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## Obama Administration Renews Support of Mandatory E-Verify Use for Federal Contractors

Reinforcing the federal government policy of only doing business with companies that have a legal workforce, the Department of Homeland Security (DHS) announced that it supports a regulation that awards federal contracts only to those entities enrolled in E-Verify.

E-Verify is a voluntary, Internet-based system operated by DHS in partnership with the Social Security Administration (SSA) that allows participating employers to electronically verify the employment eligibility of newly hired employees. The regulation amends the Federal Acquisition Regulation (FAR) and is estimated to impact 168,624 contractors and subcontractors and 3.8 million workers in the first year of implementation alone.

The E-Verify clause must be included in prime federal contracts with a period of performance longer than 120 days and a value above the simplified acquisition threshold (\$100,000). Such prime contractors must in turn flow the E-Verify clause down to subcontractors awarded a subcontract for services or construction with a value over \$3,000.<sup>1</sup>

Exemptions include:

- Contracts that include only commercially available off-the-shelf (COTS) items (or minor modifications to a COTS item) and related services;
- Contracts of less than the simplified acquisition threshold;
- Contracts less than 120 days; and
- Contracts where all work is performed outside the United States.

Starting September 8, 2009, employers awarded federal government contracts must use E-Verify to confirm the employment eligibility of all new hires during a contract term and all current employees who perform the contracted services within the United States. The regulation also allows these employers to verify the work authorization of all existing employees hired after November 6, 1986. However, this provision is legally questionable since the original E-Verify statute permits verification of "new hires" only.

Employers will have 30 days from the date of contract award to enroll and 90 days from that date to initiate verification queries for covered employees. After the 90-day phase-in period, the contractor must verify each newly hired employee within 3 business days after their start date. The employer must continue to use E-Verify for the life of the contract for all new hires, regardless of their anticipated involvement in the assigned contract.

Using E-Verify creates a rebuttable presumption that the contractor has not knowingly hired an unauthorized alien. However, it does not provide a "safe harbor" from worksite enforcement actions. Further, if the government

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<sup>1</sup> Existing indefinite-delivery/indefinite-quantity contracts would be modified on a bilateral basis to include the clause on future orders if the remaining period of performance extends at least six months after the final rule effective date, and the amount of work or number of orders expected under the remaining performance period is substantial.

terminates the contract due to a failure to use E-Verify, the contractor faces possible suspension or debarment from future contracts.

Alarming, a 2007 DHS-commissioned report concluded that the E-Verify database is not sufficiently up to date to meet acceptable accuracy standards. E-Verify is partially based on SSA records, 4.1% of which are thought to contain errors (most of which relate to native born U.S. citizens). These errors could result in a "false" non-confirmation of identity or employment status. As such, an employer using E-Verify risks having to act on such false reports for personnel who are in fact authorized to work in the U.S. Among other complaints about the program, some employers believe that they lose their new employee training investment when they have to terminate an employee after waiting for weeks while the employee challenges an E-Verify determination they believe to be incorrect.

The regulation has already been the subject of a lawsuit in December 2008 in which an injunction was granted. The Administration's renewed support of the regulation will most likely lead to another round of court proceedings.

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