



Employment Law Alert

Legal developments affecting human resource management

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E-Verify rule for federal contractors goes into effect on September 8, 2009

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The new E-Verify rules that require federal contractors to use E-Verify are set to take effect September 8, 2009, notwithstanding legal challenges. A federal district court in Maryland has dismissed a lawsuit by the U.S. Chamber of Commerce and other business groups challenging the implementation of the E-Verify rule for federal contractors. *Chamber of Commerce of the USA v. Napolitano*, No. AW-08-3444 (D. Md. Aug. 25, 2009). Thus, the last hurdle may have been removed, and E-Verify is set to take full effect on September 8, 2009, unless an appellate court issues a stay, and no appeal has yet been filed.

About E-Verify

E-Verify is Department of Homeland Security's (DHS's) electronic system that permits employers to verify the employment eligibility of new hires against DHS and Social Security Administration (SSA) databases. DHS estimates that more than 134,000 employers have enrolled in E-Verify, some of them having been required to do so under state and local legislation. Before an employer enrolls in the E-Verify program, it must enter into a Memorandum of Understanding (MOU) with DHS and SSA, agreeing to continue hiring employees lawfully and to ensure that "no employee will be unfairly discriminated against" as a result of the employer's participation. Violation of the MOU can lead to termination of an employer's participation in the E-Verify program and, thus, participation in federal contracts.

About FAR

The Federal Acquisition Regulation (FAR) E-Verify rules will require a federal contractor, and any covered subcontractors on a federal contract, to enroll in the E-Verify program within 30 calendar days of the contract or subcontract award date. The final rule applies to solicitations issued and contracts (1) awarded after September 8, 2009, and (2) that include the FAR E-Verify clause (73 FR 67704). Federal contractors may **NOT** use E-Verify to verify current employees until the rule becomes effective and they are awarded a contract that includes the FAR E-Verify clause.

Action required under the new rules

Prime Contractors

By September 8, 2009, federal contractors ***not yet enrolled, or who have been enrolled for less than 90 days, in the E-Verify program*** AND who have accepted federal contracts that extend over 120 days and are valued at \$100,000 or more, must

- enroll in the E-Verify program within 30 days from the date of contract award,
- begin verifying all new hires within 90 days of enrolling in E-Verify, and
- initiate verification of all existing workers assigned to a new federal contract within 30 days after the initial 90-day enrollment time frame.

Note that federal contractors currently enrolled in the E-Verify program for fewer than 90 days must initiate verification of existing workers assigned to a federal contract within 90 calendar days after the date of enrollment or within 30 calendar days of the employee's assignment to the contract, whichever date is later.

Contractors who ***have been enrolled in the E-Verify program for 90 days or longer*** must

- continue to verify all new hires within three days of hiring, and
- verify all existing workers assigned to a new federal contract within 90 days from the contract award.

Subcontractors

The FAR E-Verify rule covers a subcontract only if a prime contract includes the clause. For subcontracts that flow from such prime contracts, the rule extends the E-Verify requirement to subcontracts for services or for construction with a value greater than \$3,000. Existing indefinite-delivery / indefinite-quantity contracts should be modified by the government's contracting officers on a bilateral basis in accordance with FAR 1.108(d)(3) to include the clause for future orders, if the remaining period of performance extends at least six months after the final rule effective date and if the amount of work or number of orders expected under the remaining performance period is substantial.

Finally, if a federal contractor or subcontractor wishes to ***re-verify its entire workforce***, it will have 180 days to do so. This option will include both new hires and existing employees, including those not assigned to a federal contract. If a company elects to do so, it must notify the Department of Homeland Security. A federal contractor that chooses to exercise this option must initiate an E-Verify query for every employee in its workforce within 180 days of updating its company profile.

Exemptions

The final rule *exempts* certain contracts from E-Verify:

1. Contracts for commercially available off-the-shelf (COTS) items or items that would be COTS items but for minor modifications and related services
2. Contracts with a value of less than \$100,000
3. Contracts with performance terms of less than 120 days

4. Contracts for work to be performed outside the United States

What's next?

What should an employer do now, in advance of E-Verify enrollment?

- Ensure that I-9s are in perfect order and that all work authorizations are unexpired and updated
- Gingerly assess the composition of the workforce to determine potential casualties while avoiding gaining actual knowledge of employee use of false documents
- Determine if an existing or anticipated federal contract is subject to the rule
- Determine which, if any, current employees will be subject to the rule
- Determine if any exemptions apply or can be obtained
- Identify and train the future E-Verify administrator within the company, and understand how to implement E-Verify participation in a compliant and lawful manner
- Create companywide E-Verify and I-9 programs, policies, and procedures
- Institute corrective actions, where needed, particularly with regard to employees with unconfirmed employment authorizations

Be aware

E-Verify employers should know that U.S. Immigration and Customs Enforcement (ICE) is data mining the E-Verify database in order to detect violations, such as failing to use E-Verify for *all* new hires and failing to terminate employees after receipt of a final non-confirmation of work authorization. Further, ICE can also detect instances of identity theft, where an employee uses valid Social Security and Permanent Resident cards and those cards are in use at multiple locations throughout the United States.

If you would like more information about the topics covered in this alert, please contact your Nixon Peabody attorney or:

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