



## The E-Verify Program: Requirements for Federal Contractors

Employment, Labor & Benefits Practice Group

*Foster Swift Employment, Labor & Benefits Quarterly*

October 2009

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### **PRACTICE AREAS**

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On June 6, 2008, President Bush issued an amendment to Executive Order 12989 requiring federal contractors and subcontractors to use the Department of Homeland Security's E-Verify System to check whether their employees are eligible for lawful employment in the U.S. This order was held in abeyance when President Obama took office, to allow his administration to evaluate the E-Verify rule. That review has now been completed and enforcement of the E-Verify rule began on September 8, 2009. This article provides a summary of the E-Verify System.

### **WHAT IS E-VERIFY AND HOW DOES IT WORK?**

E-Verify is a free 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.

### **WHO IS REQUIRED TO USE THE E-VERIFY SYSTEM?**

An E-Verify clause must be inserted into applicable federal contracts awarded on or after September 8, 2009, committing government contractors to use E-Verify for their new hires and all employees (existing and new) assigned to any applicable federal contract.

Applicable contracts include prime federal contracts with a period

of performance longer than 120 days and a value above \$100,000. For subcontracts that flow from those prime contracts, the rule extends the E-Verify requirement for services or construction with a value over \$3,000.

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 an E-Verify clause for future orders if the

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remaining period of performance extends at least six months beyond September 8, 2009, and the amount of work or number of orders expected under the remaining performance period is substantial.

The following prime contracts are exempt from the E-Verify rule:

- 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 of less than 120 days; and
- Contracts where all work is performed outside the United States.

**WHEN AND HOW DO EMPLOYERS ENROLL IN E-VERIFY?**

When a contractor wins the bid on a federal contract requiring E-Verify, 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. Upon enrolling, basic contact information for the company must be provided, and the company must agree to follow the rules of the program. At the end of the enrollment process, a company representative will be required to sign a Memorandum of Understanding (MOU) that provides the terms of agreement between the company and DHS.

Once the enrollment process is completed, USCIS will review the information and activate the company's account. After the account is activated, an email will be sent, providing login instructions, user ID, and password.

Companies have 90 days from the date of enrollment with E-Verify to initiate verification queries for current employees 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, companies are 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. Pre-screening of job applicants is not allowed; the system may be used for new hires only after the employee has been offered the job and has accepted.

**WHAT NOTICES ARE REQUIRED?**

Employers participating in E-Verify are required to post a notice provided by DHS indicating the company's participation in the E-Verify program as well as an 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.