

## **A Basic Guide to E-Verify and Related Immigration Compliance: Everything Federal Contractors and Others Need to Know to Comply with E-Verify Requirements**

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### **I. Background**

#### ***What is E-Verify***<sup>1</sup>

E-Verify is an Internet-based system operated by the Department of Homeland Security's U.S. Citizenship and Immigration Services (DHS) in partnership with the Social Security Administration (SSA) that allows participating employers<sup>2</sup> to verify<sup>3</sup> electronically the identity<sup>4</sup> and employment eligibility of their newly hired employees, regardless of citizenship. Specifically, the SSA<sup>5</sup> will verify that the name, Social Security number, and date of birth are correct, and the DHS will verify that the employee is in an employment-authorized immigration status.

Until recently, participation in E-Verify was completely voluntary. E-Verify expanded to all 50 states on December 1, 2004, and in the last few years - and particularly in 2008 - many states began making E-Verify mandatory<sup>6</sup> for their public contractors and the federal government enacted its own amendment to the Federal Acquisition Regulation ("FAR") mandating E-Verify for many of its contractors and some of their subcontractors.<sup>7</sup>

#### *E-Verify or Form I-9?*

The use of E-Verify does not replace the requirement<sup>8</sup> that all employers in the U.S. and all post-November 6, 1986,<sup>9</sup> hires properly complete Form I-9, the Employment Eligibility Verification form, as part of the employment eligibility verification process. This means that *in addition* to the mandatory completion of Form I-9, those who choose or are required<sup>10</sup> to do so, must also enroll in and use the E-Verify system.<sup>11</sup> As of April 3, 2009, all U.S. employers are required to use the latest version of Form I-9,<sup>12</sup> which contains the revised list<sup>13</sup> of acceptable types of supporting documents for the employment eligibility verification process.

#### *E-Verify: Federal and State Legislation*

Although it is beyond the scope of this article, there are situations in which state legislation concerning state contractors is in conflict with the requirements at the federal level. Employers must refer to each state's legislation as it affects state contracts.

Examples:

(A) State of Missouri: Under Missouri Revised statutes sections 285.525-550 (House Bill 1549 signed into law by Missouri Governor Matt Blunt on July 7, 2008 and effective January 1, 2009) any employer that contracts or receives a grant in excess of \$5,000 with the state or political subdivision and any employer that receives a state-administered or subsidized tax credit, tax abatement or loan must verify the employment eligibility of every new hire using the Basic Pilot/E-Verify Program. In addition, the State of Missouri requires that these employers sign a notarized affidavit for *all* hires affirming that the employer does not and will not knowingly employ any person who is an unauthorized worker in connection with the contracted services. The requirements that these employers contracting with the State of Missouri use E-Verify and that these employers sign an affidavit for all hires, meaning new and current employees, are problematic. First, E-Verify was implemented for *federal* contracts, not state contracts. Second, the

blanket requirement imposed by the State of Missouri that *all* employees who work in connection with the contracted services have been verified through E-Verify would violate the MOU that is signed when an employer registers with E-Verify, which prohibits the verification of existing employees. The rule permitting federal contractors to verify existing employees who are working on the contract is a limited exception to the normal E-Verify program and applies only to those covered under the federal contractor E-Verify Rule.

The Missouri bill shares similarities to other bills enacted in states such as Colorado, Georgia, Minnesota, Oklahoma, Rhode Island, and Utah. The difference is that this bill goes further by requiring employers with state-administered tax credits, tax abatement, or state-administered loans to also use E-verify.

(B) State of Utah: Utah Code section 63-99a-103(1)-(3), in reference to public works contracts, states that effective July 1, 2009, public employers may not enter into a contract for the physical performance of services in Utah with any contractor unless the contractor registers with and participates in the Status Verification System (SVS) to verify the federal employment authorization status of a new *employee*. The SVS includes E-Verify, the SSA's SSNVS, or an independent third-party system that is equally or more reliable than the other programs. This statute is problematic as there is no definition of *who* exactly is an *employee*. Thus, the term *employee* is ambiguous and it raises concerns as to how far-reaching this statute may be; specifically, whether this *employee* could be someone located across state lines.

