

FEDERAL CONTRACTORS

BECOMING “I-9 COMPLIANT” IN THE FACE OF EXECUTIVE ORDER 12989

EXECUTIVE ORDER 13465 – AMENDING EXECUTIVE ORDER 12989, AS AMENDED

EXECUTIVE SUMMARY

On June 6, 2008, the President issued Executive Order 13465 “Economy and Efficiency in Government Procurement through Compliance with Certain Immigration and Nationality Act Provisions and the Use of an Electronic Employment Eligibility Verification System,” providing that “Executive departments and agencies that enter into contracts shall require, as a condition of each contract, that the contractor agree to use an electronic employment eligibility verification system designated by the Secretary of Homeland Security to verify the employment of:

- All employees hired during the contract term by the contractor to perform employment duties within the United States; and
- All employees assigned by the contractor to perform work within the United States on the federal contract.

The Federal Acquisition Regulation (FAR) was therefore amended to require federal contractors to use E-Verify, which is the system designated to implement the Executive Order.

The final rule applies to solicitations issued and contracts awarded after the effective date of the final rule.

The final rule will be effective on June 30, 2009. Under the final rule, employers are required to enroll in E-Verify if and when they are awarded a federal contract or subcontract that requires participation in E-Verify as a term of the contract.

If you wish to enroll in E-Verify before the effective date of this rule you may do so now. Enrolling now will help you become familiar with the system and may make it easier for you to use E-Verify if and when you are awarded a federal contract. **Verification of employees through E-Verify is limited to new hires only, unless you are a federal contractor who has been awarded a contract on or after May 21, 2009.**

FEDERAL CONTRACTS AFFECTED

The rule requires the insertion of the E-Verify clause into applicable Federal Contracts, committing Government contractors to use E-Verify for their new hires and all employees (existing and new) “assigned to any given Federal Contract”.

The rule affects the following types of prime Federal Contracts:

- Contracts with a period of performance longer than 120 days;
- Contracts in excess of the simplified acquisition threshold (\$100,000).
- Subcontracts with a value in excess of \$3,000;
 - If the prime Federal Contract includes the E-Verify clause.
- Existing indefinite-delivery/indefinite-quantity Contracts should be modified by Contracting Officers on a bilateral basis to include the E-Verify clause for future orders if:
 - The remaining period of performance extends at least six months after the final rule effective date of **June 30, 2009**, and;
 - The amount of work or number of orders expected under the remaining performance period is substantial.

FEDERAL CONTRACTS EXEMPTED

The rule **exempts** the following types of prime Federal Contracts:

- Contracts that include only commercially available off-the-shelf (COTS¹) items (or minor modifications to a COTS item) and related services;
- Contracts of less than the simplified acquisition threshold (\$100,000);
- Contracts a performance period of less than 120 days;
- Contracts where all work is performed outside the United States.

EMPLOYEES AFFECTED

As a Federal Contractor participant in E-Verify, you are **required** to use E-Verify for:

- All **new employees** working in the United States;
 - To include the fifty States, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands.
- All **existing employees** who are classified as “assigned to the Federal Contract²”.
 - An employee “assigned to the federal contract” is defined as any employee hired after November 6, 1986, who is directly performing work in the United States under a contract that includes the clause committing the contractor to use E-Verify.
 - NOTE: An employee is NOT considered to be directly performing work under 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.

ENTITIES WITH EXCEPTIONS

The rule requires most Federal Contractors to use E-Verify for all new employees, regardless whether the employees are “assigned to a Federal Contract”.

There are some exceptions to the requirement to use E-Verify for all new hires. The exceptions apply to;

- Institutions of higher learning
- State and Local governments
- Governments of federally recognized Indian tribes
- Sureties performing under a takeover agreement with a federal agency

Under the rule, such entities may choose to ONLY use E-Verify on new and existing employees “assigned to the covered Federal Contract”.

EMPLOYEES WITH EXCEPTIONS

¹ A COTS item is a commercial item that is sold in substantial quantities in the commercial marketplace and is offered to the government in the same form that it is available in the commercial marketplace, or with minor modifications.

² “Assigned to a Federal Contract” means an employee who was hired after November 6, 1986, who is directly performing work in the United States under a contract subject to the final rule. Employees are not considered to be assigned to the contract if they (1) normally provide support work, such as indirect or overhead functions; and (2) do not perform any substantial duties applicable to the contract. See 73 FR at 67703-704.

