



E-VERIFY: THE TRUTH ABOUT WHO HAS TO USE IT

Now, not only do all private employers with operations in certain states (Arizona, Mississippi, and South Carolina) have to use E-Verify, but also certain employers with certain federal contracts or subcontracts have to as well. Figuring out whether you are required to use E-Verify and what you need to do can prove challenging, so we've rounded up some helpful tips.

What is E-Verify?

E-Verify is a free, Internet-based system operated by the Department of Homeland Security (“DHS”) in partnership with the Social Security Administration (“SSA”). The system allows participating employers to electronically verify their employees’ employment authorization, i.e., whether the employees are both authorized to work in the United States and are authorized to work for the employer running the check. For more detailed information, please see [our previous E*Bulletin on this issue](#).

Am I Required to Use It Now?

The FAR is a set of rules and regulations used to manage the way the federal government acquires supplies and services. The FAR final rule, known as the “E-Verify Contractor Rule,” directs federal agencies to require many federal contractors to use E-Verify to verify the work eligibility of certain employees. This rule went into effect September 8, 2009, and it can affect current users of E-Verify and companies that have never used it before.

Of course, the easiest way to find out if you are covered is to review any new federal contracts awarded or any solicitations issued on or after September 8, 2009, and see whether they include the FAR E-Verify clause. It is the government contracting official, not DHS or E-Verify, that decides whether a federal contract qualifies for the FAR E-Verify clause.

To qualify for the E-Verify clause, the contract must meet **all** the following requirements:

1. It was awarded on or after September 8, 2009, and includes the clause;
2. It has a period of performance that is more than 120 days;
3. The value of the contract exceeds \$100,000; and
4. At least some portion of the work under the contract is performed in the United States.

Also, if you have an existing indefinite-delivery/indefinite quantity contract, a government contracting official may modify it to include the E-Verify clause for future orders. Contracts involving commercially available off-the-shelf (“COTS”) items **are exempt** from this clause.



What if you're a subcontractor? The rule does require certain federal prime contractors to require their subcontractors to use E-Verify when:

1. The prime contract includes the E-Verify clause;
2. The subcontract is for commercial or noncommercial services or construction;
3. The subcontract has a value of more than \$3,000; and
4. The subcontract includes work performed in the United States.

As proof of enrollment, the subcontractor should provide the prime contractor a copy of its "Maintain Company" page, which can be printed directly from E-Verify.

Two more notes about the relationship between prime and subcontractors:

1. The prime contractor must ensure that all covered subcontractors at every tier use E-Verify; and
2. The subcontractor may designate the prime contractor as its agent for ensuring E-Verify compliance.

If It Applies... Then What?

If this FAR E-Verify clause applies, then you **must** verify the employment authorization of all new hires **and** existing employees currently assigned to that contract. You **may**, but are not required to, verify your entire workforce, which includes all other existing employees regardless of whether they are assigned to a federal contract.

If you have to start using E-Verify as a federal contractor, and have not previously been using the system, then you have to enroll within 30 calendar days of the award of the date of a contract that contains the FAR E-Verify clause. You then must begin verifying all new hires within 90 calendar days of your enrollment date, unless the company qualifies for an exemption. You also have to initiate verification of all existing employees assigned to that contract within 90 calendar days of your enrollment date. If you've chosen to verify your entire workforce, you have to initiate that verification within 180 days of notifying DHS that you've chosen to do this.

If you are already using E-Verify, but you were not designated as a federal contractor in E-Verify, then you must update your company profile to designate the company as a federal contractor within 30 calendar days of the award date of the contract that contains the E-Verify clause or an existing contract that has been modified to include the E-Verify clause. You have 90 calendar days from the date you changed your designation to begin verifying all new hires and verify all existing employees assigned to the qualifying contract. Again, if you've chosen to verify all existing employees, you have to initiate that verification within 180 days of notifying DHS that you've chosen to do this.

When it comes to verifying existing employees assigned to the contract, you do **not** have to use E-Verify to check employees:

1. Hired before November 7, 1986, and having continuous employment;
2. Already confirmed as authorized to work in E-Verify;



3. Who perform support work such as general company administration or indirect or overhead functions and do not perform any substantial duties applicable to the contract (for example, HR, accounting, or IT); or
4. Who have active confidential, secret, or top-secret security clearance (TWIC does not qualify as such).

What Else?

Remember, regardless whether you are required to use E-Verify, you must still comply with Form I-9 regulations. If you choose to or are required to use E-Verify, then you have additional requirements to comply with I-9 issues, namely:

1. You may only accept a List B document that contains a photo (and if the employee objects on religious grounds, you need to contact E-Verify Customer Support);
2. You must photocopy any Employment Authorization Document (“EAD” or Form I-766) or Permanent Resident Card (“green card” or Form I-551) if your employee presents one of these documents and you must keep the document with that employee’s I-9 form; and
3. Your employees **must** write their Social Security numbers in Section 1 of the I-9. If you don’t use E-Verify, then you **cannot** require employees to write their Social Security number in Section 1.

When in Doubt

Because the rule is so new, both prime and subcontractors may be caught by surprise. If you have questions, you should consult with your government contracting official and/or your legal counsel.

– [Laurie M. Chess](#)



Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

Laurie M. Chess
Partner, Jones Walker
Courvoisier Centre II
601 Brickell Key Drive, Suite 500
Miami, FL 33131
305.679.5728 *tel*
305.679.5710 *fax*
lchess@joneswalker.com

Labor & Employment Practice Group

H. Mark Adams
Kevin O. Ainsworth
Jennifer L. Anderson
Timothy P. Brechtel
Gregory Brumfield, Jr.
Susan K. Chambers
Laurie M. Chess
Amy C. Cowley
Anita B. Curran
Jennifer L. Englander
Virginia W. Gundlach

Jane H. Heidingsfelder
Cornelius R. Heusel
Thomas P. Hubert
R. Scott Jenkins
Mary Ellen Jordan
Tracy E. Kern
Jennifer F. Kogos
Celeste C. Laborde
Joseph F. Lavigne
Sidney F. Lewis, V
Joseph J. Lowenthal, Jr.

Christopher S. Mann
Edward A. R. Miller
James Rebarchak
Olivia S. Regard
Kirkland E. Reid
Stephen D. Ridley
Victoria J. Franklin-Sisson
Mary Margaret Spell
David K. Theard
Patrick J. Veters
Robert B. Worley, Jr.

This newsletter should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own attorney concerning your own situation and any specific legal questions you may have.

To subscribe to other E*Bulletins, visit <http://www.joneswalker.com/ecommunications.html>.