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Toward Achieving a Legal Texas Workforce

Key Points

- The integrity of the immigration system in the United States relies upon everyone doing their part to follow the law. Using the federal government's electronic employment authorization verification system (E-Verify) is a critically important means of doing this.
- To avoid disrupting the current workforce, E-Verify use requirements should be prospective in nature, only applying to new employees.
- Simply requiring the use of E-Verify is not enough. To ensure the law is adhered to, compliance provisions and mechanisms are also needed.

Executive Summary

In an effort to deter illegal immigration and reduce the number of unauthorized people in the U.S. workforce, in 1986, the Immigration Reform and Control Act ([IRCA, 1986](#)) made it unlawful to hire illegal aliens knowingly. The law required employers to examine new hires' documentation to verify their identity and eligibility to work in the U.S.

The IRCA led to Form I-9, Employment Eligibility Verification, which required employees to "attest to their work eligibility, and employers to certify that the documents presented reasonably appear (on their face) to be genuine and to relate to the individual" ([E-Verify, 2022a, History and Milestones](#)). However, as the Bipartisan Policy Center ([2013](#)) has noted, this document-based system "quickly proved to be highly unreliable and fell victim to fraud, as many of the documents permitted for meeting I-9 requirements were easy to counterfeit" ([p. 1](#)).

To improve and strengthen the process, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ([IIRIRA, 1996](#)) mandated the creation, but not the use, of an electronic employment verification system. That system is known today as E-Verify. The federal government itself uses E-Verify when hiring new employees, contractors, and subcontractors. However, though there have been attempts to do so, Congress has yet to pass a law requiring all public and private sector employers to use the E-Verify system.

Nonetheless, state governments have passed their own laws requiring the use of the E-Verify system. In 2014, Texas began to use E-Verify as part of the onboarding process for all new state government employees. Through subsequent legislation ([SB 374, 2015](#), [SB 312, 2017](#), [SB 766, 2021](#)), that requirement now applies to all state contractors and subcontractors, as well as new employees of sexually oriented businesses.

E-Verify should continue to be expanded throughout the state of Texas with a view toward achieving a legal Texas workforce. Since the use of E-Verify in Texas was initiated in the public sector, at the state level, the logical next step in this expansion is to enact legislation requiring all political subdivisions in the

state, including counties, municipalities, and government-funded educational institutions, to use the system. In like manner as the federal government, all taxpayer-funded contractors and subcontractors should also be required to use E-Verify.

In addition, the potential of E-Verify disrupting the state's current labor force can be avoided by making all new E-Verify requirements prospective in nature—that is, only applicable to new hires beginning at a certain future date. This way, no current employees will be subject to removal from their jobs. Finally, in view of the experience of other states that have legislated on this matter, no E-Verify requirement will be effective unless it includes both incentives for compliance as well as consequences for noncompliance.

Texas and other states can uphold the rule of law, but they must have the political willpower to do so. As Texas began the process of requiring E-Verify for state government employees, contractors and subcontractors, it should continue to set the example. In sum, requiring the use of E-Verify for all public service employment in Texas can help ensure that taxpayers are not subsidizing the employment of people without proper work authorization.

Origins of E-Verify

As Texas civil rights pioneer Barbara Jordan pointed out when she served as chair of the U.S. Commission on Immigration Reform in 1994, “employment continues to be the principal magnet attracting illegal aliens to this country” (Jacobs, 2023, para. 1). Under Jordan's leadership, that commission was the first to recommend the creation of a computerized national employment verification registry to combat illegal immigration and the abuses that come with it (Associated Press, 1994)

In addition to violating immigration law, employers who knowingly hire unauthorized immigrants often take advantage of them by paying them lower wages, refusing to pay, or threatening to report them for deportation to Immigration and Customs Enforcement (ICE; Vickerstaff Law Office, n.d.). Moreover, employers who engage in this practice often avoid adhering to labor laws and tax obligations that must be observed when employing American citizens and lawful residents, such as by subjecting unauthorized workers to longer, inhumane work hours or more dangerous conditions. A study by Tiffany D. Joseph (2011) revealed that some migrant farm workers “identified rigid work demands, hard physical labor, and employer exploitation” (p. 176). One example of this is noted by a workplace



As Chair of the U.S. Commission on Immigration Reform, former Texas Congresswoman Barbara Jordan recommended the creation of the federal electronic employment verification system, known today as E-Verify. Photograph reproduced from *State buildings, homes to TDI*, named after Texas's Bill Hobby, Barbara Jordan, Texas Department of Insurance (<https://www.tdi.texas.gov/general/hobby-jordan.html>).