- Employees who normally perform support work, such as indirect or overhead functions, and do not perform any substantial duties applicable to the Federal Contract, would be excluded from the E-Verify requirement.
- Employees who have been previously verified by the Federal Contractor using E-Verify;
- Employees with active security clearance of “confidential,” “secret,” or “top secret”; or
- Employees who had background investigations completed and credentials issued pursuant to Homeland Security Presidential Directive (HSPD) – 12, “Policy for a Common Identification Standard for Federal Employees and Contractors.”
 - NOTE: The employer still must complete the Form I-9 at the time of hire for such employees.

EMPLOYER OPTION TO VERIFY “ENTIRE WORKFORCE”

Federal Contractors and Subcontractors have the OPTION of verifying their entire workforce hired after November 6, 1986 – including those “employees not assigned to a Federal Contract”.

A Federal Contractor or Subcontractor that chooses to exercise this OPTION must initiate an E-Verify query for each employee in the contractor’s entire work force within 180 days. (reference; **TIMEFRAME REQUIREMENTS #5 below**)

TIMEFRAME REQUIREMENTS

1) Federal Contractors NOT ENROLLED in E-Verify at Time of Contract Award

If your company is NOT ENROLLED in E-Verify, then you have 30 days from the date of contract award to enroll and 90 days from the date you enroll with E-Verify to initiate verification queries for employees already on your staff who will be working on the contract and to begin using the system to verify newly hired employees.

After this 90-day phase-in period, you will be required to initiate verification of each newly hired employee within 3 business days after their start date. To meet this three-day requirement, employers may initiate verification of a newly hired employee before their start date if the employee has accepted the job offer and completed the Form I-9. The 90-day window applies only to new E-Verify users and is intended to provide additional implementation time.

Please remember that you must continue to use E-Verify for the life of the Federal Contract for ALL your new hires, whether or not they are employees “assigned to the Federal Contract”, unless your company falls under one of the EXCEPTIONS to this requirement as detailed above.

Federal Contractors NOT ENROLLED in E-Verify at Time of Contract Award

	TIMEFRAME	START POINT	REQUIRED ACTION
1	Within 30 days	Federal Contract award	Enroll in E-Verify
2	Within 90 days	Enrollment in E-Verify	E-Verify all New Hires within 3 days of hire
3	Within 90 days	Enrollment in E-Verify	E-Verify all employees “assigned to the Federal Contract”
4	Within 30 days (if later than 90-day timeframe directly above) ³	Employees are newly “assigned to the Federal Contract”	E-Verify all employees newly “assigned to the Federal Contract”

³ The rule requires that employees assigned to the contract be verified within 90 days after enrollment in E-Verify or within 30 days of the worker’s assignment to the contract, whichever date is later.

5	Within 180 days	Federal Contract award	OPTION: E-Verify entire workforce <i>(including those employees NOT "assigned to the Federal Contract")</i>
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2) Federal Contractors CURRENTLY ENROLLED in E-Verify at Time of Federal Contract Award

If your company is CURRENTLY ENROLLED in E-Verify for more than 90 days, then you are required to continue to initiate verification of newly hired employees within three business days of their start date, but you have 90 days from the Federal Contract award date to begin using E-Verify for each employee already on your staff who are "assigned to the Federal Contract". Your transition to using the E-Verify system as a Federal Contractor does not allow you to stop using E-Verify for your new hires on the standard three-day schedule.

Please remember that you are required to continue using E-Verify throughout the duration of your Federal Contract for all new hires, whether or not they are employees "assigned to the Federal Contract", unless your company falls under one of the EXCEPTIONS to this requirement as detailed above.

Federal Contractors CURRENTLY ENROLLED in E-Verify at Time of Contract Award

	TIMEFRAME	START POINT	REQUIRED ACTION
1	Immediately (if enrolled in E-Verify 90 days or more)	Federal Contract award	Verification of all New Hires within 3 days of hire
2	Within 90 days (if enrolled in E-Verify less than 90 days)	Enrollment in E-Verify	Verification of all New Hires within 3 days of hire
3	Within 90 days	Federal Contract award	Verification of employees "assigned to the Federal Contract"
4	Within 30 days (if later than 90-day timeframe directly above) ⁴	Employees are newly "assigned to the Federal Contract"	Verification of employees newly "assigned to the Federal Contract"
5	Within 180 days	Notification of Federal Contractor "status" to E-Verify Designated Agent	OPTION: E-Verify entire workforce <i>(including those employees NOT "assigned to the Federal Contract")</i>

THE PRECEDING IS NOT CONSIDERED TO BE LEGAL ADVICE, EITHER EXPRESSED OR IMPLIED. CONSULTATION WITH LEGAL COUNSEL IS RECOMMENDED FOR ALL EMPLOYMENT AND/OR IMMIGRATION RELATED MATTERS.

⁴ The rule requires that employees assigned to the contract are verified within 90 days of the contract award *or* within 30 days of the worker's assignment to the contract, whichever date is later.