

E-Verify and the Federal Contractor Rule for Colleges and Universities

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A final version of the rule making E-Verify mandatory on federal contractors and subcontractors (“the Federal Contractor Rule” or “the Rule”) is now scheduled to go into effect September 8, 2009. This Rule amends the Federal Acquisition Regulation (FAR), which is the main body of rules governing the federal government’s acquisition of goods and services.¹ More and more states are also requiring employers and state contractors to use E-Verify.

This article covers the basics of E-Verify as well as key provisions of the new Federal Contractor Rule including, for example, certain exceptions to the E-Verify requirement unique to universities. Guidance regarding enrollment considerations including E-Verify advantages and disadvantages as well as current state laws is provided. In addition, this article provides practical guidance and considerations for colleges and universities in dealing with E-Verify and the impending Federal Contractor Rule.

What is E-Verify?

E-Verify (formerly known as the “Basic Pilot Program”) is a web-based system provided to employers by the United States Citizenship and Immigration Service (“USCIS”). This system allows employers to electronically verify the employment eligibility of newly hired employees.

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Are Universities Required to Enroll in E-Verify?

Under federal law that will become effective September 8, 2009, federal contractors--including any colleges and universities that qualify as contractors under that law--will be required to participate in E-Verify. Importantly, as described in more detail below, the Federal Contractor Rule does not apply to current contracts. Rather, it applies to qualifying contracts awarded after September 8, 2009 and certain Indefinite Delivery Indefinite Quantity Contracts amended after September 8, 2009. Under the Rule, any qualifying contract must include a clause requiring the contractor to participate in E-Verify ("the E-Verify Clause).

Failure to comply with the Federal Contractor Rule can result in loss of federal contracts and debarment from future federal contracts. The Rule, including exemptions and the types of entities considered "contractors" under the Rule, is discussed in detail below.

There is also a growing patchwork of state laws that require employers to participate in E-Verify. These laws can be broken down into three basic categories: (1) laws that require all employers in the state to participate in E-Verify, (2) laws that require public or state employers to participate and (3) laws that require those contracting with the state or political subdivisions within the state to participate in E-Verify. The penalties for non-compliance vary by state and may include, for example, loss of business licenses and the ability to conduct business in the state, loss of state contracts as well as civil fines and penalties.

State universities and institutions may be considered public or state employers that are required to participate in E-Verify. The North Carolina statute, for example requires state universities to enroll in E-Verify. Universities may also be required to participate as employers or state contractors.

At this point, Colorado, Georgia, Minnesota, Mississippi, Missouri, Nebraska, Oklahoma, Rhode Island, South Carolina, and Utah require E-Verify for employers who have public contracts with state agencies or political subdivisions. Virtually all of these states also require public employers to use E-Verify. The Arizona and Mississippi statutes, which became effective, respectively, in January and July of 2008, are the most far-reaching of current legislation as they require all employers within the state to use E-Verify. Effective July 1, 2009, South Carolina requires all employers with 100 or more employees to (1) register and participate in the E-Verify or (2) employ only workers who, at the time of employment, have a valid South Carolina driver's license or identification card, are eligible to obtain a South Carolina driver's license card, or possess a valid driver's license from another state where the license requirements are at least as strict as South Carolina.

In addition to the many states that have already passed legislation or executive orders requiring E-Verify, dozens of states have legislation pending that would mandate the use of E-Verify. A full summary of these laws is not included in this article as it is lengthy and ever-changing. The above author has drafted a complete State Summary of E-Verify Laws for Universities which can

be found at www.worksite-enforcement.com under the E-Verify subheading. The website will also report on upcoming state laws.

How Does the E-Verify Program Work?

The employer submits information provided on the Form I-9 into the E-Verify online system. E-Verify then checks that information against the Social Security Administration and the Department of Homeland Security databases. Once the I-9 information is submitted the employer receives one of the following results (often within a matter of seconds):

<i>Employment Authorized</i>	This means that the employee is authorized to work.
<i>Department of Homeland Security (“DHS”) Verification in Process</i>	DHS will usually respond within 24 hours with either an Employment Authorization or DHS Tentative Non-Confirmation response.
<i>Social Security Administration (“SSA”) Tentative Non-Confirmation</i>	There is an information mismatch with the SSA.
<i>Final Non-Confirmation</i>	The employee is not work authorized.

What Happens After You Receive the E-Verify Results?

If *Employment Authorized* the employer records the system-generated verification number on the Form I-9 or attaches a printout of the result screen. This ends the process. While the employer must re-verify under the standard I-9 procedures for time-limited work authorizations, USCIS currently takes the position that E-Verify cannot and should not be used for such re-verifications.

If *Final Non-Confirmation* the employer records the system generated verification number on the Form I-9 or attaches a printout of the result screen.

If *SSA Tentative Non-Confirmation* the employee can contest the finding and then:

- Resolve the Social Security Number mismatch directly with the SSA
- Resolve the non-citizen status mismatch directly with the DHS
- The employee has eight federal government workdays from the date of referral to visit or call the appropriate agency to resolve the discrepancy
Note: The employee has the right to work while the case is being resolved
- If the employee chooses not to contest the Tentative Non-Confirmation, it is considered a Final Non-Confirmation and the employer may terminate the employee.

If *SSA Tentative Non-Confirmation* and the employer discovers an error in the original E-Verify query submitted to USCIS, the employer may review and update employee data then resubmit the query to resolve the Tentative Non-Confirmation through the amended query.

How is a Tentative Non-Confirmation Resolved?

