

E-Verify for Federal Contractors and Subcontractors Finally Implemented

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The long-delayed E-Verify for federal contractors and subcontractors, hereinafter referred to as FAR (Federal Acquisition Regulation) E-Verify, was finally implemented on September 8, 2009.

The saga of FAR E-Verify began over a year ago with an Executive Order issued by President George W. Bush. The June 2008 Executive Order stated an electronic employment eligibility verification system shall be required to be used by contractors on federal contracts and the contractors would verify all employees hired during the contract term and all employees assigned by the contractor to perform work on the contract.

Pursuant to the Executive Order, the Department of Homeland Security published proposed rules and regulations. On November 14, 2008, the final rule was published setting the Executive Order's effective date as January 15, 2009. The final rule specified E-Verify would only be required on federal contracts of \$100,000 or more and subcontracts of \$3,000 or more.

On December 23, 2008, the Chamber of Commerce and several other employer organizations filed suit seeking to block FAR E-Verify's implementation on the basis the final rule and Executive Order violated federal immigration and procurement laws. Thereafter, the Department of Homeland Security agreed to several postponements of its implementation. In July 2009, the Secretary of DHS, Janet Napolitano, announced it planned to go forward with the implementation of FAR E-Verify on September 8, 2009. On August 25, 2009, a federal judge in Maryland found the federal government did not violate any federal laws or regulations in promulgating FAR E-Verify, which cleared the path for its implementation on September 8.

FAR E-Verify is significantly more comprehensive than voluntary E-Verify. Not only do federal contractors/subcontractors have to verify all newly-hired employees, regardless of whether they are assigned to the federal contract, but also all existing employees assigned to the federal contract. Additionally, federal contractors and subcontractors may elect to verify all existing employees regardless of whether they are working on a federal contract. The voluntary E-Verify is only for verification of newly-hired employees and strictly prohibits the use of E-Verify to verify existing employees.

FAR E-Verify covers all contracts entered into between federal agencies and contractors for goods or services of \$100,000 or more and must include language requiring the contractors to use E-Verify. Furthermore, subcontracts of \$3,000 or more related to federal contracts will require subcontractors to utilize FAR E-Verify. There are also several exemptions that are not related to the cost of the contract: (1) if the contract has performance terms of less than 120 days; (2) contracts for commercially available off-the shelf (COTS) items; (3) contracts for work performed outside of the United States; and (4) existing employees who normally perform support work, such as general company administration or indirect or overhead functions, and do not perform any substantial duties applicable to the federal contract.

The final regulations provide for various time periods for federal contractors and subcontractors to be in compliance with FAR E-Verify. The time periods are:

1. 30 calendar days from the date of the contract award to enroll in FAR E-Verify;
2. 90 calendar days from enrollment to begin using FAR E-Verify for new employees and existing employees assigned to the contract for first-time participating federal contractors and subcontractors;

3. 30 calendar days for contractors and subcontractors to initiate verification of existing employees, who are newly assigned to a federal contract and who have not previously been verified by E-Verify; and

4. Three days for new hires, where the contractor has already been enrolled in and utilizing E-Verify.

If you are going to be bidding on federal contracts, you should become familiar with all of the requirements of FAR E-Verify. This is true even if your company already uses voluntary E-Verify.