

# Spotlight Topic: Federal Acquisition Regulation Requires Federal Contractors to Use E-Verify

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## *How Did This New E-Verify Requirement for Federal Contractors Come About?*

On June 6, 2008, President George W. 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 Verification System” which amended Executive Order 12989 announced by President William Clinton in 1996. The amended Executive Order reinforces the policy that the Federal government conducts business with companies that have a legal workforce.

On June 9, 2008, the Department of Homeland Security (“DHS”) designated E-Verify, operated by the United States Citizenship and Immigration Services (“USCIS”) in partnership with the Social Security Administration (“SSA”), as the electronic employment eligibility verification system that all Federal Contractors must use in compliance with the amended Federal Acquisition Regulation (“FAR”). E-Verify (formerly known as the Basic Pilot Program) is administered by USCIS and the Social Security Administration (SSA). This program allows employers to electronically verify the employment eligibility status of newly-hired employees. E-Verify participants electronically submit information provided on the Form I-9, and the system queries databases of the SSA and Department of Homeland Security (DHS) to verify the validity of the documents/information provided by the employee for completion of the Form I-9.

On June 12, 2008, in response to Executive Order 13465, the Defense Acquisition Council and the Defense Acquisitions Regulations Council (Department of Defense, General Services Administration and NASA) published in the Federal Register a proposed rule to amend FAR to require certain Federal contractors and subcontractors to use the E-Verify system as the means of verifying that employees are eligible to work in the U.S.

On November 14, 2008, the Final Rule to amend FAR was published in the Federal Register (73 Fed. Reg. 67704). The new rule takes into account over 16,000 comments submitted in response to the proposed rule and also, as stated in the USCIS’ November 13, 2008 Update, “reflects some changes that are designed to lighten the burden on small businesses who decide to accept federal contracts, and to provide contractors with flexible means of complying with the basic requirement that all persons working on federal contracts be electronically verified.”

## *When Is the Final Rule to Use E-Verify Effective for Federal Contractors?*

As of January 15, 2009, federal contractors and subcontractors, as defined by FAR, will be required to begin using E-Verify to verify their employees’ eligibility to legally work in the U.S. Specifically, federal contractors will be required to enroll in E-Verify if and when they are awarded a federal contract or subcontract that requires participation in E-Verify as part of the contract requirements.

All companies in the United States should be familiar with the current law requiring all employers in the United States to verify the identity and employment authorization by of each new employee hired after November 6, 1986 by completing an Employment Eligibility Verification Form (Form I-9). Under the final FAR rule, federal contractors will have an additional responsibility to verify an employee's employment eligibility information via the E-Verify system which compares I-9 information against information contained in SSA, USCIS and other Government databases.

The FAR final rule will require the insertion of a clause in affected Federal contracts to commit federal contractors and subcontractors to use the USCIS E-Verify system to verify that all of the contractors' and subcontractors' new hires and existing and new employees directly performing work under Federal contracts are authorized to work in the United States.

### ***What Types of Federal Contracts Are Affected by the New FAR Rule?***

The final FAR rule applies to solicitations issued and contracts awarded after January 15, 2009:

- For prime federal contracts with a period of performance longer than 120 days and a value above the simplified acquisition threshold of \$100,000;
- For subcontracts: The FAR final rule only applies to subcontractors if a prime contract includes the E-Verify clause. For subcontracts that flow from covered prime contracts, the final rule will require compliance with the E-Verify system if the subcontract is for services or for construction with a value of over \$3,000;
- For existing indefinite-delivery/indefinite-quantity contracts. In accordance with the FAR final rule, Contracting Officers of Federal Departments and Agencies should – on a bilateral basis – modify to include the E-Verify clause for future orders if the remaining period of performance extends at least six months after the final rule effective date of January 15, 2009, and the amount of work or number of orders expected under the remaining performance period is substantial;
- For prime federal contracts or subcontracts that have employees working in the United States. The final rule does not apply to employees working outside of the U.S. on applicable contracts. The United States is currently defined to include the fifty states and Washington, D.C., Guam, Puerto Rico, and the U.S. Virgin Islands.

