

## **CLIENT ALERT**

### **USCIS ISSUES GUIDANCE REGARDING E-VERIFY FEDERAL CONTRACTOR RULE AND REMINDS EMPLOYERS THAT THE RULE IS EFFECTIVE SEPTEMBER 8, 2009**

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The USCIS has just issued a [Supplemental E-Verify Guide](#) for Federal Contractors as well as a [Press Release](#) reminding employers that E-Verify Federal Contractor Rule (“the Rule”) is effective September 8, 2009.

The Rule requires certain federal contractors to enroll in and use the E-Verify system to check the employment authorization of new hires and of employees assigned to federal contracts. This Rule amends the Federal Acquisition Regulations (“FAR”).

As outlined in previous [client alerts](#), the effective date of the Rule was delayed several times so that President Barack Obama’s Administration could review the Rule and briefing could take place in a lawsuit filed by the U.S. Chamber of Commerce in federal court in Maryland requesting that the Rule be declared invalid. On [July 8](#), the Administration indicated its full support of the Rule and on [August 26](#), the federal court upheld the Rule and dismissed the suit by the Chamber. Although the Chamber appealed the ruling and requested expedited consideration of its emergency motion to enjoin the Rule pending appeal, the federal court has yet to rule on the motion. Accordingly, at this point, the Rule is effective September 8.

Importantly, however, although the Rule is effective September 8, it does not apply to existing contracts. It only applies to qualifying acquisition contracts awarded on or after September 8, 2009 and certain indefinite-delivery/indefinite-quantity contracts modified after September 8, 2009. In addition, the Rule requires that the contract contain language specifically requiring participation in E-Verify. Thus, the E-Verify requirement only applies to contracts awarded/amended after September 8, 2009 that contain the FAR E-Verify clause.

When a contractor wins the bid on a federal contract on or after September 8, 2009 that contains the FAR E-Verify clause, the contractor will be required to enroll in the E-Verify program within 30 calendar days of the contract award date. After enrollment, there is a 90 day phase-in period for the contractor to begin verifying both new and current employees under E-Verify.

The Rule requires the insertion of the E-Verify clause only in prime federal acquisition contracts with a period of performance longer than 120 days and a value above the simplified acquisition threshold (\$100,000). Subcontracts are also covered where such contracts flow from a prime contract that includes the E-Verify clause if those subcontracts are for services or for construction with a value over \$3,000.

The Rule also does not apply to contracts to be performed outside the United States, or for acquisition of commercially available off-the-shelf items. The comments to the Rule also clarify that the term “contract” as used in the rule does not extend to federal grants and cooperative agreements.

Federal contractors with qualifying contracts will generally be required to verify the employment eligibility of all new hires, whether they will work under the contract or not, as well as all employees assigned to the federal contracts. Only those employers that have covered federal contracts that contain the E-Verify Clause may use E-Verify for existing employees. Certain contractors (institutions of higher education, state and local governments, governments of federally recognized Native American tribes, and sureties performing under a takeover agreement entered into with a federal agency) will have the option of using E-Verify only for employees assigned to a covered federal contract.

The Rule also allows Federal Contractors to choose to verify all new hires and all existing employees hired after November 6, 1986, whether or not the employee is currently assigned to a federal contract. A contractor that elects this option must initiate verifications for the contractor's existing employees within 180 calendar days of notifying DHS that they are selecting the entire workforce option. Note that a contractor does not have to elect the 180 day option immediately. Rather, a contractor can proceed under the general requirements and then elect—at a later point in time—the option to verify the entire workforce. This provision is intended to make it easier for contractors who may find it difficult to determine which employees have been assigned to a certain federal contract or to track which employees have already been verified.

The just-issued E-Verify Supplemental Guide for Federal Contractors (“the Guide”) provides practical guidance regarding federal contractor enrollment in E-Verify, time-lines for verification under the Rule and the 90 day phase-in, qualifying contracts and exemptions as well as prime contractor and subcontractor obligations.

It also provides much-needed guidance regarding verification of existing employees under E-Verify. The Guide explains that Contractors have two options with regard to existing employees: (1) completing new I-9 Forms for existing employees subject to the E-Verify requirement under the Rule (“Option I”) or (2) updating the existing employees’ I-9 Forms (“Option II”). The Guide notes that Option I may not only help avoid claims of discrimination, but it may be easier because the process is the same as that for newly hired employees. Interestingly, the Guide also provides that for Option II, “to avoid possible I-9 violations” the employer must carefully determine which cases require a new Form I-9 using the detailed guidance at Section 2.2.1. That section lists many situations in which an employer—even though Option II of updating is selected—will need to complete a new I-9 including, for example, if the employee: presented a List B document that did not have a photo, had a change in his or her immigration status, changed his or her name, or presented an expired document. Detailed rules regarding updating are also provided. As a practical matter, not only will Option I avoid claims of discrimination due to disparate treatment, but it will also likely be easier to implement than the detailed rules for updating.

Importantly, the Guide emphasizes that, whichever option is chosen, the employer “will be required to retain any previously completed Form I-9 for that employee” and the employer “will also be required to make the previous form available for inspection if it is requested by an authorized official.” Accordingly, employers are well-advised not only to retain I-9s consistent with regulatory guidelines but to regularly audit existing I-9s. This is especially true for Federal Contractors and other employers who sign up for E-Verify as they agree under required Memorandum of Understanding to make employment records available (including new and existing I-9s) to the government or its agents.