

THE IMMIGRATION EDGE

Employers Awarded Federal Contracts Must Now Verify Employees' Work Authorization

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Effective September 8, 2009, employers with federal contracts must begin checking work authorization for employees through the government E-Verify system. The rule applies to federal contractors and subcontractors, including those who receive American Recovery and Reinvestment Act Funds. E-Verify is an Internet-based program operated by the Department of Homeland Security agency, U.S. Citizenship and Immigration Services ("USCIS"), for employers to cross-check a worker's birth date, name, Social Security information, and visa and immigration status against records contained in Homeland Security and Social Security Administration ("SSA") databases. Employers who enroll in the program must use it uniformly for employees, regardless of citizenship.

E-Verify is available to all employers and there is no fee for enrollment, but the rule, stemming from the Federal Acquisition Regulation, now imposes its use on federal contractors and subcontractors for all employees assigned to federal contracts, and all new hires.

Does the Rule Apply to All Federal Contracts?

The rule does not apply to all pre-existing contracts. It applies only to new contracts executed or modified September 8, 2009, or thereafter, with the following:

- The contract includes a Federal Acquisition Regulation ("FAR") E-Verify Clause.
- Prime federal contract provides for
 - a period of performance longer than 120 days, and
 - a value above \$100,000.
- Subcontract, under a prime contract that includes the FAR clause, provides
 - for services or for construction (subcontracts that only provide supplies, such as food, are exempt from the rule); and
 - with a value over \$3,000.

Employers with federal contracts for work solely outside the United States, including the 50 States and the District of Columbia, Guam, Puerto Rico and the U.S. Virgin Islands, are not obliged to use E-Verify.

Must the Entire Workforce be Processed Through E-Verify, Regardless of Hire Date and Regardless of Citizenship?

Not all employees are subject to E-Verify processing. Existing employees not assigned to any federal contract are not subject to E-Verify. Federal contractor participants in E-Verify must use E-Verify for the life of the contract, and for the following types of employees:

- All new employees, regardless of citizenship, following completion of the Employment Eligibility Verification Form ([I-9](#)); and
- All existing employees, regardless of hire date and citizenship, who are classified as "employees assigned to the contract."

Some employees are exempt:

- Employees hired before November 6, 1986;
- Employees with certain types of U.S. Government security clearances;
- Administrative support personnel with indirect or overhead functions, and without any substantial duties under the contract; and
- Employees who do not work on federal contracts within the United States, including the 50 States and the District of Columbia, Guam, Puerto Rico and the U.S. Virgin Islands, are excluded.

Otherwise, to comply with the rule, the employer must use E-Verify for even senior, high-level and U.S. citizen corporate management employed with the company, if the person works on federal contracts for the employer.

A federal contractor may elect to verify the entire workforce, but must do so in a nondiscriminatory fashion.

When Does the Employer Need to Start Using E-Verify?

When a contractor wins the bid on a federal contract that contains the FAR E-Verify clause, the contractor and any covered subcontractors on the project are required to enroll in the E-Verify program within 30 calendar days of the award date, and to implement the employment authorization checks within 90 days of the award date. After this 90-day phase-in period, the employer must initiate verification of each newly hired employee within three business days after his or her start date. Following is a summary of the timing requirements:

- Enroll in E-Verify within 30 days after the contract award;
- By the 90th day after the contract award,
 - Begin verifying each newly hired employee within three business days after his or her start date;
 - Enroll existing employees assigned to the contract; and
- After enrollment in E-Verify for 90 days, continue to initiate verification of newly hired employees within three business days of the employment start date.

What Are the Employer's Obligations if the Employee's Authorization Cannot be Verified?

E-Verify can produce complications when an employee's name, birth date, Social Security number or immigration status is submitted and does not match the combination associated with any government data. In that case, E-Verify alerts the employer and triggers a nonconfirmation notice requiring follow up to rectify errors within eight days. The employer must allow time to resolve the discrepancy, and not terminate the employee unless the discrepancy cannot be resolved in a reasonable period of time.

Does Using E-Verify Give the Employer a Safe Harbor Against Immigration Enforcement?

E-Verify does not give the employer a safe harbor from immigration enforcement actions. Each employer still must take measures not to knowingly employ persons who lack legal authorization to work in the United States. In addition, employers enrolled in E-Verify must sign a [Memorandum of Understanding](#) ("MOU") that requires agreement to provide access to company records. Under the MOU, Homeland Security is permitted to conduct any enforcement activity authorized by law. The MOU contains specific provisions for federal contractors.

More information on the program is available on the E-Verify [website](#).

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