There are two ways to resolve a Tentative Non-Confirmation. An employer will receive one of two results from the E-Verify online system:

- *Final Non-Confirmation*: the employee is not work authorized;
- *Employment Authorized*: the employee is employment authorized.

Either of these results resolves the Tentative Non-Confirmation. As referenced above, if the employer, however, discovers an error in the original E-Verify query submitted to USCIS, the employer may also review and update employee data then resubmit query to resolve the Tentative Non-Confirmation through the amended query. The Tentative Non-Confirmation is thereby resolved by ultimately obtaining either a Final Non-Confirmation or Employment Authorized result.

How does an employer enroll in E-Verify?

- Enrollment is on-line at <https://www.vis-dhs.com/EmployerRegistration/StartPage.aspx>
- The employer must execute a Memorandum of Understanding (MOU) with the Department of Homeland Security (DHS) and the Social Security Administration (SSA).
- The employer can choose to verify its employees directly through E-Verify or through a Designated Agent.
- The employer should designate Program Administrators (oversees queries and can add General Users) or conduct queries through a Designated Agent.
- The employer/users must read the User Manual, complete and pass the on-line tutorial (note User Manual lengthy and tutorial takes at least one hour to complete; additional tutorial for federal contractors to be issued in near future).
- Non-federal contractors may register selected work locations/worksites.

What are the key employer responsibilities/obligations under the MOU?

- Employers are required to post a notice informing prospective employees that they are an E-Verify participant.
- Employers must post an Anti-Discrimination Notice issued by the Department of Justice, Office of Special Counsel visible to prospective employees.
- Employers must attach E-Verify results to Form I-9 and retain for same time as the form.

- E-Verify participants can leave the E-Verify program only after providing 30 days notice to USCIS.
- Employers agree that they will notify the government should they continue to employ an individual after receiving a Final Non-Confirmation (civil penalties of \$500-\$1000 for failure to notify).
- If the employer continues to employ the individual after a Final Non-Confirmation, there is a rebuttable presumption of a violation of INA Section 274A (relating to employment of unauthorized workers).
- Employers agree to allow the government to interview their employees and to make available for government inspection all of their E-Verify records as well as related I-9 and other personnel records (**Note:** to date, USCIS has refused to limit that portion of the MOU to requests for documentation/information related to E-Verify queries. Therefore, an employer's I-9s and personnel records—even those in place prior to an employer participating in E-Verify--could be subject to review under the MOU. Therefore, this section could result in a waiver of employer protections even for non-E-Verify records).

What are the general guidelines for employer use of E-Verify?

- E-Verify procedures should be applied equally to all U.S. citizen and non-citizen employees.
- E-Verify cannot be used to pre-screen and should only be used after a written offer of employment has been made.
- E-Verify can only be used to verify employees hired after E-Verify enrollment unless employer is a federal contractor.
- E-Verify queries must be conducted within 3 days after hire (unless there is no social security number available for the employee or the employer is a federal contractor-see contractor time-lines below).
- E-Verify does NOT relieve employers of the I-9 employment eligibility verification requirement.
- Form I-9 requirements remain the same for employers with the exception that E-Verify participating employers can only accept “List B” identity documents that have a photograph.
- Registration in E-Verify does NOT protect employers against worksite enforcement actions.
- The employer cannot terminate based upon a Tentative Non-Confirmation but must retain the employee unless the employer obtains other independent evidence of unauthorized status.

What are the some of the advantages and disadvantages of participation in E-Verify?

Colleges and Universities and related institutions should carefully consider whether to participate in E-Verify at this time. Indeed, as of March 4, 2009, the USCIS reported that only about 112,000 employers nationwide had enrolled in E-Verify. Even where there are state statutes mandating E-Verify, there has been reluctance by employers to enroll. In Arizona, for example, although the statute requiring E-Verify was effective January 1, 2008 and widely publicized, the USCIS has reported that only 29,397 out of over 110,000 Arizona employers had enrolled as of February 2009.

E-Verify relies on government databases with high error rates. An independent evaluation of the program commissioned by the Department of Homeland Security found that the Basic Pilot/E-Verify database “is still not sufficiently up to date” to meet the requirements for “accurate verification.”² Even though there have been some improvements, there are still significant error rates. In May 2008, USCIS implemented a system-based and data-source enhancement to address the high number of mismatches and faulty data regarding foreign born US citizens. This system reduced those mismatches only by about 39% resulting in continued mismatches for foreign born US citizens that require follow up through USCIS or the Social Security Administration. As further evidence of the high error rate of the databases, Intel, one of the largest U.S. employers, found that 12% of its 1,360 workers hired between January and July 2008 were initially rejected. Intel challenged the 143 rejections and all of the workers were found to be legal U.S. residents, the company said in a letter to the federal government.³ Indeed, in her January 30, 2009 Immigration and Border Security Action Directive, U.S. Department of Homeland Security (DHS) Secretary Janet Napolitano directed a review of the E-Verify system noting “E-Verify has encountered criticism both for false negatives (persons who are authorized to work but who nonetheless receive a tentative non-confirmation from the system) and for false positives (unauthorized aliens who receive a confirmation because they have borrowed or stolen the identity of an authorized worker).”⁴

The Department of Homeland Security’s own Privacy and Integrity Advisory Committee, in a February 2009 letter to DHS Secretary Janet Napolitano, noted significant concerns with regard to privacy and fraud and recommended that the program not be expanded until these concerns are addressed:

“E-Verify. The Committee recommends that DHS eliminate or significantly reduce fraud vulnerabilities in the current E-Verify system. At a minimum, such reductions should occur before further expanding the mandated use of the system. The Committee has made recommendations on improving employer authentication in its Report No. 2008-2. The lack of procedures for authenticating the eligibility of employers to use the system creates a significant opportunity for fraud, which could result in legal residents and citizens becoming victims of identity theft.”⁵

