

FAQ on Federal Contractor E-Verify Regulation

By Greg Siskind¹

On November 14, 2008, the Department of Defense, the General Services Administration and the National Aeronautics and Space Administration jointly released a final regulation amending the Federal Acquisition Regulation (FAR) requiring a large number of employers contracting with the federal government to begin using the E-Verify electronic employment verification system. Federal agencies will include a section in their agreements with covered employers that specifically calls on the employer to use the E-Verify program in order to comply with the contract.

When does the rule take effect?

Originally, the rule was set to take effect on January 15, 2009. However, the combination of a lawsuit and the new President's executive order to delay implementing new rules for 60 days has led to the implementation date being pushed back to May 21, 2009.

On July 8, 2009, the White House announced it would proceed with making the rule effective September 8, 2009. At the time of this writing, it is not clear whether the litigation will delay the effective date.

How does the new rule affect existing contracts?

While all new contracts are covered under the new regulation (assuming the agreement is not exempt under various categories outlined below), only certain existing contracts would be covered. Government agency contracting officers are required to modify existing "indefinite-delivery/indefinite quantity" (ID-IQ) contracts if the remaining period of performance under the contract extends at least six months after January 15, 2009 and if the remaining work under the contract is expected to be "substantial."

What is the basis for the new rule?

On June 6, 2008, President Bush issued Executive Order 13465 "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." The order mandates that all federal agencies that enter in to contracts shall require, as a condition of each contract, that the contractor agrees to use an electronic employment eligibility verification system designated by the Department of Homeland Security (DHS) to verify all new employees and all persons assigned by the contractor to perform work within the US on the federal contract. The order also mandates that the Department of Defense, NASA and the General Services Administration amend the FAR to carry out the order. On June

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9, 2008, DHS designated E-Verify as the system to be used in carrying out the order. For more information on E-Verify, see the attached FAQ on the subject.

According to the preamble to the new rule, the rule is less intended to be about fighting illegal immigration and more about increasing the stability and dependability of federal contractors. Furthermore, contractors that employ unauthorized workers undermine “overall efficiency and economy” in government contracting.

Can the requirement to include the E-Verify clause be waived?

Yes. In exceptional circumstances, the head of the contracting activity at an agency may waive the requirement. This authority may not be delegated.

Are any contracts exempt from the new requirement?

Yes. The following types of contracts do not require inclusion of the E-Verify clause:

1. Contracts for commercially available off-the-shelf (COTS) items as well as items that would be classified as COTS items but for minor modifications;
2. Prime contracts that have a value less than \$100,000 and subcontracts under those contracts that have a value of less than \$3000
3. Contracts waived based on exceptional circumstances by the head of contracting authority at the agency
4. Contracts that are less than 120 days in duration.
5. Contracts for work that will be performed outside the United States (the fifty states, the District of Columbia, Guam, Puerto Rico and the US Virgin Islands)

How much time does a contracting employer have to start running employees’ names through the E-Verify system?

There are a few key timelines to watch in complying with the regulation. For employers not yet enrolled as a federal contractor in E-Verify:

1. Employers have thirty calendar days to enroll as a federal contractor in E-Verify after a contract is awarded.
2. Within 90 calendar days of enrollment in E-Verify, the employer must begin verifying employment eligibility for all *new* hires working in the US.

3. For all employees assigned to the contract, the employer must begin verification within 90 calendar days of enrollment in E-Verify or within 30 calendar days of the employee's assignment to the contract, whichever date is later.

For employers already enrolled as a federal contractor in E-Verify when the contract is awarded, the following timelines apply:

1. For employers already enrolled for 90 calendar days or more, the employer must initiate verification of all new hires within three business days after date of hire (except certain universities, state and local government employers and federally recognized Indian tribes).
2. For employers enrolled less than 90 calendar days, within 90 calendar days after enrollment as a federal contractor, the employer shall initiate verification of all new hires .
3. For each employee assigned to the contract, the employer shall begin verification within 90 calendar days after the date of the contract award or within 30 days after assignment to the contract, whichever date is later. Note that the 90 day clock starts on the date the contract is awarded instead of 90 days from the date of enrollment as would be the case for employers enrolled less than 90 days when the contract is awarded

What types of employers only need to verify employees assigned to a federal contract?

1. Institutions of higher education
2. State and local governments
3. Federally recognized Indian tribes
4. Sureties performing under a takeover agreement entered into with a federal agency pursuant to a performance bond

Are any types of employees exempt from being verified even if the contract is subject to the new requirement?

