

# Government Contracts Blog

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## Trust, but E-Verify: A Cheat Sheet for Mandatory Employment Eligibility Verification by Federal Contractors

### Introduction

The final rule mandating E-Verify for federal contractors became effective on September 8, 2009. The lawsuit that stayed implementation of E-Verify since January ended with the district court's granting of the Government's motion for summary judgment. As long as Congress continues to fund E-Verify, it should remain a permanent fixture of federal procurement.

Solicitations issued or contracts awarded after September 8 must now include Federal Acquisition Regulation ("FAR") [52.222-54](#), Employment Eligibility Verification. FAR 52.222-54, which is a [mandatory flowdown clause](#) for commercial items, should then be flowed down by prime contractors to their subcontractors.

### The Basic Requirements

Previously, we [discussed](#) the requirements, applicability, and exemptions of E-Verify. Briefly, E-Verify covers contracts that are:

- Longer than 120 days in performance;
- Above the simplified acquisition threshold (\$100,000); and
- Performed in the fifty states, District of Columbia, Guam, Puerto Rico, or the U.S. Virgin Islands.

There are several other important points regarding coverage of E-Verify:

- Some types of contracts are not covered by E-Verify, such as:
  - commercial-off-the-shelf ("COTS") items and related services (see [FAR 2.101](#));
  - items that would be COTS items but for the "minor modifications" they contain; and

- items that would be COTS items but for being “bulk cargo.”
- Subcontracts for supplies are not covered. Subcontractors are covered only if they are (1) performed in the United States; (2) valued at more than \$3,000; and (3) are for:
  - construction; or
  - commercial or noncommercial services (unless related to COTS).
- Contracting officers may also begin attempting to modify existing contracts that were awarded before September 8. In promulgating the final rule, the FAR Councils dismissed concerns that these contracts would also be covered by the E-Verify mandate. See 73 FR 67683. But keep in mind that any modifications to existing contracts must occur on a bilateral basis. Existing contracts are not automatically required to comply with the E-Verify mandate.
- Existing indefinite-delivery/indefinite-quantity (“IDIQ”) contracts are also covered only if they are modified on a bilateral basis. They should be modified to include FAR 52.222-54 if the remaining period of performance on the contract is (1) at least six months after September 8 and (2) the work or orders expected during this time is substantial.
- Not only must all employees “assigned to the contract” be verified through E-Verify, but all new employees must also be verified through E-Verify unless a contractor is:
  - an institution of higher learning;
  - a state or local government;
  - a government of a federally recognized Indian tribe; or
  - a surety performing under a takeover agreement with a federal agency.

**Enrollment and Verification Deadlines**

Being a government contractor means never having a good enough excuse for missing a deadline. Federal contractors using E-Verify have strict timelines to observe:

	<i>Company Enrollment</i>	<i>Verification of employees “assigned to the contract”</i>	<i>Verification of new hires</i>
<i>Not Yet Enrolled in E-Verify</i>	Within 30 calendar days of contract award	Either within: 30 calendar days of an employee’s assignment to the contract	Within 90 calendar days of enrollment; once verification has begun, queries must be initiated within 3 business days after date of hire

		OR  90 calendar days after enrollment  whichever is later.	
<b><i>Already Enrolled in E-Verify</i></b>	Update profile to reflect “Federal Contractor” status	Either within: 30 calendar days of an employee’s assignment to the contract  OR  90 calendar days after contract award  whichever is later.	Same as above (if enrolled less than 90 calendar days)  OR  Within 3 business days after date of hire (if enrolled 90 calendar days or more)

**Some Suggestions for Implementation**

Any compliance program implementing the E-Verify mandate ought to give serious consideration to the following:

- Responsibility for implementation should be centralized. Consider entrusting compliance to your Human Resources department or Compliance Manager. Compliance with E-Verify will require more than initial registration and simply processing applicants through the system. Among other things, contract award dates and deadlines can easily be missed, as can the inclusion of an “employee assigned to the contract.” Centralization should minimize the occurrence of these mistakes.
- Collaboration with the Law Department is essential. Your company may decide to flow down FAR 52.222-54 to subcontractors and prime contractors may decide to flow the clause down to your company. Whether E-Verify is required for your company in the first place is a legal question, and if that’s not answered correctly, compliance with E-Verify may be wholly unnecessary.
- Carefully scrutinize the Memorandum of Understanding (“MOU”) that E-Verify requires your company to enter into with the Government, and then incorporate the terms into your compliance program. Among other terms of the MOU, your company agrees to: follow the E-Verify User Manual; post notices; complete tutorials; maintain lawful employment practices (including anti-discrimination laws); and cooperate with the Government as it monitors your company’s compliance with E-Verify. Perhaps most important, violations of the terms of the MOU may be reported to contracting officers and other Government officials who review your

company's compliance with federal contracting requirements.

- *Your company has the option of using E-Verify for the entire workforce*, which means your company can verify employment eligibility for existing employees who are not working on covered contracts. Blanketing your workforce with E-Verify coverage may simplify compliance.

The official Government website for E-Verify may be found [here](#) and a Supplemental Guide for government contractors is [here](#).

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