Nor does the use of E-Verify provide full protection from claims of discrimination. Although the MOU provides that “no person or entity participating in E-Verify is civilly or criminally liable under any law for any action taken in good faith on information provided through the confirmation system,” this provision does not fully insulate an employer against claims and charges of discrimination. In fact, as part of its participation in the program, an employer must post an anti-discrimination notice issued by the Office of Special Counsel for Immigration – Related Unfair Employment Practices, Department of Justice (DOJ) in an area visible to prospective employees. In addition, the MOU language does not fully insulate an employer as such claims are often heavily based upon facts. Thus, an employer may be faced with fighting a discrimination charge or claim and incur substantial attorneys fees in defending itself to show that its actions were based in good faith upon E-Verify rather than upon some other discriminatory basis alleged by the complainant. The likelihood of such actions also increases when one considers the database errors referenced above.

In addition, the provisions in the MOU which allow for the federal government and designees to conduct site visits, have full access to employment records, and to interview employees cause concern among many. By entering into such an MOU, the employer is arguably waiving its Fourth Amendment rights and allowing the government free access to employment records.

Although an employer who verifies work authorization under E-Verify is presumed to not have knowingly hired an unauthorized alien, participation in E-Verify does not provide a safe harbor from worksite enforcement. The MOU itself clearly provides participation does not provide a safe harbor from worksite enforcement. An example of protection afforded to an employer by participation in E-Verify is the December 12, 2006 worksite enforcement action by the United States Immigration and Customs Enforcement (ICE) at Swift meat packing plants around the country. Although ICE raided the company and found over a thousand illegal workers, because E-Verify had actually confirmed that the employees were authorized, Swift and its management did not face the now common criminal charges lodged against employers. New photo tool enhancements to E-Verify have been instituted in an effort to deal with the situation that occurred at Swift. It is unclear, however, whether employers will be able to effectively use this tool and whether they will continue to be afforded the same treatment and protection from criminal action that those at Swift received. Indeed, raids against participating employers continue as evidenced by the August 2008 raid conducted by ICE at Howard Industries, a Mississippi manufacturer of electrical products that participates in E-Verify.

It is also important to emphasize that to the extent that E-Verify provides any greater protection than that afforded by an employer following the standard I-9 process, such protection only extends to those employees queried under the E-Verify system. E-Verify currently only allows employers to verify the employment of hires following enrollment and it does not allow for verification of contractors or reverification of current employees. The only exception will be under the Federal Contractor Rule described above. Therefore, E-Verify will not provide any protection with regard to past hires (except for employers assigned to qualifying federal contracts) or contractors.⁶ All employers, universities included, are therefore well advised to

follow consistent I-9 procedures and to audit I-9 records for all current employees for compliance with IRCA. Such advice also applies to those who choose to sign up under E-Verify especially as those employers, through the MOU, agree to site visits, employee interviews and the production of employment documentation.

A key advantage for many employers is the 17 month Optional Practical Training extension available to those who have graduated from a US institution with a qualifying STEM degree if the employer participates in E-Verify. The 17 month extension was passed in large part to benefit H-1B employers who were facing shortages in STEM fields in light of the H-1B cap. While participating employers can take advantage of this extension for qualifying employees, it is less valuable to those in the University context, as those institutions are generally exempt from the H-1B cap.

Are there any disadvantages that are unique to universities?

Yes. Universities, more so than many employers, often employ a large number of foreign national employees. These include not only F-1 and J-1 students in the SEVIS system but also other foreign national employees commonly in the faculty and post-doc ranks. Because of the semester-based system, Universities often have a large number of employees hired at the beginning of the term.

Foreign national students often receive initial Tentative Non-Confirmations (TNC) as the SEVIS system does not currently fully link to the E-Verify system. These TNCs must be resolved by calling DHS within the allotted 8 day period. Many universities choose to have an individual on staff assist the foreign national student (sometimes newly arrived to the U.S.) with this process to assure that the E-Verify query is ultimately resolved appropriately. Combine the likely TNCs for students in SEVIS with the volume that often peaks at the beginning of a semester, and it is clear that Universities will often have additional administrative burdens in complying with E-Verify.

Problems for students may also arise in cases in which the department processes the student's employment paperwork before the SEVIS system has been updated to reflect that the student has arrived on campus to begin studies. In these cases, SEVIS must be updated to ultimately resolve the TNC. Note that, at least as far as initial TNCs for SEVIS students, USCIS has reported that they are actively working on improving the communication between SEVIS and E-Verify to limit the number of such TNCs. That process, however, is not yet complete.

Universities may also face increased TNCs for non-student foreign national employees having work-authorized visas such as the H-1B. E-Verify must query the CLAIMS system to determine whether these individuals are work-authorized. Although USCIS is making efforts to update E-Verify's access to the CLAIMS system, there are similar problems as the CLAIMS data (which will show the person's status and work authorization) in many cases is not accessible to E-Verify. Therefore, like the SEVIS students, these employees also often receive TNCs.

What are the origins of the Federal Contractor Rule?

On June 6, 2008, President Bush 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.” That Order provided, “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: (i) all persons hired during the contract term by the contractor to perform employment duties within the United States; and (ii) all persons assigned by the contractor to perform work within the United States on the federal contract.”

