



# Federal Contractors and the New E-Verify Requirement 2009

# E-Verify Requirements for Federal Contractors

## Is your company required to comply?

### *New Contracts*

The rule applies to federal contractors awarded a new contract AFTER September 8, 2009 that includes the Federal Acquisition Regulations (FAR) E-Verify clause. It is important to note that FAR does not cover all contracts with Government entities. The FAR applies to all “acquisitions” as defined in FAR Part 2, except where expressly excluded.

### *Existing Contracts*

While the September 8 date is key for new contracts, the rule also covers certain existing contracts. Specifically, the rule directs contracting officers to amend existing contracts that are indefinite delivery/indefinite quantity (ID/IQ) contracts. The amendments will include the clause for future orders, if the remaining period of performance extends at least six months beyond September 8, and the amount of work or number of orders expected under the remaining performance period is substantial.

However, if you have an existing contract, you will not be required to adhere to the rule until your contract has actually been amended.

### *Exempt Contracts*

The rule provides for exemptions of certain types of contracts as follows:

- Contracts for what is known as “commercially available off-the-shelf items” (COTS). Generally this means it is a product already broadly available that is not specifically produced/developed for the government;
- Prime contracts under the simplified acquisition threshold of \$100,000;
- Prime contracts with performance terms of less than 120 days;
- Contracts that do not include any work performed in the United States; and
- Contracts that are outside the scope of the FAR.

There are also exceptions for higher education institutions, state and local governments, and federally-recognized Tribes and Sureties. Under the final rule, these entities are only required to use E-verify to check the employment eligibility of employees assigned to the covered government contract.

## What triggers the E-Verify requirement?

Upon being awarded a federal contract solicited after September 8 containing the E-Verify clause, or if your company’s ongoing contract receives an amendment from a contracting officer.

## Which employees must be verified through E-Verify?

The rule applies to all “new hires” and existing employees performing “direct work” in the United States under a contract, hired after November 6, 1986. This means that all employees who perform direct work under a Government contract, regardless of whether they are new hires or existing employees, must be verified through E-Verify. An employee is not considered to be performing “direct work” under the contract if the employee normally performs support work (such as indirect overhead functions) and does not perform any substantial duties applicable to the contract. For example, this type of defined work might be a company’s accounting department.

**A critical first step is to determine whether or not your contracts are covered by the new rule.**

### *Existing Employees*

The rule provides contractors with the option of verifying all existing employees regardless of whether they are assigned to the contract. Any contractor choosing this option must notify DHS and initiate verifications for the entire workforce within 180 days of the notice.

### *Exempt Employees*

An employee is exempt if he/she holds an active security clearance of confidential, secret or top secret. Additionally, an employee is exempt if he/she has gone through a background investigation and had credentials issued pursuant to the Homeland Security Presidential Directive - 12.

## What if I use Subcontractors?

The E-Verify requirement clause must be included in all subcontracts meeting the specified requirements. Accordingly, all subcontractors must also verify all existing employees directly performing work under the covered contract. Contractors will need to include a clause for a subcontractor if the subcontract meets the following conditions:

- Is for commercial or non-commercial services or construction;
- Exceeds \$3,000; and
- Includes work performed in the United States.

## What do I do now?

We anticipate that many new federal contracts will contain the E-Verify clause. To prepare now, you should think about what steps you would take if you receive a contract with the clause.

1. If you are not currently an E-Verify member, or if you hired any employees before you joined E-Verify, you will have to make a decision about what part of your workforce should be run through E-Verify. You should make a decision whether you would E-Verify all of your workforce or only those employees who work on the federal contract. Logistically it may be difficult to identify specific employees defined as “working on a federal contract” from those performing other functions.
2. Information from the existing I-9s will be used to do the verification of current employees required by E-Verify. You should make sure you can locate all your I-9s for active employees and begin to audit them for completeness and accuracy.

## Why Compliance Matters

### The Problem

Too often, businesses find it challenging to navigate the ever-growing complex rules, regulations and compliance laws at both the federal and state level. Legal responsibilities that at one time went unenforced are now being enforced in unprecedented ways. Business executives that don't heed this new intensity of enforcement may in fact find their bottom line impacted, or in some cases, find themselves personally liable.

