



LABOR & EMPLOYMENT DEPARTMENT  
AND IMMIGRATION PRACTICE

# ALERT

FEDERAL CONTRACTORS REQUIRED TO USE E-VERIFY SYSTEM  
EFFECTIVE JANUARY 15, 2009

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On November 14, 2008, the U.S. Department of Homeland Security (DHS) published the final rule implementing the Executive Order that requires all federal contractors, and certain subcontractors, to use the E-Verify system to verify their employees' authorization to work in the U.S. beginning on January 15, 2009.

E-Verify is an online database jointly administered by DHS and the Social Security Administration (SSA) that enables participating employers to verify the work authorization of newly hired employees by checking the information employees provide on their Form I-9 against both DHS and SSA databases. Although participation in E-Verify is voluntary in principal, certain federal contractors and their subcontractors are now obligated to participate as a condition to performing under their government contracts. Also, certain states now have laws, which have been challenged in some instances, that compel private employers to participate in E-Verify.

The new rule amends the Federal Acquisition Regulation to mandate that, for contracts of a certain length of time and size, federal contractors consent, through language in their contracts with federal agencies, to verify the work eligibility of (1) **all new employees** hired during the contract term, *not just employees hired to work on the federal contract*, and (2) **all existing employees assigned to work in the U.S. on the federal contract** using the E-Verify system.

Consequently, all federal contracts awarded and solicitations issued after January 15, 2009, will incorporate a clause committing all federal contractors with a contract performance period of longer than 120 days and a value exceeding \$100,000 to enroll in E-Verify within 30 days of the contract award date. This rule also will apply to subcontractors providing commercial or noncommercial services or construction in excess of \$3,000.

As part of the process of enrolling in the E-Verify system, federal contractors and subcontractors will have to sign a Memorandum of Understanding (MOU), which sets out the terms of agreement between their companies and DHS. The MOU imposes additional burdens on employers, such as providing for a shorter list of acceptable I-9 documents and tracking tentative nonconfirmations (a "nonconfirmation" is notice from DHS that an employee has not yet been confirmed as authorized to work under the applicable databases). The MOU also requires that participating employers grant the federal government the right to view certain employment records without a court order as well as enter the workplace and question employees with no advance warning.

It is not yet clear what legal exposure participating employers will face for terminating employees or not hiring applicants based upon a final nonconfirmation that results from an error in the E-Verify database. Also,

employers need to recognize that because the federal government tracks nonconfirmations in the electronic database system, the E-Verify system facilitates the government's enforcement activities, including I-9 audits, worksite enforcement raids, and other I-9 and employment-related sanctions investigations.

Federal government contractors are subject to audits of their compliance with federal affirmative action obligations. Pursuant to a governmental work-sharing agreement, when the Office of Federal Contract Compliance Programs audits a company for affirmative action purposes, it also reviews I-9 form compliance. The new Executive Order increases contractor exposure

to immigration enforcement actions and debarment.

Fox Rothschild can provide appropriate guidance to federal contractors, integrating both affirmative action and immigration compliance considerations. If you have further questions regarding these or other employer compliance related issues, please contact Theodore Eisenberg (affirmative action) at 973.994.7533 or [teisenberg@foxrothschild.com](mailto:teisenberg@foxrothschild.com), Alka Bahal (immigration) at 973.994.7800 or [immigration@foxrothschild.com](mailto:immigration@foxrothschild.com), or any member of Fox's Labor & Employment Department or Immigration Practice. Visit us on the Web at [www.foxrothschild.com](http://www.foxrothschild.com).



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