

## E-Verify For Federal Contractors

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On November 14, 2008, the Federal Acquisition Regulation Council ("FAR Council") issued final regulations concerning the mandatory use of the E-Verify system by federal contractors.

E-Verify is an online system provided by the Department of Homeland Security that checks an employee's I-9 information on the United States Customs and Immigration Service's ("USCIS") and Social Security Administration's ("SSA") databases. The E-Verify program gives an employer instant notice that an employee's I-9 information matches or does not match the USCIS and SSA records. If an employee's I-9 information does not match USCIS and SSA records, the employer receives a "tentative non-conformation" notice and must follow specific procedures, which include notifying the employee, providing written instructions to allow the employee to contest the notice, and refraining from any adverse action if the employee contests the notice. If the employee does not contest a tentative non-conformation, or if the discrepancy in records could not be resolved, the employer will receive a "final non-conformation" notice and the employee must then be terminated.

The FAR Council's final regulations follow the issuance of an Executive Order by President Bush on June 6, 2008 requiring that federal contractors use E-Verify to confirm employment eligibility of all employees assigned to work on a federal contract and all new hires. The final regulations take effect in 60 days from publication and, therefore, federal contracting agencies will include the E-Verify requirements for contracts in excess of \$100,000.00 issued beginning January 15, 2008.

There are four main requirements for Contractors who fall within the scope of the new regulations:

1. The contractor must enroll in E-Verify as a contractor. If the contractor already uses the system, but is not enrolled as a federal contractor, the contractor should be able to update the company profile without the need to re-enroll.
2. Within 90 days of enrollment on E-Verify or 30 days of a new contract award, the contractor must E-Verify the employment eligibility of all employees "assigned to the federal contract." The final rule defines "assigned to the federal contract" as any employee who is directly performing work in the United States under the federal contract. Excluded are those employees who only work in support, indirect or overhead positions, those who work outside the United States, and those hired before November 6, 1986 and, therefore, are not subject to I-9 requirements.
3. Within 90 days of enrollment, the contractor must E-Verify the employment eligibility of all new hires within 3 working days of hire.
4. The contractor must require subcontractors of \$3,000.00 or more to use the E-Verify system. There are exceptions for subcontracts completed in less than 120 days, performed outside the United States, or for commercially available off-the-shelf items.

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## **Conclusion**

Covered federal contractors need to begin preparation for compliance with the E-Verify rules as the January 15 effective date is fast approaching. Contractors should: 1) enroll on the E-Verify system as a federal contractor if they have not already done so; 2) determine which incumbent employees are directly assigned to the federal contract and must to be E-Verified under the final rules in addition to new hires; 3) create and adopt procedures for tentative non-compliance notices received from the E-Verify program; and 4) adopt protocols for terminations where the tentative notice is not challenged or pursuant to a final non-confirmation notice received.

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