### ***What Are the definitions Used by FAR for “Contract”, “Contractor”, “Subcontract” and “Subcontractor”?***

For purposes of the FAR final rule, the following definitions are used:

**Contractor** is defined in FAR Subpart 9.4. “Contractor” means any individual or other legal entity that –

(1) Directly or indirectly (*e.g.*, through an affiliate), submits an offer for or is awarded, or reasonably may be expected to submit offers for or to be awarded, a Government contract, including a contract for carriage under Government or commercial bills of lading, or a subcontract under a Government contract; or

(2) Conducts business, or reasonably may be expected to conduct business, with the Government as an agent or representative of another contractor.”

**Contract** is defined in FAR Subpart 2.101. “‘Contract’ means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance of performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, *et seq.* For discussion of various types of contracts, see Part 16.”

**Subcontract** as defined by the FAR final rule “means any contract, as defined in 2.101, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.”

**Subcontractor** as defined by the FAR final rule “means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.”

### ***What Types of Federal Contracts Are Exempted?***

The FAR final rule exempts the following federal contracts from the E-Verify clause:

- Contracts that include only commercially available off-the-shelf (COTS) items (or minor modifications to a COTS item) and related services;
- Contracts of less than the simplified acquisition threshold of \$100,000;
- Contracts of less than 120 days;
- Contracts for food and agricultural products that fall within the definition of COTS;
- Contracts for food and agricultural products shipped as bulk cargo, but that otherwise would be considered COTS items, such as grain, oils and produce;
- Subcontracts that only provide supplies, such as food; and
- Contracts where all work is performed outside of the United States.

As noted above, contracts that include only COTS items are exempt from the FAR final rule. A COTS item is a commercial item that is sold in substantial quantities in the commercial marketplace and is offered to the government in the same form that it is available in the commercial marketplace, or with minor modifications.

Also exempted from the E-Verify clause are contractors who receive a waiver of the E-Verify requirement by the head of the contracting activity. The final rule indicates that this will only

apply to exceptional cases and such waiver may be for a contract or subcontract or a class of contracts or subcontracts, either temporarily or for the period of performance.

### ***Which Employees Must be Verified Using E-Verify?***

Federal Contractors and Subcontractors covered by the FAR final rule are required to use the E-Verify system to verify the employment eligibility of all new and existing employees hired after November 6, 1986 who are directly performing work in the United States under a contract that is required to include the E-Verify clause. In addition, the contractor must continue to use the E-Verify process for the life of the contract for all new hires, whether or not such employees are employees assigned to the contract.

As stated in the final rule, an employee is not considered to be directly performing work under a contract if the employee (1) normally performs support work, such as indirect or other overhead functions; and (2) does not perform any substantial duties applicable to the contract. Thus, existing employees who are not directly performing work under the covered contract are not required to go through the E-Verify process. Please note that the final rule does not exempt employees from the E-Verify process based on the intermittent nature of the work or the length of time that they spend performing the work on the contract; even an employee working a minimal amount of time on the covered contract is subject to E-Verify.

Although employers who win a contract or subcontract that includes the E-Verify clause are required to run existing employees assigned to the contract through E-Verify, such employers may also elect to verify their entire workforce, including new hires and existing employees not assigned to a federal contract. If a company elects to verify their entire workforce through E-Verify, the company must notify DHS by updating the company profile through the “Maintain Company” page of the E-Verify program. A federal contractor that exercises this option must initiate an E-Verify query for each employee in the contractor’s entire workforce within 180 days of updating the company profile in E-Verify.

### ***Which Employees Are Not Required to be Verified Using E-Verify?***

As noted above, existing employees who are not directly performing work under the covered contract are not required to go through the E-Verify process. In addition, the following employees are not required to be processed through the E-Verify system:

- Employees who have already been verified through E-Verify by the contractor or subcontractor (e.g. employer is already a participant of the E-Verify program and verified the employee upon initial hire);
- Employees who hold an active security clearance of confidential, secret, or top secret;
- Employees for whom background investigations have been completed and credentials issued pursuant to Homeland Security Presidential Directive (HSPD)-12.

In addition, there are exceptions to the E-Verify requirement for certain entities. Federal contractors who are (1) Institutions of higher education (as defined at 20 U.S.C. 1001(a)); (2) State or local governments; (3) Governments of federally recognized Native American tribes;

and, (4) Sureties performing under a takeover agreement entered into with a federal agency pursuant to a performance bond are only required to use E-Verify to verify employment eligibility for employees assigned to a covered federal contract. However, to comply with existing law, all of these entities are still required to complete Form I-9 for all employees hired after November 6, 1986.

