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Federal Contractors Are Subject to the Requirements of E-Verify on January 15, 2009

Areas of Interest
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Government Contracts
United States

The Department of Homeland Security (DHS) will publish its final rule requiring federal contractor participation in the internet-based system known as "E-Verify." E-Verify allows enrolled employers to electronically verify the eligibility of newly hired employees to work in the United States. E-Verify compares the identifying information provided by an employee to records contained in DHS and Social Security Administration (SSA) databases.

Employer participation in E-Verify is voluntary, with the exception of federal contractors and subcontractors and employers in some states where its use is mandated by state law. Federal contractors subject to the rule must begin using E-Verify by no later than January 15, 2009. The new rule will require federal contractors to agree to use E-Verify to confirm the employment eligibility of new employees and, after January 15, 2009, all current employees who perform contract services for the federal government.

Eventually, federal contracts will contain language requiring the employer's participation in the E-Verify program. There are certain exceptions to the general rule, including contracts where all work is performed outside the United States, contracts of less than 120 days, and contracts of less than the simplified acquisition threshold of \$100,000.

Contractors should pay close attention to the Federal Government's application of the rule to commercial products and services. The rule applies the E-Verify requirements to contracts for "commercial items" as defined in Federal Acquisition Regulation (FAR) 2. However, the rule also provides that "commercially available off-the-shelf (COTS)" items and associated services, as defined in the new FAR 22.1801 and 22.1803, are exempt. Under the regulations, "COTS" is a subset of "commercial items." Those current contractors whose contracts are not exempt from the rule will likely be subject to contract modification requiring participation in E-Verify, unless their contracts will expire before January 15, 2009. Significantly, as mentioned above, the new FAR contract clause will require the follow down of the E-Verify requirements to subcontractors.

Federal contractors and other employers may voluntarily enroll in E-Verify now so as to become familiar with the system and to develop procedures to ensure compliance with the governing rule. There are numerous requirements to comply with the system, including specific notice requirements; early review of the system and the employer's obligations would be beneficial to those federal contractors and voluntary participants in the system. **Note that employers are prohibited from using E-Verify before making a job offer and receiving the applicant's acceptance of that offer.** Nor may an employer use E-Verify for any other purpose. Doing so may subject the employer to legal action and termination of its access to E-Verify.

To enroll in E-Verify and to learn more about the system and employer's obligations, visit www.uscis.gov.

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