

PRACTICE ALERT: Advising Clients on Potential Issues of Using Electronic I-9 Resellers

AILA Verification & Documentation Liaison Committee
(with special thanks to committee member Wendy Madden for her work on this alert)

The purpose of this practice alert is to inform members of a recent dispute between two Electronic I-9 software providers and to provide an overview of the potential issues clients may face when choosing a vendor that outsources its electronic I-9 software to a third party.

Background

As a result of DHS's enhanced worksite enforcement efforts and the implementation of the new electronic I-9 regulations,¹ many employers have elected to implement paperless I-9 and E-Verify processes. As of this writing, there are several I-9 software vendors in the marketplace, including stand-alone providers that focus solely on I-9/E-Verify, as well as "all-in-one" providers that offer an I-9 module that integrates with the employer's traditional personnel management software or an employment screening/background check application.² A significant number of the all-in-one systems "outsource" the I-9 and E-Verify service to a third party vendor under a "reseller agreement." The reseller agreement governs the terms of use and other important details regarding accessibility of the employer's I-9 records. In light of recent I-9 audit trends, it is more important than ever for employers and counsel to closely examine these arrangements to ensure that the employer's best interests are protected. It is not advisable for an employer to rely on a vendor's representations regarding system compliance as such representations won't insulate the employer from liability. Employers must undertake independent due diligence to ensure the system they choose complies with the applicable regulations.

The Dispute

In June 2006, LexisNexis Screening Solutions, Inc. (Lexis)³ entered into a five year reseller agreement with USVerify, Inc. (USVerify) whereby the latter would provide electronic I-9 and E-Verify services to Lexis customers. In exchange, Lexis compensated USVerify pursuant to a pre-determined fee schedule. On April 1, 2011, Lexis notified USVerify in writing that it would not be renewing the reseller agreement when it expired on June 27, 2011, and that it would contact USVerify regarding the return of its customers' I-9 data. USVerify countered that the return of this data in a particular format constitutes "additional work," which they would do only for a fee. In addition, it appears that USVerify contacted Lexis customers directly seeking to enter into a new agreement for I-9 and E-Verify services.

¹ On October 30, 2004, President George W. Bush signed legislation into law authorizing employers to retain Forms I-9 in electronic format. Pub. L. 108- 390. The final regulations were published by DHS on July 22, 2010. 75 Fed. Reg. 42575. The electronic I-9 requirements are found at 8 CFR §274a.2(e)–(g).

² See "Advising Your Clients on the Selection of an Electronic I-9 Software Provider," *published on AILA InfoNet at Doc. No. 10040134* (posted Jan. 26, 2011).

³ Prior to January 2010, LexisNexis Screening Solutions, Inc. was known as ChoicePoint WorkPlace Solutions, Inc.

Unable to resolve their differences, Lexis filed suit on June 27, 2011, seeking an injunction to require USVerify to return its clients' I-9 data in a reasonably usable and accessible format and to cease and desist from using or disclosing any confidential client information.

Access to the I-9 and E-Verify Data

From the employer's perspective, the most important issue in this case is access to the I-9 and E-Verify data. At this time, it appears that employers who were on the Lexis-USVerify system do not have access to I-9 data which gives rise to a host of potential issues and problems. Unless these employers have managed to save the data in another format or system, it can be assumed that if they were served with an ICE Notice of Inspection (NOI), they would not be able to comply with the NOI's strict deadlines.

Furthermore, the electronic I-9 regulations state:

[a]n electronic generation or storage system must not be subject, in whole or in part, to any agreement (such as a contract or license) that would limit or restrict access to and use of the electronic generation or storage system by an agency of the United States, on the premises of the employer, recruiter or referrer for a fee (or at any other place where the electronic generation or storage system is maintained), including personnel, hardware, software, files, indexes, and software documentation.⁴

This provision will undoubtedly present major issues for employers if their chosen vendor is unable or unwilling to provide requested information in a timely fashion and they are not able to comply with an NOI.

Employers Caught in the Middle

It appears that Lexis originally communicated this problem to its clients via e-mail (see attached). The communication informed employers that Lexis was changing providers from USVerify to TALX (EQUIFAX provider) in less than one week, and directed them to contact USVerify to obtain their I-9 and E-Verify data and have it sent to Lexis for migration into TALX. The Lexis communication provided employers a very short timeframe in which to conduct the necessary due diligence with respect to TALX and/or to determine if they wanted to terminate their agreement with Lexis and move to another provider.

