, Arkansas, in 1992.

"At first you assume it's a clerical problem, but when you look deeper it turns out these [employees] were not providing accurate information. It's a very uncomfortable situation. You get this letter and you don't know what to do with it."

Potential hires providing forged or stolen Social Security numbers when applying for a job is a more widespread problem than many realize, especially in the quick-service industry. Individuals looking to work illegally in the U.S. will often present fabricated Social Security cards that either contain invented numbers or the numbers of legal U.S. workers, and employers are often unaware that they are being duped—that is, of course, until they get a letter from the IRS.

In an effort to combat this problem, Wilkin recently began using E-Verify, an Internet-based system operated by the Department of Homeland Security (DHS) in partnership with the Social Security Administration (SSA) that allows participating employers to electronically verify the employment eligibility of their newly hired employees. In short, E-Verify checks a provided Social Security number against an Internet database. If there is a match between the number and the identification, an employee is eligible for work. If not, the employee receives a tentative "nonconfirmation" notice and can appeal to the SSA, which is often a lengthy and arduous process.

So far, Wilkin says he is pleased with the results. "When you read about big immigration raids at chicken plants or factories across the country, that scares the hellfire out of a small pizza proprietor," he says.

"So a tool from the federal government that shields you from that is what the foodservice community has been asking for. It took a while, but I think the federal government is finally listening to us."

On the surface, E-Verify seems like a godsend for the quick-service industry. It's free, fairly simple to use, and growing in popularity, so much so that 12 states have already passed laws that make some uses of the system mandatory. Moreover, in September President Obama implemented an executive order from the Bush administration making E-Verify mandatory for millions of federally contracted employees. Mandating its use in other industries—including quick-service—could be right around the corner.

There's just one problem: E-Verify isn't perfect.

"My sense is that E-Verify is an extremely flawed alternative, or even supplement, to the system we have now," says Eric Bord, a Washington, D.C.–based immigration lawyer who counsels employers across the country.

"Yes, E-Verify will identify completely fictional work-eligibility documents, and it will flag those, and that person will be presumably denied employment. What it will not do, what it can't do, is identify somebody who is pretending to be another person who is a lawful worker, and that's a problem."

To be sure, most employers agree that the employee verification system is not working as well as it should either. Industry experts say the I-9 employee-verification process, which requires all potential employees to provide documents that prove identity and employment eligibility in the U.S., is porous and easily manipulated (either by false applicants or shady employers looking to hire illegal workers). The critical flaw of the system, experts say, is that it relies solely on documents the new employee is presenting. Whether or not E-Verify is the solution to this problem is a matter of hotly contested debate.

On the positive side, E-Verify received the endorsement of federal officials like Homeland Security Secretary Janet Napolitano, who said in May that recent surveys showed 96.1 percent of cases queried through the system authorized the employees for work, and that 3.9 percent showed a tentative nonconfirmation. Also, she said the survey showed 0.4 percent of applicants successfully contested a negative initial decision.

But not everyone is convinced that E-Verify is ready for primetime. Jim Reidy, a labor and employment lawyer who has represented several national restaurant chains, resorts, and foodservice providers throughout his 20-plus-year career, says the most troubling aspect of E-Verify is the threat it poses to exposing employers to undeserved discrimination lawsuits.

"I know E-Verify is being used in the foodservice industry, but I don't recommend folks use it until they're required to," Reidy says. "My greatest concern is the missteps employers might make and therefore get into problems with discrimination and failure-to-hire claims."

Reidy says employers are not protected against potential discrimination suits that may result from an employee being denied work based on a flagged E-Verify notification, and he says the potential for human error, especially with such a new system, is too great to ignore.

"There are certainly potential discrimination issues to consider," says Becki Young, a U.S. immigration attorney whose practice focuses on the hospitality industry. "It's already a dilemma when you fill out the I-9 because you are always walking a delicate path between collecting the proper documents while also making sure you're not being perceived as discriminating. E-Verify only makes that path more confusing."

Also of concern for quick-service analysts are the added time, cost, and security liabilities E-Verify might bring. Elizabeth Murray is vice president of human resources and chief legal officer for professional employer organization Modern Business Associates. Several of her clients are quick-service owners seeking help in setting up E-Verify for their businesses.

Murray says making E-Verify mandatory could place a technological and financial burden on many quick-service businesses that they are not prepared to handle.

"A quick-service restaurant that does not have the needed equipment and space, or that does not have back-office support, could find compliance with E-Verify to be difficult and potentially costly," Murray says.

"Another challenge for a quick-service employer using E-Verify is how to safeguard the private information that is collected during the process. The inadvertent release of an employee's private information can result in liability under various laws."

Bord says he shares these concerns and says the potential costs associated with E-Verify need to be more carefully considered. "I think the government is a bit disingenuous when it trumpets that E-Verify is free," he says.

"There are considerable costs to an employer in implementing E-Verify. Administrative costs, overhead costs, time and energy that personnel had been using in one capacity that now must be redirected for compliance."

Charles Foster was an immigration policy adviser to several recent presidential campaigns—including those of George W. Bush in 2000 and President Obama in 2008—and is the chairman of Americans for Immigration Reform. He says the E-Verify debate is nothing more than a distraction from the larger discussion that should be taking place regarding comprehensive immigration reform.

In other words, he says E-Verify is still forcing employers to act as policemen, when the focus should be on the problem of a growing illegal workforce.

"I think E-Verify is a red herring," Foster says. "First of all, the Social Security database was never meant to be a secure database. And besides, E-Verify only tells you a limited piece of information: Does that number match your name? But a significant portion of undocumented workers that are working here are using someone else's name and Social Security number, so the computer will be very happy because it sees a perfect match." His advice to quick-service owners is the same as Reidy's: Don't use E-Verify until you have to.

In the end, most experts believe a mandatory use of the E-Verify system will eventually be implemented, which is why Bord says he is counseling quick-service employers to get ready.

"I think all employers, for better or worse, need to assume E-Verify is in their future," Bord says. "Just how soon it will be a reality remains to be seen, but they should be positioning themselves for this to become mandatory."