

Managing People

by Keith Covington

E-VERIFY NOW REQUIRED FOR FEDERAL CONTRACTORS

The controversial rule that will require most federal construction contractors to use E-Verify to check the work eligibility of their employees officially went into effect on September 8, 2009. This rule, originally issued in November 2008, had been delayed for several months pending review. In July, Department of Homeland Security (DHS) Secretary Janet Napolitano announced that the new administration would move forward with implementation, meaning that thousands of federal contractors will soon be obligated to enroll in and use the government's E-Verify system.

What Is E-Verify?

E-Verify is an Internet-based system operated by the DHS in partnership with the Social Security Administration (SSA). It allows employers to electronically verify the work authorization status of their employees by comparing the information provided by the employees during the Form I-9 process with information contained in the DHS and SSA databases. An employer's use of E-Verify does not replace its Form I-9 obligations, but is designed to supplement those procedures.

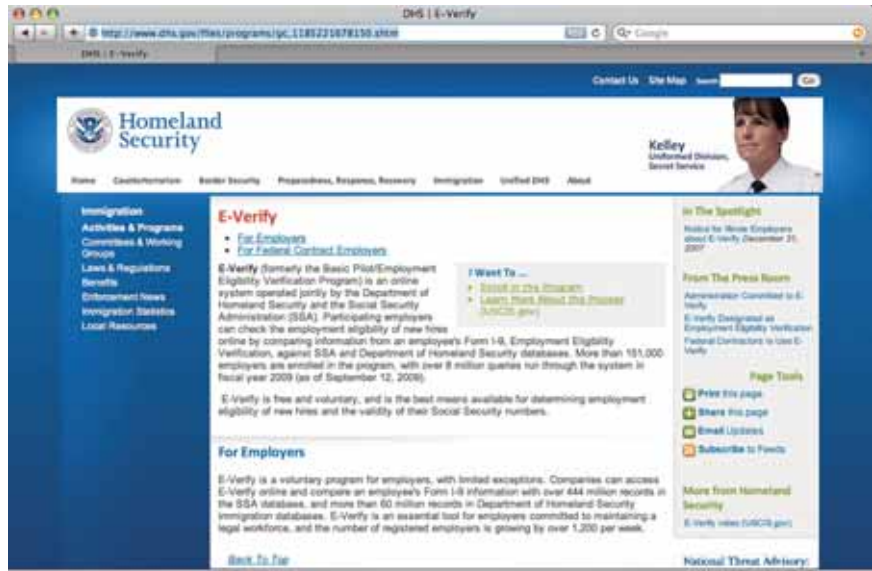
The E-Verify system was originally developed as an entirely voluntary program in which employers had the option to participate. It remains voluntary for most private sector employers, although, in some states, employers must comply with various state

laws making E-Verify mandatory.

What Is the E-Verify Rule for Federal Contractors?

The new E-Verify rule is an amendment to the Federal Acquisition Regulation (FAR). It requires federal contracting officers to include, in most federal contracts exceeding \$100,000, a clause stipulating that the contractor must be enrolled in E-Verify and must use the system to confirm the employment eligibility of (1) all new hires and (2) all employees—new and existing—assigned to the contract.

This new rule represents a departure from the way E-Verify has operated previously in two significant ways. First, E-Verify will no longer be voluntary for most federal contractors; if the contractor has at least one federal contract containing the E-Verify clause, its participation in



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the program is mandatory. Second, covered federal contractors will now be required to use E-Verify not only for new hires, but also to check at least some of its existing employees.

Consequences of Non-Compliance

Compliance with the E-Verify rule is

a contract performance requirement and an absolute necessity for companies wanting to continue to do business with the federal government. Failure to comply with the requirements imposed by the new rule can lead to termination of the contract and, potentially, suspension or debarment of the contractor.

The Effective Date

Under the new rule, contracting officers will be required to include the E-Verify clause in all covered contracts and solicitations awarded after September 8, 2009. Additionally, existing indefinite-delivery/indefinite-quantity (IDIQ) contracts must be amended to include the E-Verify clause if the remaining period of performance extends at least six months past September 8, 2009, and the amount of work or number of orders expected during the remaining performance period is deemed substantial. A contractor's obligations under the new E-Verify rule do not commence unless and until the contractor is awarded a new contract which includes the E-Verify clause or it has an existing IDIQ contract which is amended to include the clause.