## **Legislative History**

### *In General*

The Immigration and Nationality Act (INA) section 274A, as established by the Immigration Reform and Control Act of 1986 (IRCA), prohibits any "person or other entity" from knowingly hiring, or knowingly continuing to employ, any unauthorized alien. INA section 274A(b) provides for an "Employment Verification System," which requires that employers attest, after examination of documentation presented by the employee, that the person being hired, recruited or referred for employment is not an unauthorized alien. INA section 274A also provides for the assessment of civil monetary penalties and cease and desist orders against any employer that has knowingly hired or continued to employ an unauthorized alien, or that has failed to comply with the employment verification system mandated by INA section 274A(b).<sup>14</sup> Employers that engage in a "pattern or practice" of violating the prohibition against illegal employment of unauthorized workers may face criminal sanctions.<sup>15</sup>

The Illegal Immigration and Reform and Immigration Responsibility Act of 1996 (IIRIRA) requires that the Attorney General implement "employment eligibility confirmation" pilot programs. Under the programs, the Attorney General must establish a confirmation system through a toll-free telephone line or other toll-free electronic media that responds to inquiries about the identity and employment eligibility of individuals. In cases of nonconfirmation, the Attorney General must ensure that secondary verification is provided within ten working days after the date of tentative nonconfirmation. The basic pilot program, now known as "E-Verify," expanded to all 50 states on December 1, 2004. The program allows employers to electronically verify newly hired employees' work authorization documents.

### *Federal Contractors*

The Executive branch has long recognized that the instability and lack of dependability that afflicts contractors that employ unauthorized workers undermines overall efficiency and economy in government contracting. The first formal expression of this policy is found in Executive Order (E.O.) 12989, signed by President Clinton in February 1996. Twelve years later, on June 6, 2008, President George W. Bush issued E.O. 13465, the "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," amending E.O. 12989. On June 9, 2008, the Secretary of Homeland Security designated the "E-Verify system, modified as necessary and appropriate to accommodate the policy set forth in the Executive Order \* \* \* as the electronic employment eligibility verification system to be used by Federal contractors."

Effective June 30, 2009, the final rule requiring certain federal government contractors to use the E-Verify system to confirm their employees' eligibility to work in the United States will go into effect. The final rule was first published by the Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) in the Federal Register on November 14, 2008. It implements Executive Order 12989, as amended by President Bush on June 6, 2008.

### ***The Enrollment Process***

#### *Online Enrollment and MOU*

To enroll, employers should visit [E-Verify Enrollment](#) and follow the instructions. In addition to the online registration, employers that chose to participate in the program are required to enter into a memorandum of understanding (MOU) with the DHS and SSA. Under the MOU, employers must:

- post a DHS-proscribed notice visible to prospective applicants;
- give DHS the name, title and telephone numbers of its E-Verify representatives;
- require staff using the program to complete a tutorial;
- require that when an employee presents a "List B" document for I-9 identification purposes, the document includes a photograph;
- submit a verification request for each employee hired within three days of hiring;
- record the SSN verification number provided by the DHS on the employee's I-9 form; and
- allow periodic visits by the DHS for reviewing E-Verify-related records.

The employer must, as usual, retain the I-9 Forms for inspection. In addition, the MOU specifically prohibits employers from using E-Verify as a screening device.

#### *Use of E-Verify*

If the information provided by the worker matches SSA and DHS records, the employer will record the verification identification number and the result obtained from the E-Verify query on Form I-9 or print out a copy of the result and retain it with Form I-9.

On the other hand, if the information provided by the worker does not match SSA and DHS records, the employer will receive an "SSA Tentative Nonconfirmation" notice and/or a "DHS Tentative Nonconfirmation" notice. Upon receipt of such notice, the employer must provide the worker with a "Notice to Employee of Tentative Nonconfirmation" generated by the E-Verify system, whereby the burden shifts to the employee to either contest or not contest the nonconfirmation. The employee's decision is recorded on the employer's tentative nonconfirmation notice and both the employer and worker must sign it. If the worker chooses to contest the tentative nonconfirmation, the employer must print a second notice generated by the E-Verify system called a "Referral Letter," which contains information about resolving the tentative nonconfirmation, as well as the contact information for SSA or DHS, depending on which agency was the source of the tentative nonconfirmation. The worker then has eight federal government workdays to visit an SSA office or call DHS to try to resolve the discrepancy. Under the E-Verify MOU, if the worker contests the tentative nonconfirmation notice, the employer is prohibited from terminating or otherwise taking adverse action against the worker while he or she awaits a final resolution from the federal government agency. However, if the worker fails to contest the tentative nonconfirmation, or if SSA or DHS is unable to resolve the discrepancy, the employer will receive a notice of final nonconfirmation and the worker's employment may be terminated. In those cases where the nonconfirmation becomes final and the employer does not terminate the employee, the employment becomes a "knowing hire" of an unauthorized alien, subject to penalty.<sup>16</sup>

#### *Fees*

Currently, there are no fees associated with the use of the E-Verify system.