whistleblower Josue Diaz. Diaz, a Mexican-born undocumented day laborer, who, among others, was recruited to clean up after Hurricanes Gustav and Ike. According to a *Los Angeles Times* article (Soni, 2017), while him and his fellow workers were promised good jobs with fair wages, they were instead subject to living in tents “in an isolated labor camp at an abandoned oil refinery” and were forced to “work in toxic conditions without safety equipment” (para. 9). Labor exploitation is a problem faced by many undocumented workers who end up receiving pay under minimum wage, lack access to proper equipment, work long, strenuous hours without proper compensation and face a threat of deportation when they try to achieve workplace fairness (Ozment Law, n.d.).

Today's electronic employment verification system emerged from Jordan's work. That system, known as E-Verify and administered by U.S. Citizenship and Immigration Services (USCIS), verifies whether new hires are legally allowed to work in the United States by electronically comparing information provided by employees on the Form I-9 with records available to the Social Security Administration and the Department of Homeland Security (E-Verify, 2020).

How Does E-Verify Work?

Today, the E-Verify system quickly confirms 99.8% of work-eligible employees and takes less than two minutes per person to use (House Judiciary GOP, 2017).

Using a desktop computer, laptop, tablet, or even a smartphone, the user must go to the USCIS website and log into the E-Verify program by submitting a unique username and password. Once logged in, the employer fills out the fields for the employee's first and last name, date of birth, and social security number.

The next step is for the employer to provide the citizenship status for the newly hired employee. They select the documents the employee submitted, such as a social security card, driver's license, or a U.S. passport. In a matter of seconds, the E-Verify system will compare the information submitted against records at the Social Security Administration (SSA) and Department of Homeland Security (DHS) to determine whether the employee is, in fact, eligible to work in the United States.

E-Verify will generate one of three possible results:

1. Employment Authorized
2. DHS Verification in Process
3. Tentative Nonconfirmation (TNC)

It should be noted that the E-Verify system only pings *existing* SSA and DHS databases, and it only pings the DHS database if there is not an immediate match in the SSA database or if immigration documents are provided by the employee. That means that the vast majority of employees entered into E-Verify are only run through the SSA database ([E-Verify, 2022b](#)).

In this way, E-Verify also benefits employees, since a mismatch in the SSA database discovered during an E-Verify check gives an employee the opportunity to correct any bad data in their file with SSA before they hit retirement and only then learn that their account has not been properly credited.

Challenges Posed to E-Verify

No government-run system is perfect, and E-Verify is no exception. One of the system's most persistent challenges is that it is "unable to detect when an employee uses valid documents that are stolen or borrowed, or when an employer uses a work-authorized employee's documents to verify another employee with questionable work eligibility" ([Stumpf, 2012, p. 396](#)). One reason this occurs is due to the fact that E-Verify's photo-matching process is still not fully automated, which means that it continues to rely on employers to confirm individuals' identities by manually reviewing photos.

Of the roughly 48 million cases processed by E-Verify in FY 2022, 98.34% were automatically confirmed as authorized to work either instantly or within 24 hours.

A report by the U.S. Department of Homeland Security Office of the Inspector General ([2021](#)) found that in fiscal year 2019, E-Verify processed more than 39 million cases. Of that number, the system "returned an 'Employment Authorized' result for about 280,000 non-U.S. citizens without using the photo-matching process to confirm their identities"s ([p. 6](#)).

Additionally, although the majority of individuals submit a driver's license to prove identity, E-Verify's process does not use photos to ensure that individuals match the license submitted. [The Office of the Inspector General] found errors in E-Verify's license verification process that resulted in E-Verify deeming about 613,000 individuals 'Employment Authorized' without meeting USCIS' own identification system use requirement. ([p. 6](#))

Another challenge is that USCIS must be able to handle the projected expansion of users. In the event that more states mandate the use of E-Verify, or if a nationwide mandate were to occur, USCIS must expand the system's workload capabilities to handle a higher volume of queries and a higher number of concurrent users. "USCIS confirmed E-Verify could meet the minimum performance threshold for the number of queries per minute and the number of concurrent users" ([U.S. Department of Homeland Security Office of the Inspector General, 2021, p. 15](#)), but funding constraints, outdated methodology, and cooperation between government partners hindered the completion of E-Verify testing for higher workload capabilities.

