



September 2009 Immigration Special Update



E-Verify Applicability to Federal Contractors: Phase-In Begins After September 8, 2009

E-Verify, which compares information from the Employment Eligibility Verification Form (I-9) against federal government databases to verify workers' employment eligibility, is a free, web-based system operated by the Department of Homeland Security (DHS) in partnership with the Social Security Administration (SSA). The system facilitates compliance with federal immigration laws and helps to deter unauthorized individuals from attempting to work and also helps employers avoid employing unauthorized aliens.

The Aug. 25 decision in [Chamber of Commerce, et al v. Janet Napolitano](#) has cleared the way for implementation of E-Verify for Federal Contractors. The court rejected all challenges to the Federal Acquisition Regulation E-Verify (FAR E-Verify) requirement and its regulatory authority. FAR E-Verify will begin its roll out on Sept. 8.

To whom does Federal Contractor E-Verify (FAR E-Verify) apply?

- **Prime Contracts:** Companies that are awarded federal prime contracts above \$100,000 and have a performance period of over 120 days.
- **Subcontracts:** The rule covers subcontractors only if a prime contract includes the clause. For subcontracts that flow from those prime contracts, the rule extends the E-Verify requirement to subcontracts for services or for construction with a value over \$3,000.
- **Indefinite-Delivery/Indefinite-Quantity Contracts:** Existing indefinite-delivery/indefinite-quantity contracts should be modified by Contracting Officers on a bilateral basis in accordance with FAR 1.108(d)(3), to include the clause for future orders if the remaining period of performance extends at least six months after the final rule effective date, and the amount of work or number of orders expected under the remaining performance period is substantial.

■ Exemptions from the E-Verify requirement:

- Contracts that include only commercially available off-the-shelf (COTS) items (or minor modifications to a COTS item) and related services;
- Prime Contracts of less than the simplified acquisition threshold (\$100,000);
- Prime Contracts less than 120 days; and
- Contracts where all work is performed outside the United States.

What does an employer have to do to comply with Federal Contractor E-Verify?

If you are new to E-Verify or have been enrolled for less than 90 days:

30 days

- Companies awarded a federal contract or subcontract with the E-Verify clause after Sept. 8 will be required to enroll in E-Verify within 30 calendar days of the federal contract or subcontract award date.

90 days

- After a company enrolls in E-Verify, the company has 90 days from the date on which the company enrolled with E-Verify to initiate verification queries for employees already on your staff who will be working on the contract and to begin using the system to verify newly hired employees.

3 days

- After this 90-day phase-in period, the company will be required to initiate verification of each newly hired employee within three business days after his first date of paid employment.
- ****TIP:** To meet this three-day requirement, employers may initiate verification of a newly hired employee before his/her start date if the employee has accepted the job offer and filled out Section One of the Form I-9, and the employer has completed but not certified Section Two of the Form I-9.

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If your company has been enrolled in E-Verify for more than 90 days:

- You are required to continue to initiate verification of newly hired employees within three business days of their first day of paid employment, but you have 90 days from the contract award date to begin using E-Verify for each employee already on your staff who is assigned to the contract.
- If you enrolled in E-Verify prior to Sept. 8, you will need to update your company profile on the E-Verify site after Sept. 8 and select the option indicating you are a federal contractor to ensure compliance.

PLEASE NOTE: Covered federal contractors must use E-verify to confirm the work authorization of all new hires, regardless of whether the new hire will perform work on the federal contract, and all existing employees who perform work on the federal contract.

May a federal contractor verify its entire workforce?

Yes. Federal contractors and subcontractors have the option of verifying their entire workforce, both new hires and existing employees - including those not assigned to a federal contract. If your company elects to do this, you must notify DHS by updating your company profile through the Maintain Company page if you are a current participant, or during enrollment if you are a new participant. A federal contractor that chooses to exercise this option must initiate an E-Verify query for each employee in the contractor's entire work force **within 180 days** of updating its company profile.

Applicability of the Federal Contractor E-Verify to certain entities was limited in the following ways:

- Institutions of higher education need only verify employees assigned to a covered federal contract.
- State and local governments and federally recognized indian tribes need only verify employees assigned to a covered federal contract.
- Sureties performing under a takeover agreement entered into with a federal agency pursuant to a performance bond need only verify employees assigned to the covered federal contract.
- In addition, the final rule exempts from verification requirements: (a) employees who hold an active security clearance of confidential, secret, or top secret; and (b) employees for whom background investigations have been completed and credentials issued pursuant to Homeland Security Presidential Directive (HSPD)-12.

What to expect in the future?

FAR E-Verify is a new regulation, so we are anticipating additional clarifications to the system and additional guidance to make this transition smooth. All indicators show that this regulation is here to stay in one form or another. In fact, Department of Homeland Security Secretary Janet Napolitano has recently strengthened employment eligibility verification by announcing the Administration's continued support for FAR E-Verify regulation and the use of E-Verify to check employee work authorization. Congress also has pending legislation extending and possibly broadening the scope of E-Verify.

Useful Links:

Useful information for federal contractors can be found here on the [USCIS website](#).

Williams Mullen, in conjunction with the Bureau of National Affairs (BNA), will be hosting a free webinar concerning E-Verify on Sept. 16. [Click here for more information about this webinar.](#)

More information on the program is available on the "[E-Verify](#)" website. E-Verify customer support is also available by calling toll free 888.464.4218.

For more information on the recent changes applying E-Verify to federal contractors please contact Kathryn Carmichael, kcarmichael@williamsmullen.com or Eliot Norman, enorman@williamsmullen.com.

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