That Order, however, was not immediately effective and implementing regulations were required. A final version of the regulations making E-Verify mandatory on federal contractors and subcontractors was published in the Federal Register on November 14, 2008.⁷ The Federal Contractor Rule is now scheduled to go into effect September 8, 2009. This Rule amends the Federal Acquisition Regulation (FAR), which is the main body of rules governing the federal government’s acquisition of goods and services.⁸ The Rule requires that a clause requiring participation in E-Verify must be inserted into all covered federal contracts (“the E-Verify clause”).

Why was this Rule issued as part of the FAR, and not the regulations governing the Department of Homeland Security or USCIS?

The FAR is the government-wide regulation that guides agencies in acquiring goods and services. Because the new Federal Contractor Rule amends procedures to be followed for contracts entered into by the federal government for acquisition purposes, the FAR had to be revised to implement the Executive Order requiring federal contractors to use E-Verify to address these changes to the federal acquisition system.

Does the E-Verify requirement extend to contracts that are not covered by the FAR?

No. Only those contracts that are covered by the FAR are covered by the Rule. As the FAR only relates to acquisition contracts, the Federal Contractor Rule only extends to acquisition contracts. An acquisition is defined in the FAR as “the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated.”⁹ Note that not all “acquisition” contracts are covered by the Rule. Please see the questions below that detail at length which acquisition

contracts are covered by the Federal Contractor Rule as well as exemptions unique to Universities.

Who must generally be verified under the Federal Contractor Rule?

The Rule provides that federal contractors who are subject to mandatory enrollment must conduct E-Verify queries for two categories of employees:

- *New hires*—that is, all individuals who are hired by the contractor after the award of the federal contract to perform employment duties within the United States (whether or not assigned to the contract), and
- *Employees assigned to the federal contract*—that is, all employees, whether new or not, who are assigned to perform work within the United States on the federal contract.

As described in more detail below, however, there is an exception for Universities as they may elect to only query those employees assigned to the federal contract as well as a 180 day option to verify the entire workforce added to Rule for those employers who find it difficult to determine who is assigned to the contract.

Who is an employee “assigned to the federal contract?”

The Federal Contractor Rule provides that an “employee assigned to the federal contract” is one who is hired after November 6, 1986 and who is directly performing work in the United States under a contract that is required to include the E-Verify clause—i.e. a qualifying federal contract. The United States is currently defined to include the fifty states as well as the District of Columbia, Guam, Puerto Rico and the U.S. Virgin Islands.

The definition in the Rule further provides that “employee assigned to the federal contract” excludes individuals who normally carry out support work, such as indirect or overhead functions, and do not perform any “substantial duties” applicable to the contract.

Any guidance that is given seems to focus on direct work in support of the contract—however short—that triggers the E-Verify requirement versus indirect or tangential support work that does not trigger E-Verify. In its “Frequently Asked Questions: Federal Contractors and E-Verify” (“USCIS FAQs”), the USCIS clarified that the length of time an employee is assigned to directly perform work under a contract, however brief or intermittent, is immaterial as “the rule does not exempt employees based on the intermittent nature of the work or the length of time spent performing the work.” In the preamble to the Rule, however, the authors noted that “tangential involvement, if it is in terms of indirect involvement instead of directly working on a contract, does not necessarily trigger the E-Verify requirement.” The preamble to the Rule (“Preamble”) further explains that “a mailroom clerk who delivers mail to a program office supporting a

contract as well as to all other offices served by the mailroom” would be an example of such tangential or indirect involvement with the federal contract that does not require an E-Verify query.¹⁰

Other than the USCIS FAQs and information in the Preamble referred to above, however, there is not much current guidance as to “assigned employee.” When responding to further questions pressing for guidance as to who is an “assigned employee”, the authors of the Rule explained: “The Councils [issuing agencies] do not believe it is appropriate to try to establish a mathematical definition of an assigned employee. Contractors will instead have to interpret the definition stated in the final rule as it applies to various individual situations.”¹¹

What is the 180 day option to verify the entire workforce?

Verification of Entire Workforce. As an alternative to the requirement that all new hires and all employees assigned to the federal contract be run through E-Verify, the FAR rule also provides the option of verifying all new hires and all existing employees hired after November 6, 1986, whether or not the employee is currently assigned to a federal contract.

- The USCIS has explained that companies that elect the 180 day option must notify DHS by either (1) updating their company profile through the E-Verify “Maintain Company Page” if the company is a current participant or (2) by selecting the 180 day option during enrollment if the company is a new participant.
- A contractor that elects this option must initiate verifications for the contractor's existing employees within 180 calendar days of notifying DHS that they are selecting the entire workforce option. Note that a contractor does not have to elect the 180 day option immediately. Rather, a contractor can proceed under the general requirements and then elect--at a later point in time—the option to verify the entire workforce. Once the DHS is notified of the election, the contractor has 180 days to verify the entire workforce.
- *Rationale.* This provision is intended to make it easier for contractors who may find it difficult to determine which employees have been assigned to a certain federal contract or to track which employees have already been verified.

What is the Institution of Higher Education new hire exemption?

Under the Federal Contractor Rule, Institutions of Higher Education may elect to only run employees assigned to a federal contract through E-Verify. Thus, such institutions are not required to use E-Verify for all new hires but may choose to only query the system for those assigned to a contract.

The Rule incorporates the definition of “institution of higher education” found at 20 U.S.C. §1001(a). Section 1001(a) provides that an “institution of higher education” means an educational institution in any state that - -

- (1) “admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate;
- (2) is legally authorized within such State to provide a program of education beyond secondary education;
- (3) provides an educational program for which the institution awards a bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree;
- (4) is a public or other nonprofit institution; and
- (5) is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary for the granting of preaccreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.”