Meanwhile, USVerify informed employers that they were unable to comply with Lexis' demands and provide the requested data, unless Lexis or the employer entered into an agreement with USVerify to obtain the data at a cost to either the employer or Lexis. It also offered employers the opportunity to contract directly with USVerify to ensure continuity of service. It is unclear if Lexis would consider this a breach of contract on part of the employer.

⁴ 8 CFR §274a.2(e)(3).

Conclusion

Advising clients as to potential issues with an electronic I-9 provider is absolutely crucial, especially in light of increasing I-9 audits and the proliferation of “all-in-one” systems and reseller arrangements. If your client is using a background screening provider, applicant tracking system, or all-in-one solution, it is imperative that they perform due diligence to ensure they will have unrestricted access to their I-9 and E-Verify data, especially in the event the reseller agreement is terminated or if the client terminates the agreement with its vendor. Clients should be advised to ask the following questions:

- (1) Who owns the I-9 E-Verify data under the terms of the agreement?
- (2) Can the employer request a backup of the electronic I-9 and E-Verify data at no or little cost?
- (3) How often can the employer request such a backup and in what format will it be delivered?
- (4) What happens if the vendor closes shop or decides to assign the data to another provider?

Lastly, be sure to remind clients that there are specific regulatory electronic I-9 requirements that affect almost every aspect of a vendor’s system and relationship. These requirements are often confusing or unclear, and clients should be encouraged to discuss these issues with experienced counsel to ensure an I-9 electronic existence that is as smooth and painless as possible.

To access this content on your mobile device, [view the online version](#).

LexisNexis® Screening Solutions

Product Update Information

Recommended Action

Dear Valued Customer,

On June 27, 2011, LexisNexis will launch a new release of I-9 and EEV. We're excited to share the news with you as we continue to enhance our products and services to better service your needs. The June 28th release will expand upon our existing relationship with TALX Corporation, a provider of Equifax Workforce Solutions. As of this date, we will no longer be using USVerify as part of our EEV service.

Unfortunately, USVerify has been uncooperative with respect to the return of your I-9 and EEV-related data without the payment of exorbitant fees that we believe are unreasonable and unrealistic. Please be advised that you will likely receive communication from USVerify shortly about this transition. Therefore, we strongly urge you to follow up on USVerify's communication with a written request for the immediate return to LexisNexis of all documents and data relating to previous I-9s or EEVs that you have processed.

[Click here](#) to see a suggested sample request letter you could send to USVerify.

In addition, please be sure to take the following action in preparation for the transition:

- Close all open cases as authorized or not authorized by this Friday, June 24th
- Return the TALX Memorandum of Understanding, if you have not done so already, to LexisNexis Screening Solutions support at employment.support@lexisnexis.com in order to be properly transitioned on Monday, June 27th.

Sincerely,

Lee Rivas

Vice President

LexisNexis® Screening Solutions



Sample Form of Letter to USVerify:

Darrin Shaffer
Chief Executive Officer
USVerify, Inc.
5860 Ridgeway Center Parkway
Suite 110
Memphis, TN 38120

Dear Mr. Shaffer:

We understand that USVerify, Inc.'s relationship with LexisNexis Screening Solutions, Inc. is expiring and that we will be transitioned to another I-9/EEV service provider. In connection therewith, this letter shall serve as our formal request to return all data previously submitted to USVerify, Inc. on our behalf, including all data necessary to respond to an audit by U.S. Immigration and Customs Enforcement. Please ensure all such data is returned to LexisNexis no later than July 1, 2011.

Please send the Form I-9 images and associated data and audit trail, as well as E-Verify data and audit trail, to LexisNexis via a .zip file. The zip file must be PGP encrypted and sent to LexisNexis via FTP. The zip file must contain the following files:

1. A folder containing all I-9 image files (.pdf); and
2. An indexing data file with all the I-9 data, following the naming conventions LexisNexis has previously communicated to you (.mil file).

Please confirm upon receipt of this letter that you intend to comply with the above request. Such confirmation may be sent to [_____] at [_____].

Sincerely,
