



## **E-Verify Requirements for Contractors**

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E-Verify is an internet-based program that allows U.S. employers to electronically verify the work authorization of all new employees, U.S. citizens and foreign workers alike. Use of E-Verify has grown rapidly in the past year, with over 69,000 employers currently signed up for the program. Due to expansion of the program under new state and federal regulations, government officials expect approximately 170,000 contractors and subcontractors to enroll in the system in the upcoming months.

The E-Verify system can be used in addition to, not in place of, Form I-9 completion. Once the Form I-9 is complete, the employer enters certain information from the Form into the E-Verify system. The Social Security Administration (SSA) and Department of Homeland Security (DHS) databases then compare this information to millions of existing records to determine whether the information supplied by the employee matches the information in the SSA and DHS databases.

Although the legislation allowing continuation of the E-Verify system is set to expire November 30, 2008, it is expected that Congress will pass legislation to extend the program soon; the President is expected to sign said legislation.

### **Federal Contractor Requirements**

E-Verify is currently a voluntary process under federal law. However, the “voluntary” nature of the program is quickly changing. On June 6, 2008, President Bush issued an Executive Order requiring Federal agencies to include a clause in all Federal contracts which requires contractors to use the E-Verify system. Proposed federal regulations implementing this Executive Order were published shortly thereafter. The proposed regulations would amend the Federal Acquisition Regulations (FAR) to require that all government contracts worth \$3,000 or more for goods, services or construction contain a clause requiring the contractor to use the E-Verify System. The rule would not apply to the purchase of goods which are commercially available off-the-shelf. The proposed regulations would not apply to grant agreements and cooperative agreements with the Federal government.

The proposed regulations state that contractors will be required to agree to use E-Verify for all new hires employed by that contractor in the U.S. during the term of the contract. The contractor will also need to use E-Verify on all existing employees that are assigned to work on the contract in question. The contractor would be required within 30 days of the contract award to enroll in the E-Verify program and use the program for all new hires during the term of the contract. Furthermore, all employees working on the contract, even those that are not new employees, must be put through the E-Verify program. Normally, E-Verify cannot be used on existing employees. The new federal contracting requirements would create an exception to this general rule. The proposed FAR rule specifies that only those employers that are awarded





a contract with the Federal government that includes the contract term required by the final FAR rule may run existing employees through E-Verify, and then, only if such employees work on the covered contract.

## **State Requirements**

In addition to this federal mandate, several states require the use of E-Verify for some or all public and/or private employers within the state. Currently, these states are Arizona, Colorado, Georgia, Idaho, Minnesota, Mississippi, Missouri, North Carolina, Oklahoma, Rhode Island, South Carolina, and Utah. Note that many of these state laws apply to entities that contract with the state, including independent contractors. Although Tennessee does not require employers to use E-Verify, this state encourages its use by providing registered employers safe harbor from certain state penalties. In contrast, Illinois enacted legislation to limit the use of E-Verify until the program achieves greater accuracy, privacy, and nondiscrimination protections. Employers and contractors are advised to check state E-Verify requirements regularly for updates.

## **E-Verify Mechanics**

### **A. Registration**

Before an employer can start using the E-Verify system, the employer needs to enroll in the program. When registering, the employer will be asked to provide basic contact information and must agree to follow the rules of the program. At the end of the registration process, the employer is required to sign a Memorandum of Understanding (MOU) that provides the terms of agreement between the employer, the SSA, and U.S. Citizenship and Immigration Services (USCIS).

### **B. Form I-9 Requirement**

All new hires are required to complete the Form I-9 before an E-Verify query is conducted. Note that E-Verify users are subject to additional Form I-9 requirements. For example, employees of an E-Verify participating employer must include a social security number on his or her Form I-9. Normally, a social security number is not required for proper Form I-9 completion. E-Verify employers can only accept List B documents which contain photos; non E-Verify employers can accept a List B document for Form I-9 purposes, even those documents without photos. Also, E-Verify employers must make a copy of any Employment Authorization Documents (EAD) or Permanent Resident Cards ("Green Card") presented by employees during their Form I-9 processing. Generally, employers are not required to make or retain copies of the employee documents presented as part of the Form I-9 process.

### **C. Query Information & Response**

Contractors enrolled in E-Verify must submit a query into the E-Verify system that includes information from sections 1 and 2 of the Form I-9, including:





- a) Employee's name and date of birth
- b) Social Security Number (SSN)
- c) Citizenship status (US Citizen, Lawful Permanent Resident, or Alien Authorized to Work)
- d) Alien number or I-94 number (if applicable)
- e) Type of I-9 document(s) presented to establish identity and/or work eligibility status
- f) In some cases, the document number and expiration date

After inputting the information, the E-Verify system will respond with an “employment authorized” response, a “SSA tentative non-confirmation” response, or “DHS verification in process.” According to government reports, about ninety-two percent of queries confirm within seconds that an employee is employment authorized. If “employment authorized” is indicated, the employer must record the system-generated verification number on the employee’s Form I-9. If “DHS verification in process” is indicated, DHS will usually provide an “employment authorized” or “tentative non-confirmation” response within 24 hours.

If a “tentative non-confirmation” response is received, the employer must immediately notify the employee in writing about how to contest the determination and resolve the mismatch with the SSA or DHS. If the employee wishes to challenge the non-confirmation, the employee must contact the appropriate federal agency within 8 federal work days.

#### **D. Photo Tool**

If an employee presents an EAD or Green Card as an I-9 document, E-Verify's Photo Screening Tool requires the employer to check the photo on the employee’s EAD or Green Card against the images stored in DHS immigration databases. If the photo on the EAD or Green Card does not match the photo in the E-Verify system, the employer must treat the query as a “tentative non-confirmation” and follow appropriate, required steps.

#### **E. Timing**

The employer cannot initiate an E-Verify inquiry for a new hire until the new hire has completed a Form I-9. The employer must initiate an E-Verify query for a new hire no later than the end of three business days after the new hire's actual start date. An employer can initiate the query before a new hire's actual start date but may not pre-screen applicants based upon a tentative non-confirmation or a delay in the receipt of a confirmation of employment authorization.

#### **F. Postings**

All employers using E-Verify must notify applicants of their use of the program by posting the notice provided by DHS indicating the company’s participation in the E-Verify program, as well as an anti-discrimination notice issued by the Office of Special Counsel for Immigration-Related Unfair Employment Practices. The postings must be placed in an area where they can be viewed by applicants and new hires. Once an employer is enrolled and able to log





into the E-Verify online system, these notices can be found in the “On-line Resources” section of the system.

### **Special Concerns for Independent Contractors**

As federal and state laws expand the required use of E-Verify, independent contractors must take immediate steps to ensure their ability to use the E-Verify system. For example, under the proposed federal contracting regulations, an independent contractor subject to the regulations must register for E-Verify, even if the contractor has no employees. A federal Employer Identification Number (EIN) is required in order to register for the system. If a self-employed contractor does not have an EIN, s/he must obtain one before registering for and using E-Verify. A social security number cannot be used in place of an EIN.

In addition to registering with E-Verify, independent contractors who use E-Verify must be thoroughly trained in appropriate, legally required E-Verify procedures and policies. Failure to use the program appropriately can lead to penalties, including monetary fines, expulsion from the E-Verify program and debarment from federal contracting.

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