### ***What is E-Verify (Employment Eligibility Verification)?***

E-Verify (formerly known as the Basic Pilot Program) is administered by USCIS and the Social Security Administration (SSA). This program allows employers to electronically verify the employment eligibility status of newly-hired employees. E-Verify participants electronically submit information provided on the Form I-9, and the system queries databases of the SSA and Department of Homeland Security (DHS) to verify the validity of the documents/information provided by the employee for completion of the Form I-9.

**Note that an employer's participation in E-Verify does not provide the employer a safe harbor. That is, participation does not protect an employer from prosecution or liability for immigration violations.** The raids which took place at the Swift Meat Packing Plants are a prime example. Swift was participating in E-Verify, yet significant civil and criminal penalties were levied against the employer for immigration violations. Granted, the immigration violations in that case were egregious, with a demonstrated pattern and practice of violations. However, the fact remains that participation in E-Verify did not protect the employer, and may have in fact exposed the employer to additional liability as incriminating information was more readily available to the enforcement agencies. Thus, it is imperative that all employers, and not just federal contractors, ensure that they comply with the U.S. immigration laws relating to the legal hiring and employment verification of employees.

### ***What Are the Timelines for Enrollment in E-Verify and Employee Verification by Federal Contractors?***

All employers, including federal contractors, may enroll in E-Verify at any time regardless of the FAR final rule. As of January 15, 2009, employers are required to enroll in E-Verify if and when they are awarded a federal contract or subcontract that includes the E-Verify clause. Please keep in mind that verification of employees through the E-Verify system is limited to new hires unless the company is a federal contractor that has been awarded a contract on or after January 15, 2009. Once a company that has already enrolled in E-Verify is awarded a federal contract on or after January 15, 2009, the company will need to update its company E-Verify profile through the "Maintain Company" page of E-Verify once the federal contract has been awarded. Please note that once a company has been identified as a federal contractor in E-Verify, all of the company's E-Verify users will be required to take a federal contractor tutorial that explains the new policies and features of E-Verify that apply to federal contractors.

As of January 15, 2009, when a contractor wins a bid on a federal contract that contains the E-Verify clause pursuant to the FAR final rule, if the company is not yet enrolled in E-Verify as a federal contractor, the company will have 30 days from the date of contract award to enroll and 90 days from the date the company enrolls with E-Verify to initiate verification queries for employees already on staff who will be assigned to the contract and to begin using the system to verify newly hired employees. After the 90-day phase-in period, the company will be required to initiate verification of each newly hired employee within 3 business days after their employment

start date. Please note that employers may initiate verification of a new hire before his/her start date provided that the employee has accepted the job offer and has completed Form I-9. This practice, if an employer chooses to follow it, must be applied consistently for all new hires.

If the federal contractor has been enrolled as a federal contractor in E-Verify at the time that the contract is awarded and the contractor has been enrolled in E-Verify for 90 calendar days or more, the contractor is required to initiate verification of all new hires of the contractor who are working in the United States, whether or not assigned to the contract, within 3 business days after the date of hire.

Federal contractors are required to continue to use E-Verify throughout the duration of the federal contract for all new hires, whether or not they are assigned to the contract with the exception for (1) Institutions of higher education (as defined at 20 U.S.C. 1001(a)); (2) State or local governments; (3) Governments of federally recognized Native American tribes; and, (4) Sureties performing under a takeover agreement entered into with a federal agency pursuant to a performance bond, as noted above with regard to new hires not assigned to the contract.

### ***How Does a Federal Contractor Enroll in E-Verify?***

Prior to using the E-Verify system to verify an employee's employment eligibility, a company is required to enroll in the E-Verify program. There is no fee or cost to enroll and participate in the E-Verify program. The initial steps of the E-Verify enrollment process include questions about the basic contact information for the company. In addition, the company must agree to abide by the rules of the E-Verify program and at the end of the enrollment process the company is required to sign a Memorandum of Understanding ("MOU") that provides the terms of the agreement between the company and DHS. The DHS has created a draft MOU for federal contractors which is different than the standard MOU for non-federal contractor E-Verify participants. We have included a copy of this draft federal contractor MOU at the end of this spotlight article. The website to commence the E-Verify enrollment process is <https://www.vis-dhs.com/employerregistration>.

