

HOW TO COMPLY: E-VERIFY IN NORTH CAROLINA EFFECTIVE OCTOBER 1, 2012

Background

House Bill 36 “*Employers & Local Government Must Use E-Verify*” was signed into law by Governor Beverly Perdue on June 23, 2011. The legislation requires counties, municipalities and private employers to use the E-Verify system with staggered effective dates. Since the 1996 *Illegal Immigration Reform and Responsibility Act*, federal law has prohibited the employment of any illegal worker. HB 36 now mandates that North Carolinians verify legal employment utilizing the federal E-Verify program.

In 2007, the US Government Department of Homeland Security (DHS) in partnership with the Social Security Administration (SSA) launched E-Verify, an internet-based, free program that compares information from an employee's *Employment Eligibility Verification Form I-9* to data from US government records. If the information matches, that employee is eligible to work in the United States. If there's a mismatch, E-Verify alerts the employer and the employee is allowed to work while he or she resolves the problem (the employee must contact the appropriate agency to resolve the mismatch within eight federal government working days from the date the report is issued). The North Carolina Department of Labor (NC DOL) has enforcement authority only over private employers (not counties or municipalities).

Implications for Retail Employers in North Carolina

Exemptions

- Employers with 24 or less employees are exempt from the E-verification requirement.
- A temporary seasonal employee (*employed for less than 90 days within a consecutive 12-month period*) is exempt.

Employers who violate the new law can be assessed civil penalties (see page 3).

Employers must continue to comply with the existing *Federal Immigration & Nationality Act (INA)* that prohibits discrimination in interviewing and hiring.

Within three (3) business days of hiring a new employee, the employer must complete Sections 1 and 2 of the Form I-9 for each new hire before initiating the E-Verify verification procedure.

Once the prospective employee is hired and the Form I-9 completed, the employer can then begin the E-verify verification process.

Employers are advised to:

- Become familiar with and comply with the E-Verify manual, which can be accessed [online](#).
- Appoint one or more employee(s) as your designee(s) who will submit and verify new hire status. An E-Verify tutorial is available from the E-Verify site once you have registered to participate. Additionally, the designee will comply with current I-9 procedures. DHS provides further guidance on I-9 forms on their designated [website](#).

- Post Department of Homeland Security (DHS) E-Verify posters in visible areas to all new hires. The poster is available in both English and Spanish and can be downloaded from the E-Verify website after the employer completes his initial registration.
- After completing the employer registration process, provide the contact information (name, title, address, and telephone number) to DHS for those employees who are designated to process and verify new hires on the Form I-9.

Note: North Carolina law requires employers to retain copies of all e-verification documents during an individual's employment and for one year after employment ceases.

Verification Requirements

Employers subject to this new law will be required to verify a new employee's work eligibility after the employee has been hired. If the employee voluntarily terminates employment after the process has been initiated, the employer can access the E-Verify site to cancel the process by selecting "self-terminate" under the *Process for Resolving Conflict*.

Employers must register online before the process of verifying any new hires can begin. To register, go directly to E-Verify's registration site: <https://e-verify.uscis.gov/enroll>

Complaints Lead to Investigation

NC DOL has responsibility for responding to complaints that employers (with 25 or more employees) have not verified new employees. NC DOL does not have responsibility to enforce existing federal law regarding appropriate uses of E-Verify, employing unauthorized workers, or ancillary document retention.

Any person with a good faith belief that an employer has failed to use E-Verify may file a complaint with the NC DOL setting forth the basis for that belief.

Investigation Process:

Under the law, the NC DOL is directed to investigate allegations of violations, and may request the State Bureau of Investigation to assist in the investigation. Subpoenas for employment records related to the recruitment, hiring, employment, or termination policies, practices, or acts of employment may be requested as part of the investigation of a valid complaint.

The NC DOL will not investigate complaints based solely on race, religion, gender, ethnicity, or national origin. The Department is authorized by statute to only investigate complaints against companies with the requisite number of employees. If it is discovered that a company has fewer than the required number, NCDOL must cease all investigative activities. Anyone who knowingly files a false and frivolous complaint is guilty of a Class 2 misdemeanor.

Investigative Hearing:

If the NC DOL has determined that a complaint is valid (not false or frivolous), a hearing will be held to determine if a violation has occurred and, if appropriate, impose civil penalties (below).

If, during the course of the hearing, the NC DOL concludes that there is a reasonable likelihood that an employee is an unauthorized alien, the United States Immigration and Customs Enforcement (ICE) as well as local law enforcement agencies will be notified of the possible presence of an unauthorized alien.

© 2015 NC Retail Merchants Association. Information in this publication may not be reproduced or otherwise disseminated by non-NCRMA members without prior consent.

Please note that while this document is intended to help you comply with this new North Carolina law, it is in no way intended to serve as legal advice. Please consult a licensed attorney to address more specific questions that may arise concerning this issue.

Penalties for Violations

Employers found in violation can be assessed civil penalties.

First Violation: the employer will be ordered to sign a sworn affidavit with the NC DOL within three (3) business days after the order is issued. The affidavit will state that the employer has, after consultation with the employee, requested a verification of work authorization through E-Verify.

If an employer fails to file the required affidavit within three (3) business days, the employer will be ordered to pay a civil penalty of \$10,000.

Second Violation: the employer will be ordered to sign a sworn affidavit and pay a civil penalty of \$1,000 (regardless of the number of required employee verifications the employer failed to make).

Third Violation: the employer will be ordered to sign a sworn affidavit and pay a civil penalty of \$2,000 for each required employee verification the employer failed to make.

Under the law, the NC DOL will maintain:

- copies of all orders,
- a database of employers and business locations with recorded violations, and
- a website with all orders available.

