

LEGALLY SPEAKING

by Bob Dunlevey

E-Verify Requirements for Federal Contractors - Developments

The “on again, off again” implementation of the regulations requiring government contractors to check the employment eligibility of newly hired and current employees has been upsetting to most federal contractors. Four times implementation has been deferred and further efforts to block the regulations are anticipated. Most recently, the U.S. Chamber of Commerce unsuccessfully tried to block the regulations from becoming effective September 8, 2009. E-Verify is a free, internet-based system operated by DHS and SSA which permits enrolled employers to verify employment eligibility after the employee completes the I-9 form. It is intended to stop illegal aliens from being employed and is voluntary for most employers – mandatory for some government contractors.

While there are many articles and red alerts being issued indicating all federal contractors must act quickly to comply with E-Verify regulations, the truth is that the E-Verify regulations only require action by certain federal contractors and subcontractors and do not require any immediate action, even when applicable. The first step is to determine if your company is likely to be affected by the regulations and, if so, to begin learning the procedures so you are prepared if and when use of the E-Verify system is required. The following questions and answers will provide you with the basic information to get started.

Am I a covered federal contractor for purposes of E-Verify?

The E-Verify regulations only affect certain federal contractors who are awarded new contracts or whose existing contracts are amended on or after September 8, 2009. Existing contracts that are not amended to include E-Verify requirements are not subject to the regulations. The following is a list of the types of contracts which will be affected:

- Prime contracts with a performance period of 120 days or more and a value of \$100,000; and
- Subcontracts (stemming from covered prime contracts as described above) over \$3,000 for services or construction.

If I am a covered federal contractor, when do I enroll in E-Verify?

- Covered federal contractors and subcontractors must enroll in E-Verify within 30 calendar days of the contract award date. After enrollment, covered federal contractors have 90 days from the date they enroll to initiate verification of required employees.
- When a covered federal contract ends, an employer is not required to continue using E-Verify. In order to end the obligations under E-Verify, an employer must complete the termination form on-line.

Which employees am I required to E-Verify if I am a covered federal contractor?

- Covered federal contractors must initiate verification for all new hires within three business days after their start date, regardless of whether the employee will be assigned to the federal contract.
- All existing employees assigned to the covered federal contract regardless of the amount of time the employee spends working under the contract.
- Once an employee is E-Verified, the employee should not be re-verified even if reassigned to a different covered contract for the same employer.

May I use E-Verify for all existing employees?

- Only covered federal contractors may voluntarily choose to E-Verify all of its existing employees.
- Employers who are not covered under these regulations and who choose to enroll in E-Verify voluntarily may E-Verify new hires only, not existing employees.

May I pre-screen applicants to ensure no problems will arise or rely on another employer's or organization's E-Verify results?

- Employers may not rely on E-Verify performed by another employer.
- Employers may not pre-screen applicants. Verification must occur after acceptance of a specific job offer and completion of the I-9 form.

What happens if I receive notice that an employee cannot be confirmed through the E-Verify system?

- If a non-confirmation result is obtained from E-Verify, the employer must provide the employee with a specific written notice entitled "Notice to Employee of Tentative Non-Confirmation." An employer cannot terminate based on this tentative non-confirmation notice unless the employee does not contest the result.
- After receiving the "Notice to Employee of Tentative Non-Confirmation," the employee has 8 work days to contact the Social Security Administration Office or USCIS – U.S. Citizenship and Immigration Services
- After the employee contacts the appropriate agency, a final determination from E-Verify will be made. If a final non-confirmation letter is received or the employee fails to contest the results of the tentative non-confirmation, an employer can terminate the employee.
- If an employer continues to employ an individual who received a final non-confirmation letter, a rebuttable presumption exists that the employer knowingly employed an unauthorized alien.

Do the regulations impose posting and notice obligations?

- Any employer participating in E-Verify must post the notice provided by DHS indicating participation in the E-Verify program as well as the anti-discrimination notice issued by the Office of Special Counsel for Immigration-Related Unfair Employment Practices at the Department of Justice. These notices can be found on the E-Verify website after enrollment. To enroll, go to <https://e-verify.uscis.gov/enroll>.

Any questions related to e-verify or any other employment law matter, call Bob Dunlevey at (937) 223-6003.