

# AMERICAN PAYROLL ASSOCIATION

April 24, 2019

The Honorable Lindsey Graham  
Chair, Judiciary Committee  
United States Senate  
290 Russell Senate Office Building  
Washington, DC 20510

The Honorable Dianne Feinstein  
Ranking Member, Judiciary Committee  
United States Senate  
331 Hart Senate Office Building  
Washington, D.C. 20510

The Honorable Rob Portman  
United States Senate  
448 Russell Senate Office Building  
Washington DC 20510

Re: Comments on S. 301, the E-Verify Act of 2019

Dear Senators Graham, Feinstein, and Portman:

The American Payroll Association (APA) offers recommendations for your consideration on S. 301, the E-Verify Act of 2019.

## **About APA and Immigration**

Established in 1982, APA is a nonprofit professional association serving the interests of more than 20,000 payroll professionals in the United States. APA's primary mission is to educate members and the payroll industry about the best practices associated with paying America's workers while complying with all applicable federal, state, and local laws. APA's Government Relations Task Force (GRTF) works with legislative and executive branches at the federal and state levels to assist employers with understanding their legal obligations. Significant emphasis is placed on minimizing the administrative burden on government, employers, and individual workers.

APA's GRTF Immigration Subcommittee works closely with the Outreach Branch in the Verification Division of the U.S. Citizenship and Immigration Services (USCIS) and the Immigrant and Employee Rights Section in the Civil Rights Division of the U.S. Department of Justice (DOJ), offering recommendations on improving the Form I-9 and E-Verify system and sharing information to assist APA members with compliance. In addition, USCIS, DOJ, and the U.S. Immigration and Customs Enforcement (ICE) have partnered with APA to offer seminars to payroll professionals to raise awareness about employment verification requirements.

APA does not advocate for or against matters associated with residency, citizenship, and right-to-work. Establishing policies on immigration reform, security, and civil rights are outside of APA's mission. Instead, our efforts are focused on verification of employment requirements and employers' administrative burden.

### **General Comment**

In general, most of the provisions of S. 301 mimic existing requirements for employment verification through the Form I-9, Employment Eligibility Verification, and E-Verify system, managed by the USCIS under the Department of Homeland Security (DHS). Descriptions of what constitutes a violation are also similar to existing enforcement actions by the DOJ. Using somewhat different language than already exists in the Immigration and Nationality Act Section 274A to achieve the same or similar requirements only serves to confuse the regulated community. In addition, the new wording may confuse USCIS on what system Congress intends, especially with the funds already allocated by Congress to maintain and upgrade E-Verify.

If the Senate and House of Representatives intend to invest in a mandatory employment verification system for all employers, APA recommends a review of the existing system and upgrades accordingly. To the extent possible, Congress should maintain descriptions, definitions, and enforcement language for which employers are already familiar.

### **Specific Comments**

Below are specific comments about new requirements proposed in S. 301.

- New section 274A(c)(1)(B)(i)(II)(bb) offers employers the option of completing an employment verification form via telephone or video conference. This change keeps up with technology and makes it easier to hire remote employees. However, this approach is likely to result in increased fraud by making it easier for an individual to assume someone's identity and use of false documents to obtain a job. In turn, this

increases employers' risk of hiring workers who are not authorized to work and subjects employers to increased risk of a DOJ investigation for document abuse and hiring discrimination. In addition, employers are placed at risk for E-Verify monitoring and compliance audits and ICE worksite investigations. Currently, employers are required to review employee documents and complete section 2 of Form I-9 in the physical presence of the employee.

- The provisions under Section 274(c)(iv)(E)(3) and (4) require the DHS to create regulations on copying and maintaining records. APA is concerned about the administrative burden and increased risk this will place on employers with requirements to maintain employment verification documents in excess of current requirements. Currently, employers have the option to retain copies of employee documentation used for Form I-9 and are only required to retain copies of certain photo match documents when the employer participates in the E-Verify program.
- Proposed section 274(d)(2)(D) would mandate that employers use the S. 301 E-Verify system. APA does not offer an opinion on whether to mandate an employment verification system. Instead, APA's recommendations focus on successful implementation if Congress decides to mandate a system.

Assuming the intent is to use the existing E-Verify system, to ensure successful implementation of mandatory E-Verify, APA recommends the following:

- **Adequate funding:** Additional funding may be necessary for initial system upgrades under a mandatory requirement, system interface programs, and employer-employee outreach. Funding is necessary to prevent tentative nonconfirmations because of system and process errors that can have a negative impact on an employee's productivity. In addition, the system cannot remain stagnant such that funding will be needed in the future for upgrades and ongoing outreach. Funding also is needed for the Social Security Administration (SSA), other government agencies, and third-parties to upgrade systems and records because E-Verify matches data provided by employers with data from those agencies and third-parties' records.

