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With the rejection of an 11th-hour appeal, a Maryland district court judge has permitted the new E-verify requirements for federal contractors to become effective September 8, 2009. Federal agencies are now permitted to require federal contractors to use E-Verify to confirm the work eligibility status of their employees.

Federal Contractors: Be Aware of New E-Verify Requirements in Contracts

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With numerous appeals filed, monitoring the evolving developments regarding the implementation of Executive Order 13465 requiring certain employers qualified as federal contractors to enroll in the Department of Homeland Security's employment verification system has been a full-time occupation.

This article highlights the fundamental basics that employers should be considering with regard to the practical implementation of Executive Order 13465 as amended by the Federal Acquisitions Regulations (FAR).¹

Highlights of E-Verify Requirements for Federal Contractors

- The "federal contractor" rule mandating E-Verify enrollment and usage for many federal government contractors and sub-contractors is effective September 8, 2009.
- The E-Verify federal contractor requirement will be *triggered only* upon the inclusion of specific FAR language in a new federal contract or a modification or amendment of an existing federal contract. Starting on September 8, 2009, companies will need to monitor their contracts to see if they have entered into a contract that requires them to use E-Verify as a federal contractor.
- Employers enrolled in E-Verify as federal contractors must check the employment eligibility of all new hires, as well as all existing employees assigned to work on the contract. Federal contractors will also have the option to check the employment eligibility of all employees of the company, which might be preferred if it is too difficult to determine which existing employees are assigned to work on the contract. Employees who normally perform support work, such as indirect or overhead functions, are *not* considered to be directly performing work under the contract. Similarly, employees who do not perform any substantial duties applicable to the contract are not considered to be assigned to work on the contract. The main factor in determining whether an employee is performing substantial duties applicable to the contract is whether the involvement is direct or indirect, and not

the amount of time spent working under the contract. These definitions are intentionally broad to permit interpretation in each individual situation, but will cause uncertainty for employers who wish to distinguish between existing employees who are assigned to work on the contract and those who are not working directly on the contract.

- Only companies subject to the E-Verify federal contractor requirement are permitted to use E-Verify to check the employment eligibility of existing employees. Companies without a federal contract or subcontract that requires the use of E-Verify *may not* use E-Verify to check the employment eligibility of existing employees.
- The Memorandum of Understanding (MOU) that federal contractor and subcontractor users of E-Verify will be signing requires that the company prepare a current I-9 form for the existing employees that it runs through the system, or ensure that the previously completed I-9 complies with the E-Verify documentation requirements that: 1) the employee's work authorization has not expired, and 2) that the employee's basis for work authorization has not changed. This is because E-Verify checks whether the individual has the documentation to show that he/she is authorized to work in the United States *today*. Older I-9 forms often will be based on documents that could not be used today to prove employment eligibility.
- I-9s are an integral part of the E-Verify program as well as the initial stage of most federal government enforcement efforts – as such, all employers, but especially those with federal contracts, should carefully review their I-9 compliance and take proper due diligence steps to improve.
- E-Verify does *not* replace Form I-9, the Employment Eligibility Verification form, nor its requirements and role in the employment eligibility verification process. For every new hire after November 6, 1986, the employer and employee must complete Form I-9 whether or not the employer is enrolled in E-Verify.
- The federal contractor rule applies to solicitations issued and contracts awarded *on or after* September 8, 2009. The preamble to the rule specifically notes that, in addition to new contracts awarded on or after that date, government agencies must amend, on a bilateral basis, existing indefinite term/indefinite quantity contracts if there is substantial work to be performed or goods to be provided within six months following the effective date of the final rule.
- The federal contractor rule will apply only to contracts under FAR that include some work in the United States, have performance terms of 120 days or more, and meet the value threshold. The value threshold for prime federal contracts applies to those with a value in excess of \$100,000.
- Federal contractors subject to the rule must include a provision requiring certain subcontractors to enroll in E-Verify. The requirement applies only to subcontracts for services or construction with a value above \$3,000 that involve work in the United States. Subcontracts for products and goods are not subject to the E-Verify requirement.
- Specifically exempted from the E-Verify requirement are contracts and subcontracts for: (1) commercially available, off-the-shelf (COTS) products; (2) items that would be COTS products but for minor modifications; (3) items that would be COTS products were they not bulk cargo; and (4) commercial services that are part of the purchase of a COTS product, are performed by the COTS provider and are normally provided for that product.

