



E-VERIFY AND FORM I-9: COMPLIANCE BASICS FOR FEDERAL CONTRACTORS

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E-Verify: What is it?

- Free, internet based system, operated by DHS and SSA, administered by US Citizenship and Immigration Service
- Primary purpose is to verify employment eligibility of new hires
- Federal Contractor Rule
- Checks information obtained from new hire in Form I-9 against information in SSA, DHS and Department of State databases.

Benefits:

What the Government Tells Us

- Improves accuracy of tax and wage reporting
- Protects jobs for authorized workers
- Protects Civil Liberties and employee privacy
- Helps employers maintain legal workforce
- Verification typically “within seconds”
- I-9 archived for easy retrieval
- Electronic confirmation reduces likelihood of receiving “no-match” letter from SSA or DHS
- Rebuttable presumption that employer has not knowingly hired unauthorized workers if employer retains only employees DHS “confirms.”
- NOT a “safe harbor”

E-Verify: Drawbacks

- Time and cost to train users on E-Verify
- Database errors:
 - Backlogs may cause newly authorized citizens not yet in system to present as unauthorized
 - Estimated that .3 percent of employees are “inaccurately barred” from jobs
- Must permit DHS and SSA inspections and audits
- USCIS provides TNC and Final Non-Confirmation information to Immigration and Customs Enforcement Division of DHS
 - Encourages audits, worksite enforcement raids

Longevity of E-Verify

- DHS launches “I E-Verify” campaign end of 2009, includes PSAs touting companies committed to program
- Secretary Napolitano: E-Verify “will be a centerpiece of our effort to maintain a legal workforce for a long time to come.”
- E-Verify is a “long-term reality for doing business in our country.”
- Appropriations to support E-Verify for another three years

Court Challenge Pending

- Chamber of Commerce of U.S. v. Janet Napolitano, August 26, 2009
- Challenge to E-Verify – improper to force participation in pilot program -- struck down by Federal Court
- Rationale: no one forces you to be a federal contractor
- Until appeal is resolved, E-Verify remains law of the land

Program Goals

- Review fundamental Form I-9 and E-Verify compliance requirements
- Offer guidance to promote a more efficient enrollment and problem-free participation in E-Verify
- Points of Contact/Resources

Authority for E-Verify

- Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) – instructs DHS to administer pilot programs to confirm employment eligibility
- Executive Order 12989 (1996) – provides for debarment of Federal Contractors failing to comply with immigration laws
 - “Contractors that employ unauthorized alien workers are necessarily less stable and dependable procurement sources than contractors that do not hire such persons”
- President Bush amends EO 12989: mandates electronic employment verification system in June 2008
- FAR 52.222-54: E-Verify “Federal Contractor Rule” implemented through this clause. Mandatory for all federal contracts awarded or modified after September 8, 2009
- FAR Subpart 22.18, Employment Eligibility Verification

Contracts Subject to E-Verify

- Federal Contracts awarded or modified on or after September 8, 2009 to include the E-Verify FAR clause subject to E-Verify requirements unless:
 - Value less than \$100,000 (simplified acquisition threshold), or
 - Period of performance less than 120 days, or
 - All work performed outside United States (includes DC, Guam, Puerto Rico, USVI), or
 - Contract includes only COTS items and related services

E-Verify Flow Down Requirement

- FAR E-Verify Clause flows down to ALL tiers of subcontracts
- Prime contractor is responsible for insuring that FAR E-Verify clause is included in qualifying contracts
- What can prime do?
 - Require documentation from subcontractor confirming compliance, e.g., proof of enrollment in E-Verify,
 - Indicate sub may be subject to compliance checks by prime
 - Terminate if noncompliant

Subcontracts Subject to E-Verify

- Value of more than \$3,000
- Contract is for commercial or noncommercial services or construction
- At least some of the contract work is performed in the United States
- Does not include subcontracts for COTS items and related services
- Note: Subcontractors who are suppliers are not subject to Federal Contractor Rule

ID/IQ Contracts

- CO and Contractor can bilaterally modify existing ID/IQ contract to include FAR E-Verify clause if:
 - Period of performance extends at least six months after September 8, 2009
 - Substantial amount of work or number of orders expected during remaining performance period

Contractors With Divisions And Affiliates

- Only legal entity that signs the contract is considered the contractor and is bound by the E-Verify obligation
- Whether subs or affiliates are bound will depend on specific factual context

When Must You Enroll?