### ***Penalties for Noncompliance with E-Verify***

Needless to say, those employers that would enter into a contract with the federal government and are required to enroll in E-Verify, must register with E-Verify once the provision takes effect. Once enrolled in E-Verify, an employer must report to the DHS if it continues to employ an individual after receipt of a final nonconfirmation notice stating that the individual is not employment authorized. Continuing to employ such a person exposes the employer to a fine ranging from \$500 to \$1000.<sup>17</sup> This fine is in addition to civil monetary or criminal sanctions that can be levied against an employer for knowingly employing an illegal alien. In addition, failure to comply with the requirements of the E-Verify MOU for the period of performance of the contract may result in the termination of the contractor's MOU and denial of access to the E-Verify system in accordance with the terms of the MOU. In such a case, the contractor will be referred to a suspension or debarment official.

## **II. Federal Contractors Subject to the Rule**

The amendment to Executive Order 12989 and its implementing regulation require federal departments and agencies that enter into certain contracts to include, as a condition of those contracts, a provision that the contractor agree to use E-Verify to verify the employment eligibility of all new hires as well as all existing employees who are assigned to perform work under the contract.<sup>18</sup> The Executive Order is intended to enhance stability in the federal workforce by requiring federal contractors to take more rigorous employment eligibility verification measures.<sup>19</sup> By requiring federal contractors to take these steps, the executive branch achieves dual purposes: first, reinforcing the administration's commitment to worksite enforcement of immigration laws; and second, ensuring that federal contractors use a legal workforce and are not subject to loss of workers due to immigration enforcement actions.<sup>20</sup>

With the election of President Obama and the change in administration in January 2009, the effective date of all pending federal rules was delayed to allow the new administration to review the rules and potentially make changes or withdraw certain regulations.<sup>21</sup> In addition, the U.S. Chamber of Commerce and other plaintiffs filed a lawsuit challenging the Federal Contractor E-Verify Rule.<sup>22</sup> As a result of both the lawsuit and change in administration, the effective date of the Federal Contractor Rule was postponed to May 21, 2009. This postponement means that solicitations that the federal government makes prior to May 21, 2009, will not contain the E-Verify related contract clauses that the federal contractor regulation mandates.

### ***Types of Contracts Subject to the Rule***

#### *Prime Contracts*

The regulation requiring federal contractors to enroll in E-Verify applies only to contracts under the FAR that include some work in the United States, have performance terms of 120 days or more and meet the value threshold.<sup>23</sup> The value threshold for prime federal contracts applies to those with a value in excess of \$100,000 (the simplified acquisition threshold).<sup>24</sup>

The rule applies to solicitations issued and contracts awarded after the effective date of the final rule. The preamble to the rule specifically notes that, in addition to new contracts awarded after that date, government agencies must amend, on a bilateral basis, existing indefinite term/indefinite quantity contracts if there is substantial work to be performed or goods to be provided within six months following the effective date of the final rule.<sup>25</sup> Further, only the legal entity that signs the contract is considered to be the contractor, and therefore required to comply with the E-Verify requirement. Related but separate entities will not be subject to the contract requirements.<sup>26</sup> The Office of Federal Contract Compliance Programs (OFCCP), as part of its responsibility to enforce Executive Order 11246 prohibiting discrimination and requiring affirmative action, has analyzed whether a parent and subsidiary should be considered a single entity and therefore both subject to affirmative action requirements when only one signed the relevant government contract. In this context the OFCCP applies a "five factor" standard to determine whether the entities have: (1) common ownership, (2) common directors and/or officers, (3) *de facto* exercise of control, (4) unity of personnel policies emanating from a common source, and (5) dependency of operations.<sup>27</sup> If enough factors are met then the parent and subsidiary are considered to be a single entity and both are subject to OFCCP requirements.<sup>28</sup> These five factors are very similar to those used under the National Labor Relations Act and other federal employment laws. Therefore, it is likely that the same or a similar standard could apply under the Federal Contractor E-Verify Rule.

