

UNDERSTANDING OTHER ASPECTS OF EMPLOYMENT LAW

by

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I. THE E-VERIFY RULE

E-Verify is an Internet-based system operated by the Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) that allows employers to verify the employment eligibility of their employees, regardless of citizenship. Based on the information provided by the employee on his or her Form I-9, E-Verify checks this information electronically against records contained in DHS and Social Security Administration (SSA) databases.

On June 6, 2008, the President issued Executive Order 13465 "Economy and Efficiency in Government Procurement through Compliance with Certain Immigration and Nationality Act Provisions and the Use of an Electronic Employment Eligibility Verification System," providing that "Executive departments and agencies that enter into contracts shall require, as a condition of each contract, that the contractor agree to use an electronic employment eligibility verification system designated by the Secretary of Homeland Security to verify the employment of:

- all persons hired during the contract term by the contractor to perform employment duties within the United States; and
- all persons assigned by the contractor to perform work within the United States on the federal contract."

The Federal Acquisition Regulation (FAR) was therefore amended to require federal contractors to use E-Verify, which is the system designated to implement the Executive Order.

FEDERAL CONTRACTS AFFECTED BY THE RULE

What is the E-Verify clause?

The rule requires the insertion of the E-Verify clause into applicable federal contracts, committing Government contractors to use E-Verify for their new hires and all employees (existing and new) assigned to any given federal contract.

What is the acquisition threshold for this rule?

The rule requires the insertion of the E-Verify clause for prime federal contracts with a period of performance lasting longer than **120 days** and with a value above the simplified acquisition threshold (**\$100,000**).

Does the rule apply to subcontracts?

The rule only covers subcontractors if a prime contract includes the clause. For subcontracts that flow from those prime contracts, the rule extends the E-Verify requirement to subcontracts for services or for construction with a value over **\$3,000**.

Does the rule extend to contracts outside the United States?

The rule applies only to employees working in the United States, which is currently defined to include the fifty States and the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands.

Does the rule apply to existing indefinite-delivery/indefinite-quantity contracts?

Existing indefinite-delivery/indefinite-quantity contracts should be modified by 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 the amount of work or number of orders expected under the remaining performance period is substantial.

Types of Contracts Exempted

What types of prime contracts are exempt from the rule?

The rule exempts:

- Contracts that include only commercially available off-the-shelf (COTS) items (or minor modifications to a COTS item) and related services;
- Contracts of less than the simplified acquisition threshold (\$100,000);
- Contracts less than 120 days; and
- Contracts where all work is performed outside the United States.

What is considered to be a COTS item?

A COTS item is a commercial item that is sold in substantial quantities in the commercial marketplace and is offered to the government in the same form that it is available in the commercial marketplace, or with minor modifications.

Are contracts for agricultural and food products exempt from the rule?

Nearly all food and agricultural products fall within the definition of “commercially available off-the-shelf (COTS)” items. Federal contracts for COTS items are exempt from the rule. Federal contracts for food and agricultural products shipped as bulk cargo, but that otherwise would be considered COTS items, such as grains, oils and produce are also exempt.

Subcontracts that only provide supplies, such as food, are exempt from the rule.

EMPLOYEES AFFECTED BY THE RULE

As a federal contractor, which employees may I verify through the E-Verify system?

As a federal contractor participant in E-Verify, you are required to use E-Verify for:

- All new employees, following completion of the Employment Eligibility Verification Form I-9 (Form I-9); and
- All existing employees who are classified as “employees assigned to the contract.”

Employees whom you have already verified through E-Verify should not be re-verified. However, an employee’s previous employment authorization through E-Verify from another employer does not satisfy your obligation to use E-Verify once you have hired them.

Those who have an active federal agency HSPD-12 credential or who have been granted and hold an active U.S. Government security clearance for access to confidential, secret, or top secret information in accordance with the National Industrial Security Program Operating Manual do not need to be verified.

Under the rule, only those employers that win a contract or subcontract that includes the E-Verify clause may run existing employees through E-Verify. A federal contractor must verify their new hires and the employees who are assigned to the contract, and may elect to also verify their entire workforce.

There are some exceptions to the requirement to use E-Verify for all new hires. The exceptions apply to institutions of higher learning, state and local governments, governments of federally recognized Indian tribes and for sureties performing under a takeover agreement with a federal agency. Under the rule, such entities may choose to only use E-Verify on new and existing employees assigned to the covered federal contract.

What is an “employee assigned to the federal contract”?