As part of the E-Verify enrollment process, the company will need to select the category that best describes the company. If the company has been awarded a federal contract on or after January 15, 2009, the company must select the category of "federal contractor". Upon selection of the "federal contractor" category, the E-Verify program will then ask the company to identify the federal contractor category that best describes the company, such as institutions of higher education, state and local governments or federally recognized Indian tribes, certain sureties, or "none of these categories". In addition, the company will need to select what groups of current employees (current employees assigned to the federal contract or all employees in the workforce) that the federal contractor plans to verify through the E-Verify program.

Once the company has completed the enrollment process, the USCIS will review the information and upon acceptance of the company's enrollment request, activate the E-Verify account. Upon activation, the company will receive an e-mail from the USCIS with the login instructions, user ID, and password in order to log into the E-Verify system and obtain instructions and other related materials on the E-Verify procedures and requirements, including the Federal Contractor User Manual and Tutorial (<https://www.vis-dhs.comWebBp>). Additional details of how the E-Verify program works can be obtained from the USCIS at [www.dhs.gov/E-Verify](http://www.dhs.gov/E-Verify) or via the E-Verify Customer Support line at 1-888-464-4218.

As part of the E-Verify participation process employers are required to post the notice provided by DHS indicating the company's participation in the E-Verify program. In addition, E-Verify employers are required to post an anti-discrimination notice issued by the Office of Special Counsel for Immigration-Related Unfair Employment Practices at the Department of Justice. The E-Verify program specifies that the posting be placed in a prominent location (e.g. company website and bulletin boards within the company office) that is clearly visible to prospective employees and to all employees who will be verified through the E-Verify system. These notices are provided by the E-Verify system once a company has enrolled and logged into the E-Verify system.

### ***Must All Worksites of a Federal Contractor Enroll in E-Verify?***

Pursuant to the current E-Verify program an employer is not required to enroll all worksites, but rather may choose to enroll only certain worksites. Please keep in mind that all new hires at a specific worksite must be E-Verified if the worksite is enrolled in E-Verify. However, the FAR final rule's requirements for federal contractors to enroll in E-Verify do not make any distinction among company worksites or locations. Given that the organization as a whole is the contracting entity, it is unclear if there would be any consequences if an organization were to enter into a federal contract for work that is done only at one location and then only enroll that specific location in E-Verify. Thus, there is the possibility that the failure of the organization to E-Verify new hires of a location at which none of the contract work is performed is a violation of the contract requirements to use E-Verify.

### ***What are the Penalties for Noncompliance?***

The FAR final rule mandates that the federal contractor comply, for the period of performance of a covered contract, with the requirements of the E-Verify MOU. Thus, failure to comply with the "federal contractor" MOU may result in termination of the federal contract. In addition, the federal contractor pursuant to the verification responsibilities under the MOU will be required to consent to the release of information relating to compliance with federal contracting requirements. Failure to consent may result in termination of the MOU. If DHS or SSA terminates the federal contractor's MOU and denies it access to the E-Verify system due to the federal contractor's failure to comply with the MOU, the federal contractor will be referred to a suspension or debarment official pursuant to FAR.

### ***What Happens to E-Verify When the Federal Contract Has Ended?***

The company may continue to use E-Verify, but will be required to update the company profile through the E-Verify "Maintain Company" page. The company also will need to cease verifying existing employees through the E-Verify program. If the federal contractor chooses not to continue to participate in E-Verify following completion of the federal contract, the company is required to terminate participation in the E-Verify program by selecting the "request termination" link in the E-Verify system. Failure to do so will mean that the terms of the MOU will remain in place and may be enforced against the company by DHS and SSA. Please note that termination of the E-Verify program requires 30-day written notice.

## *State and Local E-Verify Requirements In Addition to FAR*

Although immigration law is federal, several states have passed their own laws which impose additional or different employment verification requirements on employers. For example, the State of Colorado enacted legislation requiring the use of E-Verify, and retention of copies of documents used in support of an I-9. In Arizona legislation went into effect on 1/1/08 which requires employers to participate in E-Verify, and failure to do so may result in the loss of the employer's business license. Illinois, on the other hand, is suing the federal government, alleging that the use of E-Verify is discriminatory due to the error rate of the program. Illinois is taking the position that it will refuse to allow the use of E-Verify in the state until the program can demonstrate a 99% accuracy rate.

For your reference, **states that have enacted legislation that mandates the use of E-Verify (public or private) include** Arizona, Colorado, Georgia, Minnesota, Mississippi, Missouri, Oklahoma, Rhode Island, South Carolina, and Utah.