### *Subcontracts*

In addition to complying with the E-Verify requirement itself, contractors subject to the rule must include a provision requiring certain subcontractors to enroll in E-Verify. The requirement applies only to subcontracts for services or construction. Subcontracts for products and goods are not subject to the E-Verify requirement. This removes the requirement for a large proportion of subcontracts. The E-Verify subcontractor requirement applies only to subcontracts for services or construction that are necessary to the performance of a prime federal contract that itself is subject to the E-Verify requirement and only if the subcontract involves work in the United States and has a value.<sup>29</sup> above \$3,000<sup>30</sup> Affected subcontractors must likewise include this provision in any of their subcontracts that in turn are necessary to the performance of the first subcontract.<sup>31</sup>

A *subcontract* is defined as any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or subcontract.<sup>32</sup> It includes but is not limited to purchase orders and changes and modifications to purchase orders. Further, a *subcontractor* is defined as any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or subcontractor.<sup>33</sup> Therefore, any entity issuing a purchase order to an affected prime contractor or subcontractor for services or construction with a value above \$3,000 involving work in the U.S. will be subject to the E-Verify requirement.

The preamble to the rule also suggests that contractors must perform some degree of oversight to ensure subcontractors are complying with the E-Verify requirement:

The Councils believe that prime contractors are responsible for all aspects of contract performance including subcontract requirements. The methods used to assure compliance are also the responsibility of the prime and the subcontractor. The contractor should perform general oversight of subcontractor compliance in accordance with the contractor's normal procedures for oversight of other contractual requirements that flow down to subcontractors. Prime contractors are not expected to monitor the verification of individual subcontractor employees. Nor is the prime contractor responsible for the subcontractor's hiring decisions. However, the prime contractor is responsible for ensuring by whatever means the contractor considers appropriate, that all covered subcontracts at every tier incorporate the E-Verify clause at 52.222-54, Employment Eligibility Verification, and that all subcontractors use the E-Verify system.<sup>34</sup>

In this regard, contractors should establish or update their own policies and procedures used to ensure that subcontractors are in compliance with all flow down requirements. While the rule does not establish a set procedure that contractors must follow to meet this obligation, it does state that contractors are *not* required to obtain written assurances of compliance from subcontractors.<sup>35</sup>

### *Exceptions*

Specifically exempted from the E-Verify requirement are contracts and subcontracts: (1) for commercially available, off-the-shelf (COTS) products, (2) items that would be COTS products but for minor modifications, (3) items that would be COTS products were they not bulk cargo, and (4) commercial services that are part of the purchase of a COTS product, are performed by the COTS provider, and are normally provided for that product.<sup>36</sup> *COTS products* are defined as commercial items that are sold in substantial quantities in the marketplace.<sup>37</sup> These products must either be offered to the government without modification (that is, in the same form in which they are sold in the marketplace), or with only minor modifications.<sup>38</sup>

The final rule clarified the definition of bulk cargo. First, *bulk cargo* is defined to mean "cargo that is loaded and carried in bulk onboard ship without mark or count, in a loose unpackaged form, having homogenous characteristics."<sup>39</sup> The preamble to the rule states that almost all food and agricultural products will fall within this exception for bulk cargo.<sup>40</sup>

### *Waiver Available*

Included in the rule is a provision allowing the head of a contracting activity to waive the E-Verify requirement for a contract or subcontract in exceptional cases.<sup>41</sup> The term "exceptional cases" is not defined in order to allow the head of a contracting activity flexibility in using the waiver.<sup>42</sup> However, the preamble notes that the head of a contracting activity should balance the needs of the agency and the policies and goals enumerated in the Executive Order when determining whether to waive the E-Verify requirement on either a temporary basis or for the entire term of the contract.<sup>43</sup> Furthermore, this waiver authority cannot be delegated.<sup>44</sup>

### **III. Deadlines Imposed by the Federal Contractor E-Verify Rule**

#### ***General Enrollment and Verification Requirements***

The Rule provides a special enrollment window for those contractors not yet enrolled in the E-Verify program as federal contractors at the time that the federal contract is awarded.<sup>45</sup> This special enrollment window will apply even if the contracting employer is already enrolled in the E-Verify program - so long as the contracting employer is not yet enrolled as a federal contractor.