Yes. The rule exempts employees who hold an active security clearance of confidential, secret or top secret. Employees for which background investigations have been completed and credentials issued pursuant to the Homeland Security Presidential Directive (HSPD) – 12, "Policy for a Common Identification Standard for Employees and Contractors," issued on 8/27/2004.

Can an employer verify *all* existing employees as opposed to just employees working on the contract?

Yes. Contractors can choose to verify all employees of the contractor. If this option is exercised, the employer must notify DHS and must initiate verifications for the contractor's entire workforce within

180 day of notice being given to DHS. To notify DHS that the entire workforce will be verified, the employer should update its company profile through the “Maintain Company” page on E-Verify.

Does a company already enrolled in E-Verify need to re-enroll in order to comply with the new rule?

No. However, an employer does need to update its profile on E-Verify’s “Maintain Company” page. There is an option for federal contractors where employers and employees will need to take a brief federal contractor tutorial that explains the new policies and features that are unique to contractors. Once the federal contractor option is selected, employers will not be able to verify new employees until it takes the refresher tutorial.

What does a company do once the contract is over?

After the contract is over, the company should update its Maintain Company page to reflect the revised status. After that, existing employees may not be run through E-Verify. If the company chooses to terminate participation in E-Verify, it can select “request termination” in the E-Verify system.

What are COTS contracts?

The new rule does not apply to contracts to supply “commercially available off-the-shelf (COTS) items. This applies to items of supply that are commercial items sold in substantial quantities in the commercial marketplace and offered to the government, without modification, in the same form in which it is sold in the commercial marketplace. The new rule also does not apply to contracts to supply bulk cargo such as agricultural products and petroleum products. Contracts for items that would be COTS items but for minor modifications are also not covered. The preamble to the rule specifically notes that food is an item of supply and most agricultural suppliers will not be affected by the new rule.

Services related to supplying the COTS items that are procured at the same time the COTS items are procured and supplied by the same employer providing the COTS items are also not subject to the rule. The services also must be typical or normal for the COTS provider.

Which employees associated with work on a contract must be verified under the new rule?

Employees hired after November 6, 1986 who are directly performing work in the United States under the contract. An employee is not considered to be directly performing work under the contract if the employee

- normally performs support work, such as indirect or overhead functions, and
- does not perform any substantial duties applicable to the contract

What if the Form I-9 for an existing employee is not the current Form I-9?

Employers may use a previously completed Form I-9 as the basis for initiating E-Verify verification of an assigned employee as long as that Form I-9 complies with the E-Verify documentation requirements and the employee's work authorization has not expired, and as long as the employer has reviewed the Form I-9 with the employee to ensure that the employee's stated basis for work authorization has not changed. If the Form I-9 does not comply with the current E-Verify requirements, or employee's basis for work authorization has expired or changed, the employer should complete a new Form I-9. If the Form I-9 is up to date, but reflects documentation (such as a US passport or green card) that expired after completing the Form I-9, the employer shouldn't use E-Verify's photo screening tool unless USCIS issues further instructions on the subject at some later point.

Are subcontractors also responsible for participating in E-Verify under the new rule?

Yes. Any subcontractor furnishing commercial or noncommercial services or construction under a prime contract or a subcontract covered by the rule must participate in E-Verify. The value of the contract must be more than \$3000 and the work to be performed must be in the United States.

How many employers will be affected by the new rule?

The GSA, DOD and NASA believe that 168,324 contractors will be impacted in this fiscal year.

What is the contract language that must be included in contracts of employers covered by the new rule?

EMPLOYMENT ELIGIBILITY VERIFICATION (JAN 2009)

(a) Definitions. As used in this clause—

Commercially available off-the-shelf (COTS) item—

(1) Means any item of supply that is—

(i) A commercial item (as defined in paragraph (1) of the definition at 2.101);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural

products and petroleum products. Per 46 CFR 525.1 (c) (2), "bulk cargo" means cargo that is loaded and carried in bulk onboard ship without mark or count, in a loose unpackaged form, having homogenous characteristics. Bulk cargo loaded into intermodal equipment, except LASH or Seabee barges, is subject to mark and count and, therefore, ceases to be bulk cargo.

Employee assigned to the contract means 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. 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.

Subcontract means any contract, as defined in 2.101, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.

Subcontractor means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime Contractor or another subcontractor.

United States, as defined in 8 U.S.C. 1101(a) (38), means the 50 States, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands.