- Enrollment in E-Verify is required within 30 calendar days of:
 - contract award date, or
 - contract modification date

Enrollment Procedures

- If already enrolled in E-Verify, update your company profile to indicate you are a Federal Contractor with contract subject to E-Verify Clause
- If new to E-Verify, go to www.dhs.gov/E-Verify, click on E-Verify Registration, select enrollment as Employer, Designated Agent, or Corporate Administrator

Enrollment Procedures

- Electronically Sign MOU with DHS
- DHS will issue Name, Password, and E-Verify Web Address within 48 hours
- Review E-Verify Manual for Federal Contractors and E-Verify Supplemental Manual for Federal Contractors
- Complete online Tutorial: need 70% correct to pass, take as many times as necessary
- Print and post E-Verify Participation Poster and Office of Special Counsel Anti-Discrimination Poster

MOU – Requirements for Employer

- Acknowledges that participation in E-Verify does not exempt Employer from inspection, audits, I-9 procedures
- Rebuttable presumption – Authorized and Final Nonconfirmation - cuts both ways

MOU – Requirements for Employer

- Civil money penalty of \$500 and \$1,100 for each failure to notify DHS if employment continues after final nonconfirmation
- No pre-employment screening
- E-Verify participant not subject to civil or criminal liability for actions taken in good faith on info provided by DHS, SSA

MOU – Requirements for Federal Contractors

- Expressly states that compliance with MOU is a performance requirement under the contract
- Contractor consents to release of info relating to its compliance to CO and other authorized officials charged with monitoring compliance
- What does this mean?
 - Failure to comply with E-Verify is material breach

Two Choices After Enrollment:

- Verify entire workforce: this means all new hires and all existing employees throughout organization, or
- Verify all new hires and only those existing employees “assigned to the Contract”

Employee Assigned to a Federal Contract

- Hired after November 6, 1986
- Working in the United States
- “Directly performing work” on a contract containing the E-Verify clause. FAR 22.1801(2).
- Includes short term and temporary employees

Employee Is Not “Directly Performing Work” on Contract If:

- Employee normally performs support work, such as indirect or overhead functions, AND
- Employee does not perform any substantial duties applicable to the contract
- Watch for further regulatory/judicial illumination in interpretation of these terms

Employees Who Should NOT Be Verified

- Hired on or before November 6, 1986, continuing in employment
- Employees previously confirmed by E-Verify as Employment Authorized continuing in employment
- In addition, you may choose not to verify employees with certain active security clearances or who have completed certain background checks with DHS. Just be uniform in your choice.

Deadline for New Hire Verification 90 Days

- Employer must initiate verification of new hires within 90 days of enrolling in E-Verify or updating company profile to “Federal Contractor with E-Verify Clause” if an existing E-Verify user.
- Once you begin verification, initiation of new hire verification must occur within 3 business days after employee’s start date

Deadline for Verification of Existing Employees – 90 Days

- Employer must initiate verification of all existing employees assigned to federal contract within 90 days of enrolling or updating organization designation to “Federal Contractor with E-Verify Clause”
- If assigning employee to federal contract anytime after day 60 of 90 day period, initiate verification of employee within 30 days

Deadline for Verifying Entire Workforce - 180 Days

- Employer electing to verify entire workforce must initiate verification of all existing employees within 180 calendar days of enrolling or updating organization designation to Federal Contractor with FAR E-Verify clause and selecting “Entire Workforce”

Form I-9 and Existing Employees

- Two Options:
- Option 1: Complete new Form I-9 for all employees who will be run through E-Verify
- Option 2: Complete new Forms I-9 when required and update existing Forms I-9 when allowed
- If following Option 2, Form I-9 rules apply: update for document expiration, change in status, change in name

Initial Verification Result – Three Possibilities

- Employment Authorized
 - Employee authorized to work – record confirmation number on I-9 and resolve case
- SSA Tentative Non Confirmation (TNC)
 - Information mismatch
- DHS Verification in Process
 - DHS respond in 24 hrs with Employment Authorized or TNC

Handling TNC

- Two Options:
- Option 1: Employee contests TNC
- Option 2: Employee does not contest TNC
- If Employee does not contest, TNC considered Final Nonconfirmation, you may terminate employee and resolve case

Handling a TNC – Employee Contests

- Print TNC notice and review it with employee. This is generated by E-Verify, contains basis for TNC, instructions for both employer and employee regarding next steps
- Refer the employee to appropriate agency, SSA or DHS to contest
- Employer will certify undertaken foregoing actions

Handling a TNC – Employee Contests

- Employee has eight Federal Government workdays from referral date to visit or call appropriate agency to resolve the discrepancy
- Employee must continue to work at full status during period TNC is pending
- DO NOT take any adverse actions against employee based on TNC during resolution process

Handling a TNC – Employee Contests

- Employee should inform you of status changes, resolution of case
- Check E-Verify periodically for change in status following employee's inquiry: 6 outcomes:
 - Employment Authorized (Submit Resolve Case)
 - Case in Continuance
 - Review & Update Employee Information and Resubmit
 - DHS Verification in Process
 - Final Nonconfirmation
 - DHS No Show

Options After Contract Ends

- Update company profile to Federal Contractor without E-Verify Clause. Continue using E-Verify for New Hires.
- End participation in E-Verify
 - Notify USCIS and Request Termination. Otherwise, terms of MoU remain in place.