**State legislation regarding employment eligibility verification falls within the context of employment law, rather than U.S. immigration law. As a result, LMAC cannot advise regarding compliance with these state laws. However, we strongly advise that employers discuss these state requirements with their general counsel/ employment law attorneys to ensure they are in compliance with applicable state employment laws.**

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The E-Verify program, which is voluntary in most cases, has become a foundation of the Bush administration's increased worksite enforcement efforts. As you can see, more aggressive enforcement of U.S. immigration and state employment laws, combined with the likelihood of increasingly frequent prosecution of employers and employees alike, render it imperative that employers make immigration compliance a priority. Congress recently extended the law that established E-Verify until March 2009 and it is anticipated that after Congress resumes session in January 2009 it will reauthorize E-Verify beyond March 2009. It is unlikely that President-elect Barack Obama will oppose the extension of E-Verify or the implementation of the FAR final rule.

As always, please do not hesitate to contact us should you have any questions or concerns regarding U.S. immigration law compliance.

Sincerely,

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# **THE E-VERIFY PROGRAM FOR EMPLOYMENT VERIFICATION**

## **MEMORANDUM OF UNDERSTANDING**

### **ARTICLE I**

#### **PURPOSE AND AUTHORITY**

This Memorandum of Understanding (MOU) sets forth the points of agreement between the Social Security Administration (SSA), the Department of Homeland Security (DHS) and \_\_\_\_\_ (Employer) regarding the Employer's participation in the Employment Eligibility Verification Program (E-Verify). E-Verify is a program in which the employment eligibility of all newly hired employees will be confirmed after the Employment Eligibility Verification Form (Form I-9) has been completed.

Authority for the E-Verify program is found in Title IV, Subtitle A, of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, 110 Stat. 3009, as amended (8 U.S.C. § 1324a note).

If the Employer is a Federal contractor or subcontractor that is required to verify employment eligibility of certain employees as provided by Subpart 22.18, "Employment Eligibility Verification", of the Federal Acquisition Regulation (FAR) (hereinafter referred to this MOU as a "Federal contractor"), additional authority and requirements for the Employer to verify employment eligibility are found in Subpart 22.18.

### **ARTICLE II**

#### **FUNCTIONS TO BE PERFORMED**

##### **A. RESPONSIBILITIES OF THE SSA**

1. The SSA agrees to provide the Employer with available information that allows the Employer to confirm the accuracy of Social Security Numbers provided by all employees verified under this MOU and the employment authorization of U.S. citizens.
2. The SSA agrees to provide to the Employer appropriate assistance with operational problems that may arise during the Employer's participation in the E-Verify program. The SSA agrees to provide the Employer with names, titles, addresses, and telephone numbers of SSA representatives to be contacted during the E-Verify process.
3. The SSA agrees to safeguard the information provided by the Employer through the E-Verify program procedures, and to limit access to such information, as is appropriate by law, to individuals responsible for the verification of Social Security Numbers and for evaluation of the E-Verify program or such other persons or entities who may be authorized by the SSA as governed by the Privacy Act (5 U.S.C. § 552a), the Social Security Act (42 U.S.C. 1306(a)), and SSA regulations (20 CFR Part 401).
4. SSA agrees to establish a means of automated verification that is designed (in conjunction with DHS's automated system if necessary) to provide confirmation or tentative nonconfirmation of U.S. citizens' employment eligibility and accuracy of SSA records for both citizens and aliens within 3 Federal Government work days of the initial inquiry.
5. SSA agrees to establish a means of secondary verification (including updating SSA records as may be necessary) for employees who contest SSA tentative nonconfirmations that is designed to provide final confirmation or nonconfirmation of U.S. citizens' employment eligibility and accuracy of SSA records for both citizens and aliens within 10 Federal Government work days of the date of referral to

SSA, unless SSA determines that more than 10 days may be necessary. In such cases, SSA will provide additional verification instructions.

## **B. RESPONSIBILITIES OF THE DEPARTMENT OF HOMELAND SECURITY**

1. After SSA verifies the accuracy of SSA records for aliens through E-Verify, DHS agrees to provide the Employer access to selected data from DHS's database to enable the Employer to conduct, to the extent authorized by this MOU:

- Automated verification checks on alien employees by electronic means, and
- Photo verification checks (when available) on alien employees.