As an initial matter, the contractor should determine if it is already enrolled in the E-Verify program. Even though E-Verify was voluntary prior to the effective date of the Federal Contractor E-Verify Rule, it is possible that the company may have enrolled in E-Verify either voluntarily or pursuant to an applicable state law, such as the Legal Arizona Workers Act of 2007.<sup>46</sup> If the company is already enrolled in the E-Verify program - but not as a federal contractor - then it will need to return to the E-Verify on-line system,<sup>47</sup> modify its enrollment to reflect that it is a federal contractor and complete the special federal contractor MOU. The contracting employer will be required to execute the special federal contractor MOU even if it has previously executed the standard E-Verify MOU, because the standard MOU does not contain language regarding the federal contractor's additional obligations under the E-Verify program.

Under the special enrollment window for the contractor not yet enrolled in the E-Verify program as a federal contractor, the contracting employer must enroll in the E-Verify program within thirty (30) calendar days of the contract award.<sup>48</sup> Within ninety (90) days of enrolling in the E-Verify program, the contractor must begin to use E-Verify to initiate verification of the employment eligibility of all new hires (whether or not those new hires are assigned to the contract) within three (3) business days after the new worker's date of hire.<sup>49</sup> For each employee assigned to the contract,<sup>50</sup> the employer must initiate verification within ninety (90) calendar days after the date of enrollment or within thirty (30) calendar days of the employee's assignment to the contract, whichever date is later.<sup>51</sup>

#### ***Enrollment and Verification Requirements Pertaining to a Contractor Already Enrolled in E-Verify as a Federal Contractor at the Time of the Federal Contract's Award***

Different enrollment and verification deadlines apply to the contracting employer already enrolled in the E-Verify program as a federal contractor when the federal contract containing the E-Verify clause is awarded.<sup>52</sup> As the federal contractor E-Verify rule is not effective until May 21, 2009, these deadlines will not apply to employers registering on May 21 even if those employers are already enrolled in the standard E-Verify program. These deadlines only apply to employers already registered with the E-Verify program as federal contractors.

If the federal contractor has been enrolled for ninety (90) calendar days or more, then the rule provides that the contractor shall initiate verification of all new hires (whether or not they are assigned to the contract) within three (3) business days after the date of hire.<sup>53</sup> However, if the federal contractor has been enrolled for less than ninety (90) calendar days, then - within those initial ninety (90) calendar days after enrollment in E-Verify as a federal contractor - the contractor shall initiate verification of all new hires (whether or not assigned to the contract) within three (3) business days after the date of hire.<sup>54</sup>

For each employee assigned to the contract, the federal contractor shall initiate verification within ninety (90) calendar days after the date of the contract's award, or within thirty (30) days after assignment to the contract, whichever date is later.<sup>55</sup> An "employee assigned to the contract" does not include

employees normally performing support work, such as indirect or overhead functions, and employees who do not perform any substantial duties applicable to the contract.<sup>56</sup>

### ***The Option to Verify All Employees (Current and New Hires)***

Under the E-Verify program as it exists, employers are only permitted to verify the employment eligibility of *new hires* - current employees cannot be queried in E-Verify. However, many large contractors feel that it would be administratively cumbersome to monitor their E-Verify obligations with respect to employees "assigned to the contract" and new hires where numerous federal contracts are in play and the workforce is variable. To that end, the Department of Defense in connection with the U.S. Department of Homeland Security has created a provision under the Federal Contractor E-Verify Rule whereby an employer can elect to query all of its existing employees hired after November 6, 1986, rather than just those assigned to the contract.<sup>57</sup>

Contracting employers that elect to exercise this option must initiate verification for each existing employee hired after November 6, 1986, within one hundred eighty (180) calendar days of enrollment in the E-Verify program or notification to E-Verify Operations of the contractor's decision to exercise this option. Notification of the decision to elect this option should be provided using the contact information provided in the E-Verify MOU. Indeed, the fact that the contractor will be given one hundred eighty (180) days rather than ninety (90) days to verify its existing employees and to begin verifying its new hires may make the all employee option attractive to many federal contractors, especially companies that have a good proportion of their employees working on federal contracts.

