

Federal Contractors Face Mandatory E Verify Requirement as of September 8, 2009

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Companies serving as prime contractors or, in some cases sub-contractors, on federal contracts awarded after September 8, 2009 will be required to register and participate in the E Verify program of the Department of Homeland Security. E Verify is an electronic system by which employers must submit information on new hires, and in some cases existing employees who are going to be assigned to work on a federal contract, to the government, which will then verify the individual's identity and authorization to work in the United States. It no longer will be sufficient simply to complete an I-9 form for employees covered by this regulation.

The Federal Acquisition Rule on E Verify (FAR Case 2007-013) ("FAR E Verify Rule") applies to all federal contracts and solicitations issued starting on September 8, 2009 that are valued at \$100,000 or more, and that extend over 120 days. However, contracts for commercially available off the shelf items (COTS) and contracts for work performed outside the United States are not subject to this rule. The rule also applies to sub-contracts for services or construction if the prime contract contains the rule and the sub-contract has a value of greater than \$3,000.

The FAR E Verify Rule requires that companies awarded a federal contract enroll in the E Verify program within 30 days of the award date. The company must begin verifying all new hires within 90 days of enrolling in E Verify. Where the FAR E Verify Rule differs most significantly from existing I-9 requirements is that a company awarded a federal contract must verify existing employees who are going to be assigned to work on the federal contract within 30 days of that employee's assignment to the contract. Thus, long time employees of a company who long ago completed the I-9 form will be subject to another review of their identity and authorization to work in the United States.

It is important to understand that companies subject to the E Verify requirement must utilize the system for all new employees hired, not just those who will be assigned to a federal contract. In addition, as part of the registration process for E Verify, companies will be required to enter in to a Memorandum of Understanding ("MOU") with U.S. Citizenship and Immigration Services ("USCIS"). Among other items, the MOU requires registered companies to comply with legal hiring procedures and to ensure that no employee will be subject to discrimination in use of the E Verify program. Violation of the MOU will result in employers being excluded from the E Verify program, which, in turn, would act as a bar to being a federal contractor. The registration process will require companies to identify a point of contact for E Verify matters. Furthermore, companies must decide if all company E Verify registrations will flow through one site, or if individual work sites will have their own E Verify authorization. If the latter, each included site will have to execute an MOU and identify a point of contact.

One of the most frustrating aspects of E Verify is that participation does not provide what is known as a "safe harbor" against work site immigration enforcement, although companies that utilize E Verify will be presumed not to have actual knowledge of hiring an individual who is not

authorized for employment in the United States. Thus, companies still must properly complete and maintain I-9 records for all new employees hired, and are subject to on site enforcement actions from government agencies.

These new requirements pose a significant new set of obligations and administrative burdens on companies. Combined with a renewed emphasis from the Department of Homeland Security on employer focused enforcement of I-9 and related immigration laws, companies must act soon to assess their compliance with these laws.