E-Verify's detractors have noted that lawful permanent residents in the U.S. receive erroneous E-Verify determinations more often than U.S. citizens do. However, an initial tentative non-confirmation (TNC) or mismatch does not necessarily mean one is not authorized to work in the U.S.

Following the result of a TNC, the recipient has 10 federal government working days to take action. From there, the employer will refer the case to DHS and/or the Social Security Administration through E-Verify and give the applicant a Referral Date Confirmation, which is a date by which the applicant must contact DHS and/or SSA. While the applicant awaits their pending case, an employer cannot take adverse action against them, including termination or suspension of employment, withholding pay or training, or delaying an employment start date ([E-Verify, n.d., Step 3](#)).

U.S. citizens, legal residents, and foreign nationals temporarily authorized to work in the United States have every incentive to take the necessary steps to gain lawful employment.

According to E-Verify ([2023](#)), of the roughly 48 million cases processed in FY 2022, 98.34% were automatically confirmed as authorized to work either instantly or within 24 hours. Only 1.54% cases returned as a TNC, and of those, just 0.12% were determined to be wrongly flagged and were later confirmed as work authorized after the employees resubmitted documents through contesting the false claim ([E-Verify, 2023](#)).

Detractors of E-Verify also raise the spectre of discrimination. Their concern is that the requirement to confirm the work authorization of candidates could disproportionately impact minorities and people of color, as well as people those who are eligible to work in the U.S., though have not yet obtained citizenship status. Some even present the issue that errors due to name changes resulting from marriage or divorce disparately affect women ([Rieke et al., 2014, para. 5](#)).

Specifically, some employers “may purposefully discriminate by unlawfully using E-Verify to either selectively screen only new hires who they suspect of being unauthorized, or to prescreen applicants and then fail to hire or notify those who receive tentative nonconfirmations” ([Stumpf, 2012, p. 401](#)). A recent example of this is 2022 instance in which the Justice Department reached a settlement with Aero Precision LLC which “had a policy of unlawfully screening out certain non-U.S. citizen job candidates, including asylees and refugees, in violation of the Immigration and Nationality Act” ([U.S. Department of Justice, 2022](#)). Citizenship discrimination is already unlawful and legal avenues exist to redress any related grievances.

According to the E-Verify website, if an employee believes that their employer violated E-Verify program rules,

the employee may report the violation to the E-Verify Employee Hotline and may be eligible for pay for work lost ([E-Verify, 2022c](#)). If an employer is found to be in violation, they are subject to fines. Furthermore, asylees and refugees have permanent permission to work in the U.S. ([U.S. Department of Justice, 2017](#)). Employers cannot have a policy of only hiring U.S. citizens unless a law, regulation, government contract, or executive order requires the employer to limit the specific position to U.S. citizens ([Employer.gov, n.d.](#)). E-Verify itself is inherently colorblind in its application, regardless of race, ethnicity, or sex.

E-Verify in Texas

States can pass their own laws and regulations on the use of E-Verify. In 2014, Texas Gov. Rick Perry initiated the process by signing an executive order ([Exec. Order No. RP-80, 2014](#)) requiring the use of E-Verify by state agencies under the purview of the Governor’s Office, while encouraging any contractors and subcontractors those state agencies hired to also use E-Verify.

Unfortunately at the time, the directive did not assign a state agency to ensure compliance or prescribe penalties for agencies or contractors that failed to use the system ([Aguilar, 2015](#)). Initially, this use of E-Verify was run under an honor system in which it was incumbent upon state agencies to police themselves and each other to ensure E-Verify was being used as ordered.

Since then, Gov. Greg Abbott has supported and signed into law all ensuing E-Verify legislation sent to his desk. The 84th Texas Legislature passed SB 374 ([2015](#)), which was drafted to ensure that taxpayer dollars were not used to fund government contract workers who were in Texas illegally ([Senate Research Center, 2015](#)). The bill mandated that potential hires at state agencies and public colleges be vetted by E-Verify, but it did not extend to employees of businesses contracted by the state. To begin to fill the compliance gap, the Legislature charged the Texas Workforce Commission with the implementation of the law. The commission’s enforcement mechanism, however, remains unclear.

