

E-Verify and the New Federal Contractor Requirements

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In a set of new regulations released in the last week, the federal government is mandating the use of E-Verify for employers performing work under federal contracts. Effective January 15, 2009, all employers with federal contracts for commercial, non-commercial, and construction services will be required to utilize E-Verify to check the employment authorization of all newly hired employees and existing employees directly performing work on the federal contract. This new requirement will apply to any federal contract lasting longer than 120 days and exceeding \$100,000 in value. The regulation also requires contractors to impose these requirements on any subcontractor if the value of the work performed by the subcontractor exceeds \$3,000. In its regulatory issuance, the federal government anticipates this new regulation will impact approximately 170,000 employers with a total workforce of approximately 4 million employees. Even if this number is accurate, this is a significant portion of the U.S. workforce. Considering the reach of the subcontracting provisions, it is likely these numbers significantly understate the impact to employers that have some involvement with federal contracts.

The E-Verify system is the electronic employment verification tool operated by the Department of Homeland Security and The Social Security Administration. Historically, employers have been free to voluntarily participate in E-Verify or choose to limit the verification of work authorization to the completion of the I-9 forms mandated under federal law. In the last few years, employers have been under increasing pressure to utilize the E-Verify system as part of the process by which the employers verify the work authorization of newly hired employees. This pressure has come from various federal regulations and state law enactments making E-Verify part of voluntary safe harbor provisions within those laws and regulations. These safe harbors for voluntary participation, while an enticing carrot, have not convinced employers to participate in E-Verify in mass quantities. This latest regulation is a specific mandate requiring a large sector of our economy to participate in E-Verify as a condition of doing business. This new regulation reaches further than any prior enactment by shifting the verification obligation to existing employees rather than newly hired employees. This extension to existing employees takes E-Verify in a new direction it was never intended for in its initial implementation. In fact, for employers voluntarily participating in E-Verify (not federal contractors), the verification of existing employees is absolutely prohibited. At this juncture, employers facing these new requirements need to evaluate the scope of its coverage to their workforce and prepare for its implementation in January of 2009. There are complications in the application of this new regulation to existing employees that are directly working on the contract and employers will need to consider those options carefully prior to January of 2009.

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