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# Labor & Employment

## Alert

### New E-Verify Requirements For Government Contractors Now Effective on Feb. 20, 2009

BY LYNN F. JACOB AND ROBERT E. KORROCH

On Nov. 14, 2008, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council issued a final rule that amended the Federal Acquisition Regulations (FAR), to implement the Employee Eligibility Verification system. Many federal contractors and subcontractors are scheduled to have additional employment-related obligations associated with the use of the E-Verify system to verify that certain of their employees are eligible to work in the U.S. Employers have now been given a brief reprieve. As a result of an interim settlement of a lawsuit challenging the regulations, the implementation of these new requirements has now been delayed from Jan. 15, 2009 until Feb. 20, 2009.

Information on registration for and use of the E-Verify program can be obtained via the Internet at the Department of Homeland Security web site: <http://www.dhs.gov/E-Verify>.

#### What is E-Verify?

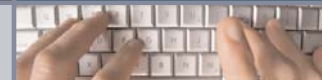
E-Verify (formerly known as the Basic Pilot/Employment Eligibility Verification Program) is a free Internet based data system operated by the Department of Homeland Security (DHS) in partnership with the Social Security Administration (SSA) that allows

enrolled employers to electronically verify the validity of social security numbers and eligibility of employees to work in the U.S.

#### Who Must Follow the New Rules?

- Employers that enter into prime government contracts above the simplified acquisition threshold (\$100,000 or more);
  - Employers with indefinite delivery/indefinite quantity (IDIQ) contracts where the performance extends past Aug. 20, 2009; and
  - Employers with construction or services subcontracts in excess of \$3,000 containing the E-Verify clause.
- Exemptions
- Contracts for commercially available off the shelf (COTS) items, which include agricultural products not shipped as bulk cargo;
  - Certain services associated with the provision of COTS items;
  - Contracts for work to be performed outside of the U.S.;

*continued*



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- Contracts with performance periods of less than 120 days.

### What Steps Must Be Taken by Feb. 20, 2009?

- If you are currently a covered government contractor or subcontractor, you must register with E-Verify and sign a memorandum of understanding which, among other things, contains a prohibition against employment discrimination as well as a prohibition against the use of the E-Verify system to pre-screen job applicants. If you are already using E-Verify, you must go on-line and change your status in the E-Verify system to “federal contractor;”
- If you get a new government contract or sub-contract with the FAR E-Verify clause or your indefinite-delivery/indefinite-quantity contract is modified after Feb. 20, 2009, you must enroll in the E-Verify program within 30 days of the award/contract modification.

### What Other Steps Must Be Taken?

- Within 90 days of enrollment in the E-Verify program, you must use the E-Verify system for all new employees working in the U.S., whether or not they are assigned to the government contract work. After the expiration of the 90 days, all new employees must thereafter be verified within three days of hire;
- Within 90 days of enrollment with E-Verify, you must use the E-Verify system for current employees hired after Nov. 6, 1986 working in the U.S. that are directly performing work on a contract that is required to have the E-Verify clause (the government contract). Thereafter, current employees must be verified within 30 days of assignment to the government contract;
- You have the option of verifying all of your employees, but you are not required to do so. If you choose to verify all of your employees, you must notify DHS of your decision to do so, either by updating your company profile if

you are a current participant in the E-Verify program or during initial enrollment if you are a new participant. You must then initiate a query on your entire workforce within 180 days of updating your company profile;

- You must post a new poster indicating your participation in the E-Verify program and certain anti-discrimination provisions;
- You must provide applicants and employees an opportunity to contest a Tentative Nonconfirmation in situations where there is a “mismatch” between the database information and the information you submitted;
- You must notify DHS if you continue to employ someone for which a Final Nonconfirmation was issued.

### Prohibitions

- You may not use the E-Verify system to pre-screen applicants. You may only submit the names of new hires that have been offered jobs and who have accepted the job;
- You may not screen employees selectively;
- You may not use the E-Verify system to discriminate against applicants or employees on the basis of national origin, citizenship or immigration status;
- You cannot take adverse action against an employee based upon information received during the E-Verify process unless the Program issued a Final Nonconfirmation. It is considered unlawful adverse action to prohibit an employee from working during the verification process.

*For more information on this topic and other matters pertaining to labor & employment law, please contact issue editor Lynn F. Jacob. For more information pertaining to government contracts please contact Robert E. Korroch*

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