

PUBLICATION

E-Verify Burrows Through Economy: In Your Face

Authors: Robert C. Divine

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Hospitality providers looking to boost sales through government contracts in which the period of performance is 120 days or more will need to comply with the complex rules of E-Verify. If your business undertakes these arrangements with the government, please read on.

On September 8, federal government agencies began adding the "E-Verify Clause" to most significant acquisition contracts, requiring vendors to begin to use E-Verify within 30 days and to insert a similar clause into the vendor's contracts with its own vendors, and so forth. Given the increasing extent of the federal arm into the economy, most large institutions and many small companies will be affected. Plans should be in place and ready to implement.

Employers wondering if they will be subject to the requirement should look at their existing government agreements. If they refer to the "Federal Acquisition Regulation" (FAR), involve a period of performance of at least 120 days, and are not for "commercial off-the-shelf" (COTS) items, they will probably be amended to include the E-Verify requirement after September 8. Regulations have clarified that grants are not covered, most agricultural products are exempt COTS items, financial agency agreements do not normally cause banks to be covered, hotels rarely have a government contract have a period of performance lasting 120 days, and only sureties that are assigned to an actual takeover agreement are covered. Nevertheless, it only takes one covered contract to trigger the E-Verify requirement for an entire institution.

Employers cannot fully implement the rule's requirements until it actually takes effect and at least some contracts are amended, but almost all employers need to plan now for nearly immediate implementation once contracts are amended. Of course, any employer has been free for years to implement E-Verify for NEW employees in any facilities it chooses. This rule REQUIRES affected employers to start using E-Verify for new hires in ALL facilities, and employers who want to get a jump on implementation could go ahead with that part or wait a little longer to get it done within 30 days of the first contract containing the E-Verify clause. Some employers who know they have federal contracts, but fear that the human resources department will not necessarily hear when the first one is amended with the E-Verify clause, are planning to get started by October 8 -- within the 30 day period allowed.

The "flow down" requirements of the E-Verify rule are breathtaking. Sub-contracts for services and construction are covered, above \$3,000 for performance lasting at least 120 days. Deciding which vendors can be exempted, and monitoring compliance of covered vendors, will be tricky business. Purchasing officers of government contractors and subcontractors (at every level) must be prepared to inject the "E-Verify Clause" into relevant subcontracts as soon as an upstream contract includes the E-Verify Clause.

The truly tricky part concerns EXISTING employees. Normal E-Verify rules actually PROHIBIT employers from running E-Verify queries for employees hired before the relevant facility started using E-Verify. Employers may query only for new employees, but they must query for ALL NEW employees once a facility is signed up. Affected federal contractors, however, MUST query E-Verify for some or all EXISTING employees. Employers MAY choose to limit this to existing employees working on federal government contracts or subcontracts (and not including administrative support). But many employers, especially those with sprawling arrangements,

sensibly question their ability to track contracts with employee assignments, and they may choose instead to commit to running E-Verify for ALL existing employees within a six month start-up period.

Running E-Verify for existing employees is more complicated than it sounds. E-Verify is a real-time process of matching data from I-9 forms against federal databases. But the biography and status that a worker presented within the first three days of hire (to complete Form I-9) might have changed in the years since hire, and an E-Verify query entered straight from the old I-9 might not match the current database.

Employers face many strategic, practical and technical choices from the E-Verify developments. Now is an excellent time to review past I-9 procedures and recordkeeping, implement new, more comprehensive employment verification policies and procedures, and plan for implementation of the federal contractor rules. Our firm has guided many employers through this process in a practical way.

How We Can Help

Baker Donelson's Hospitality Group offers experienced lawyers who have represented hotel and restaurant owners, developers, investors, operators, franchisors, suppliers, consultants and lenders. We're proud of our heritage of innovation, and we take the time to understand your business, your goals, your transactions and the markets you serve.

Our Immigration Group regularly counsels employers on I-9 compliance. We perform private audits of I-9 documents, prepare compliance programs and train managers and workers in implementing those programs. We evaluate particular questionable documents and situations. We help employers decide whether and how to create or store I-9 forms electronically, to use Social Security Administration's Number Verification System, or to participate in the Department of Homeland Security's E-Verify program. We help federal contractors design and implement E-Verify programs in compliance with Executive Order 13465 as implemented in Federal Acquisition Regulations.

We defend sanctions actions by ICE for "paperwork" and "knowingly hire" violations of I-9 rules. We work with our strong Litigation Department to bring and defend claims against competitors based on employment of unauthorized aliens. We advise and defend employers and managers in the increasingly common criminal investigations and proceedings relating to employment of aliens.

We coordinate our Team's services closely with our firm's well-respected Labor and Employment Law Group and with our firm's White Collar Crime Group. We provide advice and coordinate with U.S. and foreign preparers concerning U.S. taxation of international companies doing business in the U.S., and concerning the U.S. taxation of international workers placed in the U.S. and abroad.