

**ELECTRONIC VERIFICATION OF THE ABILITY TO WORK IN THE U.S.**  
**By Karen Sutherland**

**LEGAL BACKGROUND**

Beginning May 21, 2009, federal contractors and subcontractors are required to use the U.S. Citizenship and Immigration Services E-Verify system for verifying that employees are eligible to work in the United States. E-Verify is not a new program. It is currently used by over 100,000 employers, according to the U.S. Citizenship and Immigration Services. E-Verify checks the information on employee' I-9 forms electronically against records contained in Department of Homeland Security and Social Security databases.

This new rule implements Executive Order 12989, as amended by President Bush on June 6, 2008. It mandates that language be included in federal contracts requiring federal contractors to use E-verify to confirm the eligibility of the contactors' current employees who perform contract services for the federal government within the United States and all persons hired during a contract term. The rule applies to prime contracts that are over \$100,000 with a period of performance longer than 120 days. The clause mandating the use of E-Verify will also be required for subcontracts over \$3,000 for services or construction. Contracts of less than \$100,000 are exempt from the rule, as are contracts for items that are commercially available off-the-shelf.

Most employers are required to use E-Verify for all current employees who are assigned to the federal contract and to all new hires for the life of the contract, not just the new hires that are assigned to the contract. However, there are exceptions for institutions of higher learning, state and local governments, governments of federally recognized Indian tribes, and for sureties performing under a takeover agreement with a federal agency. These employers can choose to only use E-Verify on new and existing employees assigned to the covered federal contract. The rule also defines what is meant by "employee assigned to a federal contract." For example, the new rule applies even if the employees only work on a contract for a minimal time or on an intermittent basis.

The new rule applies to federal contracts awarded and solicitations issued after May 21, 2009, including contracts awarded to corporations, institutions of higher learning, state and local governments, etc.). The rule also applies to indefinite delivery/indefinite quantity contracts modified on a bilateral basis in accordance with FAR 1.108(d)(3) after the May 21, 2009 effective date of the rule. The new rule provides that if the remaining period of the contract is at least six months after the final rule's effective date, and the amount of work or number of orders expected under the remaining performance period is substantial, then the contract should be modified to include the clause.

Employers that are required to use E-Verify must enroll in the program within 30 days of the contract and sign a Memorandum of Understanding. Employers can enroll through the links that can be found at [www.dhs.gov/e-verify](http://www.dhs.gov/e-verify). Employers will have 90 days after enrolling in E-Verify to initiate verification inquiries for current employees, and to begin using the system for new hires. After the 90-day period, employers will be required to initiate verification of each new

employee within three days of hire. Pre-screening of job applicants is not allowed; the system may only be used for new hires after they have accepted the job.

Employers can continue to use E-Verify after the contract expires, but will need to update their company profile, and they will no longer be able to use E-Verify for existing employees after their federal contract expires. Employers whose federal contract has ended can terminate their participation in E-Verify if they want to do so.

The U.S. Chamber of Commerce filed suit in December 2008 to block the new rule from going into effect under the theory that the Bush administration exceeded its authority by making the rule mandatory. The government's answer to the lawsuit is not due until February 27, 2009, and it may take some time to be resolved.

### **PRACTICAL GUIDELINES**

- If you are a federal contractor or subcontractor, review your new contracts and contract modifications carefully to see if you are required to enroll in E-Verify, and then enroll if necessary.
- If you are a federal contractor and you are issuing subcontracts where the new rule would apply, be sure to include the appropriate clause in your subcontracts.
- If the new rule applies to you and you have policies, employment agreements or collective bargaining agreements relating to the release of confidential employee information, then update your policies, employment agreements or collective bargaining agreements if necessary to facilitate participation in E-Verify.
- If you have employees who would be subject to E-Verify who are covered by a collective bargaining agreement, you probably need to bargain the effects of the new rule since their employment would need to be terminated if an E-Verify check shows that they are not authorized to work in the United States. This process could be initiated by sending a letter to the union noting the change in the federal law and describing how the employer expects to comply with it and asking for the union's comments or input, if any.
- If your new hires are subject to verification using E-Verify, consider including language in your offer letters to the effect that the offer is contingent upon obtaining verification of eligibility to work under E-Verify.
- E-Verification is a hot topic, and the status of the new rule may change in light of the Chamber of Commerce lawsuit or the new Presidential administration.
- The rule is complex. Consider seeking legal help in implementing it for your workforce.

*This article is a summary and is not a complete analysis of the law, and should not be relied on. This article was current as of January 15, 2009; subsequent changes in the law or in its implementation may affect the accuracy of this article. The author, Karen Sutherland, is the*

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