

The E-Verify Program and Its Application to Federal Contractors

By Jamie Tedlock McCoy

Introduction

On November 14, 2008, the *Federal Register* published a final rule that requires federal contractors to enroll and participate in the E-Verify program.¹ The E-Verify program is an internet-based system designed for employers to electronically verify employment eligibility of newly-hired employees. The E-Verify program is operated by the Department of Homeland Security (DHS) in conjunction with the Social Security Administration (SSA). The final rule, slated to become effective on May 21, 2009, requires federal contractors to use the E-Verify program to verify not only the employment eligibility of all new hires, but the eligibility of existing employees who directly perform work under a federal contract, with some exceptions. In addition, the rule applies to certain subcontractors.

Federal Legislative Background

On February 13, 1996, President Clinton issued Executive Order 12989, prohibiting federal contracting agencies from contracting with employers that had not complied with the Immigration and Nationality Act's (INA) employment provisions prohibiting the unlawful employment of aliens.² The Executive Order also stipulated that federal contractors found to have violated the INA's employment provisions could be suspended from current contracts or debarred from future federal contracts. On June 6, 2008, President George W. Bush amended Executive Order 12989 to direct federal agencies to require that federal contractors agree to electronically verify the employment eligibility of their employees. Based on the amended Executive Order, on June 9, 2008, the DHS, through DHS Secretary Michael Chertoff's announcement, designated its E-Verify program as the system that all federal contractors must use to verify their employees' employment eligibility.

On June 12, 2008, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) proposed to amend the Federal Acquisition Regulations (FAR) to require all federal con-

tractors to use the E-Verify program as the means of verifying their employees' work eligibility in the United States. The Councils submitted a Notice of Proposed Rulemaking to the *Federal Register* soliciting public comment on the proposed changes to the regulations. On November 14, 2008, the *Federal Register* published the final rule, with an original effective date of January 15, 2009 (now May 21, 2009).

State Responses to the E-Verify Program

The E-Verify program, formerly the Basic Pilot/Employment Eligibility Verification Program, is an online system that participating employers can use to verify employment status. Historically it has been used only for new hires. Verification of employment authorization is done by the employer comparing information from an employee's I-9 form against SSA and DHS databases. According to the DHS, more than 87,000 employers are enrolled in the program, and over 6.5 million queries were run in fiscal year 2008. Of those queries, 99.5 percent of qualified employees were cleared automatically by E-Verify.³

For the most part, the E-Verify Program has been a volunteer program in which employers can enroll to validate employment eligibility of new hires. However, some states have enacted legislation requiring all employers (for example, Arizona⁴) or all public employers (such as Georgia⁵) to electronically verify employment authorization for newly-hired employers through the E-Verify Program.

It is noteworthy that the State of Illinois has enacted legislation prohibiting employers from using the E-Verify program. Employers in Illinois are barred, except as required by federal law, from using the E-Verify program until the DHS and SSA databases can make a determination on 99 percent of the tentative nonconfirmation notices issued to employers within 3 days.⁶ The federal government has challenged Illinois's prohibition of the use of E-Verify by employers in federal court – the suit was pending as of March 4, 2009.⁷

The State of Michigan had not passed any legislation concerning the required use of the E-Verify program by employers as of early March 2009. However, on November 6, 2007, the State enacted a general appropriations bill that requires state agencies to consider a number of factors when awarding or canceling contracts for work or purchase with private businesses. One factor is whether a vendor would use employees, contractors, subcontractors, or other individuals who are not “citizens of the United States, legal resident aliens, or individuals with a valid visa” to perform services for the State, as this would be “detrimental to the state of Michigan, its residents, or the state’s economy”.⁸ This could be seen as encouraging employers to use programs like E-Verify.

Implementation of the Final Rule

The final rule requires federal contracting officers to include a new clause in all federal contracts awarded and solicitations issued on or after its effective date. This clause will require that federal contractors use the E-Verify program to confirm the employment eligibility of all persons hired during a contract term. The federal contractor also agrees to confirm employment eligibility of current employees who perform contract services for the federal government within the United States. Most existing federal contracts will not be affected by the final rule unless they are extended, renewed, or otherwise amended between the U.S. contracting officials and the federal contractors. However, if an existing federal contract is for indefinite delivery or quantity to last at least six months beyond the final rule’s effective date, the regulation directs federal contract officers to modify the existing contract on a bilateral basis to include an E-Verify clause for future orders, as long as the amount of work or number of orders expected under the remaining performance period is substantial.⁹

Federal government contracting officials are responsible for determining if a contract with the federal government requires the E-Verify clause, determining which contracts are subject to the final rule, and implementing such clauses in those contracts. The businesses contracting with the government do not have any responsibility to ensure the contract includes the E-Verify clause, if applicable. However, they are required to make certain that their own contracts with subcon-

tractors covered under the rule include the E-Verify clause when necessary.

Exceptions to the Final Rule

There are various exceptions to the final rule concerning when a contract with the federal government is required to include the E-Verify clause. Most importantly, the rule only applies to agreements covered by the Federal Acquisition Regulations (FAR). Because federal grants and cooperation agreements are not covered by the FAR, they are not subject to the final rule.

