

E-VERIFY IN THE STATES

Employers support worksite enforcement. The overwhelming majority of employers want to be on the right side of the law – it's their obligation as citizens, and it makes good business sense.

Employers need a workable, effective worksite enforcement system. Any mandatory employment verification program must be timely, efficient, accurate and easy for businesses to use.

Punish bad employers and protect good ones. Because E-Verify cannot detect identity theft, the information it gives employers is often wrong. Employers who use the system in good faith should not be held liable for actions they take on the basis of the information provided – even if they end up hiring unauthorized workers or terminating legal employees.


One size does not fit all. Small businesses and agriculture are different. Many do their own hiring, without dedicated staff or at a worksite outdoors, and agriculture in particular relies heavily on an immigrant workforce. This is one reason why using E-Verify is still voluntary under federal law: lawmakers recognize that making it mandatory could overburden critical sectors – not just agriculture and the industries that depend on it, but also the small businesses that create 70 percent of all new jobs.

Employers can't police each other. Employers should be held responsible for verifying only their own employees. Just as business owners can't and don't monitor colleagues' purchasing or payroll, they cannot be held responsible if subcontractors fail to verify their workforce or hire unauthorized workers.

Phased implementation to ensure workability. Use of E-Verify should be phased in on a realistic timetable. Start with government, then government contractors, then companies that administer critical infrastructure, then large corporations and finally, if necessary, smaller businesses.

The states' room to maneuver on E-Verify is now a matter of settled law. With Congress stalemated and unable to act on immigration, states across the country have been taking matters into their own hands – and until last spring, no one could be sure what was constitutional for the states to require employers to do. That changed in May with the Supreme Court's *U.S. Chamber of Commerce v. Whiting* decision, which clarifies precisely what state lawmakers can and cannot require.

The Supreme Court said states may mandate E-Verify – under certain conditions. In the wake of the *Whiting* decision, states may require some or all employers to enroll in E-Verify. States may also suspend or revoke the business licenses of employers found to have hired unauthorized immigrants. Both types of measures are constitutional. But the justices also placed strict limits on what the states can mandate – only state worksite enforcement that “closely tracks” federal enforcement and is consistent with all its rules.



What kind of state E-Verify law will hold up in court? The *Whiting* decision drew clear, bright lines for state lawmakers crafting immigration law. The justices upheld Arizona's 2007 E-Verify mandate, the Legal Arizona Workers Act, because it was consistent with federal enforcement – virtually an extension of the federal system, with few modifications or additional moving parts other than the business-license penalties explicitly authorized by the 1986 Immigration Reform and Control Act. "Arizona," the court wrote approvingly, "uses the Federal Government's own definition of 'unauthorized alien,' it relies solely on the Federal Government's own determination of who is an unauthorized alien, and it requires Arizona employers to use the Federal Government's own system for checking employee status."

What the states cannot require of employers. States cannot establish their own worksite enforcement protocols. They cannot order employers to use E-Verify in any special or unique state-mandated way – only in keeping with existing regulations issued by the federal government. And states cannot punish employers for failing to use E-Verify – remember, participating is voluntary under federal law – only for knowingly hiring unauthorized immigrants. Also prohibited by federal law: using E-Verify in any context other than the workplace – to verify who is eligible for state unemployment insurance, for example, or other state benefits.

The Supreme Court has not authorized any other kind of state immigration enforcement. The *Whiting* decision is narrowly tailored and applies to worksite enforcement only. Measures modeled on Arizona's controversial 2010 policing law, state efforts to repeal birthright citizenship, provisions canceling contracts with unauthorized immigrants, mandates that state authorities check the immigration status of students or hospital patients – none of these have been sanctioned by the court. And state efforts to pass provisions other than worksite enforcement risk being found unconstitutional.

Enforcement alone won't solve the problem. An accurate and reliable employment verification system is a cornerstone of the fix that's needed to make immigration work for U.S. businesses and the U.S. economy. But it is only a first step. Eventually, worksite enforcement must be accompanied by provisions that give employers who have made every reasonable effort to hire Americans a way to hire legal foreign workers to keep their businesses open and contributing to the economy.

ImmigrationWorks USA is a national nonprofit organization building a grassroots business constituency in favor of immigration reform. The national network links major corporations, trade associations and 25 state-based coalitions of small to medium-sized employers working to advance better immigration law. Their shared aim: legislation that brings America's annual legal intake of foreign workers more realistically into line with the country's labor needs.

For more information about E-Verify and state immigration law or for a consultation with ImmigrationWorks' Legal Advisory Committee, please email sweiss@immigrationworksusa.org.