The rule defines an “employee assigned to the federal contract” as any employee hired after November 6, 1986, who is directly performing work in the United States under a contract that includes the clause committing the contractor to use E-Verify. An employee is not considered to be directly performing work under the contract if the employee normally performs support work, such as indirect or overhead functions, and does not perform any substantial duties under the contract.

My employee is working on a contract for a minimal amount of time. Is he or she subject to E-Verify?

Yes. The rule does not exempt employees based on the intermittent nature of the work or the length of time spent performing the work.

One of my employees was run through E-Verify by a previous employer. Do I need to run this employee through E-Verify again?

Yes. Under the rule, federal contractors are required to enter the worker’s identity and employment eligibility information into the E-Verify system following completion of the Form I-9 at the time of hire.

One of my employees was previously run through E-Verify by my company. Do I need to run this employee through E-Verify again?

No. Once an employee has been run through E-Verify they should not be re-verified through E-Verify by the same employer.

Must I verify all new employees? What are the exceptions to this requirement?

The rule requires most federal contractors to use E-Verify for all new employees, regardless whether the employees are assigned to a federal contract.

Federal contractors who are state and local governments, governments of federally recognized Native American tribes, and sureties performing under a takeover agreement entered into with a federal agency pursuant to a performance bond need only use E-Verify for employees assigned to a covered federal contract.

What employees are not considered to be directly performing work under a contract and therefore excluded?

Those employees who normally perform support work, such as indirect or overhead functions, and do not perform any substantial duties applicable to the contract, would be excluded.

**My employee has been previously confirmed as work authorized through E-Verify but is moving to another contract.
Do I need to run him or her through E-Verify again?**

No. Once an employee has been run through E-Verify and employment authorization has been confirmed, the employee should not be reverified through E-Verify again by the same employer.

Are there any exceptions to verify employees with certain credentials and security clearances?

Yes. The federal contractor is not required to perform employment verification using E-Verify for any employee who has been granted and holds an active federal agency HSPD-12 compliant credential or a U.S. Government security clearance for access to confidential, secret, or top secret information in accordance with the National Industrial Security Program Operating Manual. The employer still must complete the Form I-9 at the time of hire for such employees.

Can my subcontractor verify under my MOU?

No. Each employer must enter into its own MOU with DHS and SSA.

BEFORE YOUR COMPANY ENROLLS IN E-VERIFY

**As a current or prospective federal contractor,
am I required by the final rule to enroll in E-Verify now?**

The final rule applies to solicitations issued and contracts awarded after the applicability date of the final rule. The final rule will become applicable to contractors on September 8, 2009. All employers, including federal contractors, may enroll in E-Verify at any time without waiting for the applicability date. Under the final rule, employers are required to enroll in E-Verify if and when they are awarded a federal contract or subcontract that requires participation in E-Verify as a term of the contract.

If you wish to enroll in E-Verify before the applicability date of this rule you may do so now. Enrolling now may help you become familiar with the system and may make it easier for you to use E-Verify if and when you are awarded a federal contract. Verification of employees through E-Verify is limited to new hires only, unless you are a federal contractor who has been awarded a contract on or after September 8, 2009.

If you have already enrolled in E-Verify and you are awarded a federal contract after September 8, 2009, you will need to update your company profile through the “Maintain Company” page once the contract has been awarded. Once you designate your organization as a federal contractor, all E-Verify users at your company will need to take a federal contractor tutorial that explains the new policies and features that are unique to federal contractors.

My company was just awarded a federal contract and the rule is now in effect.

When is my company required to enroll in E-Verify?

When a contractor wins the bid on a federal contract that contains the 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 contract or subcontract award date.

Usage of E-Verify also applies to indefinite-delivery/indefinite-quantity contracts modified after the September 8, 2009 effective date.

How do I enroll my company in E-Verify?

Before you can start using E-Verify, you need to enroll your company in the program. When you enroll your company, you will be asked to provide basic contact information for your company and agree to follow the rules of the program. At the end of the enrollment process, you will be required to sign a “Memorandum of Understanding (MOU) that provides the terms of agreement between your company and DHS.

You can register your company at the U.S. Citizenship and Immigration Services website:

<http://www.uscis.gov>

During the E-Verify company enrollment process, you will be asked “Which category best describes your organization?” If you have been awarded a federal contract after September 8, 2009, you should select “federal contractor” from the drop-down box.