### ***Duration of the Federal Contractor Obligation***

The federal contractor will be required to continue to adhere to the requirements of the Federal Contractor E-Verify Program set forth in the MOU for the period of performance of the federal contract.<sup>58</sup> It is advisable for the employer to work closely with immigration counsel and to monitor the period of performance of its federal contract(s). This is especially important because a company that is not a federal contractor *may not* use E-Verify on its incumbent employees. Companies that are not subject to a federal contract that requires the use of E-Verify may only use E-Verify on new hires. When a contract expires, the employer will be able to modify its E-Verify enrollment accordingly so as not to continue to be bound by the additional Federal Contractor E-Verify Program requirements when it is not mandated to do so.

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<sup>1</sup> E-Verify, previously known as Basic Pilot/Employment Eligibility Verification Program, was implemented under the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA) signed into law by President Clinton. For more information on E-Verify, such as FAQs and updates, please visit [www.dhs.gov/E-Verify](http://www.dhs.gov/E-Verify).

<sup>2</sup> Please see Part II for a detailed explanation of who needs to enroll in E-Verify.

<sup>3</sup> Information entered by the employer is compared against records in DHS, SSA, and other U.S. government databases.

<sup>4</sup> Refers to validity of the worker's Social Security number.

<sup>5</sup> The SSA has an Internet option to verify Social Security numbers (SSN) called Social Security Number Verification Service (SSNVS), which is an independent and distinct system to the E-Verify system. Its purpose is to verify current or former employees' names and SSNs only for wage reporting (Form W-2) purposes. It is not proper to use it before hiring an employee as a means of employment verification, or as evidence to punish employees whose names and SSNs do not match SSA records, or to establish identity.

<sup>6</sup> Please refer to the section *E-Verify: Federal and State Legislation* for examples of conflicts that may arise due to differences between the federal and state legislation.

<sup>7</sup> Please see Part II for a detailed explanation of who needs to be E-Verified.

<sup>8</sup> 8 U.S.C. section 1324a(b) was originally codified for a paper-based employment verification system.

<sup>9</sup> The regulations implementing the Immigration Reform and Control Act of 1986 (IRCA) require employers to verify the employment of "employees," that is, individuals who provide services or labor for an employer for wages or other remuneration. See 8 C.F.R. § 274a.1(f). This definition does not include "independent contractors." *Id.* The regulations define *independent contractors* as individuals "who carry on independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results." *Id.* § 274a.1(j). The administrative case law in this area has not relied completely on the regulatory factors, but has incorporated the "economic realities" test set forth by the U.S. Supreme Court in *U.S. v. Silk*, 331 U.S. 704 (1947), which looks to the amount of independence the worker has towards the employer. The case law generally teaches that no single factor is determinative, although it does appear that the degree of control that the employer has over the worker is often given the greatest weight. See *U.S. v. Hudson Delivery Serv., Inc.*, 7 OCAHO 945 at 385 (1997). Although IRCA may not require employers to verify the employment authorization of independent contractors, employers may nonetheless run afoul of other requirements under the Immigration and Nationality Act, as amended (INA), when dealing with foreign nationals who may be considered "consultants" or contractors.

<sup>10</sup> Please see Part II for a detailed explanation of who needs to be E-Verified.

<sup>11</sup> Please refer to Part III for a detailed explanation on the timing of enrollment in E-Verify.

<sup>12</sup> Form I-9 (Rev. 02/02/2009) available at <http://www.uscis.gov/>.

<sup>13</sup> Published in the Federal Register on December 17, 2008. Full text available at [Rules and Regulations](#).

<sup>14</sup> 8 U.S.C. § 1324a(e)(4)-(5).

<sup>15</sup> INA § 274A(f).

<sup>16</sup> Please refer to subpart D. for penalties associated with noncompliance.

<sup>17</sup> Employment Eligibility Verification, 73 Fed. Reg. at 67,652.

<sup>18</sup> Exec. Order No. 13,465, Amending Exec. Order No. 12,989, 73 Fed. Reg. 33,285 (2008); Employment Eligibility Verification, 73 Fed. Reg. 67,651 (2008).

<sup>19</sup> Exec. Order, 73 Fed. Reg. at 33,285.

<sup>20</sup> *Id.*

<sup>21</sup> Memorandum from Rahm Emanuel, Chief of Staff, Jan. 20, 2009, urging federal agencies to "[c]onsider extending for 60 days the effective date of regulations that have been published in the Federal Register but not yet taken effect."

