



Q & As: HANDLING TRICKY SITUATIONS IN THE E-VERIFY PROCESS

Q. An employee who received temporary non-confirmation has not been able to resolve the issue after 8 days. Should I terminate the employee?

A. No, as long as the employee can demonstrate that he/she has contacted the Social Security Administration (SSA) and is actively trying to resolve the non-confirmation. If the employee informs you of his/her attempts to contact SSA, you should document what the employee has done (e.g., date and time of his/her visit to the SSA Office and name(s) of people with whom he/she has spoken). Note, however, that the latest DHS guidance is that employers should **not** ask the employee for any documentation, to stay clear of discrimination claims.

Q. I believe that the employee is really trying to resolve the discrepancy. However, he/she still cannot resolve the situation after 8 days. How long can I give the employee before terminating him/her?

A. DHS has stated that "the eight-day timeframe in the E-Verify program rules is the time allotted for the employee to initiate the process of resolving his or her tentative non-confirmation—not the time allotted for a tentative non-confirmation to be finally resolved." DHS expects that the employer will simply keep checking back with the E-Verify system to see if the matter has been resolved.

Q. What if you receive a final non-confirmation from the E-Verify system, but the employee insists that s/he is legally authorized to work, and you believe him/her?

A. You may set a company-wide policy to simply terminate the employee, which is the safest route from a compliance perspective, but may have other ramifications when you truly feel the issue is government database error. Know that if you keep the employee on your payroll despite a final non-confirmation, you are risking a finding by DHS that you knowingly hired an unauthorized worker. However, if you have strong evidence to support the employee's claim (such as an original approval notice from the USCIS adjudicatory arm of the DHS for a visa or other work permit filed by your company), you may rebut the argument that there was no willful violation of the law, but only a desire to not unfairly discriminate against any worker. These cases will be extremely rare. Please contact your counsel immediately to guide you.



Q. What if an employee confesses that he/she does not have work authorization in the U.S.?

A. When this happens, you have been charged with actual knowledge that the employee is not authorized to work in the U.S. The company will be subject to both civil and criminal liabilities if the employee continues to be employed. Therefore, you will need to terminate the employee.

Q. What if the employee tells me that he/she has been using a fake Social Security Card or Number, and lied on his/her application form about his/her immigration status? However, he/she has now come forth with a correct Social Security Number.

A. If your company has a policy of terminating an employee who has lied on his/her application or used fake documents, you may have grounds to terminate the employee even though he/she has now possessed a valid Social Security Number/Card or valid work authorization. You have to review how strictly the policy has been used to terminate employees. If it has been used on a case-by-case basis, you should clearly document why you have decided to keep or terminate the employee in this particular situation. You can take into consideration the longevity, job performance, and other objective criteria of the employee. However, if your company has been using the policy on a "zero tolerance" basis, you should continue to apply the policy the same way and terminate the employee.

Q. I really want to help the employee because he/she has been with the company for a long time and is a good worker. Is there anything we can do? Can we sponsor the employee for a green card?

A. There is generally nothing a company can do to "legalize" an employee's immigration status in the U.S. in a short period of time. While it is possible for a company to sponsor "green cards" for employees, the process is lengthy and the results are uncertain. Some employees who have been in the U.S. for a long time with a U.S. citizen spouse or children may be eligible for some immigration benefits. It is possible for the employee to turn himself/herself in to U.S. immigration authorities and seek a special benefit. However, the process is risky and the consequence of failure is deportation. Therefore, many employees would be too afraid to try that. They would prefer to continue to work under the table and take their chances. We suggest that you speak with an immigration attorney if you have employees in this situation, who you really want to keep.