Are Any Contracts Exempt?

Certain federal contracts are exempt from the E-Verify rule. These include contracts that do not exceed \$100,000, contracts with a performance period of less than 120 days, and contracts that are only for work that will be performed outside the United States.

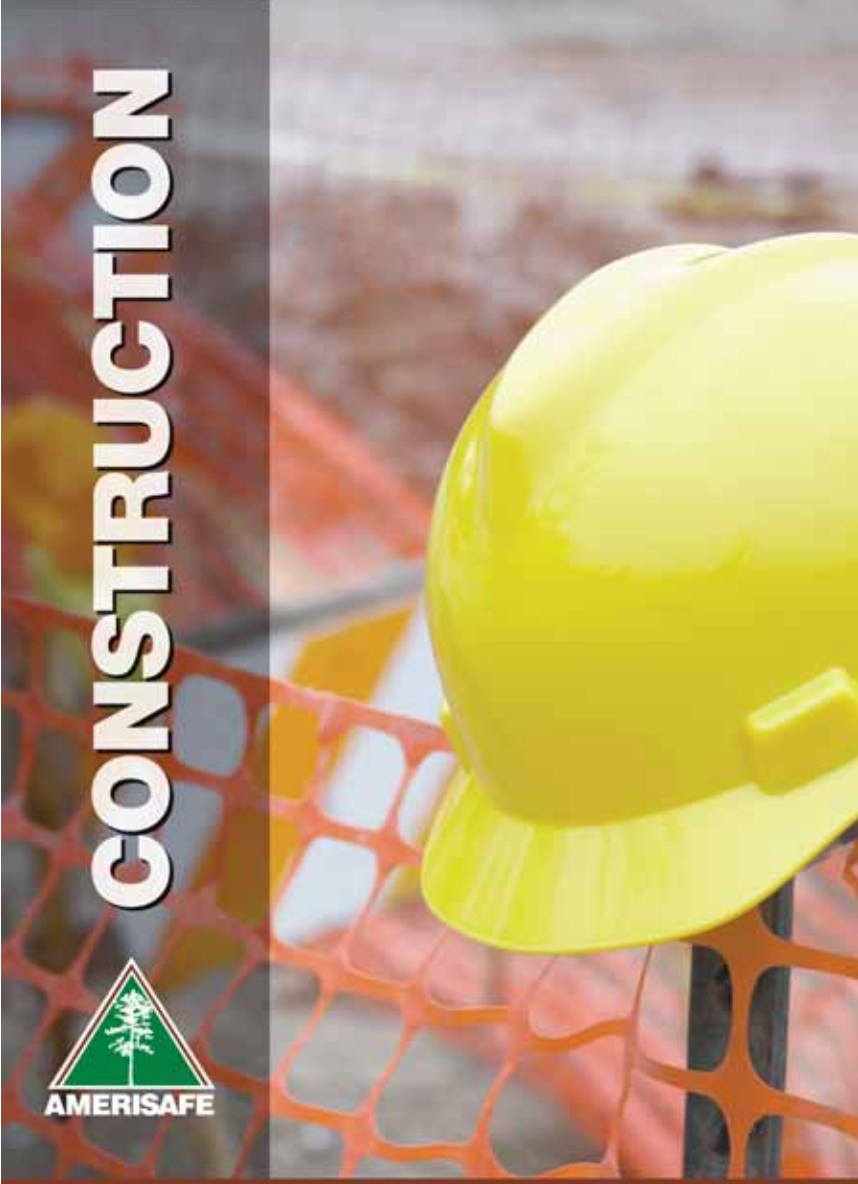
Which Employees Must Be Verified?

If the federal contract contains the E-Verify clause, the contractor must verify (1) all newly hired employees who work in the United States and (2) all existing employees "assigned to" the federal contract. An employee is considered to be "assigned to" the federal contract if he or she is "directly

performing work" under that contract. The rule provides that an employee is not "directly performing work" under the contract if the employee normally does support work, such as indirect or overhead functions, and does not perform "substantial duties applicable to the contract." The contractor also has an option to elect to verify all its

existing U.S. employees, company-wide. Contractors electing this option must provide notice on the E-Verify system.

