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E-Verify: Now Mandatory for Federal Contractors

Tuesday, October 06, 2009

Introduction

Effective September 8, 2009, covered federal contractors and subcontractors are required to use the E-Verify system to verify their employees' eligibility to work in the United States. Accordingly, those businesses and organizations who do work for the federal government should confirm if they are considered a covered contractor and if so they should then become familiar with the new obligations imposed by Executive Order 13456 and the corresponding Federal Acquisition Regulations. As of this writing, E-Verify is still otherwise a voluntary program for all other employers who are not federal contractors. That, too, is subject to change.

What is E-Verify?

E-Verify is a free online system operated jointly by the U.S. Department of Homeland Security ("DHS") and the U.S. Social Security Administration ("SSA"). It allows participating employers to electronically verify their employees' employment eligibility by comparing information from an employee's Form I-9, Employment Eligibility Verification, against SSA and DHS databases.

According to United States Citizenship and Immigration Services (USCIS), E-Verify is the best method for verifying employment eligibility in the U.S. The program is designed to protect jobs for authorized workers and minimize verification-related discrimination, through a process that is meant to be quick and easy for participating employers.

What is the Federal Contractor E-Verify rule (the "Rule")?

Recent legislation requires most federal contracts awarded and solicitations issued after September 8, 2009 to include a clause mandating use of E-Verify for all employees hired during the contract period and all existing employees assigned to perform work under the contract. However, a federal contractor is not required to enroll in E-Verify unless and until it wins a new contract on or after the effective date which contains the E-Verify provision mandating use of E-Verify for all employees, or until any of its current federal contracts are modified or amended to include such provision.

Notably, a coalition of business groups challenged implementation of the Rule in the case *Chamber of Commerce of the USA v. Napolitano*, No. AW-08-3444 (D. Md. Aug 25, 2009), arguing that the E-Verify program should remain voluntary for all employers, and alternatively that mandatory application to federal contractors should be limited to employment verification of new hires only. However, the court rejected all the arguments opposing the Rule on the basis that an employer's decision to be a government contractor is voluntary, and thus no employer is actually

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required to participate in the E-Verify program. Therefore, except as otherwise provided in the Rule, federal contractors are required to use E-Verify.

Is the Rule Mandatory for *all* Federal Contractors?

The new law requiring E-Verify for federal contracts only applies to contracts with a total value greater than \$100,000 and with performance terms longer than 120 days. As briefly explained above, employers are required to enroll in E-Verify if and when they are awarded a federal contract or subcontract that requires participation in E-Verify as a term of the contract. The regulations provide for insertion of the E-Verify clause for prime federal contracts with a period of performance longer than 120 days and a value above the simplified acquisition threshold, which is set at \$100,000. Note that the Rule requires insertion of the clause in subcontracts with a value greater than \$3,000, known as the micro-purchase threshold.

Which Employees must be Verified via E-Verify?

All new employees and all existing employees who are classified as "employees assigned to the contract" must be verified via E-Verify. An "employee assigned to the contract" means an employee who was hired after November 6, 1986, and who is directly performing work in the United States under a contract that is required to include the E-Verify clause. 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.

What Specific Obligations does the Rule Impose upon Federal Contractors?

Upon the award of a contract that requires E-Verify, employers not yet enrolled in E-Verify must do so within 30 days of the date of the contract award. They then have 90 days from the date of enrollment to initiate verification queries for employees already on staff who will be working on the contract and also to begin using the system to verify newly hired employees. After the 90 day phase-in-period, employers will be required to initiate verification of each newly hired employee within 3 business days after his or her start date, whether or not they are assigned to the contract. Federal contractors must continue to use E-Verify for the duration of their federal contracts, but may terminate participation in E-Verify once those contracts have ended.

E-Verify Doesn't Replace the I-9 Form and Related Employer Obligations

It is important to note that E-Verify does not replace the current Form I-9, Employment Eligibility Verification process. The I-9 process remains mandatory for all U.S. employers. Furthermore, E-Verify may not be used to "pre-screen" job applicants. Similar to the I-9 rules, an employer must wait until the job has been offered and accepted before commencing employment eligibility verification procedures.

Finally, employers should keep in mind that use of E-Verify does not create a "safe harbor" to worksite enforcement, but does create a rebuttable presumption that the company has not knowingly employed an unauthorized alien.

This article is intended to serve as a summary of the issues outlined herein. While it may include some general guidance, it is not intended as, nor is it a substitute for, legal advice. Your receipt of Good Company or any of its individual articles does not create an attorney-client relationship between you and Sheehan Phinney Bass + Green or the Sheehan Phinney Capitol Group. The opinions expressed in Good Company are those of the authors of the specific articles.