Following recommendations by the Sunset Advisory Commission, a 2017 bill further extended the Texas Department of Transportation’s (TxDOT) use of E-Verify. SB 312 ([2017](#)) mandated that TxDOT not award a contract to a contractor not registered in the E-Verify program. Such contractors are required to use the system when hiring all new employees throughout the life of the contract ([SB 312 Bill Analysis, 2017, p. 8](#)). Subcontractors

must also remain similarly active in E-Verify until their work is completed. Failure to submit the required E-Verify Memorandum of Understanding for Employers will result in the bidder forfeiting the proposal and not being considered for future work. Subcontractors in the same situation will also not be approved to work on TxDOT projects.

In 2021, the Texas Legislature required E-Verify use for the first time in the state's private sector. Approved by a unanimous vote, SB 766 (2021) requires "sexually oriented businesses," such as strip clubs and massage parlors, to use E-Verify in their hiring process. Since sexually oriented businesses have been identified as extremely high-risk for human trafficking and exploitation ([Office of the Texas Attorney General, 2015, p. 2](#)), this was a significant step for Texas to take in its fight against this modern-day slave trade.

As noted during official consideration of SB 766, fake IDs have become more accessible and can be as technologically advanced as legal IDs. According to the SB 766's bill analysis (2021), "Human traffickers regularly provide fake IDs to their underage victims for purposes of gaining employment at sexually oriented businesses" ([para. 3](#)). A deficiency in this law that must be pointed out and eventually addressed is that it did not "expressly grant any additional rulemaking authority to a state officer, institution, or state agency" ([para. 6](#)). Texas continues to make advancements in the use of E-Verify but does not expressly designate a state rulemaking authority to ensure state compliance with E-Verify laws.

Legislation in Other States

Some states have gone further, but the extent and effectiveness of compliance remain in question. Take, for example, Georgia. Georgia began enacting work verification laws in 2006 via SB 529 (2006), the Georgia Security and Immigration Compliance Act, which enacted work eligibility verification requirements for public employers and the contractors and subcontractors of public employers. In 2011, the Illegal Immigration Reform and Enforcement Act of 2011, part of HB 87 (2011), mandated that every city and county, except those with one or fewer employees, register and participate in E-Verify for all newly hired employees.

Today, "for employers of more than 10 full-time employees, E-Verify is required in Georgia to receive a business license or certain professional license" ([Verify9, n.d., "E-Verify and the Georgia Business License"](#)). House Bill 1027 (2022) expanded the definition of businesses required to use E-Verify into the entertainment industry. The state labor

commissioner is authorized to audit public employers for compliance upon reasonable suspicion.

Florida expanded its use of E-Verify in 2021. SB 664 (2020) requires every public employer, contractor, and subcontractor in the Sunshine State to register with and use E-Verify for all newly hired employees. This includes local school districts, public universities and colleges, and state and local agencies. Private employers must, after candidates accept their offers of employment, verify the candidates' employment eligibility by either using E-Verify or requiring them to provide the same documentation that is required by USCIS and its Employment Eligibility Verification (I-9) form ([Lopez & Whiting, 2021](#)). This only applies to private employers who have a contract with a public employer or apply for taxpayer-funded incentives through the Florida Department of Economic Opportunity. Private employers are required to maintain these records for at least three years after a person's initial date of employment.

The Florida legislation's strength is in its penalties.

If a private employer does not appropriately verify employment eligibility of its new employees, the Florida Department of Economic Opportunity will require the employer to provide an affidavit stating that it will comply, that it has terminated the employment of all unauthorized workers in the state, and that the employer will not intentionally or knowingly employ an unauthorized worker in the state. If this information is not provided, the appropriate licensing agency will suspend all applicable licenses held by the private employer until it provides the Department with the appropriate affidavit. An employer found to have violated this provision three times within any 36-month period will face permanent revocation of all licenses it holds specific to the business location where the unauthorized worker performed work (or alternatively, all of the licenses necessary to operate the employer's business generally). ([Lopez & Whiting, 2021](#))

In December of 2022, Florida Gov. Ron DeSantis further tightened the grip on compliance. Florida's Department of Economic Opportunity sent letters to six companies that had failed to provide documentation affirming they were in compliance with the state's E-Verify laws ([Blankley, 2023](#)). The letters gave them until January 16, 2023 to affirm all of their employees have passed through the E-Verify process. Failing to meet the deadline would mean the companies would be subject to suspension of their licenses.

