



New E-Verify Rules For Federal Contractors

Insights

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A final rule just published in the Federal Register amends the Federal Acquisition Regulation (FAR) to require certain federal contractors and sub-contractors to use the E-Verify system. All federal solicitations issued and contracts awarded after January 15, 2009 will include a clause related to the new rule.

The E-Verify System was established by the U.S. Citizenship and Immigration Services (USCIS) to verify the employment eligibility of newly-hired employees against the information contained in the Social Security Administration, USCIS, and other government databases. Under the new rule, federal contractors and subcontractors will be required to verify through E-Verify the employment eligibility of all new-hires and all existing and new employees directly performing work on the covered federal contract, during the term of the covered contract. Existing indefinite-delivery/indefinite-quantity federal contracts will be amended to include the E-Verify clause for future orders if the performance period extends at least to July 16, 2009 and the work or number of orders will be or is expected to be "substantial."

Coverage Has Exceptions

The rule covers prime federal contracts with a value of at least \$100,000 and a period of performance of 120 days or longer. A contract is not covered by this rule if: 1) the work will be performed only outside the U.S.; 2) the performance period is less than 120 days; 3) it includes only commercially available off-the-shelf (COTS) items (or but for minor modifications would be COTS items); or 4) it is for a value of less than \$100,000. The rule also does not apply to prime contracts for food and agricultural products shipped as bulk cargo and which would otherwise be classified as COTS items.

Subcontractors are covered only if the prime contract includes a clause covering the subcontract and only for services or construction with a value of \$3,000 or more. In exceptional circumstances, the head of the contracting activity is allowed to waive the requirement to include the E-Verify clause in the contract or, after the contract award, to waive the E-Verify requirements temporarily or for the period of performance.

Institutions of higher education, state and local governments, federally recognized Indian tribes, and sureties operating under a takeover agreement with a Federal agency pursuant to a performance bond are required to verify only employees assigned to the covered federal contract.

Employees holding an active security clearance of confidential, secret or top secret or who have undergone background investigations under the Homeland Security Presidential Directive (HSPD-12) are exempt from verification requirements.

Employees are not considered to be directly performing work under the contract if they normally perform general company administration or indirect or overhead functions, and do not perform any substantial duties on an individual contract.

Time Is Phased In

Federal contractors and subcontractors who are not currently enrolled in E-Verify must enroll within 30 calendar days of the award of the contract that requires E-Verify participation. Contractors enrolling for the first time in E-Verify must begin using the system to verify new employees within 90 days of enrollment. After the 90-day period, the contractor must initiate the E-Verify verification of the newly-hired employees within three business days of their start date of employment.

Federal contractors and subcontractors who have been enrolled in E-Verify for more than 90 days are required to continue to submit verification queries to E-Verify within three business days of the newly-hired employee's start date but must start using E-Verify for existing employees assigned to perform work on the contract 90 days from the contract award date. Contractors or subcontractors who have been enrolled in E-Verify for less than 90 calendar days are allowed 90 calendar days from the date of enrollment in the system to initiate verification of newly-hired employees.

Contractors must continue to use E-Verify for all new hires during the validity of the covered federal contract. While pre-screening of employees is not allowed, the Form I-9 and E-Verify query may be completed prior to the start date so long as the employee has been offered and has accepted the position.

The final rule provides the option to verify all employees, including existing employees not assigned to the federal contract. If you choose this option, you must notify the USCIS and begin initiating verifications for the entire workforce within 180 days of this notification.

What It All Means

President Bush amended Executive Order #12989 on June 6, 2008 to require all federal contractors to use E-Verify during the term of the federal contract as a condition for future federal contracts. The FAR Counsel issued a proposed rule to implement the amendments covering federal contracts that met the micro-purchase threshold of \$3000. This final rule brings relief to small businesses by increasing the simplified acquisition threshold to \$100,000. The final rule also extends the timing for enrolling in E-Verify (30 calendar days instead of three business days) for first-time users and provides the option to verify all employees of the contractor, including existing employees not assigned to work on a federal contract.

You should review any current federal contracts, any bids and/or solicitations for future federal contracts, and the scope of any applicable contracts (in particular, contracts on which current

contracts, and the scope of any applicable contracts (in particular, contracts on which current employees are working or will be assigned to work) to determine whether and when the requirements of this rule will need to be implemented. We also recommend auditing of the company's current Form I-9 compliance and retention procedures for all I-9 Forms for current employees.

For more information about this new requirement, contact any member of our Global Immigration Services Group.

This Legal Alert provides information about a specific new rule. It is not intended to be and should not be construed as legal advice for any particular factual situation.