Therefore, the Rule’s exemption for “institutions of higher education” is broad enough to include virtually all colleges and universities.

In the preamble, the authors explained that institutions of higher education were granted this exception due to the large number of students with intermittent employment: “The Councils recognize that coverage of a large number of educational institutions was not anticipated in the proposed rule. These entities have a large number of students with intermittent employment, which may complicate these institutions’ efforts to comply with E-Verify requirements.”¹² Interestingly, the exception was also included because of an apparent concern that universities would push for exempt contracts otherwise: “[t]he Councils are also concerned that including universities under this broad rule may increase incentives for academic institutions to insist on grant funding rather than agreeing to enter into contracts. This would increase costs and performance risks to the Federal Government.”¹³ Thus, recognizing the unique complications presented by institutions of higher education, the final Federal Contractor Rule makes the requirement that all new hires be verified inapplicable in the college/university context.

Are any other entities afforded such a new hire exception?

Yes. Other contractors—namely, state and local governments, governments of federally recognized Native American tribes, and sureties performing under a takeover agreement entered into with a federal agency pursuant to a performance bond—also may elect to only E-Verify employees assigned to a federal contract. Thus, these employers—in addition to universities—are not required to use E-Verify for all new hires.

Are there any other general exceptions to the E-Verify requirement that are not based on the nature of contract?

Yes, other than the new hire exception that applies to universities and other limited entities, there is a security clearance exception and a possible discretionary waiver of the E-Verify requirement.

- *Security clearance exception:* According to the USCIS FAQs, “those [employees] who have an active federal agency [Homeland Security Presidential Directive] HSPD-12 credential or who have been granted and hold an active U.S. Government security clearance for access to confidential, secret, or top secret information in accordance with the National Industrial Security Program Operating Manual do not need to be verified.”¹⁴
- *Discretionary waiver of E-Verify requirement is available for exceptional cases:* The head of the contracting activity may waive the E-Verify requirement for a certain contract or subcontract or even for a class of contracts or subcontracts in exceptional cases. This waiver may exist on a temporary basis or last for the duration of performance under the contract. The head of the contracting activity cannot delegate his authority to waive the E-Verify requirement.¹⁵

The introductory comments to the FAR rule explain, “The term ‘exceptional cases’ is intentionally not defined in the rule in order to allow the head of a contracting activity the flexibility to use this waiver as unique situations arise within each agency. Each head of the contracting activity will be accountable to the agency leadership to appropriately balance the needs of the agency and the policies and goals of the Executive Order 12989.”¹⁶

For exceptions to the E-Verify requirement based on the nature of the contract, see below.

Does the E-Verify requirement apply to current contracts?

No. The final rule is not retroactive; rather, it applies to:

- solicitations issued on or after September 8, 2009
- contracts awarded on or after September 8, 2009, and
- indefinite-delivery/indefinite quantity (IDIQ) contracts where the remaining period of performance extends at least 6 months after the final rule effective date, and the amount of work or number of orders expected under the remaining performance period is substantial.

While the general rule is that **current contracts are not subject to the E-Verify Rule**, please note that “indefinite-delivery/indefinite quantity” (IDIQ) contracts may be affected. The Rule

provides that they should be modified on a bilateral basis in accordance with FAR 1.108(d)(3) to require E-Verify enrollment if the remaining period of performance under the contract extends at least six months after September 8, 2009 and if the remaining work under the contract is expected to be “substantial.”¹⁷

What is the deadline for registering one’s employees through the E-Verify program?

The timeline for compliance with the E-Verify requirement depends on the employer’s length of enrollment in the E-Verify program.

*****Company not enrolled in E-Verify program at the time of contract award:*** The rule provides a phase-in period before a federal contractor not currently enrolled in E-Verify must first use the program to verify the employment eligibility of his workers.

- Starting from the date of the contract or subcontract award (issued or amended after the effective date of September 8, 2009), the contractor has 30 calendar days in which to enroll his business in the E-Verify program.
- After enrollment, the contractor is permitted a 90 day phase-in period before he must begin verifying both new and current employees assigned to the contract using the E-Verify program.
- *New hires:* After the 90 day phase-in period is over, the federal contractor is required to initiate verification of a newly hired employee within three business days of his or her date of hire.
- *Employees assigned to the contract:* For each employee who is assigned to the contract, the federal contractor is required to initiate verification within 90 calendar days after the date of enrollment in the E-Verify program or within 30 calendar days of the employee’s assignment to the contract, whichever date is later.

*****Company enrolled in E-Verify at the time of contract award:*** A company that is already enrolled in E-Verify on the date of the contract award must begin verifying employees on a shorter timeline.

- If a federal contractor has been enrolled in E-Verify for more than 90 days on the date the contract is awarded, the contractor must initiate verification of the employment eligibility of all newly hired employees, whether or not they are assigned to the federal contract, within three business days of their date of hire. However, the federal contractor must begin verifying the employment eligibility of employees who are assigned to the federal contract within 90 calendar days from the date on which the contract was awarded or within 30 days of assignment to the contract, whichever date is later.

- If a federal contractor has been enrolled in E-Verify for less than 90 days on the date the contract is awarded, the timeline for compliance depends on the type of employee whose employment eligibility needs to be verified–
 - a) *New hires*: For new hires, the federal contractor is allotted a 90 day phase-in period starting with the date of its enrollment. But once 90 days have passed since the date of its enrollment, the federal contractor must initiate verification of the employment eligibility of all newly hired employees, whether or not they are assigned to the federal contract, within three business days of their date of hire.
 - b) *Employees assigned to the contract*: For employees assigned to the contract, the federal contractor must begin verifying their employment eligibility within 90 calendar days from the date on which the contract was awarded or within 30 days of assignment to the contract, whichever date is later.

