

## E-Verify Compliance Pushed Again to September 8, 2009

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**E-Verify – What is it?** By Executive Order 13465, the President has directed the Department of Homeland Security to implement a new electronic employment verification system (coined “E-Verify”). In short, E-Verify is a government database developed to help identify illegal aliens in the U.S. workforce. E-Verify represents a new compliance requirement for government contractors and their employees (the “E-Verify Rule”). The E-Verify Rule is applicable to contractors by operation on FAR Clause 52.222-54, entitled “Employment Eligibility Verification.” The E-Verify Rule was supposed to take effect on June 30, 2009. The Government has extended the effective date now to September 8, 2009.

On September 8, 2009 all new solicitations will contain the E-Verify Rule at 52.222-54 unless otherwise exempted. All contracts awarded on or after September 8, 2009, will contain the E-Verify Rule, unless otherwise exempted. ID/IQ contracts awarded prior to September 8 may require modification to include the E-Verify Rule if performance is expected to continue beyond March 8, 2010 or there remains considerable value in the work to be performed.

**Penalties for Noncompliance.**

Contractors who continue to employ individuals who are not eligible to work in the United States may be subject to criminal, civil and administrative proceedings, resulting in conviction, monetary penalty, imprisonment, civil fines and suspension or debarment proceedings. 8 USC 1324a.

**Contracts Exempt from E-Verify.** Not all contracts will be subject to the E-Verify Rule. There are exempt and non-exempt contracts. The following government contracts are exempt from the E-Verify Rule: (1) contracts valued at less than the simplified acquisition threshold (currently set at \$100,000 per FAR 2.101, subject to limited escalation); (2) contracts

to be performed in less than 120 days; (3) contracts for COTS items or COTS items with minor modifications; and (4) contracts to be performed outside of the United States.

**Contracts Subject to E-Verify.** All government contracts not qualifying under one of the above exemptions is non-exempt and will be subject to the E-Verify Rule.

**Subcontracts.** Prime contracts that are subject to the E-Verify Rule must flow-down the same requirements to all subcontracts for services or construction work in excess of \$3,000.

**Employees Subject to E-Verify.** On September 8, 2009 government contractors will be required by operation of FAR 52.222-54 to use the E-Verify system to confirm the employment eligibility of (1) all new employees hired by the contractor during the term of performance of a covered government contract, regardless of whether such employee will actually be assigned to work on the covered government contract; and (2) all employees (new hires and existing employees) assigned by the contractor to work on a covered government contract where such work is charged as a direct cost to that contract. The E-Verify Rule will apply regardless of the type of contract (ID/IQ, cost-type, T&M, fixed price, etc.).

**Employees Exempt from E-Verify.** The following groups of employees are exempt from the E-Verify Rule: (1) Employees assigned to indirect cost pools are not subject to the E-Verify Rule. (2) Employees possessing government issued security clearances, such as Homeland Security Presidential Directive (HSPD) 12 clearances, personal identity verification credentials authorizing access to federally controlled facilities or systems, or active U.S. government security clearances. (3) New employees hired by colleges,

For more information regarding E-Verify Compliance, please contact:



**Hilary S. Cairnie**  
202.467.8888  
hilary@vorys.com

universities, state or local governments, governments of federally recognized Indian tribes and sureties performing under federal takeover agreements are not subject to the E-Verify Rule unless they are actually assigned to work on a covered government contract.

#### **Verification of Entire Workforce.**

Under the E-Verify Rule contractors have the option of verifying their entire workforce, including any existing employees not currently assigned to perform work under a covered government contract. While this option is available, it will still require the employer to verify the status of each individual employee – a labor-intensive undertaking for large businesses.

#### **E-Verify and DHS I-9 Requirements.**

The E-Verify Rule is a new requirement, in addition to the employment verification still required under DHS Form I-9, with one important qualification: Contractors subject to the E-Verify Rule must:

- (1) make and retain photocopies of “List A” documents (e.g. green cards and INS Employment Authorization Documents) presented by each employee; and
- (2) only accept as proof positive “List B” documents which are required to include a photograph (such as a state issued driver’s license, school ID or military ID).

Contractors will be required to use the E-Verify system to confirm that the I-9 information they receive from a subject employee matches the information contained in the governments’ files for that individual.

#### **Pre-employment Verifications**

**Prohibited.** Contractors are prohibited under the new E-Verify Rule from conducting E-Verify employment verifications prior to the employment decision to hire a job applicant. It is not until after (1) an employee has submitted his/her application for a job, (2) the employer has extended an offer of employment, (3) the employee has actually accepted employment, and (4) the employee has completed a form I-9 and submitted List A and List B documentation; only then may an employer conduct an E-Verify assessment.

**Time Period for Enrollment and Verification.** Contractors entering into covered government contracts on and

after September 8 must complete an online E-Verify registration through the DHS website ([www.dhs.gov](http://www.dhs.gov)) no later than 30 calendar days after the contract or subcontract award date. Thereafter, contractors will have an additional 90 days to conduct E-Verify eligibility verifications for all subject employees. After the 90-day period, any existing employees of the contractor who are assigned to work on the contract must be verified by the contractor within 30 calendar days after their assignment. And, all new employees hired after this 90-day period must be verified by the contractor within three business days after their start date.

**E-Verify Results.** If E-Verify confirms an employee’s eligibility, then no further action is required by the contractor other than for the employer to print the E-Verify report for that employee and to retain a copy for its records.

If E-Verify is not able to confirm an employee’s employment eligibility in the United States, then the contractor will be required to provide the employee with a copy of the nonconfirmation notice generated by the E-Verify system. The employee must then indicate on that notice whether he or she contests the finding, and both the employer and employee must sign. If the employee contests the finding, then the contractor must provide the employee with a second E-Verify-generated notice and the appropriate contact information for Social Security Administration (SSA) and U.S. Customs and Immigration Service (USCIS). The employee then has eight business days to contact SSA and/or USCIS and rectify the discrepancy between the employee’s Form I-9 information and the information contained in the SSA and USCIS databases (the “Discrepancy Period”).

**Employer’s Right to Terminate.** The contractor is prohibited from firing or taking any adverse employment actions against the employee during the Discrepancy Period. But, if the employee is unable to rectify the problem during the Discrepancy Period, then E-Verify will issue the contractor a notice of final nonconfirmation and the contractor may proceed with termination after receipt of that notice.

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