



TOPIC:

E-VERIFY: Compliance for College and University Federal Contractors

INTRODUCTION:

Many colleges and universities perform contract work for the federal government. On June 6, 2008, President Bush issued Executive Order (EO) 13,465 [1]. This EO mandates that covered federal contractors enroll in what had previously been a voluntary program to electronically verify the social security number and employment authorization of employees through a web-based E-Verify system [2].

The Department of Homeland Security (DHS) issued final regulations (the Rule) implementing the Executive Order on November 14, 2008 [3]. These regulations became effective September 8, 2009 [4]. The Rule generally requires federal contractors to enroll in and use the E-Verify system to check the employment authorization of all new hires and all existing employees assigned to covered federal contracts. Under the Rule, colleges and universities may also choose to E-Verify all their existing employees (as well as new hires) [5], or just those employees (newly hired and existing) assigned to covered federal contracts.

This Note discusses how the new E-Verify Rule applies to colleges, the compliance options, the risks, and best practices.

DISCUSSION:

What is E-Verify?

What is E-Verify? E-Verify is an internet-based system operated by the Department of Homeland Security (DHS) in partnership with the Social Security Administration (SSA). The system permits employers to electronically verify their employees' authorization to work in the United States. E-Verify has been in existence as a voluntary program since 1996 [6]. It does not replace the existing I-9 identity and employment verification process that all employers, not just federal contractors, must use when hiring new employees. Rather, E-Verify supplements the existing I-9 process by comparing employee identification information against DHS' electronic records and SSA's name and social security number database [7].

Does the new E-Verify Rule apply to my college or university?

The final rule only applies to solicitations issued and contracts awarded pursuant to the Federal Acquisition Regulations ("FAR") after September 8, 2009 [8]. In addition, the Rule requires that the contract contain language specifically requiring participation in E-Verify. Thus, the E-Verify Rule only applies to contracts awarded on or after September 8, 2009 that contain the FAR E-Verify clause [9]. Certain existing indefinite-delivery/indefinite-quantity (IDIQ) contracts may also be subject to the Rule, if they are modified after the effective date [10].

The Rule requires the insertion of the E-Verify clause for prime federal acquisition contracts with a period of performance longer than 120 days and a value above the simplified acquisition threshold (\$100,000) [11]. Subcontracts are 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 [12]. The Rule does not apply to contracts to be performed outside the United States or for acquisition of commercially available off-the-shelf (COTS) items [13].

The Rule's comments also clarify that the term "contract" as used in the Rule does not extend to federal grants and cooperative agreements [14]. The Rule only applies to acquisitions by the federal government and its agencies that are covered by the FAR. Because the FAR 's -1.15 TdSR inus tbconycit7(e o[(exclud7(e dog9(es -8(nts(f)-

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requirement.

Form I-9 requirements remain the same with the exception that E-Verify participating employers can only accept “List B” identity documents that have a photograph.

All employers, universities included, should follow consistent I-9 procedures and audit I-9 records of all current employees for compliance with IRCA [34]. This advice also applies to those who choose to sign up voluntarily under E-Verify, because those employers agree, through the MOU, to site visits, employee interviews and the production of employment documentation.

Finally, DHS has stated that it engages in “data mining”, which means that DHS actively reviews individual employer’s activity in E-Verify to ensure compliance. As a result, investigations are more likely to happen than they would under the old I-9 complaint based audit system. As a result, employers that participate in E-Verify are advised to diligently follow all E-Verify rules and to establish detailed training and compliance programs to ensure continued compliance [35].

Are there disadvantages to participation in the E-Verify Program?

Some of the most potentially significant disadvantages for universities that participate in E-Verify are:

The high error rates [36] and unresolved privacy and identity theft concerns [37] affecting the government databases on which E-Verify relies.

Possible increased exposure to investigations and worksite enforcement actions. Participation in E-Verify does not provide a safe harbor from worksite enforcement. Instead, the MOU contains provisions which allow for the federal government and designees to conduct site visits, have full access to employment records, and interview employees. By entering into the MOU, the employer may arguably be waiving its Fourth Amendment rights and allowing the government free access to employment records.

For those universities electing to enroll all employees, not just those working on federal contracts, the increased administrative burden created by large numbers of foreign national employees entering a semester-based hiring system is significant. Many of these foreign nationals are F-1 and J-1 students in the Student Exchange Visitor Information System (SEVIS). At present, the SEVIS system does not fully link up with the E-Verify system. As a result, foreign national students often receive initial TNCs. Universities may also face increased TNCs for non-student foreign national employees having work-authorized visas such as the H-1B because E-Verify has similar inaccessibility problems with the Computer Linked Applicant Information Management System (CLAIMS) used to verify work-authorized visas. Together, these issues could produce an immense administrative burden at the beginning of a term, when most hiring takes place [38].

Federal contractors will also have additional burdens for qualifying subcontracts and they must develop procedures to comply with the rule, including, for example, assuring that the E-Verify clause is inserted into all such contracts.