For example, the current E-Verify memorandum of understanding and implementation processes need to be enhanced and retooled to accommodate high volumes of employers – many through E-Verify employer agents – joining the program in the event E-Verify is made mandatory.

In addition, S. 301 contemplates a reverification process that the current E-Verify program does not provide. To upgrade E-Verify to accommodate reverification will require additional funding.

- **Preemption:** Tracking state and local E-Verify requirements is an unnecessary burden on employers. A decision by Congress to make E-Verify mandatory should preempt state and local government employment verification requirements.

To date, at the federal level, E-Verify is mainly a voluntary program with mandatory requirements for qualified government contractors. Where they exist, state requirements range broadly. Local governments also have enacted ordinances on E-Verify and these too are inconsistent.

Approximately 25 states have passed legislation regarding E-Verify. These laws include recognizing E-Verify as a voluntary program, blocking local governments from mandating use of E-Verify, applying mandatory requirements to government entities or contractors only, and mandating use of E-Verify for public and private employers. When private-sector mandatory use is required, thresholds for employer size range from 5 to 50 or more employees with no two states the same. Some states include contract size or type of project in defining which government contractors must use E-Verify. Public-sector requirements are sometimes narrowed to specific agencies or job tasks. At least one state offers an alternative to E-Verify through use of a state-developed authorization document list for employees and document retention requirements for employers that differ from the federal Form I-9 process, a key component of the E-Verify system.

- **Retroactive application:** APA opposes mandatory E-Verify for all current employees. Mandatory E-Verify, if implemented, should only apply to new hires and employees requiring reverification and not all current employees. The burden on employers to apply E-Verify to current employees, especially large businesses and employers with significant remote employee populations, is too costly.
- **Criteria and training for users and employer agents:** Legislation should require USCIS to establish universal criteria and training requirements for all users processing E-Verify cases as well as all E-Verify employer agents to

ensure they are knowledgeable about employment verification requirements. Mandatory E-Verify will increase the number of private enterprise and employer agent software systems interfaced with E-Verify that seek to minimize risk, increase compliance, and improve efficiency for employers. In addition, the number of employer agents using the E-Verify website to process cases for employers also will increase. The employer is the party responsible for maintaining compliance with employment verification requirements. Therefore, when an employer uses a software system, internal or outsourced, it is critical that the employer identify legitimate, compliant services and ensure that all users processing cases understand and comply with E-Verify processes and procedures.

- **Reasonable compliance grace period:** APA appreciates the phased process outlined in S. 301, but is concerned about the capability of the verification system to meet these deadlines. Employers will need sufficient time to understand the mandatory E-Verify requirements and to develop processes, procedures, and internal training programs to implement the system. Employers also need time to consider outsourcing and, if so, to integrate that decision into internal procedures and electronic systems. This holds true even for employers already engaged in E-Verify to the extent of legislative and regulatory changes and system upgrades.
- **Notice and time to cure problems:** When employers make mistakes in complying with mandatory E-Verify requirements, they should be provided with sufficient notice and time to make corrections before penalties are assessed. This approach makes sense to advance the intent of mandatory E-Verify and to encourage employers striving to comply.
- **Program enforcement:** What government agency will be responsible for enforcing proper use of the E-Verify system? Currently, there is not a specific agency responsible for enforcement. The DOJ and ICE may utilize E-Verify information when conducting employer audits, but are not responsible for enforcing its use. USCIS can only provide outreach services about E-Verify as it lacks authority to recommend that an employer be penalized for its misuse. USCIS may remove an employer from E-Verify for misuse, but that is inconsistent with a mandatory usage requirement.
- **Protections from liability:** If an employer acts in accordance with an E-Verify nonconfirmation and terminates an individual's employment based

upon a mistake in the E-Verify process, that employer should be protected from a wrongful termination lawsuit.

- **Increased hours of operation:** Employers deserve 24-hour availability of the E-Verify system. Currently, the E-Verify system goes offline at night because of maintenance and batch processing at the SSA. Limited uptime plus a significant increase in volume because of mandatory use could create a processing bottleneck. In addition, employers hire shift employees at all times, including during the third shift.

APA looks forward to working with the Senate on employment verification legislation and would be pleased to discuss our recommendations further.

Sincerely,



David Fowler, Jr.  
Chair, GRTF Immigration Subcommittee



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