(b) Enrollment and verification requirements. (1) If the Contractor is not enrolled as a Federal Contractor in E-Verify at time of contract award, the Contractor shall—

(i) Enroll. Enroll as a Federal Contractor in the E-Verify program within 30 calendar days of contract award;

(ii) Verify all new employees. Within 90 calendar days of enrollment in the E-Verify program, begin to use E-Verify to initiate verification of employment eligibility of all new hires of the Contractor, who are working in the United States, whether or not assigned to the contract, within 3 business days after the date of hire (but see paragraph (b) (3) of this section); and

(iii) Verify employees assigned to the contract.

For each employee assigned to the contract, initiate verification within 90 calendar days after date of enrollment or within 30 calendar days of the employee's assignment to the contract, whichever date is later (but see paragraph (b) (4) of this section).

(2) If the Contractor is enrolled as a Federal Contractor in E-Verify at time of contract award, the Contractor shall use E-Verify to initiate verification of employment eligibility of-

(i) All new employees. (A) Enrolled 90 calendar days or more. The Contractor shall initiate verification of all new hires of the Contractor, who are working in the United States, whether or not assigned to the contract, within 3 business days after the date of hire (but see paragraph (b) (3) of this section); or

(B) Enrolled less than 90 calendar days. Within 90 calendar days after enrollment as a Federal Contractor in E-Verify, the Contractor shall initiate verification of all new hires of the Contractor, who are working in the United States, whether or not assigned to the contract, within 3 business days after the date of hire (but see paragraph (b) (3) of this section); or

(ii) Employees assigned to the contract. For each employee assigned to the contract, the Contractor shall initiate verification within 90 calendar days after date of contract award or within 30 days after assignment to the contract, whichever date is later (but see paragraph (b) (4) of this section).

(3) If the Contractor is an institution of higher education (as defined at 20 U.S.C. 1001(a)); a State or local government or the government of a Federally recognized Indian tribe; or a surety performing under a takeover agreement entered into with a Federal agency pursuant to a performance bond, the Contractor may choose to verify only employees assigned to the contract, whether existing employees or new hires. The Contractor shall follow the applicable verification requirements at (b) (1) or (b) (2) respectively, except that any requirement for verification of new employees applies only to new employees assigned to the contract.

(4) Option to verify employment eligibility of all employees. The Contractor may elect to verify all existing employees hired

after November 6, 1986, rather than just those employees assigned to the contract. The Contractor shall initiate verification for each existing employee working in the United States who was hired after November 6, 1986, within 180 calendar days of—

(i) Enrollment in the E-Verify program; or

(ii) Notification to E-Verify Operations of the Contractor's decision to exercise this option, using the contact information provided in the E-Verify program Memorandum of Understanding (MOU).

(5) The Contractor shall comply, for the period of performance of this contract, with the requirements of the E-Verify program MOU.

(i) The Department of Homeland Security (DHS) or the Social Security Administration (SSA) may terminate the Contractor's MOU and deny access to the E-Verify system in accordance with the terms of the MOU. In such case, the Contractor will be referred to a suspension or debarment official.

(ii) During the period between termination of the MOU and a decision by the suspension or debarment official whether to suspend or debar, the Contractor is excused from its obligations under paragraph (b) of this clause. If the suspension or debarment official determines not to suspend or debar the Contractor, then the Contractor must reenroll in E-Verify.

(c) Web site. 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>.

(d) Individuals previously verified. The Contractor is not required by this clause to perform additional employment verification using E-Verify for any employee—

(1) Whose employment eligibility was previously verified by the Contractor through the E-Verify program;

(2) Who has been granted and holds an active U.S. Government security clearance for access to confidential, secret, or top secret information in accordance with the National Industrial Security Program Operating Manual; or

(3) Who has undergone a completed background investigation and been issued credentials pursuant to Homeland Security Presidential Directive (HSPD) -12, Policy for a Common Identification Standard for Federal Employees and Contractors.

(e) Subcontracts. The Contractor shall include the requirements of this clause, including this paragraph (e) (appropriately modified for identification of the parties), in each subcontract that—

- (1) Is for— (i) Commercial or noncommercial services (except for commercial services that are part of the purchase of a COTS item (or an item that would be a COTS item, but for minor modifications), performed by the COTS provider, and are normally provided for that COTS item); or (ii) Construction;*
- (2) Has a value of more than \$3,000; and*
- (3) Includes work performed in the United States.*

(End of clause)