When investigating a complaint the NC DOL is required to verify the work authorization of the alleged unauthorized alien with the federal government.

A determination by NC DOL is final unless the employer charged with the violation takes exception to the determination within 15 days after receipt of notice. The employer must appeal the decision by:

- certified mail with return receipt;
- signature confirmation as provided by the US Postal Service;
- designated delivery service authorized (26 U.S.C. § 7502(f)(2)) with delivery receipt;
- or via hand delivery.

In this case, the final determination shall be made in an administrative proceeding according to the North Carolina Administrative Procedures Act.

Tentative Non-Confirmation

If you receive a tentative non-confirmation (TNC) from the SSA, after reviewing carefully to double check for errors, record the case verification number and print the TNC notice for the new hire. The employee may choose to contest the TNC.

If the employee chooses to contest, he must visit the local SSA office within eight (8) federal government working days with the “non-confirmation” letter provided to him by the employer (find local SSA field offices by going to www.ssa.gov and clicking on “contact us”).

Ten (10) federal government working days after the date of the “non-confirmation referral,” the employer must either make a second inquiry to obtain confirmation or final non-confirmation.

If an employer receives a TNC due to an applicant’s photo not matching DHS records, the employer must send a copy of the employee’s Form I-551 or Form I-766 to DHS for review electronically or by an express mail account (paid for by DHS).

© 2015 NC Retail Merchants Association. Information in this publication may not be reproduced or otherwise disseminated by non-NCRMA members without prior consent.

Please note that while this document is intended to help you comply with this new North Carolina law, it is in no way intended to serve as legal advice. Please consult a licensed attorney to address more specific questions that may arise concerning this issue.

Employers are prohibited from taking adverse action (i.e. termination) against any employee while the employee's status is being verified unless they find that the employee is not legal, or if the employee chooses not to contest the initial referral of non-confirmation. Initial inability to verify does not mean that the new hire is not legal; errors in the system are possible. The employee cannot be terminated until secondary verification by SSA or DHS.

NCDOL has no authority/enforcement responsibility related to the issuance of TNCs. Employers who have problems with this aspect of the system must contact the appropriate federal E-Verify office (888-464-4128).

Storing Employee Records

Because NC DOL has the authority to investigate complaints, it is important for employers to keep accurate records. Records must be accessible to an investigator. The employer may decide if the Form I-9 and related materials will be stored at headquarters or store level. In addition to keeping an original photocopy of all documentation and identification, employers should record the case verification number on the employee's Form I-9 and/or print the screen containing the case verification number and attach it to the employee's Form I-9.

Investigations by NC DOL may include the review of Forms I-9, SSA Transaction Records, and DHS verification records (which were created during the employer's participation in the E-Verify process).

All of this information must be safeguarded to the best of the employer's ability and access restricted to designated employees only. DHS and SSA also reserve the right to interview the employer regarding his/her experience with E-Verify; to interview those employees hired during the E-Verify process; and to make all records regarding E-Verify available to DHS and SSA agents.

Questions can be directed to the E-Verify Program through the
United States Immigration & Customs Enforcement:
888-464-4218
e-verify@dhs.gov

© 2015 NC Retail Merchants Association. Information in this publication may not be reproduced or otherwise disseminated by non-NCRMA members without prior consent.

Please note that while this document is intended to help you comply with this new North Carolina law, it is in no way intended to serve as legal advice. Please consult a licensed attorney to address more specific questions that may arise concerning this issue.

Frequently Asked Questions

What is an employer?

HB 36 defines an employer as any person, business entity, or other organization that operates a business and employs 25 or more employees in North Carolina (not including State agencies, counties, municipalities, or other government entities). To determine the applicability of HB 36 to an employer, the Department will examine the number of employees and who pays the employee. Generally, if the employee is paid by an LLC, NC DOL would look at the total number of employees under the LLC, not under the parent company. Some situations may not present a clear answer in which case those determinations will be made on a case-by-case basis after examining all relevant facts.

Suppose I hire a new employee and successfully clear him through E-Verify. This employee moves away, but six months later, comes back seeking a job.

Am I required to clear him through E-verify again?

In the abundance of caution, employers should verify every new hire, even those previously employed.

I occasionally hire subcontractors. Am I responsible for verifying the legal status of the subcontractor's workers, or is that the responsibility of the subcontractor?

If there is a true independent contractor relationship between two business entities, then you would not be responsible for your subcontractor's E-verify compliance. However, if your business exercises significant control over the subcontractor then the law considers your business to be the subcontractor's employer even though there is a nominal subcontractor relationship. A business should work with its attorney or accountant to be certain that all subcontracts are valid and will be recognized by the courts.

I employ additional employees during holidays and other times during the year when the workload warrants additional help. Do I need to verify seasonal workers?

If temporary and/or seasonal workers are hired for 90 days or fewer during a 12-month consecutive period, E-Verify is not required.

I own a small business, am I required to use E-Verify to verify employment for all of my new hires?

If you employ 24 employees or less, the law does not require you to use E-Verify. If you hire 25 employees or more, you are required to use E-Verify.

If I encounter false documentation, am I obligated to report the incident and employee/applicant?

Employers are not legally obligated to report false documentation to the North Carolina Department of Labor. They are only obligated to not employ the person who presents the false documents. Federal law (not HB 36) prohibits employment of illegal workers.

© 2015 NC Retail Merchants Association. Information in this publication may not be reproduced or otherwise disseminated by non-NCRMA members without prior consent.
Please note that while this document is intended to help you comply with this new North Carolina law, it is in no way intended to serve as legal advice. Please consult a licensed attorney to address more specific questions that may arise concerning this issue.