Why Form I-9 Matters to Employers

- E-Verify based on I-9
- Purpose is to document that employees are authorized to work in U.S.
- All U.S. employers must complete and retain a Form I-9 for each individual hired for permanent employment in U.S
- Requirement applies to citizens and non-citizens
- Only technical exception is for employees hired before November 6, 1986

Confirming Eligibility and Identity

- Employer must identify documents employee presents from approved list – Section 2 of I-9
- Confirm identification information and eligibility to work in US through List A,B,C docs

Form I-9 Rules for Employers

- If a translator or other preparer is used, it must be noted on the I-9, particularly if HR rep is involved, filling out form for employee
- Employer NOT in control of how form filled out, documents produced for verification
- Copy of written instructions must be given to employee
- Form is NOT filed with USCIS, ICE or any other state or federal agency, maintain form premises
- Don't put irrelevant info on form, as I-9 is frequently exhibit in case against the employer

Form I-9 Rules for Employers

- Form must be kept by employer for at least 3 years after hire or 1 year after employment ends, whichever is later
 - Forms may be maintained electronically under new rule, but we recommend keeping hard copy
- New form should be used, available at www.uscis.gov/forms or by calling 1-800-870-3676
- Form is available in Spanish for reference but English version must be completed

What Can't Employers Do

- **Discriminate:** Recruiting/Hiring/Firing Decisions based on an individual's national origin or citizenship status is illegal. Such decisions based on the fact the documents presented may soon expire is also illegal.
- **Specify Documents:** Employer cannot specify which documents they will accept from an employee. Documents presented from the list must remain the employee's choice.

What Can't Employers Do

- Partially Complete Form: The form must be fully and accurately completed.
- Rely upon prior I-9: If the employee's name has changed, work authorization has expired, or their prior I-9 was completed more than 3 years ago.
- Be inconsistent if updating Form I-9 for employees

What Can Employers Do

- Apply Common Sense: Remember that a valid SSN is nine digits, not all social security cards will look the same.
 - Look for strange fonts
 - Feel it to see if photo is glued on, etc.
- Accept Documents that Appear Genuine: Employers are not expected to be document experts
- Keep a Copy: Employers may keep a copy of the documents they are shown so long as copy and I-9 are responsibly maintained.
- E-Verify must maintain I-551 (permanent resident), I-776 (employment authorization) must be kept if E-Verify participant
- Possibly Terminate: Employer may be able to terminate employee if employee does not cure document deficiency, but legal counsel should be consulted.

What Can Employer Do

- Conduct a Self-Audit: It's better to catch any deficiencies now and not wait for ICE to audit
- Re-Verify: Certain work authorization documents (I-9 Form Lists A and C) will expire and must be renewed. Employer can and should remind (gently) employees prior to expiration to provide updated documents.

What Can Employers Do

- Ask for Help: Guidance is available re I-9:
 - www.uscis.gov
 - www.ice.gov
 - Consult legal counsel

E-Verify Civil Rights Initiatives

- Videos
 - Employer responsibility and worker rights
 - Employee rights and responsibilities re TNC
- Employee Hotline
- MOA between USCIS and DoJ OSC for Immigration Reform and Related Unfair Employment Practices. Cross-notification re
 - Misuse, Abuse, Fraudulent Use of E-Verify
 - Pattern and Practice of Discrimination

Check State Legislation

- States that have enacted legislation mandating use of E-Verify
 - Required for all employers: AZ, MS (phased in approach required full compliance by July 1, 2011)
 - Required for public contractors: CO, GA, MO, NE, UT, RI
- States that require state agencies to use E-Verify
 - CO, GA, ID, MN, MO, NC, NE, OK, UT, RI
- States that have enacted legislation that encourages use of E-Verify
 - E-Verify protects employers from prosecution: PA, TN
 - Requires that all employers within the state check the employment eligibility of new hires: SC
- States that have legislation pending that mandates employers to verify new hires using E-Verify
 - Would require all employers to use E-Verify: NE, NJ, NC, RI, TN
 - Would require public contractors to use E-Verify: IL, KS, MI, NY, NC, PA, RI, TX, WV
 - Would require state agencies to use E-Verify: CT, IL, KS, NY, PA, TX
 - Would encourage use of E-Verify: MO, NC, OR, TX, WA

Summary: Key Deadlines

- 30 days to enroll after contract award or modification
- Verify within 3 business days after start date
- Verify existing employees assigned to contract within 90 days after enrollment
- Verify employees within 180 days if verifying entire organization
- Apply E-Verify procedures to ALL new hires regardless of citizenship status

Summary: Employer “DOs”

- Provide and review with employee notice of TNC
- Provide referral notice from SSA or DHS to employee contesting TNC
- Allow employee contesting TNC to continue working
- Contact DHS if you believe employee received final nonconfirmation in error
- Accept any Form I-9 List B document with a photo from an employee who chooses to provide a List B document

Summary: Employer “DON'Ts”

- Use program to pre-screen applicants
- Influence or coerce an employee's decision whether to contest TNC
- Terminate or take adverse action contesting TNC
- Ask employee for additional documentation beyond I-9 to establish eligibility if TNC
- Request specific documents to trigger E-Verify Photo tool feature

Contact Information

- DHS E-Verify Customer Support: (888) 464-4218
- E-Verify E-mail: E-Verify@dhs.gov
- E-Verify Website: www.dhs.gov/E-Verify
- OSC: www.osc.gov
- Use OSC employer hotline if you have questions about potential employment action: anonymous and can help prevent discrimination: 1-800-255-8155