### The Solution

ICS provides a comprehensive auditing service to review existing compliance systems with a keen awareness of the vulnerabilities often exploited. For businesses that discover problems with their systems, ICS addresses those problems and recommends protocols to fully manage the issues. We also build layered compliance systems that include I-9 verification policies, E-Verify protocols, training modules, immigration related antidiscrimination protocols, No-Match policy and immigration compliance manuals to ensure businesses are prepared to meet the rigors of governmental oversight. When appropriate, ICS partners with legal counsel to actively defend companies involved in government investigations.

3. Your company will need to make a plan for how you will communicate with your employees about the E-Verify requirement, and to confirm that the information contained in Section One of the form I-9 is still accurate with respect to work authorization. Depending on the size of your company, this initial communication can be done via phone call, in-person meeting, email or with an enclosure placed in an employee's paycheck. You should not start any outreach at this time to your employees, but you should determine how you will do it in order to meet the rigorous deadlines imposed by E-Verify.
4. Even if you are a current E-Verify member, you should consider assessing your E-Verify policy and procedures. For example, have you ever reviewed your E-Verify audit reports? Who regularly does within your organization? The government does, and so should you. Complying with E-Verify is much more than simply signing up for the program and letting the rest take care of itself. You must diligently institute comprehensive protocols to ensure your hiring managers are uniformly implementing the program in a non-discriminatory way. The US Citizenship and Immigration Services is closely monitoring usage of the E-Verify program to ensure proper compliance and the Department of Justice's Office of Special Counsel has been actively following up on claims of discrimination from employees alleging inappropriate action from employers. The best way to avoid problems is to institute company-wide protocols, regularly audit E-Verify actions and train hiring personnel regularly.
5. It is also important to determine how you will handle the subcontractor requirement. In many companies, subcontractor logistics are not handled by the company's human resources department. You should ensure that you communicate with whomever handles subcontractors and make a plan to ensure appropriate compliance by your subcontractors, including when you will notify them, how you will document this notice, and how you will monitor contractor compliance.

Prepare now to ensure that you are ready to meet this new mandate.

Remember: The federal contractor rule is a new federal mandate that requires compliance. Appropriate planning is critical to ensure you keep important federal contracts, and protect your business.

If you have any questions about E-Verify implementation for federal contractors, managing the subcontractor process, or whether your potential contract item falls under an exemption, please contact ICS at 1-877-577-7053.

\*\* The information provided above is generalized and does not constitute legal advice. For particular advice tailored to your circumstances, please contact ICS. \*\*

## About ICS

ICS Consulting, LLC (ICS) is a full-service consulting and auditing firm headed by experienced professionals. Our firm is uniquely positioned to help clients build and protect business by offering informed and innovative solutions to problems relating to immigration compliance in the workplace. We have extensive senior-level Capitol Hill, Executive Branch and law enforcement experience, as well as an unparalleled network of contacts. Our company can assess vulnerabilities, identify problem areas, create internal protocols and develop customized solutions for businesses seeking to be in full compliance with immigration laws. We understand the bottom line for businesses and also understand the government mindset.

## ICS Leadership Team

### **Julie Myers Wood, President**

Julie Myers Wood is the President of ICS Consulting, LLC (ICS). In this capacity, Wood brings her extensive background to help build business solutions for companies seeking to grow and protect their bottom lines. Prior to founding the company, Wood served as head of Immigration and Customs Enforcement for nearly three years. In this role, she led the largest investigative component of the Department of Homeland Security and the second largest investigative agency in the federal government, with more than 17,000 employees and an annual budget of more than \$5 billion. ICE has five integrated divisions (Detention and Removal Operations, Investigations, Federal Protective Service, Intelligence, and International Affairs) that form a 21st century law enforcement agency with broad responsibilities for a number of key homeland security priorities.

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### **Nicholas J. Smith, Managing Principal**

Nicholas J. Smith is the Managing Principal of ICS Consulting, LLC. He previously served as Chief of Staff for U.S. Immigration and Customs Enforcement (ICE) where he oversaw the day-to-day activities of the nation's second largest federal investigative agency with more than 17,000 employees and a budget of \$5 billion. He served at the agency for three years. Prior to joining ICE, Mr. Smith spent nearly 8 years working with Senate Majority Leader Bill Frist as press secretary and deputy chief of staff. He also served as treasurer in 2000 and president in 2001 of the United States Senate Press Secretaries Association. Before his work with Senator Frist, Mr. Smith produced policy briefings and worked in investor relations for a public policy organization, did media relations for Senator Arlen Specter, and worked in sales and marketing for a multi-national publishing company.

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