

Immigration Advisory

From the Buchanan Ingersoll & Rooney Immigration Group

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USCIS' E-Verify Supplemental Guide Offers Important Guidance for Federal Contractors

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On September 8, 2009, a Federal Acquisition Regulation (FAR) final rule (the "federal contractor rule") went into effect that requires certain federal contractors and their subcontractors to agree, through language inserted into their qualifying federal contracts, to use the E-Verify program to electronically verify the employment eligibility of certain employees. U.S. Citizenship and Immigration Services (USCIS) has recently published a new Supplemental Guide to its E-Verify User Manual for federal contractors. The guide offers important guidance and clarification on some questions that have remained unanswered since the federal contractor rule was first published. Employers are encouraged to carefully review the supplemental guide and user manual, which can be downloaded from the USCIS website at www.uscis.gov.

In this article, we've highlighted some of the most interesting and important portions of the supplemental guide that employers should be aware of:

How does my company determine whether it is affected by the federal contractor rule?

Many employers are unsure whether they hold a qualifying contract or will have a qualifying contract in the future. The supplemental guide makes it clear that the employer's *government contracting official*, not the E-Verify program, determines whether a given contract will include the FAR E-Verify clause. Employers are encouraged to review their contracts carefully to look for the clause and check with their government contracting official if they have questions or need more clarification on their obligations. In the case of an existing indefinite-delivery/indefinite quantity (IDIQ) contract, employers should be aware that in certain instances the government contracting official may seek modification of the contract on a bilateral basis to include the E-Verify clause for future orders. In the case of a subcontract, it is the primary contractor's obligation to "flow down" the E-Verify clause into the subcontract, so subcontractors are encouraged to review their contracts carefully for the E-Verify clause. **A key point to remember is that an employer cannot register with the E-Verify program as a federal contractor until it has signed a qualifying contract. Until such a contract is signed, the employer can only register with the E-Verify program on a voluntary basis and verify the employment eligibility of its newly hired employees.** We encourage employers to speak with Buchanan's team of Immigration and Government Contracts attorneys for additional analysis of a specific contract or set of contracts.

What are the prime contractor's obligations as they relate to subcontractor compliance?

Although this issue was briefly addressed in the commentary portion of the regulation, the supplemental guide clarifies that prime contractors are not responsible for verifying their subcontractors' individual employees but may be subject to fines and penalties if they knowingly continue to work with a subcontractor who is in violation of the E-Verify requirement. For this reason, USCIS suggests that the prime contractor should provide general oversight to subcontractors. What counts as general oversight is left up to the prime contractor and not addressed by USCIS. At a minimum, employers are encouraged to obtain the subcontractor's proof of enrollment and written attestation that it

is enrolled in the program and agrees to comply with the E-Verify requirements. As proof of enrollment, the prime contractor should request a copy of the subcontractor's "Maintain Company" page, which can be printed from the E-Verify program.

Clarification on Employment Eligibility Verification for Existing Employees

Under the federal contractor rule, qualifying employers must use the E-Verify program to verify: (1) all new hires; and (2) existing employees *assigned to the contract*, unless they're considered exempt. Employers also have the option of choosing to verify their entire workforce. What may not have been clear for many employers is that the verification process for existing employees requires employers to have a complete, accurate existing Form I-9, or a newly completed Form I-9 if one does not already exist, for each employee hired after November 7, 1986, before the E-Verify query can be processed. Employers cannot simply enter their employees' names and Social Security numbers into the system. In most instances, employers will have to first either complete a new Form I-9 or update an existing Form I-9 for the employee before the E-Verify query can be processed. For example, if an existing employee presented a document on a previous Form I-9 that had since expired, a new Form I-9 would be required, since the current I-9 regulations do not allow expired documents to be accepted. Similarly, the E-Verify system will not accept input data from expired documents.

It is important that employers make a policy decision whether to complete new Forms I-9 for their existing employees or whether they will complete new Form I-9s when necessary and update existing Forms I-9 when allowable. Choosing which option is best for your company will depend on the number of employees you have and whether you have sufficient resources to review your existing I-9s and make the determination of whether a new Form I-9 is required or whether the existing I-9 can simply be updated.

If your company chooses to examine and review its previously completed I-9s, the supplemental guide points out several instances where a new Form I-9 must be completed, such as when your employee:

- Presented an expired document on a previous Form I-9 that allowed for such documents.
- Is an alien whose employment authorization as stated in Section 1 of Form I-9 has expired.
- Presented a List B document that did not have a photo when he or she completed the previous Form I-9.
- Presented a List B document on a previous Form I-9 and you are unable to determine if that document had a photo.
- Had a change in his or her immigration status.
- Was at the time of attestation a noncitizen national of the U.S. and was unable to attest to his or her correct status in Section 1 of Form I-9 with a revision date before February 2, 2009.
- Changed his or her name.
- Completed his or her previous Form I-9 and it did not comply with Form I-9 requirements at the time of completion.

Employers are reminded to retain any previously completed Form I-9 for the existing employee, as this form must be available for inspection if it is requested by a DHS official.

The supplemental guide also provides guidance for updating a previously completed Form I-9:

- If your employee presented an unexpired Form I-551 (Permanent Resident Card) or U.S. passport on a previous Form I-9 and that document has since expired, and his or her employment authorization is still current, you may not request that the employee present an unexpired version of either document. However, a new Form I-9 can be completed.
- If your employee presented an unexpired Form I-551 or Form I-766 (Employment Authorization Document) and it is still unexpired, you should photocopy the document and keep it with the employee's Form I-9.
- If your employee did not provide his or her Social Security number when completing a previous Form I-9, or if the employee claims that his or her number has changed since then, the employee should update Section 1 of the previous Form I-9 with his or her current Social Security number.

- If your employee's alien number has changed, the employee should update Section 1 of the previous Form I-9 with his or her current alien number.

For more information on any of these topics, employers are encouraged to contact one of our Immigration or Government Contracts attorneys. We are available to explain the federal contractor rule and the E-Verify program in more detail, including how the rule may affect your business.

For more information, email the author(s) at immigration@bipc.com.

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