Additional Considerations

In 2020, the Claes Fornell International (CFI) Group conducted a customer satisfaction survey on the E-Verify program. It assessed the experience of employers with the E-Verify system using the Customer Satisfaction Index score (CSI), which ranges from 0 to 100. The 2019 Customer Satisfaction Index (CSI) for all USCIS E-Verify users increased to 87 after holding steady at 85 for the four previous years. Employers like E-Verify, and it has high rates of satisfaction ([E-Verify, 2021](#)) from businesses that use it, and 78% of employers who use E-Verify consider themselves small businesses ([CFI Group & Federal Consulting Group, 2020](#)).

E-Verify dissuades illegal immigration ([Gonzalez-Gorman, 2021](#)) by targeting one of its main drivers, the lure of jobs. Concretely, a study by the Federal Reserve Bank of Dallas found that in 2017, five of the eight states with universal E-Verify mandates saw “the number of unauthorized immigrations and/or unauthorized immigrant workers [fall] below what would have been expected absent E-Verify” ([Orrenius & Zavodny, 2017, p. 1](#)). Finally, while employers invariably incur additional data entry costs when they participate in the E-Verify system, these costs should be taken into account in comparison with the fines they are subject to for employing people who are not authorized to work in the U.S. ([Alanis, 2021](#)).

Conclusion

While Texas has a long way to go toward achieving a legal workforce, it is moving in the right direction by initiating its use of E-Verify for the employment of taxpayer-funded employees, contractors, and subcontractors throughout the state.

As this process advances, the state can avoid unnecessary disruption of its current workforce by only applying E-Verify use requirements to new hires. In addition, accountability and enforcement mechanisms must be essential components of expanded use of E-Verify.

Should the Legislature choose to task the Texas Workforce Commission (TWC) with a role in ensuring compliance, there will be a need for clearly stipulated directives toward that end. As far as public sector employers are concerned, the agency, or task force, that is placed in charge must hold all government employers accountable. The Florida model is a good example of this by requiring regular affidavits declaring compliance with the state law and following up with the businesses that do not do so.

Effective statewide E-Verify expansion and implementation is part of a larger effort to limit illegal immigration, the underground economy, and identity fraud. Efforts at the federal level to improve the capacity and integrity of E-Verify should also continue apace, as the system depends upon lawful identification. While E-Verify does not solve all the problems of illegal immigration, the underground economy or identity fraud, it is a step toward getting them under control. ★

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In tackling this task, Oliver is leveraging the full range of his previous experience as a successful coalition builder in the conservative movement, a public diplomacy professional, and a bilingual communicator. Prior to joining the Foundation, Oliver was founding director of MRC Latino, the media research center project that challenged liberal dominance and rhetoric of U.S. Spanish-language media, particularly on immigration-related issues.

Most of Oliver's career has been divided between his native Washington, D.C., and his mother's homeland of Puerto Rico. In Washington, during President George W. Bush's administration, Oliver served as special assistant to the director of the U.S. Office of Personnel Management, as well as White House director of specialty media. Oliver is also a former program review analyst at the Voice of America and news editor at the NBC Radio Network.

In Puerto Rico, Oliver served as special assistant to former Puerto Rico Governor Luis Fortuño, as the assistant secretary of state, and as the special assistant to the administrator of the Puerto Rico Economic Development Administration. He is also a distinguished, award-winning journalist having worked for Caribbean Business and the island's leading daily newspaper *El Nuevo Día*.



Selena Rodriguez is the assistant director of federal affairs at the Texas Public Policy Foundation. In this role, she conducts research on public policy issues; assists the Foundation in academic publication; educates lawmakers and members of the public on Foundation research; and provides formal testimony to local, state, and federal entities. Prior to this position, Rodriguez served in the Marine Corps as an Intelligence Specialist and completed an internship at the Texas Public Policy Foundation. Born and raised in Del Rio, Texas, Rodriguez graduated from Texas State University with a B.A. in political science and is currently a graduate student. She has a passion for spending time with her family and volunteering in

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About Texas Public Policy Foundation

The Texas Public Policy Foundation is a 501(c)3 nonprofit, nonpartisan research institute. The Foundation promotes and defends liberty, personal responsibility, and free enterprise in Texas and the nation by educating and affecting policymakers and the Texas public policy debate with academically sound research and outreach.

Funded by thousands of individuals, foundations, and corporations, the Foundation does not accept government funds or contributions to influence the outcomes of its research.

The public is demanding a different direction for their government, and the Texas Public Policy Foundation is providing the ideas that enable policymakers to chart that new course.

