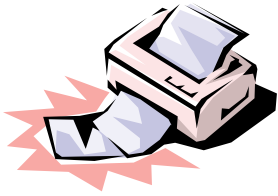


E-VERIFY FOR FEDERAL CONTRACTORS

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As of September 8, 2009, certain federal contractors and subcontractors are required to use the E-Verify online employment eligibility verification system (“E-Verify”) to validate employees' eligibility to work in the United States. Minnesota employers may be familiar with requirements similar to these as Governor Tim Pawlenty signed an Executive Order, which went into effect in January 29, 2008, that required certain contractors performing work for the state of Minnesota to comply with E-Verify. If your business has or may enter into federal or state contracts, you should plan on implementing an E-Verify policy.

WHAT IS E-VERIFY

E-Verify is an electronic employment eligibility verification system that is monitored and operated by the U.S. Department of Homeland Security (“DHS”). E-Verify relies upon databases of both the DHS and the Social Security Administration in order to determine whether workers are eligible for employment in the United States.

WHO IS SUBJECT TO E-VERIFY

Covered federal contracts and subcontracts awarded or modified after September 8, 2009, are expected to include a Federal Acquisition Regulation (“FAR”) E-Verify clause, an express provision that requires the contractor to use E-Verify to substantiate the eligibility of new and existing employees performing work under a federal contract or sub-contract. Many employers will also likely receive communications from federal contracting officers that will amend current contracts to be subject to E-Verify.

Certain federal contractors and subcontractors are exempted from the requirement to use E-Verify based upon such factors as the monetary value of the contract, the type of service and/or goods provided, and the duration of the contract. The following contracts are specifically excluded from this requirement:

- Prime contracts of less than \$ 100,000;
- Subcontracts for less than \$ 3,000;
- Subcontracts that only provide goods to the prime contractors;

- Contracts for commercially available off-the-shelf goods;
- Some existing indefinite delivery/indefinite quality contracts for future items if the remaining period is less than 180 days or the amount of work or number of orders expected under the remaining performance period is unsubstantial;
- Contracts with performance terms of less than 120 days; and
- Contracts for services outside the United States.

HOW E-VERIFY WORKS

Employers who are awarded a federal contract with the FAR E-Verify Clause are required to enroll in E-Verify within 30 days of the contract award date. After enrollment, the employer must enter the information into the system for every employee who is working on the federal project. Employers must verify new employees and current employees working on federal contracts within 90 days after the date of enrollment. All subsequent new hires must be verified within three business days of their start date. All existing employees assigned to the contract must be verified within 90 days of the date of enrollment in E-Verify or within 30 days of assignment to the project, whichever date is later.

Federal contractors now have the option of reverifying the work authorization of all employees, which was originally not permitted. Employers may wish to do so, especially since E-Verify appears to be the one practical means for employers to confirm eligibility for employment. If the employer elects to do so, the employer must notify DHS and must initiate the verification of the workforce within 180 days of the notice.

If the E-Verify system is unable to confirm the employee's eligibility status, the employer will receive a "tentative non-confirmation" notice. The employer must have the employee sign the "tentative non-confirmatory" notice and provide the employee with a referral notice. The employer must give the employee eight (8) days to resolve the issue and may not terminate or suspend the employee during these eight days. In the event that the discrepancy cannot be resolved or if the employee chooses not to contest the finding, a final "non-confirmation" decision will be issued and the employer may terminate the employee. Should the

employer choose not to terminate the employee, the employer must notify DHS, which will create a rebuttable presumption that the employer has knowingly employed an unauthorized employee. Federal officials may then terminate the contract or recommend suspension or debarment proceedings for an employer who has knowingly hired undocumented workers or has not complied with E-Verify.

ABIDING BY THE REGULATIONS

Along with the requirements to enroll listed above, it is crucial that the employer avoid a few potential pitfalls that could ultimately cause the termination of the federal contract or lead to costly litigation. The following is a non-exhaustive list of potential pitfalls:

- Employers must post all requisite notices including the notice recognizing their participation in E-Verify;
- E-Verify may be used only after an applicant has been hired and completed an I-9 form- under no circumstances may the employer use E-Verify to pre-screen applicants;
- The employer must apply the policy uniformly to all employees;
- An employer cannot suspend or terminate an employee following the receipt of a "tentative non-confirmation" notice; and
- All prime federal contractors are responsible for the E-Verify compliance of subcontractors and should include the requirement in all contracts.

In order to ensure that E-Verify is correctly implemented we would strongly advise that all employers create policies and practices to guarantee uniformity and compliance with E-Verify and to modify termination procedures to take account of the eight (8) day resolution period. Please contact the author of this article or any of the other attorneys at Seaton, Beck and Peters if you have follow-up questions or would like help with preparation of an E-Verify policy.