What are the Timelines for Federal Contractors Under the Rule?

Employers not yet enrolled in the program as a "federal contractor":

- Must enroll in the E-Verify program within thirty (30) calendar days of the contract award.
- Within ninety (90) days of enrolling in the E-Verify program, the contractor must begin to use E-Verify to initiate verification of the employment eligibility of all new hires (whether or not those new hires are assigned to the contract) within three (3) business days after the new worker's date of hire.
- For each employee assigned to the contract, the employer must initiate verification within ninety (90) calendar days after the date of enrollment or within thirty (30) calendar days of the employee's assignment to the contract, whichever date is later.

For employers already enrolled in the program as a “federal contractor” the following requirements are applicable:

- If the federal contractor has been enrolled in E-Verify as a federal contractor for ninety (90) calendar days or more, then the rule provides that the contractor must initiate verification of all new hires (whether or not they are assigned to the contract) within three (3) business days after the date of hire.
- If the federal contractor has been enrolled for less than ninety (90) calendar days, then – within those initial ninety (90) calendar days after enrollment in E-Verify as a federal contractor – the contractor shall initiate verification of all new hires (whether or not assigned to the contract) within three (3) business days after the date of hire.
- For each employee assigned to the contract, the federal contractor must initiate verification within ninety (90) calendar days after the date of the contract’s award, or within thirty (30) days after assignment to the contract, whichever date is later.

If a federal contractor wishes to re-verify its entire workforce, they will be given 180 days to do so.

As is the case with the I-9 forms, companies will not be required to verify employees who were hired by the company on or before November 6, 1986. Those employees are grandfathered in.

E-Verify will penalize any employer that continues to employ an individual after receipt of a final nonconfirmation with a fine of \$550 to \$1100 if the employer fails to submit proper notification. Further, a federal contractor risks debarment from E-Verify and thereby exclusion from this and future federal contracts if it fails to comply with the requirements. Improper use, or misuse, of the system could subject the employer to civil and/or criminal penalties. Finally, the Office of Special Counsel for Immigration-Related Unfair Employment Practices was created under IRCA to deter discriminatory practices in the employment and I-9 context. This may include practices under the E-Verify program.

Conclusion

E-Verify continues to be a *voluntary* program for employers that are not federal contractors as defined by FAR. Until the program has a better accuracy rate and demonstrates that it has the capacity to handle the influx of larger numbers of employers, it is recommended that employers *not* enroll in the E-Verify program unless specifically mandated by state or federal law or required by market conditions.

With the increase of federally available funds through the government’s stimulus packages, the amount of federal contractors will continue to rise. In addition, federal contractors will begin to appear in industries and markets not normally accustomed to the stringent compliance requirements imposed by federal contracts. As employers continue to seek stimulus dollars and enter into contracts with the federal government, the use of E-Verify will grow. So too will government enforcement actions surrounding these contracts. Prior to enrolling in E-Verify, please contact your current employment and immigration counsel to carefully review the requirements and the pitfalls of E-Verify.

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¹ For detailed analysis of Executive Order 13465, the Federal Acquisition Regulations (FAR) , and E-Verify, please see Littler’s April 2009 InSight entitled *A Basic Guide to E-Verify and Related Immigration Compliance: Everything Federal Contractors and Others Need to Know to Comply with E-Verify Requirements* as well as the firm’s in-depth August 2009 Littler Report entitled *An Employment Law Guide for Federal Contractors in the Wake of the American Recovery and Reinvestment Act of 2009*.