

Construction & Infrastructure Law Blog

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Trust, But E-Verify: A Cheat Sheet for Mandatory Employment Eligibility Verification By Federal Construction Contractors

This article was originally posted on Sheppard Mullin's Government Contracts Blog, which can be found at governmentcontractslawblog.com. For further information concerning our Government Contracts Practice, contact either of our Practice Group Leaders, Bryan Daly in Los Angeles at (213) 617-5466 or Anne Perry in Washington, D.C. at (202) 218-6875.

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Introduction

Construction companies performing projects for federal agencies such as the Corps of Engineers, Veterans Administration, and General Services Administration are now subject to the new E-Verify rules summarized in this article. Under the new rules hiring is now more risky since the building trades may have workers who have immigrated to the United States from other countries and may not have properly documented immigration status. Further, project estimators and engineers may also have entered the United States from other countries, and should be properly documented. The E-Verify requirements flow down to subcontractors as well as general contractors on covered projects.

The final rule mandating E-Verify for federal construction and other 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.

Covered contracts must now include Federal Acquisition Regulation ("FAR") [52.222-54](#), Employment Eligibility Verification. Contracting officers may now begin modifying covered contracts. Similarly, FAR 52.222-54, which is a [mandatory flowdown clause](#) for commercial items, can now 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.
- Most federal construction contracts fall within these criteria. There are important qualifications regarding coverage of E-Verify: Subcontracts for supplies are not covered. But subcontracts are covered if they are (1) performed in the United States; and (2) valued at more than \$3,000. This means virtually all construction subcontracts are covered.

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; and 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 OR 90 calendar days after enrollment whichever is later.	Within 90 calendar days of enrollment; once verification has begun, queries must be initiated within 3 business days after date of hire
<i>Already Enrolled in E-Verify</i>	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

Implementing the E-Verify mandate should not be hard for a well organized compliance program. Any compliance program 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 Legal Counsel 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.
- E-Verify is optional for your entire workforce, which means your company can verify employment eligibility for existing employees who are not working on a federal contract. 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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