The rule also forbids using E-Verify on certain categories of employees. These include employees hired before November 7, 1986, existing employees whom the federal contractor has



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previously verified through E-Verify and individuals who have an active confidential, secret or top secret security clearance.

Flow-Down Requirements

Federal contractors must also require subcontractors to use E-Verify if the subcontract is for construction, commercial or non-commercial services, has a value of more than \$3,000, and includes work performed in the United States. Subcontractors who are suppliers are not covered by the E-Verify rule. There is also an exception for subcontracts for certain services related to the purchase of commercially available off-the-shelf items. The prime contractor is not responsible for verifying its subcontractors' individual employees. The contractor, however, must take steps to ensure that all covered subcontracts at every tier incorporate the E-Verify clause,

and that all covered subcontractors use the system.

How Long Do Contractors Have to Get Into Compliance?

The time allowed to begin compliance depends on the contractor's E-Verify status as of the contract award date. If the contractor is not already enrolled in E-Verify when the award is made, it has thirty days from the award date to enroll. Then, within ninety days of enrollment, the contractor must begin using the E-Verify system to confirm the work eligibility of all new U.S. hires. Existing employees assigned to the contract must be verified within ninety days of enrollment or thirty days of the employee's assignment to the contract, whichever is later.

If the federal contractor is already enrolled in E-Verify at the time of the contract award, but is not yet

designated as a federal contractor in the E-Verify system, the contractor has thirty days to go into the system and change its designation. Within ninety days of this new designation, the contractor must begin using E-Verify on all new U.S. hires not already subject to verification. Existing employees assigned to the contract must be verified within ninety days of the new designation, or within thirty days of the employee's contract assignment, whichever is later. If the federal contractor is already enrolled in E-Verify as a designated federal contractor at the time of the award, it must verify employees assigned to the qualifying contract within ninety days of the award or thirty days of the employee's assignment to the contract, whichever is later.

If the federal contractor elects to use E-Verify for all its existing employees, it has 180 days from the date it



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gives notice on the system to initiate verification of those employees.

What About Form I-9s?

A federal contractor required to use E-Verify must continue to complete Form I-9s for all newly hired employees. This process is largely the same as it is for other employers, although there are some extra requirements relating to the work authorization documents provided by the employees. These additional requirements are detailed in the *Supplemental Guide for Federal Contractors*, which was recently published by the DHS and can be found on its website (www.dhs.gov).

With respect to its existing employees, the contractor has two options. First, the contractor may examine the previously completed Form I-9s, and, using the guidance set forth in the DHS's Supplemental Guide, evaluate—on an employee-

by-employee basis—whether they are sufficient. Depending on the circumstances, the contractor may need to update an employee's previous Form I-9 or complete a totally new one before it initiates verification under E-Verify. Alternatively, the employer may elect to complete new Form I-9s on all existing employees who need to be E-Verified. This can be either (1) the existing employees assigned to the contract or (2) all existing U.S. employees, if the employer has elected to E-Verify all those employees. Given the tremendous time and effort associated with reviewing the previous Form I-9s on an employee-by-employee basis, many contractors inevitably will opt for this second alternative.

The Legal Challenge to the E-Verify Rule

A lawsuit challenging the E-Verify rule was filed several months ago by

a number of business groups but was dismissed in August by a U.S. District Court in Maryland. The case has been appealed and is scheduled for briefing later this year. Unless this appeal is successful, the E-Verify requirements for federal contractors appear destined to stay. ■

Keith Covington is a partner in the Birmingham, AL office of Bradley Arant Boult Cummings LLP, where he practices in the areas of labor and employment and construction law. His work includes advising contractors and other employers on worksite immigration compliance, union avoidance, labor relations, OSHA issues and equal employment opportunity matters. Covington also regularly litigates, arbitrates and mediates various types of construction and employment-related disputes and does work before the National Labor Relations Board. His e-mail is kcovington@babco.com.

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