Agreements that do fall under the FAR may still be exempted from this rule if they fall under certain specific exceptions. Pursuant to the regulations, solicitations and contracts that do not meet the simplified acquisition threshold under the FAR, being contracts valued at less than \$100,000, are not covered under the final rule. Further, contracts that are only for work that will be performed outside of the United States are also excluded (United States is defined as all 50 States, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands). Also, contracts that are for a period of performance of less than 120 days are excused as well as contracts that are only for “commercially available off-the-shelf” (COTS) items or for items that would be COTS, but for minor modifications.¹⁰

There are also some exceptions from the requirement to use E-Verify to confirm a new employee’s work authorization that apply even if a contract falls under the final rule. Contractors that are higher education institutions, state and local governments, or governments of federally-recognized Native American tribes are only required to verify new employees if those employees will be assigned to a federal contract.¹¹ Moreover, if the new employee has a federal government credential or has been granted a federal government clearance for access to confidential, secret or top secret information, the employer is not required to use E-Verify for the employee.¹²

Requirements for Subcontractors under the Final Rule

A subcontractor is defined as any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.¹³ When dealing with a subcontractor, federal contractors are required to include the E-Verify clause in their contracts for commercial or noncom-

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mercial services when appropriate. Exceptions to this include contracts for commercial services that are part of the purchase of COTS items; contracts for construction; contracts that have a value of more than \$3,000; and contracts that include work performed in the United States.¹⁴ However, if the primary contract with the federal government is excluded from the final rule, then the contract between contractor and subcontractor is excluded as well.

Employer's Obligations with Respect to New and Current Employees

Once an employer is deemed to be a federal contractor under the final rule, and the company elects to continue its contract with the federal government, the employer must then enroll in the E-Verify program, if it does not participate already. Once enrolled, the employer has ninety days to implement the program.¹⁵ After such time, the employer must use the E-Verify program to confirm the employment eligibility of all new employees within three days of hire, regardless of work-site or whether the new employee is assigned to a federal contract, except for new employees that meet an exception to the final rule.¹⁶

Current employees who are assigned to the federal contract, and who do not meet an exception to the final rule, must also have their employment eligibility verified by the employer using the E-Verify program. An employee assigned to the contract is defined as an employee who was hired after November 6, 1986, who is directly performing work, in the United States, under a contract that is required to include the E-Verify clause.¹⁷ An employee is not considered to be directly performing work under a contract if the employee normally performs support work, such as indirect or overhead functions, and does not perform any substantial duties applicable to the contract.¹⁸ Current employees that may not have been assigned to a federal contract previously but are later assigned on a future federal contract must have their employment eligibility verified through the E-Verify program at that time.¹⁹ Note that once an employee is verified in the E-Verify program, the employer is not required to have the employee's work authorization confirmed again based on an assignment to another federal contract.²⁰

It is important to know that when an employer's federal contract terminates, the

employer is no longer required to use the E-Verify program.²¹ The employer can terminate its participation by submitting a termination request through the E-Verify system. If the employer fails to submit such request, then the company continues to be bound by the E-Verify Memorandum of Understanding (the policy the federal contractor agrees to when registering with the E-Verify program). If the employer continues to use E-Verify, it must use the program to verify the employment eligibility of new hires only.²²

Chamber of Commerce of the United States of America, et al v Chertoff, et al

On December 23, 2008, the Chamber of Commerce of the United States of America along with the Associated Builders and Contractors, Inc., the Society for Human Resource Management, the American Council on International Personnel, and the HR Policy Association, filed suit in the U.S. District Court for the District of Maryland, challenging the legality of the federal government's requirement that federal contractors and subcontractors use the E-Verify program. The lawsuit sets forth that the federal government overstepped its power by issuing such regulation in an Executive Order in addition to federal procurement law. Moreover, the suit challenges the legality of using the E-Verify program on an employer's current workforce. The argument set forth in the lawsuit is that the E-Verify program was held out to be a voluntary program for employers to use on new hires, pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.²³ By the federal government promulgating regulations on November 14, 2008 that required the use of the E-Verify program by federal contractors and subcontractors, on new and existing employees, the lawsuit asserts that the final rule is unlawful and should be set aside. The plaintiffs in the lawsuit and the federal government have agreed to temporarily suspend the implementation of the final rule through May 21, 2009.²⁴

Conclusion

The E-Verify program is controversial. There were objections to E-Verify when it was a voluntary program, as demonstrated by Illinois's legislation prohibiting its use until response times were improved. With the final rule requiring use of E-Verify for many federal contracts, and extending the program

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to include verification of the employment eligibility of existing employees, more concerns have been raised. With lawsuits pending and a new presidential administration taking office, it may be some time before the fate of the E-Verify program is known.



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NOTES

1. 73 Fed Reg 67651.
2. 8 U.S.C. 1324a(a)(1)(A), 1324a(a)(2)
3. www.dhs.gov
4. HB 2779 (2007), Legal Arizona Workers Act.
5. SB 529, The Georgia Security and Immigration Compliance Act
6. HB 1744
7. *The United States v Illinois*, Civ. Action. No. 07-3261 (CD. II. Sep. 24, 2007).
8. 2007 PA 127 (SB 229).
9. 73 Fed Reg 67651.
10. 48 CFR 22.1803.
11. 48 CFR 22.1802(b)(2).
12. 48 CFR 22.1802(c).
13. 48 CFR 22.1801.
14. 48 CFR 222-54.
15. 48 CFR 222-54(b)(1)(ii).
16. 48 CFR 222-54(b)(2)(i)(B).
17. 48 CFR 222-54(a).
18. *Id.*
19. 48 CFR 222-54(b)(2)(ii).
20. 48 CFR 222-54(d).
21. 48 CFR 22.1802(e).
22. 48 CFR 52.222(b)(5).
23. Pub. L. No. 104-208, div. C, tit. IV, subtit. A, 110 Stat. 3009-546, 3009-655 (codified as amended at 8 U.S.C. § 1324a note.
24. 74 Fed.Reg. 5621.