

Immigration Alert: E-Verify Rule for Federal Contractors To Go Into Effect September 8, 2009

8/31/2009

On August 26, 2009, a federal judge in Maryland upheld the legality of the federal regulation (published at 73 Fed. Reg. 67,651 (Nov. 14, 2008)) that will require most federal government contractors to use the E-Verify system to verify the employment eligibility of new hires, as well as certain existing employees. With this ruling, the regulation will take effect as planned on September 8, 2009, requiring that a new E-Verify clause be included in covered federal contracts awarded, solicited, or modified on or after that date. Once an employer becomes subject to the federal contractor E-Verify provisions, it will be required to verify not only new hires, but also all existing employees who perform work assigned under the contract.

As explained in our earlier Client Alerts (found [here](#) and [here](#)), E-Verify is an electronic system administered jointly by the Department of Homeland Security (DHS) and the Social Security Administration (SSA) for the verification of employment authorization. E-Verify provides access to federal databases to help employers determine the employment eligibility of new hires and the validity of their Social Security numbers (SSNs).

Important Timing and Practical Considerations

How Long Will a Federal Contractor Have To Enroll in E-Verify?

It is important to note that while the rule will take effect on September 8, 2009, employers who are not already enrolled in

E-Verify will **not** be required to enroll in E-Verify until they receive a federal contract award or renegotiation of an existing federal contract, containing the E-Verify clause. **From the date the employer receives the new, modified, or renegotiated federal contract, it will have 30 days in which to enroll in**

E-Verify and execute a Memorandum of Understanding (MOU).

Current voluntary E-Verify participants who receive a new, modified, or renegotiated federal contract will need to update the company profile on the [E-Verify Web site](#) through the "Maintain Company" page to designate "Federal Contractor," and will have to:

- Complete a new tutorial
- Decide whether to select the "all employees" option ([see below](#))
- Continue to E-Verify all new hires

- E-Verify "employees assigned to the contract." (This does not include employees who normally perform support work—for example, general company administration or indirect or overhead functions—and who do not perform any substantial duties applicable to an individual contract.)

By When Must a Federal Contractor Begin Verifying New Hires?

Within 90 days of enrolling, employers must initiate queries on all new hires. This 90-day phase-in period applies only to employers newly enrolled in E-Verify. Employers that are already enrolled in E-Verify at the time their federal contract is awarded, modified, or renegotiated are still subject to the requirement of initiating an E-Verify query within three days of a new hire. Thereafter, employers must run the E-Verify query within three days of a new hire.

What Are the Timing and Practical Considerations for Verifying Existing Employees?

The rule requires employers to verify all employees currently assigned to work under the contract within 90 days after enrollment, or within 30 days of the employee's assignment to the contract, whichever is later. For those employers already enrolled in E-Verify, they still have 90 days from the date the federal contract is awarded, modified, or renegotiated to verify employees assigned to work under the contract. Note that an assignment of any duration to the federal contract triggers this requirement. *In many cases it may be necessary to complete new I-9s for existing employees, particularly if the documents they presented with their original I-9s have expired, or if their status has changed since their I-9 was originally completed.* Please note that the E-Verify Photo Screen Tool requires employers to keep photocopies of an employee's I-551 (Permanent Resident Card) or I-766 (Employment Authorization Document) if the employee presents one of these documents in connection with the I-9 process. Note that if an employee has already been verified through E-Verify, he or she does not need to be re-verified if he or she is later assigned to work under a federal contract containing the E-Verify clause.

Do We Have the Option of Verifying Our Entire Workforce?

Yes, once a federal contractor becomes subject to the rule by receiving a new or modified contract containing the E-Verify clause, it may choose to verify the entire workforce, rather than only new hires and employees assigned to the contract. **If an employer chooses this option, it must initiate queries on the existing workforce within 180 days of enrollment or opting in.** (This is done by modifying the company profile through the "Maintain Company" page on the [E-Verify Web site](#).)

Are All Federal Contracts Subject to this Rule?

Some contracts are not subject to the rule. They include:

1. contracts for a period of performance of fewer than 120 days
2. contracts valued at less than \$100,000 (subcontractor threshold remains at \$3,000 and the rule applies only to subcontractors if a prime contract includes the clause)
3. contracts where all work is performed outside the United States
4. contracts for commercial off-the-shelf (COTS) products which are exempt.

What is a COTS Product?

A COTS product is a commercial item sold in substantial quantities in the commercial marketplace and offered to the government in substantially the same form as to the general public. Most commercially sold food and agricultural products qualify as COTS.

Are Any Employees Exempt from E-Verify?

Employees who hold an active confidential, secret, or top-secret security clearance are exempt from E-Verify, as are employees to whom credentials have been issued pursuant to HSPD-12. However, Transportation Worker Identification Credentials (TWICs) are not exempt. More information on TWICs is available [here](#).

Can I E-Verify a Prospective Hire Prior To Making a Job Offer?

No. As expressly indicated in the MOU required to participate in the E-Verify program, use of E-Verify may only occur once a job offer has been made and accepted by the applicant. Should an employer use E-Verify for any purposes other than as authorized by the MOU, the employer may be subject to appropriate legal action and termination of its access to the E-Verify system.

Is an Employee Required To Provide His or Her Social Security Number on the I-9 Form?

Yes. For an E-Verify employer, the employee must provide his or her Social Security number if the employee has one. If the employee has applied for and is waiting to receive a SSN, the employer should make a notation on his or her Form I-9 and proceed with E-Verify upon receipt of the SSN.

Can an Employer Elect To Terminate Their Participation in the E-Verify Program Once the Federal Contract Has Ended?

Yes. Employers can terminate their participation by selecting the "request termination" link in the E-Verify system. An employer's obligations under the MOU will continue until this request is made, even if the federal contract has already ended. If an employer elects to continue participation in the E-Verify system even after the federal contract has ended, it may do so but the employer should update their company profile through the "Maintain Company" page.

If an employer has elected to participate in the E-Verify program separate from the award, modification, or renegotiation of a federal contract with the E-Verify clause, the employer can elect to terminate its participation in E-Verify at any time. However, so long as the federal contract remains in effect, E-Verify participation by the employer must continue.

Getting Ready/Next Steps

Employers that are, or expect to be, a party to a federal contract that will fall under the scope of the new regulation should consult with legal counsel and take the following steps:

1. Notify your federal contracts team and alert them to the new Federal Acquisition Regulation (FAR) clause for any future contracts.
2. Determine if you have any indefinite-delivery/indefinite-quantify (ID/IQ) contracts that may be subject to modification.
3. Ensure regular/ongoing communication lines between employees with federal contracts responsibility and employees with I-9/E-Verify responsibility.
4. Review/audit existing I-9s to ensure your I-9s are in order.
5. Once participation in E-Verify has commenced, you must post the notice provided by the DHS indicating such participation, as well as the anti-discrimination notice issued by the Office of Special Counsel for Immigration-Related Unfair Employment Practices at the Department of Justice. The posting must take place in a prominent place that is clearly visible to prospective employees and all employees who are to be verified through the system.

USCIS will be hosting a number of webinars in the month of September about the E-Verify program. For more information, or to sign up for any of the scheduled webinars through their Web site, click [here](#).

For more information on E-Verify, watch a video podcast of Mintz Levin's May 21, 2008 webinar on this subject, available [here](#).

For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

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