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E-Verify: Questions and Answers Concerning the United States Government's Electronic Employment Eligibility Verification System.

Employers may not know it, but the Government's electronic employment eligibility verification system, dubbed E-Verify, has been up and running since 1997, and any employer may sign up to use the system. Now, pursuant to Executive Order 12989 signed by President Bush, as of September 8, 2009, certain federal contractors are required to use E-Verify. Moreover, as part of the ongoing national debate over immigration, some states legislatures have enacted laws requiring all employers to use this system.

As a result of the sudden increase in E-Verify's visibility, employers are beginning to ask questions: What is E-Verify? Who can use it? Who has to use it? The purpose of this advisory is to answer those questions and provide guidance for employers curious about E-Verify as well as for those federal contractors who are now required to use the system.

WHAT IS E-VERIFY?

E-Verify is a free, internet-based system that allows employers to electronically verify the employment eligibility of newly hired employees by comparing information from employees' Employment Eligibility Verification Form ("Form I-9") to more than 444 million records in the SSA database, and more than 60 million records in DHS immigration databases. E-verify is operated and maintained by the Department of Homeland Security (DHS) in partnership with the Social Security Administration (SSA), and is administered by the United States Citizenship and Immigration Service (USCIS). The system is accessible through any Internet-capable

computer with a web-browser of Internet Explorer 5.5 or Netscape 4.7 or higher (with the exception of Netscape 7.0).

WHO IS REQUIRED TO USE E-VERIFY?

Any employer may voluntarily enroll in E-Verify, but federal contractors and subcontractors whose contracts contain "the E-Verify clause" are required to use the system. According to the newly amended Federal Acquisition Regulations (FAR), the E-Verify clause must be inserted in all federal acquisition contracts that are:

- awarded after September 8, 2009;
- valued at \$100,000.00 or more; and
- have a period of performance of 120 days, or longer.

The FAR also require federal contractors who subcontract part or all of their work under a federal contract containing the E-Verify clause to insert the clause into any subcontract that:

- is for services or construction necessary for the completion of the prime contract; and
- is valued at \$3,000.00 or more.

Certain contracts and subcontracts are excluded from the E-Verify requirements, however. Contracts and subcontracts for work to be performed entirely outside the United States do not have to contain the E-Verify clause. Similarly, contracts and subcontracts to provide commercially available off-the-shelf items are also excluded from the E-Verify requirement. Commercially available off-the-shelf items are commercial items which are sold in

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substantial quantities in the commercial marketplace and are offered to the government in substantially the same form in which it is sold in the commercial marketplace (e.g., batteries and hardware).

Additionally, the E-Verify requirement generally applies only to federal *contracts*. Although receipt of direct federal funding under the American Recovery and Reinvestment Act (ARRA) issued under FAR will also trigger the E-Verify requirement, employers who have federally funded grants and/or cooperative agreements are not required to use E-Verify. That said, it is not always easy to tell the difference between a grant and a contract. For this reason, employers should carefully review all grants and/or contracts to determine whether they contain language requiring the employer to use E-Verify

Entities who are unsure about whether or not they are federal contractors may consult web-based resources such as www.usaspending.gov and www.fedspending.com, which track prime contracts awarded by the federal government. As of December 1, 2009, neither website tracked grants or federal subcontracts, however. For that reason, neither resource should replace a detailed review of an entity's contracts in determining whether the entity is required to comply with E-Verify.

In addition to these federal requirements, Arizona, Mississippi, and South Carolina require all employers in those states to use E-Verify. Nine other states (Idaho, Utah, Colorado, Nebraska, Oklahoma, Minnesota, Missouri, Georgia, and North Carolina) require state agencies and/or state contractors to enroll and use the system, and five states (Kansas, Arkansas, Indiana, Ohio, and Rhode Island) have

introduced legislation that would mandate E-Verify compliance for at least some employers. To date, Connecticut does not require any employer to use E-Verify.