Once you have indicated that you are a federal contractor, the system will then prompt you to identify the federal contractor category (e.g., institutions of higher education; state and local governments and governments of federally recognized Indian tribes; and certain sureties) that best describes your organization along with what groups of your current employees you plan to verify (i.e., current employees assigned to the federal contract or your entire workforce).

Once you have completed the enrollment process, USCIS will review your information and activate your account. After the account is activated, you will receive an email with your login instructions, user ID, and password.

The proposed FAR rule would require federal contractors to use E-Verify for both new hires and existing employees who work on a new federal contract.

Does the federal government use E-Verify for both new hires and existing employees?

Yes. Federal agencies verify employment eligibility of new and existing employees. In most instances, the federal government goes well beyond an E-Verify check to confirm work eligibility as part of a variety of suitability and other background checks that are required to be performed on federal employees.

These background checks may include, but are not limited to:

- FBI fingerprint and name check;
- Checks against local law enforcement databases;
- Written inquiries to educational institutions, previous employers, and neighbors;
- Credit check;
- Checks to verify name, SSN, date of birth, and citizenship; and
- Checks against other federal and private data sources.

For all new hires, federal agencies are required to use E-Verify to verify their employment eligibility. Additionally, many new hires also subsequently undergo background investigations and an FBI fingerprint and name check.

For both new and existing employees, federal agencies are required by Homeland Security Presidential Directive – 12, “Policy for a Common Identification Standard for Federal Employees and Contractors” to follow certain credentialing standards prior to issuing personal identity verification cards. These standards include conducting a background investigation which includes verification of name, DOB, and SSN (among other data points) against federal and private data sources. This includes a check against Social Security Administration (SSA) records to validate social security numbers. Additionally, these standards require verification of work authorization for non-U.S. citizens against federal immigration databases.

How much will it cost my company to enroll in E-Verify?

Nothing; E-Verify is free. It is the best means available for determining employment eligibility of new hires and the validity of their Social Security Numbers.

My company is required to use E-Verify as a federal contractor for the first time. How do I proceed?

If your company has not yet enrolled in E-Verify, then you have 30 days from the date of contract award to enroll and 90 days from the date you enroll with E-Verify to initiate verification queries for employees already on your staff who will be working on the contract and to begin using the system to verify newly hired employees. After this 90-day phase-in period, you will be required to initiate verification of each newly hired employee within 3 business days after their start date. To meet this three-day requirement, employers may initiate verification of a newly hired employee before their start date if the employee has accepted the job offer and filled out the Form I-9.

Please note that pre-screening of job applicants is not allowed. Instead, the system may be used for new hires only after the employee has been offered the job and has accepted.

Also remember that you must continue to use E-Verify for the life of the contract for all your new hires, whether or not they are employees assigned to the contract, unless certain exceptions apply.

**My company enrolled in E-Verify, but did not enroll us
as a federal contractor.**

Does my company need to re-enroll to comply with this rule?

No. You do not need to enroll again, but you will need to update your company profile through the “Maintain Company” page. Please log in to E-Verify, go to the Maintain Company page, and select the option indicating you are a federal contractor. Once you designate your organization as a federal contractor, all users (including yourself) will need to take a brief federal contract tutorial that explains the new policies and features that are unique to federal contractors. When the employer changes its profile to reflect itself as a “federal contractor,” it will not be able to proceed with processing cases in E-Verify until it has taken the refresher tutorial.

**My company has already been using E-Verify for more than 90 days.
When must we begin verifying existing employees assigned to work
on a federal contract that contains the FAR E-Verify clause?**

If your company has been enrolled in E-Verify for more than 90 days, then you are required to continue to initiate verification of newly hired employees within **three business days** of their start date, but you have 90 days from the contract award date to begin using E-Verify for each employee already on your staff who are assigned to the contract. Your transition to using the system as a federal contractor does not allow you to stop using E-Verify for your new hires on the standard three-day schedule. The 90-day window in the FAR rule to start using E-Verify for new hires applies to new E-Verify users and is intended to provide additional implementation time.

Remember that you are required to continue using E-Verify throughout the duration of your federal contract for all new hires, whether or not they are employees assigned to the contract, unless your company falls under one of the exceptions to this policy.

**My company’s federal contract has ended.
May we continue to use E-Verify?**

Yes. Your company may continue to use E-Verify but you should update your company profile through the Maintain Company page. Additionally, you will no longer be able to run existing employees through E-Verify.

**My company's Federal contract has ended.
Do we need to notify USCIS if we no longer want to participate in E-Verify?**

Yes. Federal contractors who no longer wish to participate in E-Verify after a contract has ended can terminate their participation by selecting the "request termination" link in the E-Verify system. If your company fails to do so, then the terms of the MOU remain in place.