Is there any pending, anticipated or current legislation or litigation that could also impact a university’s obligation to participate in E-Verify?

Yes. Both pending federal legislation, as well as current and pending state legislation, may impact a university’s obligation to participate in E-Verify. For instance, a bill currently making its way through Congress would expand the number of employers required to use E-Verify [39].

Because the E-Verify program is temporary in nature, it must be renewed periodically by Congress. On October 29, 2009, President Obama signed into law an extension of the E-Verify program until September 30, 2012 [40].

E-Verify to be included in any such immigration reform.

A growing patchwork of state laws also require employers to participate in E-Verify. These laws can be divided into three basic categories: (1) laws that require all employers in the state to participate in E-Verify, (2) laws that require public or state employers to participate and (3) laws that require those contracting with the state or political subdivisions within the state to participate in

Deciding whether to use an electronic I-9 system to facilitate E-Verify queries as well as electronic I-9 systems that may have features to ensure proper I-9 completion [\[46\]](#);
Deciding whether the I-9 and E-Verify process should be conducted by departments/smaller groups or

“grant” is defined as “an award of financial assistance that, consistent with 31 U.S.C. 6304, is used to enter into a relationship -- (a) The principal purpose of which is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States, rather than to acquire property or services for the Federal Government's direct benefit or use; and (b) In which substantial involvement is not expected between the Federal agency and the recipient when carrying out the activity contemplated by the award.” 31 C.F.R. § 20.650.

A “cooperative agreement” is defined as “an award of financial assistance that, consistent with 31 U.S.C. 6305, is used to enter into the same kind of relationship as a grant . . . except that substantial involvement is expected between the Federal agency and the recipient when carrying out the activity contemplated by the award.” 31 C.F.R. § 20.620.

FN15. See FAR 2.101.

FN16. FAR Case 2007-013, Employment Eligibility Verification, 73 Fed. Reg. at 67,669. For a more detailed discussion of these exemptions as well as additional types of contracts exempt from E-Verify, see “E-Verify and the Federal Contractor Rule for Colleges and Universities” by Elise A. Fialkowski at pp. 15-18. The article can be found at www.worksite-enforcement.com under the E-Verify subheading.

FN17. Although a university will not be required to enroll in E-Verify pursuant to federal law in the absence of a qualifying federal contract, there is a growing number of state laws that require employers to enroll in E-Verify. *See infra*. In addition, should the “non-federal contractor” university opt to enroll on a voluntary basis or pursuant to state law, that university may only use E-Verify to verify new employees.

FN18. The MOU can be found at this [link](#).

FN19. The Rule incorporates the definition of “institution of higher education” found at 20 U.S.C. §1001(a). Section 1001(a) provides that an “institution of higher education” means an educational institution in any state that - -

(1) “admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate; (2) is legally authorized within such State to provide a program of education beyond secondary education; (3) provides an educational program for which the institution awards a bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree; (4) is a public or other nonprofit institution; and (5) is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary for the granting of preaccreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.”

FN20. The reason the Rule adopts the exemption for institutions of higher learning permitting them to avoid having to E-Verify all new hires is because of the large number of students with intermittent employment. The preamble to the Rule states: “The Councils recognize that coverage of a large number of educational institutions was not anticipated in the proposed rule. These entities have a large number of students with intermittent employment, which may complicate these institutions’ efforts to comply with E-Verify requirements.” FAR Case 2007-013, Employment Eligibility Verification, 73 Fed. Reg. at 67,682.

FN21. See 48 C.F.R. §§ 22.1802(c), 52.222-54(d).

FN22. See 48 C.F.R. § 22.1801 (defining “employee assigned to the contract”).

FN23. For a more detailed discussion of “assigned employee,” see “E-Verify and the Federal Contractor Rule for Colleges and Universities” by Elise A. Fialkowski at pp. 10-11. The article can be found at www.worksite-enforcement.com under the E-Verify subheading.

FN24. After the 90-day phase-in period, initial queries on new hires must be made within 3 days or within 30 days for existing employees assigned to the contract.

FN25. Although the regulation states that a contractor may elect to verify all employees hired after November 6, 1986 and shall initiate verification of all such existing employees “within 180 calendar days of (i) Enrollment in the E-Verify Program; or (ii) Notification to E-Verify Operations of the Contractor’s decision to exercise this option...” (48 C.F.R. § 52.222-54(b)(4)), the October 21, 2009 Supplemental Guide for Federal Contractors (“Supplemental Guide”) suggests that the choice must be made at enrollment: “NOTE: If you choose to verify your entire existing workforce in E-Verify, you must verify all of your existing employees except those that are exempt Once you decide either to verify the entire workforce or to verify only those employees assigned to a contract with the FAR E-Verify clause, you are not permitted to change that decision.” USCIS, *E-Verify Supplemental Guide for Federal Contractors (M-574A)* 16 (Oct. 21, 2009) (emphasis added). The Supplemental Guide can be found at this [link](#). Various groups are seeking clarification and/or modification of this guidance as it is not only inconsistent with the regulations, but it is inconsistent with the rationale underlying the 180 day option—to allow contractors that find it difficult to identify those assigned to the contract the option of querying the entire workforce.