HOW DO EMPLOYERS ENROLL IN E-VERIFY?

Federal contractors and subcontractors with contracts containing the E-Verify clause must enroll in E-Verify within 30 days of the contract award date. Enrollment is free and must be done online at <https://e-verify.uscis.gov/enroll/>.

During enrollment, employers are required to provide basic contact information and to sign a Memorandum of Understanding (MOU) with DHS and SSA. A copy of the MOU can be found at <http://www.uscis.gov/files/natedocuments/MOU.pdf>. The terms of the MOU are not negotiable. By signing the MOU, the employer agrees to follow all required procedures, including:

- Posting a notice supplied by the DHS informing employees that the employer uses E-Verify;
- Accepting only List B documents that contain a photograph when completing Form I-9;
- Photocopying and retaining copies of employees' Permanent Resident Cards or Employment Authorization Document with I-9 records if they are presented by an employee;
- Notifying DHS if the employer continues to employ anyone who is not confirmed to be eligible for employment (with civil penalties of \$500 to \$1000 for failure to notify);
- Initiating the E-Verify process for all new hires within three business days of hire;
- Recording the E-Verify case verification number on the employee's I-9; and

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- Allowing DHS and SSA representatives to make periodic visits to review the employer's E-Verify procedures and make such records available along with any materials related to the I-9 process.

Within 48 hours of an employer's enrollment in E-Verify, USCIS will send (via email) the employer a user name, password, and a link to the E-Verify Web Address. Employers will also be sent a copy of the E-Verify User Manual. Additionally, a copy of the User Manual is available at http://www.uscis.gov/files/nativedocuments/E-Verify_Manual.pdf.

Upon enrolling in E-Verify, employers must then designate specific employees who will be responsible for verifying employees through E-Verify. Those employees must complete an online tutorial before beginning to use the system. Once the designated employees complete the tutorial, employers may start using E-Verify.

WHO MUST BE VERIFIED?

After an employer enrolls in E-Verify, the MOU requires the employer to verify the eligibility of all new employees within three days of the employees' start date. It is critical that an employer wait until after it hires the employee before attempting to verify the employee's eligibility, as the MOU strictly prohibits employers from using E-Verify to pre-screen potential employees. It should also be noted that while E-Verify is designed to validate the employment eligibility of prospective employees, it is not a substitute for I-9 compliance. Indeed, employees should fill out Form I-9 and produce the required identification *before* the employer uses E-Verify to confirm employment eligibility.

Although employers who enroll in E-Verify may only use the system to validate

the eligibility of newly hired employees, federal contractors and subcontractors are *required* to use the system to verify the employment eligibility of some or all current employees as well. In complying with E-Verify, federal contractors may select either of two options for compliance.

The first option is aptly deemed the "90-day option." A contractor who elects the 90-day option has 90 days from the date of enrollment in E-Verify to verify the employment eligibility for all current employees who were hired after November 6, 1986, and are "assigned to the federal contract." According to the FAR, an employee is "assigned to the federal contract" if the employee directly performs work on the contract. An employee does not directly perform work on the contract if the employee normally performs support work, such as indirect or overhead functions, and does not perform any substantial duties under the contract.

The second option, or the "180-day option," is simpler. A contractor that chooses the 180-day option has 180 days from the date of enrollment to verify the employment eligibility of *all* employees hired after November 6, 1986, regardless of whether those employees are assigned to the contract containing the E-Verify clause. The 180-day option may be a good choice for contractors with small workforces or where it is difficult to ascertain which employees do not perform work on the contract.

Because contractors may have difficulty evaluating which option is better for them when they enroll in E-Verify, the system permits those contractors who initially choose the 90-day option is to switch to the 180-day option at any time. If a

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contractor makes the switch, it will have a full 180 days to verify any unverified employees, regardless of how late in the 90-day period it decides to switch. For this reason, it is generally recommended that contractors initially select the 90-day option, and later switch to the 180-day option if they believe that option to be a better fit.