Option to Verify Entire Workforce

May I verify my entire workforce?

Yes. Federal contractors and subcontractors have the option of verifying their entire workforce, both new hires and existing employees – including those not assigned to a federal contract. If your company elects to do this, you must notify DHS by updating your company profile through the Maintain Company page if you are a current participant, or during enrollment if you are a new participant. A federal contractor that chooses to exercise this option must initiate an E-Verify query for each employee in the contractor's entire work force within 180 days of updating its company profile.

**The final rule instructs me that I must notify the
Department of Homeland Security if I plan to verify my entire workforce.
How do I do this?**

If your company plans to verify its entire workforce, you must notify the Department of Homeland Security (DHS) by updating your company profile through the "Maintain Company" page.

If your company is already enrolled in E-Verify and plans to verify its entire workforce, your program administrator must notify the Department of Homeland Security (DHS) by updating your company profile through the Maintain Company page if you are a current participant, or during enrollment if you are a new participant.

Once you have indicated you are a federal contractor, the system will then prompt you to identify the federal contractor category that best describes your organization. You will then have the option to select "all new hires and existing employees" indicating that you wish to verify your entire workforce through E-Verify. A federal contractor that chooses to exercise this option must initiate verifications for the contractor's entire work force within 180 days of updating their company profile.

Social Security Numbers

Is the employee required to provide his or her SSN on the Form I-9?

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

Additional Information for All Users

May I use E-Verify prior to making a job offer to a job applicant?

No. All users, including federal contractors, are prohibited from using E-Verify prior to a job offer and acceptance by the applicant. By signing the MOU to participate in E-Verify, all employers agree not to use E-Verify for pre-employment screening of job applicants, support for any unlawful employment practice, or any other use not authorized by the MOU. Should the employer use E-Verify procedures for any purpose 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 systems.

Does participation in E-Verify provide safe harbor from work site enforcement?

No. However, using E-Verify creates a rebuttable presumption that your company has not knowingly hired an unauthorized alien. Participation in the program does not provide a “safe harbor” from worksite enforcement, however.

If my company participates in E-Verify, are we required to notify applicants of our participation?

As an employer participating in E-Verify, you are required to post the notice provided by DHS indicating your company’s participation in the E-Verify program 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. Once you are enrolled, and able to log into the E-Verify online system, these notices can be found in the “On-line Resources” section.

Where can I find additional resources?

The Federal Contractor User Manual and Tutorial contain instructions and other related materials on E-Verify procedures and requirements.

Once your company enrolls in E-Verify and is able to log in to the system, these items are available under the “Online Resources.” In addition, you may also call E-Verify Customer Support at 1-888-464-4218.

For more information about unfair employment practices and verifying the employment eligibility of your employees, you may contact the Office of Special Counsel for Immigration Related Unfair Employment Practices, Civil Rights Division, United States Department of Justice, at 1-800-255-7688.

You can find more information at the U.S. Citizenship and Immigration Services website: <http://www.uscis.gov>

Notice: Legal Advice Disclaimer

The purpose of these materials is not to act as legal advice but is intended to provide human resource professionals and their managers with a general overview of some of the more important employment and labor laws affecting their departments. The facts of each instance vary to the point that such a brief overview could not possibly be used in place of the advice of legal counsel.

Also, every situation tends to be factually different depending on the circumstances involved, which requires a specific application of the law.

Additionally, employment and labor laws are in a constant state of change by way of either court decisions or the legislature.

Therefore, whenever such issues arise, the advice of an attorney should be sought.



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Scott Warrick combines the areas of law and human resources to assist organizations in
“Solving Employee Problems BEFORE They Happen.”

Scott uses his unique background of **LAW** and **HUMAN RESOURCES** to help organizations get where they want to go, which includes coaching and training managers and employees in his own unique, practical, entertaining and humorous style.

Scott Trains Managers and Employees ON-SITE in over 50 topics

Scott Warrick specializes in working with organizations to *prevent* employment law problems from happening while improving employee relations.

Scott's academic background and awards include:

- Capital University College of Law (Class Valedictorian (1st out of 233))
- Master of Labor & Human Resources and B.A. in Organizational Communication: The Ohio State University
- The Human Resource Association of Central Ohio's Linda Kerns Award for Outstanding Creativity in the Field of Human Resource Management and the Ohio State Human Resource Council's David Prize for Creativity in Human Resource Management

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