Which government contracts are covered by the E-Verify Rule?

Under the final rule, mandatory enrollment in the E-Verify system is required for: (1) prime acquisition contracts with a period of performance longer than 120 days that have a value greater than the simplified acquisition threshold (\$100,000), and (2) subcontracts for services or for construction that flow from a prime contract including the E-Verify clause that are worth \$3,000 or more.

Note that there is no 120-day limitation on the subcontractor flowdown rule; however, by necessity, a subcontract covered by the final rule must be longer than 30 days, or the subcontract term would end before the subcontractor would be required to enroll in E-Verify.¹⁸

What contracts are exempt from the E-Verify requirement?

The following types of contracts are exempt from the rule and need not contain the E-Verify Clause:

- Grants
- Cooperative agreements¹⁹
- Other agreements that do not constitute “acquisition contracts”
- Contracts of less than the simplified acquisition threshold (\$100,000)
- Contracts that are for a period of performance less than 120 days
- Contracts where all work is performed outside the United States
- Contracts for commercially available off-the-shelf (COTS) items, and related services

- Contracts for items that would be classified as COTS items but for minor modifications, and related services;
- Contracts for items that would be classified as COTS items if they were not bulk cargo, such as agricultural products and petroleum products;
- Subcontracts (even if they flow from the prime acquisition contract) that only provide supplies, rather than construction or services;²⁰ and
- Subcontracts of less than \$3,000.

What is the exception for “commercially available off-the-shelf (COTS) items”?

The Federal Contractor Rule makes clear that contracts for commercially available off-the-shelf items, and services that are associated with them,²¹ are exempt from the E-Verify requirement.

The Rule defines a “commercially available off the shelf (COTS) item” as (1) a commercial item of supply,²² (2) sold in substantial quantities in the commercial marketplace, (3) which is offered to the government, without modification in the same form in which it is sold in the commercial marketplace, and (4) which does not include bulk cargo.

“Bulk cargo” is defined in the Rule as “cargo that is loaded and carried in bulk onboard ship without mark or count, in a loose unpackaged form, having homogenous characteristics.” According to the Preamble to the Rule, any items that are subject to mark or count are excluded from the definition.²³ For that reason, “nearly all food and agricultural products fall within the definition of ‘COTS.’ The only likely exceptions would be bulk shipment of grains in ship holds.”²⁴ Note that the FAR rule also excludes contracts for items that would be COTS items but for minor modifications.²⁵

According to the introductory comments to the rule, the exception for COTS items recognizes that “COTS providers will generally be predominantly commercial, with only a small portion of business with the government,” implying that the E-Verify requirement is burdensome on those contractors for whom federal contracts comprise a small portion of their business.

The comments to the FAR rule also explain that the authors of the rule did not intend to exempt all commercial item contracts through this provision; “the only reason COTS items are exempt is because the Councils believe that COTS providers may choose not to do business with the Government rather than changing their practices to use E-Verify... On the other hand, contractors who provide commercial items that are not COTS items are providing commercial products that are custom-made for the Government or services that are categorized as commercial items. These contractors have decided to be part of the Government marketplace.”²⁶ Consequently, providers of non-COTS items are more willing and able to accommodate procedures (and even higher contract prices) that are required for doing business with the government.

How are grants and cooperative agreements treated under the Federal Contractor Rule?

At colleges and universities, which tend to conduct research for a public purpose commissioned or supported by the federal government, grants and cooperative agreements are often common. The definition of “contract” in the FAR explicitly excludes grants and cooperative agreements so they are not subject to the E-Verify requirement. As the Preamble to the Rule explains, “The FAR already defines the term ‘contract’ and the term does not include grants or cooperative agreements. A grant or cooperative agreement that is not governed by the FAR is not required to include the clause in this rule.”²⁷

A “grant” is defined as “an award of financial assistance that, consistent with 31 U.S.C. 6304,²⁸ is used to enter into a relationship -- (a) The principal purpose of which is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States, rather than to acquire property or services for the Federal Government's direct benefit or use; and (b) In which substantial involvement is not expected between the Federal agency and the recipient when carrying out the activity contemplated by the award.”²⁹

A “cooperative agreement” is defined as “an award of financial assistance that, consistent with 31 U.S.C. § 6305,³⁰ is used to enter into the same kind of relationship as a grant . . . except that substantial involvement is expected between the Federal agency and the recipient when carrying out the activity contemplated by the award.

Does participation in the Medicare program make you a "contractor" subject to E-Verify obligations?

While it was hoped that this issue would be clarified in the final E-Verify Federal Contractor Rule, this issue was not addressed in that regulation. However, the FAR suggests that hospitals and institutions who obtain Medicare reimbursement will not be required to participate in E-Verify by virtue of the federal contractor regulation.

The E-Verify requirement for federal contractors only applies to “acquisitions” by the federal government and its agencies that are covered by the FAR. Under the FAR, an “acquisition” is defined to mean “the acquiring by contract with appropriated funds supplies or services (including construction) by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated.”³¹

Under the Medicare program, the federal government does not directly “acquire” medical care from providers so it does not appear that a hospital or institution receiving Medicare payments for patients would be required to participate in E-Verify under the Federal Contractor Rule. Rather than the government obtaining supplies or services, under the Medicare program, statutorily defined beneficiaries are reimbursed for covered medical services. In most circumstances, the

beneficiary assigns the right to reimbursement to the provider. In addition, the Medicare patients/beneficiaries have a certain level of choice in choosing a provider/medical institution.