Regardless of whether a contractor selects the 90 or 180 day option for its initial compliance period, every contractor is required to verify the employment eligibility of *all* new hires within three days of hire.

HOW DOES AN EMPLOYER USE E-VERIFY?

Using E-verify is fairly straight forward. After logging into the E-Verify system using the login and password provided by USCIS, the employer will be prompted to input certain information from the Form I-9 into the system. Additionally, an employer may select and assign an "Employer Case ID" number for each employee to be used for tracking purposes. As a practical matter, it is recommended that employers choosing to utilize the Employer Case ID feature use their employees' employee numbers as their Employer Case ID numbers in order to streamline and simplify their records.

Once the employer enters the required information into the E-Verify system, an employer should receive a result within three to five seconds. If the information submitted matches the information in the SSA and DHS databases, and the employee is eligible to work in the United States, the employer will receive an "employment authorized" notification and a verification number. The MOU requires employers to record the verification number directly on the employee's I-9.

Employers should also print a copy of the result screen and attach it to the employee's Form I-9 as back-up documentation.

If an employee's information does not match the SSA's records the employer will receive an "SSA tentative nonconfirmation." If the information matches the SSA's records, but not the DHS's records, a "DHS Verification in Process" will result. An employer that receives a "DHS Verification in Process" should query the system each day until the DHS Verification is resolved. It may take DHS up to three days to verify the employee's information, after which, the employee will either be authorized, or the employer will receive a DHS tentative nonconfirmation.

Resolving a tentative nonconfirmation is the employee's responsibility. Nevertheless, the employer must inform the employee of the tentative nonconfirmation as soon as possible. Furthermore, the employer must print, sign, and provide the employee with a "Notice to Employee of Tentative Nonconfirmation," which will be generated by E-Verify. The Notice contains contact information for the DHS or SSA and instructions informing the employee of how he or she can challenge the tentative nonconfirmation.

The employer may not make any change to the terms and conditions of the employee's employment while the tentative nonconfirmation remains unresolved. This means that, in the event of a tentative nonconfirmation, the employer must permit the employee to continue working—at the wage, and with the same benefits and hours agreed to at the time of hire—until the tentative nonconfirmation is resolved. If the

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employee elects not to challenge the tentative nonconfirmation, however, the tentative nonconfirmation should be treated as a final nonconfirmation, and the employee must be discharged.

Assuming the employee challenges the tentative nonconfirmation, the employer should wait ten government working days from the date of the initial tentative nonconfirmation before reattempting to verify the employee's eligibility. Not all cases will be resolved within that initial ten-day window. Cases that are still open after the initial ten-day window are deemed "in continuance." The employer should query the E-Verify system each business day until it receives an authorization or final nonconfirmation for the employee.

Ultimately, an employee will either be authorized or the employee will receive a final nonconfirmation. In either case, the E-verify verification number directly on the form, and the final result screen should be printed and affixed to the employee's I-9. As discussed above, an employee who receives a final nonconfirmation must be terminated.

Finally, when an employee presents a Permanent Resident Card ("Green Card") or an Employment Authorization Document (EAD) for his or her Form I-9 documentation, employers will be asked to use E-Verify's Photo Screening Tool. When the employer indicates that the employee has provided either of these two documents, the employee's photograph automatically displays on the E-Verify screen. The employer should determine whether the photograph displayed is "reasonably identical" to the photograph on the employee's documentation. The employer should not compare the E-Verify photograph to the employee directly. If

the employer determines that the photographs are not reasonably identical, a DHS Verification in Process will result.

HOW DOES AN EMPLOYER STOP USING E-VERIFY?