FN26. See November 25, 2009 Response by the DHS E-Verify team to inquiry regarding university option to verify employment eligibility of all existing employees by Elise Fialkowski. The correspondence can be found at www.worksite-enforcement.com under the E-Verify subheading.

FN27. 48 C.F.R. §§ 22.1802(b)(2), 52.222-54(b)(1)(ii), 52.222-54(b)(2)(i)(A) & (B).

FN28. 48 C.F.R. §§ 52.222-54(b)(1)(ii). If your university is already enrolled in E-Verify, but not designated as a federal contractor in the system, update the university’s profile in the system and designate it as a federal contractor within 30 days of the of the covered contract award.

FN29. 48 C.F.R. § 52.222-54(b)(2)(ii).

FN30. 48 C.F.R. § 52.222-54(b)(4).

FN31. Although the MOU provides that “no person or entity participating in E-Verify is civilly or criminally liable under any law for any action taken in “good faith” on information provided through the confirmation system,” this provision does not fully insulate an employer against claims and charges of discrimination partially because such claims are often based heavily upon facts. In addition, the Office of Special Counsel has confirmed that an employer can only rely on a “good faith” defense if the employer used the E-Verify system correctly. In other words, if the university used E-Verify to query an existing employee before it was a federal contractor, for example, it could not rely on the E-Verify result to avoid a discrimination claim.

FN32. There are civil penalties of \$550-\$1,100 for failure

records—even those in place prior to an employer participating in E-Verify—could be subject to review under the MOU. Therefore, this section could result in a waiver of employer protections even for non-E-Verify records. But also recognize, that DHS has always had authority to audit I-9 and payroll records under the Immigration Reform and Control Act. 8 USC § 274A (e).

FN34. If the employee was previously verified in E-Verify, update or reverify this employee in accordance with Form I-9 regulations, such as when their biographical or immigration status changes. These employees may not be reverified in E-Verify.

system. At a minimum, such reductions should occur before further expanding the mandated use of the system . . . The lack of procedures for authenticating the eligibility of employers to use the system creates a significant opportunity for fraud, which could result in legal residents and citizens becoming victims of identity theft.” Draft Letter from DHS Data Privacy and Integrity Advisory Committee to Secretary Janet Napolitano and Acting Chief Privacy Officer John W. Kropf (Feb. 2, 2009), AILA InfoNet Doc. No. 09020362 (last visited March 10, 2009).

FN38. The student TNCs, for example, must be resolved by calling DHS within an eight day period. USCIS has reported that they are actively working on improving the communication between SEVIS and E-Verify to limit the number of such TNCs, but that process is not yet complete.

FN39. On July 23, a bipartisan group including Senate and House members reintroduced the SAVE Act (H.R. 3308 and S. 1505), which would phase in mandatory use of E-Verify over four years starting with the federal government, federal contractors and large employers.

FN40. See Department of Homeland Security Appropriations Act of 2010, Pub. L. No. 111-83, 123 Stat. 2142.

FN41. State universitie

The university, however, is still responsible for resolving tentative and final non-confirmations. Please note that the university cannot insulate itself from noncompliance liability by using a Third Party Agent.

FN46. A university may elect to use electronic I-9 software but still complete its own E-Verify query through the DHS website. The primary benefit of electronic I-9 software is that it reduces the error rate on completion of the I-9 Form. Many of the systems include so-called “self auditing” features that either flag missing and inconsistent information or do not allow the I-9 to be finalized in the system with missing/inconsistent

Regulations

[E-Verify Regulations, 48 CFR Parts 2, 22, and 52: Final Rule Implementing Amended E.O. 12989 \(E-Verify\)](#)

[E-Verify Proposed Rule](#)

[Federal Register: E-Verify - Delay of Effective Date](#)

[E-Verify: Delay of Effective Date](#)

[EVerify: Further Delay of Effective Date](#)

Agency Guidance:

E-Verify

USCIS: [E-Verify Website](#)

USCIS: [User Manual for Employers](#)

USCIS: [E-Verify User Manual for Federal Contractors](#)

USCIS: [E-Verify Supplemental Guidance for Federal Contractors](#)

USCIS: [Frequently Asked Questions: Federal Contractors and E-Verify](#)

USCIS: [E-Verify Memorandum of Understanding E-Verify MOU](#)

USCIS:

September 9, 2009 (denying motion for injunction pending appeal)
[Chamber of Commerce of the United States of America, et al. v. Napolitano, et al.](#), Civil Action No.
AW-08-3444 (S.D.MD, August 26, 2009)

NACUA Resources:

Resource Pages

[E-Verify Resource Page](#)

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