Therefore, it appears that the federal government is not “acquiring” medical care for the beneficiary within the meaning of the FAR; rather, the Medicare beneficiary acquires care from a provider of his or her choice, which is then reimbursed by the federal government, either to the provider or the beneficiary, if the provider is enrolled in the Medicare program.

Because this issue was not clearly addressed in the final regulations, various groups are seeking clarification. For example, the E-Verify Committee of the American Immigration Lawyers Association has requested clarification on this issue from USCIS.

Note, however, that the FAR does appear to clearly apply to the Medicare program in other contexts, such as the agency's acquisition of Medicare claims processing services, certain program integrity functions, etc.

Who determines whether a federal contract is subject to the E-Verify requirement, and are any dispute mechanisms in place to challenge this finding?

The determination of whether the E-Verify Clause applies is made by the contracting officer, who will be responsible for determining the nature of the contract and whether any exceptions apply. As the current administration supports E-Verify and efforts to limit unauthorized employment particularly on government contracts, it is likely that once the Rule is in effect, contracting officers will push for contracts to contain the E-Verify Clause. At the time of contract negotiation, a university or institution is well-advised to review the details of the agreement and expected relationship and, to the extent possible, push for the final agreement to be in a form (such as a grant or cooperative agreement) that does not require the E-Verify Clause. Even if a university may be subject to the Federal Contractor Rule for certain agreements in place after the effective date, assuming the 180 day option is not selected, limitation of any such agreements going forward will decrease the administrative burden for the institution going forward of identifying what employees are working on the particular contract and completing the E-Verify queries for those individuals in the appropriate time period.

The Final Rule does not create any new dispute resolution procedures, instead it relies on those that already existing in the FAR, which provide that a contractor may obtain review prior to the award of the contract by submitting a written “protest” to the contracting officer, Agency Head, or GAO.³² After a contracting officer receives a protest, he must seek legal advice to ensure that his conclusion about the applicability of the E-Verify requirement is correct.³³ If the federal contractor chooses to wait until after the contract is awarded to challenge the application of the E-Verify requirement to his case, then he may dispute the contracting officer’s finding through procedures laid out in FAR 33.202.

When can we expect the Federal Contractor Rule to be enforced?

The Federal Contractor Rule currently has an effective date of September 8, 2009. The effective date (originally January 15, 2009) has been pushed back four times due to federal litigation and review of the Rule by the Obama Administration.

On December 23, 2008, the U.S. Chamber of Commerce and other associations filed a lawsuit challenging the recently-published Federal Contractor Rule. The lawsuit, filed in federal court in Maryland, requests that the rule be declared invalid and that the court enjoin it from going into effect. The lawsuit alleges that the Rule exceeds the authority granted by Congress to the executive branch when the E-Verify program was created. The lawsuit points out that the regulations mandate that certain contractors must verify work authorization of their new hires through enrollment in and use of the E-Verify system; however, when Congress established the E-Verify program, it explicitly stated that no employer could be required to participate in such a program. The plaintiffs also argue that Rule requires contractors to verify the employment eligibility of any current employee assigned by the contractor to perform work within the United States on the federal contract, but such “reverification” of current employees who have already been subject to I-9 requirements at the time of hire is barred by statute.

The Rule has also been delayed to allow President Obama’s Administration an opportunity to review the rule. On January 20, 2009, Rahm Emanuel, President Barack Obama’s Chief of Staff, issued a memorandum to the heads of all executive departments and agencies governing issuance and possible suspension of regulations. The memorandum stated that agencies should “[c]onsider extending for 60 days the effective date of regulations that have been published in the Federal Register but not yet taken effect.” Following the Emanuel Memorandum, plaintiffs in the lawsuit requested the Office of Management and Budget to apply the memorandum to the Rule and made the same request to government’s counsel. Delay of the effective date was also requested due to the ongoing federal litigation. Following these requests, the current effective date is September 8. At this point, it is unclear if the government will again extend the effective date either due to review by the Administration or the on-going litigation.

What are some practical considerations for Colleges and Universities to prepare for E-Verify and the Federal Contractor Rule?

Colleges and universities should review issues related to E-Verify including whether the institution must participate either under state law or as a federal contractor. Often colleges and universities are decentralized so that departments and smaller groups within the university may be responsible for I-9s and for certain contracts. Because of this often decentralized nature, it is even more important for the institution to consider and develop policies to consistently comply with I-9 and E-Verify requirements. Key issues that should be addressed include:

- Whether the institution must participate either under state law or as a federal contractor;

- Audit of existing I-9 files (especially important should employer be obligated/decide to participate in E-Verify as MOU requires institution to produce I-9 and related records even those unrelated to E-Verify that are not afforded presumption protection under E-Verify);
- Should the institution participate in E-Verify, update I-9 policies to require that any “List B” document contain a photo;
- If subject pursuant to Federal Contractor Rule, decide which E-Verify option-(i.e. 180 day option for all workers or university exemption requiring E-Verify only for those assigned to contract);
- Develop process to identify and track potential/subject federal contracts;
- Develop process to track those employees assigned to federal contract (assuming 180 day option not selected);
- Identify employee/HR with overall responsibility for federal contracts and E-Verify compliance for such contracts;
- Develop process to track employees assigned to contract queried under E-Verify (USCIS current position is that such employees should only be run once through E-Verify);
- Should institution decide to participate in E-Verify, determine whether to conduct queries internally or through a designated agent;
- Consider use of an electronic I-9 system to facilitate E-Verify queries (as well as electronic I-9 systems that may have features to ensure proper I-9 completion);
- Decide whether I-9 and E-Verify process should be conducted by departments/smaller groups or by a central unit/HR;
- Even if conducted remotely/by departments, assign central employee with overall responsibility for I-9 process and E-Verify;
- Even if E-Verify queries conducted by departments, consider whether to have central unit/HR deal with any E-Verify non-confirmation (generally recommended for uniform process and handling and avoidance of possible discrimination charges);
- Determine what individuals should be designated as E-Verify Program Administrators and E-Verify users;
- Develop initial training program and E-Verify launch procedures;
- Conduct on-going periodic I-9 and E-Verify training both for new employees and as a refresher for current employees.

