

E-VERIFY

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E-VERIFY – WHAT IS IT?

- Free, internet based program to verify work authorization.
- Operated by USCIS/DHS and SSA.
- Compares employee information with government databases.

E-VERIFY – DO WE WANT IT?

- The government voices the advantages of wage/tax reporting accuracy, job protection and maintenance of a legal workforce.
- But employers are reluctant.

IS THERE A SAFE HARBOR?

Several states require participation.

TN law (January 1, 2008) - encourages participation in E-Verify by providing a safe harbor.

- Properly complying with I-9 regulations gets the same safe harbor.
- Different than safe harbor under “No Match” regulation.

REBUTTABLE PRESUMPTION

Federal law - participation in E-Verify provides a rebuttable presumption that the employer has not knowingly hired an unauthorized worker.

- Properly trained HR department.
- Strict and consistent adherence to the prescribed procedures.
- Misuse can lead to legal action + termination of access.

CONFLICTING STATUTES & **POTENTIAL PENALTIES**

- Illegal Immigration Reform & Immigrant Responsibility Act (IIRIRA)
- Conflicting Statutes
- Potential civil and criminal penalties

MANDATORY PARTICIPATION

E-Verify is a voluntary program unless:

- Your state mandates participation.
- You have a “covered” contract with the federal government.

Bush Administration Mandate unsuccessfully challenged.

“COVERED” CONTRACTS

If you are awarded a federal contract:

- On or after September 8, 2009;
- Of more than \$100,000 (\$3000 if a subcontract);
- With a performance period of longer than 120 days;
- Where work will be performed inside the U.S.

Contract will contain E-Verify provision.

EXISTING CONTRACTS

Certain contracts entered into before September 8, 2009 may be modified to include the E-Verify provision.

- Remaining period of performance is six month or more, and
- A substantial amount of work has yet to be done.

EXEMPT CONTRACTS

Certain contracts are exempt from the E-Verify requirement:

- Under \$100,000 (\$3,000 if subcontract).
- Performance period less than 120 days.
- All work is performed outside the U.S.
- Contract for commercially available “off the shelf” (COTS) items.

SPECIFIC EXAMPLES

NOT covered contracts:

- Federal grant (i.e. educational or healthcare organization).
- Healthcare facility reimbursed for medicare.

Covered contracts:

- Healthcare facility that enters into a federal contract to manage a program or clinical study.
- Receipt of funds under the American Recovery and Reinvestment Act of 2009 (stimulus package).

SUBCONTRACTORS

Must E-Verify their own employees.

- Prime contractor not responsible for verification.

Prime contractor may still be liable.

- Ensure subcontracts contain E-Verify provision.
- Ensure subcontractors comply by requesting proof of enrollment.
- Potential penalties for knowingly continuing to work with subcontractor in violation of mandatory E-Verify rule.

VERIFICATION REQUIREMENTS FOR FEDERAL CONTRACTORS

Employees who must be verified:

- Individuals hired during the contract term, whether or not they will work on the contract.
- Current employees performing work on the federal contract (note: different from non-federal contractors enrolled in E-Verify).

EXCEPTIONS

- Institutions of higher learning and state/local government.
- Current employees who perform only an indirect or overhead role on the federal contract.
- Employees with certain security clearance.

Must continue to complete an I-9 form!

VERIFICATION TIMETABLE

Not enrolled as a Federal Contractor:

- Enroll – 30 days of award.
- New hires – 90 days of enrollment.
- Existing – 90 days of enrollment or 30 days of assignment.

Already enrolled as a Federal Contractor:

- New hires – 90 days of award (unless already enrolled for 90 days and then 3 days of start date).
- Existing – 90 days of award or 30 days of assignment.

E-VERIFY BASIC STEPS

- Enrollment
- Create a profile
- Memorandum of Understanding
- Employee Verification
- Resolution

TENTATIVE NON-CONFIRMATION **NOTICE**

A TNC will be issued if the information cannot be immediately confirmed.

- Notify employee immediately.
- Could come from DHS or SSA, depending on the database.
- Avoid adverse employment action during resolution.
- Many reasons other than employment ineligibility.

EMPLOYEE TERMINATION

You may not terminate an employee (based on E-Verify verification):

- While verification is pending.
- While an employee is in the process of resolving a TNC.
- If you receive an “employment authorized” response to a verification (even after a contested TNC).

EMPLOYEE TERMINATION (cont'd)

You may terminate an employee if:

- The employee decides not to contest a TNC.
- You receive an “FNC” response to the verification.

You can always terminate an employee for reasons unrelated to immigration status; however, to do so without a final “FNC” verification response would be highly risky.

E-VERIFY – WORDS TO LIVE BY

- **CONSISTENCY**
- **TRAINING**
- **STRICT ADHERENCE**
- **SELF-AUDITS**