<sup>22</sup> *Chamber of Commerce of the United States of America v. Chertoff*, (D. Md. Dec. 23, 2008). The crux of the Chamber's lawsuit is that the federal contractor regulation violates an express statutory prohibition against mandating "any person or other entity to participate in a pilot program" such as E-Verify, as set forth in section 402(a) of the IIRIRA. The U.S. Chamber of Commerce and its co-plaintiffs have asked the court to declare President Bush's Executive Order illegal and void and to enjoin permanently the defendants from enforcing the federal contractor regulation. However, the government maintains that the rule does not violate section 402 and that, in any event, they have not mandated E-Verify participation because employers are not required to be government contractors or subcontractors.

<sup>23</sup> Employment Eligibility Verification, 73 Fed. Reg. at 67,704.

<sup>24</sup> *Id.* at 67,669 and 67,704 (further noting that "contract" as defined in the FAR does *not* include grants or cooperative agreements).

<sup>25</sup> *Id.* at 67,654.

<sup>26</sup> *Id.* at 67,669 (noting that ambiguous situations will be resolved consistent with established FAR principles).

<sup>27</sup> Assessing the Five Factors, [Department of Labor Federal Contractor Compliance Advisor](#) (Aug. 19, 2005).

<sup>28</sup> The OFCCP further states that "[t]he test focuses primarily on whether the ownership, management, and operations of the separate entities are, in fact, sufficiently interrelated to warrant treating them as an integrated enterprise or a single entity. A business or organization need not meet all five factors to be considered a single entity with a covered federal contractor. However, there is growing recognition that centralized control over labor relations and personnel functions is the most important factor." See [Department of Labor Single Entity Five-Factor Test](#).

<sup>29</sup> Note that the dollar threshold for covered subcontracts of \$3,000 is much lower than the dollar threshold for prime contracts of \$100,000.

<sup>30</sup> Employment Eligibility Verification, 73 Fed. Reg. at 67,705.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 67,676.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 67,704-705.

<sup>37</sup> *Id.* at 67,703.

<sup>38</sup> *Id.* at 67,703-704.

<sup>39</sup> *Id.* at 67,703.

<sup>40</sup> *Id.* at 67,669.

<sup>41</sup> *Id.* at 67,704.

<sup>42</sup> *Id.* at 67,677.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> See 73 Fed. Reg. 67,705 (Nov. 14, 2008) (modifying 48 C.F.R. § 52.222-54(b)(1)).

<sup>46</sup> See Ariz. Rev. Stat. § 23-214 (mandating the use of E-Verify by all employers regardless of size).

<sup>47</sup> See [E-Verify Enrollment](#).

<sup>48</sup> See 73 Fed. Reg. 67705 (Nov. 14, 2008) (modifying 48 C.F.R. § 52.222-54(b)(1)(i)).

<sup>49</sup> See 73 Fed. Reg. 67705 (Nov. 14, 2008) (modifying 48 C.F.R. § 52.222-54(b)(1)(ii)).

<sup>50</sup> *Employee assigned to the contract* is defined as "an employee who was hired after November 6, 1986, who is directly performing work, in the United States, under a contract that is required to include the clause prescribed at 22.1803 [the contract clause requiring federal contractors to use E-Verify, as set forth at 73 Fed. Reg. 67,704 (Nov. 14, 2008) (modifying 48 C.F.R. § 22.1803)]. An employee is not considered to be directly performing work under a contract if the employee—(1) normally performs support work, such as indirect or overhead functions; and (2) does not perform any substantial duties applicable to the contract." See 73 Fed. Reg. 67,705 (Nov. 14, 2008) (modifying 48 C.F.R. § 52.222-54(a)).

<sup>51</sup> 73 Fed. Reg. 67705 (Nov. 14, 2008) (modifying 48 C.F.R. § 52.222-54(b)(1)(iii)).

<sup>52</sup> *Id.* (modifying 48 C.F.R. § 52.222-54(b)(2)(i)).

<sup>53</sup> *Id.* (modifying 48 C.F.R. § 52.222-54(b)(2)(i)(A)).

<sup>54</sup> *Id.* (modifying 48 C.F.R. § 52.222-54(b)(2)(i)(B)).

<sup>55</sup> *Id.* (modifying 48 C.F.R. § 52.222-54(b)(2)(ii)).

<sup>56</sup> See footnote 43 *supra*.

<sup>57</sup> *Id.* (modifying 48 C.F.R. §52.222-54(b)(4)).

<sup>58</sup> *Id.* (modifying 48 C.F.R. §52.222-54(b)(5)).

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