



Labor and Employment Law Alert

A Labor and Employment Law Department Publication

September 2009

This Labor and Employment Law Alert is prepared for the general information of clients and friends and should not be relied upon as specific legal advice. If you would like more information or have questions, please contact the following:

Fred G. Pressley, Jr.
614-227-2233
fpressley@porterwright.com

Robert H. Cohen
614-227-2066
rcohen@porterwright.com

Christina A. Pate
614-227-2123
cpate@porterwright.com

John M. Stephen
614-227-2193
jstephen@porterwright.com

Michael J. Underwood
614-227-2274
munderwood@porterwright.com

*Please see our other publications at
www.porterwright.com/publications.*

As a Federal Contractor, What Does E-Verify Mean To Your Company?

You may have noticed a spate of recent articles and announcements indicating that “all federal contractors” will be required to begin using the federal government’s E-Verify system beginning September 8, 2009. Originally set to take effect on January 15, 2009, there have been three prior delays in implementing mandatory use of E-Verify for federal contractors. On August 26, however, a federal district judge rejected a request for further delay, so it appears the E-Verify regulations will actually go into effect on September 8. In light of this, current contractors should start thinking about how E-Verify will affect them – if at all.

Even though many of the articles on this topic indicate that “all federal contractors” are required to start using the system on September 8, the reality is that not all contractors will be covered and that even covered contractors have time after September 8 to enroll and start using E-Verify.

Is Your Company Covered By The E-Verify Regulations?

When Does The Regulation Apply?

- The rule affects only certain federal contractors that are awarded a new contract after September 8, 2009. Those contracts will include a clause requiring the contractor to use E-Verify.
- Generally, existing federal contracts will not be affected unless they are extended, renewed, or otherwise amended on or after September 8.
- The regulation requires the government to renegotiate contracts to include an E-Verify provision in all contracts for an indefinite delivery or for an indefinite quantity (IDIQ). This provision is limited to contracts for a substantial (not defined) amount of goods that extends for more than six months from the effective date (March 8, 2010).

What Types Of Contracts Are Affected?

- Prime contracts with a performance period of 120 days or more and a value of \$100,000 or more.

- Subcontracts over \$3,000 for services or construction (and only if the prime contract requires E-Verify).
- Contracts exempt from the rule include:
 - Contracts for less than \$100,000;
 - Contracts for commercially available off-the-shelf items (COTS);
 - Contracts for less than 120 days; and
 - Contracts where all work is performed outside the United States.

My Company Is Covered, Now What?

When Do I Have To Enroll In E-Verify?

- *Enrollment within 30 days of award date:* When a contractor wins a bid on a federal contract that contains the E-Verify clause, the contractor and covered subcontractors must enroll in E-Verify within 30 calendar days of the award date.
- *Verification of employees within 90 days from enrollment:* Contractors have 90 days from the date they enroll in E-Verify to initiate verification for employees.
- *On-going obligation:* After an employer has enrolled in the program, contractors and the new employees must complete the Form I-9 and employers must initiate verification within three business days after their start date. Verification may be initiated any time after the employee accepts the job offer and fills out the Form I-9. Pre-screening is not allowed.
- *Expiration:* When its covered contract ends, a company is not required to continue using E-Verify. However, if the company wishes to terminate enrollment in E-Verify, there is an affirmative process to complete. Employers may not simply stop using the system.

Which Employees Am I Required to Verify Using E-Verify?

- Employers are required to verify all new employees (following acceptance of job offer and completion of Form I-9) regardless of worksite and regardless of whether the employee will be assigned to a federal contract.
- In addition, employers must verify all existing employees who are assigned to the contract. This is defined to mean any employee hired after November 6, 1986 who is directly performing work in the United States under a contract with an E-Verify Clause.
- The rule does not exempt employees based on the intermittent nature of the work or the length of time spent performing the work.
- Existing employees who do not perform any substantial duties under the contract or who perform support work (i.e., administrative or clerical functions) are not required to be E-Verified.
- Contractors have an ongoing obligation to E-Verify. Any current employees assigned to work for a contract after the initial E-Verify process (in other words, current employees who have not yet been E-Verified) must be E-Verified if they are later assigned to a covered contract.
- Once an employee is E-Verified, that employee need not be re-verified if, for example, the employee was previously E-Verified but then moved to a different contract (for the same employer).
- An employer also has the option to E-Verify its entire workforce. To avoid a “rolling” process of E-Verification of existing employees, companies may choose to E-Verify all existing employees – even those not assigned to a federal contract. Employers that are not Federal Contractors are not permitted to E-Verify existing employees.
- Contractors cannot rely on E-Verification performed by a previous employer.



Notice Obligations to Applicants and Employees

- If your company participates in E-Verify, you must post: (1) a notice provided by the Department of Homeland Security indicating your company's participation in the E-Verify program, and (2) the anti-discrimination notice issued by the Department of Justice.
- The notices must be in a prominent place that is clearly visible to prospective employees and all employee who are verified through the system.
- Once you are enrolled in E-Verify, these notices will be available to you in the "On-line Resources" section of the system.