To best ensure that the university is consistently handling I-9 and E-Verify issues in compliance with current law, the above issues should be addressed by the institution and incorporated into the institution’s I-9 policies and procedures. Institutions are well-advised to consider these issues now as not only is the effective date of the Federal Contractor Rule looming, but more and more institutions are being required to participate in E-Verify pursuant to state law.

¹ The Federal Acquisition Regulation is available online at <http://www.acquisition.gov/far/>.

² Findings of the Web-Based Basic Pilot Evaluation (Westat, Sept. 2007) (hereafter “Westat 2007”), <http://tinyurl.com/2tddqs> (last visited March 10, 2009)

³ “Use of Federal Database for ID Checks Hits Some Bumps” USA Today, February 26, 2009 at [UShttp://www.usatoday.com/news/nation/2009-02-05-immigration_N.htm](http://www.usatoday.com/news/nation/2009-02-05-immigration_N.htm) (last visited March 10, 2009)

⁴ Department of Homeland Security Press Release “Secretary Napolitano Issues Immigration and Border Security Action Directive” at http://www.dhs.gov/ynews/releases/pr_1233353528835.shtm (last visited March 10, 2009)

⁵ Draft February 2, 2009 Letter from DHS Data Privacy and Integrity Committee to Secretary Napolitano and Acting Chief Privacy Officer John W. Kropf AILA InfoNet Doc. No. 09020362 (last visited March 10, 2009).

⁶ Employers may wish to develop contractor compliance policies along the lines of the “Wal-Mart contract.”

⁷ See FAR Case 2007-013, Employment Eligibility Verification, 73 Fed. Reg. 67,651 (Nov. 14, 2008).

⁸ The Federal Acquisition Regulation is available online at <http://www.acquisition.gov/far/>.

⁹ FAR 2.101(b)(2).

¹⁰ FAR Case 2007-013, Employment Eligibility Verification, 73 Fed. Reg. at 67, 669.

¹¹ *Id.*

¹² *Id.* at 67, 682.

¹³ *Id.*

¹⁴ See also *id.* at 67, 704.

¹⁵ *Id.*

¹⁶ *Id.* at 67,677.

¹⁷ See *id.* at 67,651.

¹⁸ *Id.* at 67,676.

¹⁹ Because the FAR’s definition of “contract” excludes federal grants and cooperative agreements, federal grant or cooperative agreements are also exempt from the rule and need not contain the E-Verify contract clause.

²⁰ See 73 Fed. Reg. at 67,705 (to be codified at 48 CFR pt. 52) and 67,676; see also USCIS, “Frequently Asked Questions: Federal Contractors and E-Verify,” available at www.uscis.gov.

²¹ Note that the related services must be provided only by the COTS item supplier. See FAR Case 2007-013, Employment Eligibility Verification, 73 Fed. Reg. at 67,678.

²² “Commercial item” is defined in Section 2.101 of the FAR as:

“(1) Any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and—

(i) Has been sold, leased, or licensed to the general public; or

(ii) Has been offered for sale, lease, or license to the general public;

(2) Any item that evolved from an item described in paragraph (1) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;

(3) Any item that would satisfy a criterion expressed in paragraphs (1) or (2) of this definition, but for—

(i) Modifications of a type customarily available in the commercial marketplace; or

(ii) *Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. Minor modifications means modifications that do not*

significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor;

(4) Any combination of items meeting the requirements of paragraphs (1), (2), (3), or (5) of this definition that are of a type customarily combined and sold in combination to the general public;

(5) Installation services, maintenance services, repair services, training services, and other services if—

(i) Such services are procured for support of an item referred to in paragraph (1), (2), (3), or (4) of this definition, regardless of whether such services are provided by the same source or at the same time as the item; and

(ii) The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government;

(6) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions. For purposes of these services—

(i) “Catalog price” means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public; and

(ii) “Market prices” means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.

(7) Any item, combination of items, or service referred to in paragraphs (1) through (6) of this definition, notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor; or

(8) A nondevelopmental item, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments.

²³ 73 Fed. Reg. at 67,703.

²⁴ *Id.* at 67,699.

²⁵ *See id.* at 67,703.

²⁶ *Id.* at 67,678.

²⁷ *Id.* at 67,669.

²⁸ 31 U.S.C. § 6304 explains, “An executive agency shall use a grant agreement as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when--

(1) the principal purpose of the relationship is to transfer a thing of value to the State or local government or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; and

(2) substantial involvement is not expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.”

²⁹ 31 C.F.R. § 20.650.

³⁰ 31 U.S.C. § 6305 reads, “An executive agency shall use a cooperative agreement as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when--

(1) the principal purpose of the relationship is to transfer a thing of value to the State, local government,

or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; and

(2) substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.”

³¹ FAR §§ 1.104, 2.101.

³² See FAR Case 2007-013, Employment Eligibility Verification, 73 Fed. Reg. at 67,678; FAR Part 33.

³³ 73 Fed. Reg. at 67,678.