

Akerman Practice Update

CONSTRUCTION

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The Latest Developments with the E-Verify Program

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Implementation of the final rule requiring Federal contractors and subcontractors to begin using the Department of Homeland Security's E-Verify system has been delayed until September 8, 2009. For several years, E-Verify has been a voluntary program available to Federal contractors. It is an electronic means of comparing information supplied by employees with data kept by the Department of Homeland Security (DHS) and the Social Security Administration (SSA), in order to verify that an employee is eligible to work in the United States.

Last year, the Bush Administration issued an Executive Order making E-Verify mandatory for Federal contractors. As a result, proposed changes to the Federal Acquisition Regulation implementing the order went through the public comment period and the end result was a **final rule** requiring inclusion of a new clause, FAR 52.222-54, Employment Eligibility Verification, in domestically performed Federal contracts over the \$100,000 simplified acquisition threshold with a performance period of at least 120 days. Although originally scheduled to become effective on January 15, 2009, as a result of pending litigation challenging the rule and an on-going review by the Obama Administration, the rule is now to take effect on September 8, 2009.

What follows is a brief overview of proposed new FAR clause and the E-Verify system as well as the steps Federal contractors and subcontractors will need to take to implement and comply with these requirements.



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“The potential benefit for an employer using E-Verify is that it provides a safe-harbor – a defense for the employer for potential violations of the immigration laws...”

What is E-Verify?

E-Verify is an Internet based system that allows participating employers to electronically verify the employment eligibility of employees. Employers enroll in E-Verify free of charge upon entering into a standard memorandum of understanding (MOU) with DHS and SSA. Once participating in the E-Verify system, an employer can electronically check an employee’s immigration status by entering data from the employee’s I-9 Form into the E-Verify system. If the employee’s immigration status cannot be verified, the employer receives a “tentative nonconfirmation notice” (TNC) from either DHS or SSA which must be provided to the employee. This triggers an eight working-day period for the employee to contest the TNC with the issuing agency. Under the current MOU, participants are not permitted to use E-Verify to check an individual’s immigration status prior to hiring or as part of pre-employment screening.

The potential benefit for an employer using E-Verify is that it provides a safe-harbor – a defense for the employer for potential violations of immigration laws if it turns out that an employee cleared through E-Verify is actually ineligible to work in the United States. The statute that creates E-Verify - 8 U.S.C. § 1324a - provides that if a contractor/subcontractor clears employees under the E-Verify system, then it creates a rebuttable presumption that the contractor/subcontractor did not intentionally violate the immigration laws regarding hiring employees.

What does the Proposed E-Verify FAR Clause Require?

Under proposed FAR 52.222-54, a contractor is required to enroll in E-Verify within 30 calendar days of award if they are not presently enrolled. Within 90 days of enrollment, contractors must begin to use E-Verify to confirm employment eligibility of all new hires within 3 business days of the hiring. Contractors are also required to use E-Verify to verify all employees assigned to the contract containing the clause within 30 days of their assignment to the contract.

It is important to note that the requirement to verify new hires is not limited to individuals assigned to contracts containing the clause but to each and every new hire regardless of whether they will work on a Federal government contract. However, if the contractor is an institution of higher education, a State or local government, the government of a Federally recognized Indian tribe, or a surety performing under a takeover agreement with the Federal government pursuant to a performance bond, then the contractor need only use E-Verify for employees assigned to the contract and not all new hires.

“Although E-Verify is currently voluntary for Federal contracts, several states have adopted laws or Executive Orders mandating E-Verify for employees of state agencies and state contractors and subcontractors.”

The clause provides contractors with the option of using E-Verify to verify the employment eligibility of all employees. Contractors are not required to use E-Verify to screen employees that have previously been checked with E-Verify, individuals holding certain security clearances, or individuals who have undergone a complete background investigation and been issued credentials pursuant to Homeland Security Presidential Directive 12.

Does E-Verify Apply to Subcontractors?

Under proposed FAR 52.222-54(e), contractors are required to include the requirements of the clause, including the flow-down requirement, in virtually all subcontracts. In the case of subcontracts for construction in the United States, the E-Verify requirement is a mandatory flow-down for all subcontracts over \$3,000 at all tiers. For subcontracts for commercial and non-commercial services at all tiers, the E-Verify requirements apply regardless of the subcontract value. However, the clause does provide an exception for commercial services that are part of the purchase of a commercially available off-the-shelf (“COTS”) item or an item that would be COTS but for minor modifications.

What are the Sanctions for Violating the E-Verify FAR Clause?

Under the proposed FAR 52.222-54(b)(5), contractors are required to comply with the E-Verify program MOU they entered in order to enroll in E-Verify. If the DHS or SSA terminates the MOU and denies a contractor access to the E-Verify system during the period of performance of a contract containing the clause, the contractor will be referred to a suspension and debarment official. The current form MOU provides that DHS may terminate the MOU upon a determination by SSA or DHS that an employer has breached the integrity or security of the E-Verify system or has failed to comply with established procedures or legal requirements.

Does E-Verify Apply to State Contracts?

Although E-Verify remains currently voluntary for Federal contractors until September 8, 2009, several states have adopted laws or Executive Orders mandating E-Verify for employees of state agencies and state contractors and subcontractors. These states include Arizona, Colorado, Georgia, Minnesota, Mississippi, Oklahoma, South Carolina and Utah. Other states are presently considering implementing similar requirements. Employers with state government contracts must check their contracts and applicable state law to see if E-Verify is required.

“... the effective date of these requirements on Federal contracts is September 8, 2009.”

Conclusion

Federal contracts over \$100,000 awarded after September 8, 2009 will require contractors and subcontractors to enroll in the E-Verify program and commence using the E-Verify system to confirm the immigration status of employees assigned to such contracts as well all new hires. Implementing and complying with these requirements will be challenging particularly for large firms that perform significant non-government work.

These new regulations have not come without controversy. On December 23, 2008, the U.S. Chamber of Commerce, Associated Builders and Contractor, and several other trade groups sued to block their implementation. As of this writing, that suit is stayed pending a review of the regulation by the Obama Administration. As it presently stands, the effective date of these requirements on Federal contracts is September 8, 2009.

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