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Hot Topic: E-Verify and Local Governments (2011)

Richard Stokes

Municipal Technical Advisory Service

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September 2, 2011

E-VERIFY AND TENNESSEE LOCAL GOVERNMENTS

Richard L. Stokes, PHR, IPMA-CP, Human Resource Consultant

On June 11, 2008, then President George W. Bush amended Executive Order 12989 to direct all federal departments and agencies to require contractors to use an electronic employment eligibility verification system to verify the employment authorization of employees performing work under a federal contract. The Department of Homeland Security (DHS) designated E-Verify as the electronic employment eligibility verification system that all federal contractors must use.

Formerly referred to as the Basic Pilot Program, E-Verify is an internet-based system operated by U.S. Citizenship and Immigration Services (USCIS) in partnership with the Social Security Administration. E-Verify is free to employers and provides an automatic link to federal databases to help employers determine employment eligibility of new hires and the validity of their Social Security numbers. E-Verify works by electronically comparing the information on an employee's Form I-9 with SSA and DHS records to verify the identity and employment eligibility of newly hired employees.

On Nov. 14, 2008, the Civilian Agency Acquisition Council (CAAC) and the Defense Acquisition Regulations Council (DARC) published the Federal Acquisition Regulation (FAR) final rules that implemented the amended Executive Order 12989. The FAR, effective Sept. 8, 2009, is a set of rules

and regulations used to manage the way the federal government acquires supplies and services with appropriated funds.

Also known as the E-Verify federal contractor rules, the FAR final rules also direct federal agencies to require many federal contractors to use E-Verify. It requires federal contractors, through language inserted into their federal contracts, to agree to use E-Verify to confirm the employment eligibility of all persons hired during a contract term, as well as their current employees who perform work under a federal contract.

Is your city required to use E-Verify? It depends. The E-Verify federal contractor rules only affect federal contractors who were awarded a new contract on or after Sept. 8, 2009, that includes the FAR E-Verify clause (73 FR 67704). E-Verify contracts must also have a period of performance of 120 days or more, a value exceeding the simplified acquisition threshold of \$100,000 and at least some portion of the work under the contract must be performed in the United States.

Subcontractors also may be subject to the FAR E-Verify clause if: (1) the prime contractor includes the FAR clause; (2) the subcontract is for commercial or non-commercial services or construction; (3) the subcontract has a value of more

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than \$3,000; and (4) the subcontract includes work performed in the United States. Subcontractors who are suppliers, however, are not subject to the E-Verify federal contractor rules.

If your federal contract contains the FAR E-Verify clause, subject to certain exceptions, you must use E-Verify to confirm the employment authorization of:

- All persons hired during the contract terms and
- Current employees who perform work under the federal contract within the United States.

To verify these individuals, you must:

- Enroll in E-Verify within 30 days of the contract award date and
- Use E-Verify to verify that all your new hires and existing employees working directly on federal contracts are authorized to work in the United States.

After hiring a new employee and completing the Form I-9 required for all new hires (regardless of E-Verify participation), you must submit a query into the E-Verify system that includes information from sections 1 and 2 of the form I-9, including:

- Employee's name and date of birth;
- Social Security Number (SSN);
- Citizenship status he or she attest to;
- A number or I-94 number (if applicable);
- Type of document provided on the Form I-9 to establish work authorization status; and
- Proof of identity and its expiration date, if applicable.

If your federal contract does not contain the FAR E-Verify clause, you are not required to enroll in

and use E-Verify as a federal contractor but may participate voluntarily.

Only federal contractors with the FAR E-Verify clause and covered subcontractors are permitted to run E-Verify queries for existing employees.

If your city has federal contracts issued after the Sept. 8, 2009, date that contains the FAR E-Verify clause and your city is not yet enrolled, you must:

- Enroll in E-Verify as a federal contractor with FAR E-Verify clause within 30 days of the award date of a contract. You can register online for E-Verify at <https://e-verify.uscis.gov/enroll/>.
- Initiate verification of all newly-hired employees within 90 calendar days of your enrollment date unless you are an organization that qualifies for an exception.
- Initiate verification of all existing employees assigned to the qualifying contract within 90 calendar days of enrolling in E-Verify or 30 calendar days of the employee's assignment to the contract, whichever date is later.