An employer that is using E-Verify voluntarily may withdraw from the system at any time with 30-days notice. To do so, the employer must log on to the E-Verify system and select the "request termination" option. Employers that do not affirmatively request termination will remain subject to the MOU until they do so. This means that an employer that stops using E-Verify without requesting termination will be in violation of the MOU, which may expose the employer to fines and penalties.

Federal contractors that are required to use E-Verify may not request termination until the contract is complete. Nevertheless, once the contract is completed, the federal contractor must affirmatively request termination to leave the system. A federal contractor that does not request termination will continue to be deemed a voluntary user of E-Verify until the contractor requests termination.

WHAT ARE THE BENEFITS OF USING E-VERIFY?

Because E-Verify permits employers to query government databases to confirm the validity of employees' documentation and information, it provides employers with assurance that the documents and information provided by employees are both genuine and accurate. This saves employers time, resources, and training by identifying unauthorized workers early in the employment relationship. Moreover, because enrollment in, and use of, E-Verify is free, employers are able to realize these benefits with only the

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minimal labor costs associated with actually enrolling in, and using, the system.

Using E-Verify also creates a rebuttable presumption that an employer is complying with federal immigration law by not employing unauthorized workers. This rebuttable presumption is particularly valuable given new Secretary of Homeland Security Janet Ann Napolitano's recent pledge that DHS is increasing its focus on seeking criminal punishment for immigration violations.

WHAT ARE THE DISADVANTAGES OF USING E-VERIFY?

Although E-Verify can be a useful tool in ensuring that employees are eligible for employment, it is not perfect. Currently, it is unclear whether the system will be able to handle the increased volume generated when federal contractors begin using the system *en masse*. Because of technical issues that could result from the large influx of users, E-Verify may require employers to devote significant HR time to verifying employees' work eligibility beyond what is already required by complying with Form I-9.

This additional time may not be warranted. Questions have arisen concerning the accuracy of the information contained in the DHS and SSA databases upon which E-Verify is based. Inaccuracies in that data may lead to errors allowing ineligible workers to remain employed. Of equal concern is that E-Verify does not protect against many forms of document alteration that could lead to fraud and even identity theft. These deficiencies are troubling because E-Verify does not provide employers a safe-harbor from Immigration

and Customs Enforcement. Thus, an employer that uses E-Verify could still face liability for employing unauthorized workers.

Another distinct disadvantage of E-Verify is that, at least for non-federal contractors, E-Verify may only be used to verify the eligibility of new hires. As a result, E-Verify provides no method for verifying the eligibility of the vast majority of employer's employees. Thus, the rebuttable presumption offered by E-Verify will ultimately pertain to a very small subset of an employer's workforce.

Moreover, because continued hire of workers deemed ineligible results in a rebuttable presumption of a violation, and can lead to further worksite enforcement scrutiny by the DHS, employers are strongly encouraged to terminate all employees that receive a final nonconfirmation. Inaccuracies in the databases could, therefore, also result in the termination of lawful U.S. workers. The danger that authorized workers may be terminated as a result of inaccurate data in the databases is heightened by the fact that, outside an employee's ability to challenge a tentative nonconfirmation, there is no appeal process for those employees who receive final nonconfirmations.

WHAT SHOULD EMPLOYERS DO?

Obviously, federal contractors and subcontractors that have contracts that meet the E-Verify compliance requirements should enroll in and begin using the system immediately. Contractors or subcontractors who are unsure as to whether their contracts require them to use E-Verify should review those contracts as soon as possible.

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Other employers considering voluntary enrollment in the program are well-advised to take a more cautious approach. Given the recent influx of employers using E-Verify, which will only increase as time goes on, employers who are not required to use the system can afford to take a “wait and see” approach while problems or inaccuracies are identified and ironed-out.

Moreover, because E-Verify may only be used to verify new employees, employers that do not intend to engage in substantial hiring in the near term have little incentive to enroll in the system.

If you have additional questions, please feel free to call John Zandy, Greg Brown, or Robin Martocci.

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