

ALERT

NOVEMBER 17, 2008

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E-VERIFY FOR FEDERAL CONTRACTORS AND SUBCONTRACTORS REQUIRED STARTING JANUARY 15, 2009

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Beginning January 15, 2009, many federal contractors and subcontractors doing work in the United States will have to start using E-Verify. The E-Verify system, previously called "Basic Pilot," is an automated system administered by the Department of Homeland Security ("DHS") to confirm the employment authorization of employees working in the United States.

The E-Verify system has not been without its critics—there have been reports of a high number of false positives, verifying an employee who is in fact not authorized, and false negatives, failing to confirm an employee who is authorized. Nevertheless, DHS and the current Administration have been strong proponents of this automated verification system. If the new regulation can successfully deter unlawful employment pursuant to federal contracts, mandatory E-Verify could be on the horizon for all employers.

WHAT CONTRACTS AND EMPLOYEES ARE COVERED BY THE E-VERIFY REQUIREMENT?

The E-Verify requirement amends the Federal Acquisition Regulation and applies to certain contracts with the United States government that are awarded after January 15, 2009. Generally, prime contracts over \$100,000 and subcontracts over \$3,000 are covered. Moreover, contracting officers are directed to amend, on a bilateral basis, existing indefinite-delivery/ indefinite-quantity contracts to require use of E-Verify for future orders if the remaining period of performance extends beyond June 15, 2009, and the amount of work or number of orders expected under the remaining performance period is substantial.

There are exceptions to E-Verify requirements. For instance, prime contracts for less than 120 days and contracts for commercially available off-the-shelf items (COTS) are excluded from the E-Verify requirement. Furthermore, contracts for work performed only outside the United States are not covered.

Notably, the E-Verify requirement covers *all* new hires during the contract period, regardless of whether the new hires are assigned to work on a federal contract. Institutions of higher education, state and local governments and federally recognized Indian tribes are exempted from this requirement, and they are only required to use E-Verify for new hires and existing employees assigned to federal contracts.

Federal contractors and subcontractors, however, are not required to use E-Verify for every existing employee in their workforce, but only for those employees who are assigned to work on the covered federal contract. For instance, existing employees who perform support work, such as general company administration or indirect or overhead functions, need not be input into the E-Verify system. Moreover, employees with certain security clearances or credentials issued pursuant to the Homeland Security Presidential Directive need not go through E-Verify given the already extensive background checks conducted for such employees. Nevertheless, employers may voluntarily choose to use E-Verify for all of their employees hired after November 6, 1986.

WHAT TIMEFRAMES GOVERN EMPLOYER ACTIONS UNDER E-VERIFY?

To date, employers—including federal contractors—have had the option of signing onto E-Verify as a voluntary program, and were not required to verify the authorization of already-hired employees. Starting January 15, 2009, federal contractors and subcontractors with covered contracts must use E-Verify.

Awarded contractors will have to sign onto E-Verify within 30 days of being selected for the job. The contractor must commence E-Verifying all new employees and those assigned to the contract within 90 days of registration. Once an employer has been enrolled in E-Verify for 90 days, the employer must initiate E-Verify checks on new hires within three (3) days after the new hire commences employment.

HOW CAN AN EMPLOYER REGISTER AND USE E-VERIFY?

With less than two months until the regulation's effective date, federal contractors may want to check out E-Verify registration requirements now. Signing onto E-Verify is done on-line at <https://www.vis-dhs.com/EmployerRegistration/StartPage.aspx?JS=YES> after navigating through a training program.

To check the employment authorization of an employee, the employer enters certain biographic information about the employee and his or her claimed immigration status. The E-Verify system will issue a confirmation or non-confirmation of work authorization/status.

Significantly, the E-Verify system does not provide information as to the legal immigration status of the employee, nor does it excuse the proper completion of the Department of Homeland Security's I-9 Employment Verification Form. E-Verify must be used in addition to completion of an I-9 Form.

To view the new regulation, go to <http://frwebgate1.access.gpo.gov/cgi-bin/TEXTgate.cgi?WAISdocID=953274427495+0+1+0&WASaction=retrieve>. This regulation was finalized after President

Bush issued an Executive Order in June 2008 mandating that federal contractors use E-Verify.

WHAT PENALTIES ARE THERE FOR NONCOMPLIANCE WITH E-VERIFY?

If an employer continues to employ an employee who has been issued a final non-confirmation of work authorization/status and fails to notify DHS of the continued employment, the employer may be assessed a penalty of between \$500 and \$1000 for each such notification failure. Such action also may result in civil and/or criminal penalties under the Immigration and Naturalization Act ("INA") for knowingly hiring or continuing to employ unauthorized aliens. Furthermore, a federal contractor risks debarment from federal contracts if it does not comply with E-Verify.

In sum, this new requirement for federal contractors requires close attention and compliance. The federal government is watching and E-Verify system's reach could be expanded in the future if E-Verify is successful in identifying unauthorized aliens and helping the government go after non-compliant employers.