When E-Verify asks which employees you will verify, the selection you make will affect the 180-day time period for verifying all existing employees.

If your city is already enrolled in E-Verify but not designated as a federal contractor with FAR E-Verify clause, you must do the following:

- Do not re-enroll in E-Verify. Update your "Maintain Company" page to "Federal Contractor" with FAR E-Verify clause within 30 calendar days of the award date of a new federal contract that contains the FAR E-Verify clause.

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- After updating your “Maintain Company” page, if your city has been selectively using E-Verify at certain hiring sites but not others, you must begin using E-Verify at all of your city’s hiring sites and where you will be verifying any existing employees.
- As an existing user of E-Verify, you are required to verify new hires within three days of hire. If you are already verifying new hires under a Memorandum of Understanding, you must continue to do so.
- Initiate verification of all existing employees assigned to a qualifying contract within 90 calendar days of designating your city as a federal contractor with FAR E-Verify clause in E-Verify or 30 calendar days of the employee’s assignment to the contract, whichever date is later.
- When E-Verify asks you which employees you will verify, the selection you make will affect the 180-day time period to verify all existing employees.

Some employees are exempt from the E-Verify requirements, and employers are not permitted to verify these employees in E-Verify. Other employees are not required to be verified, but employers may choose to verify them. Employees exempt from E-Verify are (1) those individuals hired on or before Nov. 6, 1986, and continuing in employment with the same employer and (2) employees previously confirmed as authorized to work in E-Verify.

The following organizations awarded a federal contract that includes the FAR E-Verify clause are only required to use E-Verify for new hires and existing non-exempt employees who are working directly under contract:

- State and local governments;
- Institutes of higher education;
- Governments of federally recognized Native American tribes; and
- Sureties performing under a takeover agreement entered into with a federal agency under a performance bond.

Your city must indicate that your organization qualifies for the exception when you enroll in E-Verify or, if your city is already enrolled, when you update your city profile.

Cities whose contracts are exempt from the E-Verify federal contractor rules are not required to enroll in E-Verify. A contract is considered exempt if any one of the following applies:

- It has a term of fewer than 120 days;
- It is valued at less than \$100,000;
- All work is performed outside the United States; or
- It includes only commercially available off-the-shelf (COTS) items and related services.

All employers using E-Verify are prohibited from:

- Using E-Verify to pre-screen applicants for employment;
- Checking employment eligibility for employees hired before the city signs the E-Verify Memorandum of Understanding;
- Taking an adverse action against an employee based upon a case result unless E-Verify issues a Final Non-confirmation (TNC);
- Specifying or requesting which Form I-9 documentation a newly-hired employee must use;
- Using E-Verify to discriminate against ANY job applicant or new hire on the basis of his/her national origin, citizenship or immigration status;

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- Selectively verifying work authorizations for newly-hired employees; and
- Sharing any user ID and/or password.

Upon enrollment in E-Verify, your city will be required to clearly display both the English and Spanish “Notice of E-Verify Participation” and the “Right to Work Poster.” Both notices are found in E-Verify after you log in under “View Essential Resources.” Notices/posters that cannot be displayed should be printed and distributed to every job applicant.

Two videos designed for employers and employees are available from the Department of Homeland

Security’s Office of Civil Rights and Civil Liberties and USCIS. They are “Understanding E-Verify: Employer Responsibilities and Worker Rights” and “Know Your Rights: Employee Rights and Responsibilities.” The videos portray re-enactments of real-world hiring scenarios. You can view them at:

- www.dhs.gov/E-Verify or
- www.youtube.com/ushomelandsecurity.

For more about E-Verify, visit www.dhs.gov/e-verify or contact USCIS at (888) 464-4218; MTAS Human Resource Consultants Richard Stokes at (615) 532-6827 or Bonnie Jones at (865) 974-0083; or your municipal management consultant.

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