2. DHS agrees to provide to the Employer appropriate assistance with operational problems that may arise during the Employer's participation in the E-Verify program. DHS agrees to provide the Employer names, titles, addresses, and telephone numbers of DHS representatives to be contacted during the E-Verify process.

3. DHS agrees to provide to the Employer a manual (the E-Verify Manual) containing instructions on E-Verify policies, procedures and requirements for both SSA and DHS, including restrictions on the use of E-Verify. DHS agrees to provide training materials on E-Verify.

4. DHS agrees to provide to the Employer a notice, which indicates the Employer's participation in the E-Verify program. DHS also agrees to provide to the Employer anti-discrimination notices issued by the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), Civil Rights Division, and U.S. Department of Justice.

5. DHS agrees to issue the Employer a user identification number and password that permits the Employer to verify information provided by alien employees with DHS's database.

6. DHS agrees to safeguard the information provided to DHS by the Employer, and to limit access to such information to individuals responsible for the verification of alien employment eligibility and for evaluation of the E-Verify program, or to such other persons or entities as may be authorized by applicable law. Information will be used only to verify the accuracy of Social Security Numbers and employment eligibility, to enforce the Immigration and Nationality Act and federal criminal laws, to administer Federal contracting requirements, and to ensure accurate wage reports to the SSA.

7. DHS agrees to establish a means of automated verification that is designed (in conjunction with SSA verification procedures) to provide confirmation or tentative nonconfirmation of employees' employment eligibility within 3 Federal Government work days of the initial inquiry.

8. DHS agrees to establish a means of secondary verification (including updating DHS records as may be necessary) for employees who contest DHS tentative nonconfirmations and photo non-match tentative nonconfirmations that is designed to provide final confirmation or nonconfirmation of the employees' employment eligibility within 10 Federal Government work days of the date of referral to DHS, unless DHS determines that more than 10 days may be necessary. In such cases, DHS will provide additional verification instructions.

## **C. RESPONSIBILITIES OF THE EMPLOYER**

1. The Employer agrees to display the notices supplied by DHS in a prominent place that is clearly visible to prospective employees.

2. The Employer agrees to provide to the SSA and DHS the names, titles, addresses, and telephone numbers of the Employer representatives to be contacted regarding E-Verify.

3. The Employer agrees to become familiar with and comply with the E-Verify Manual.

4. The Employer agrees that any Employer Representative who will perform employment verification queries will complete the E-Verify Tutorial before that individual initiates any queries.

A. The employer agrees that all employer representatives will take the refresher tutorials initiated by the E-Verify program as a condition of continued use of E-Verify.

B. Failure to complete a refresher tutorial will prevent the employer from continued use of the program.

5. The Employer agrees to comply with current Form I-9 procedures, with two exceptions:

- If an employee presents a "List B" identity document, the Employer agrees to only accept "List B" documents that contain a photo. (List B documents identified in 8 C.F.R. § 274a.2(b)(1)(B)) can be presented during the Form I-9 process to establish identity.)
- If an employee presents a DHS Form I-551 (Permanent Resident Card) or Form I-766 (Employment Authorization Document) to complete the Form I-9, the Employer agrees to make a photocopy of the document and to retain the photocopy with the employee's Form I-9. The employer will use the photocopy to verify the photo and to assist the Department with its review of photo non-matches that are contested by employees. Note that employees retain the right to present any List A, or List B and List C, documentation to complete the Form I-9. DHS may in the future designate other documents that activate the photo screening tool.

6. The Employer understands that participation in E-Verify does not exempt the Employer from the responsibility to complete, retain, and make available for inspection Forms I-9 that relate to its employees, or from other requirements of applicable regulations or laws, except for the following modified requirements applicable by reason of the Employer's participation in E-Verify: (1) identity documents must have photos, as described in paragraph 5 above; (2) a rebuttable presumption is established that the Employer has not violated section 274A(a)(1)(A) of the Immigration and Nationality Act (INA) with respect to the hiring of any individual if it obtains confirmation of the identity and employment eligibility of the individual in compliance with the terms and conditions of E-Verify ; (3) the Employer must notify DHS if it continues to employ any employee after receiving a final nonconfirmation, and is subject to a civil money penalty between \$500 and \$1,000 for each failure to notify DHS of continued employment following a final nonconfirmation; (4) the Employer is subject to a rebuttable presumption that it has knowingly employed an unauthorized alien in violation of section 274A(a)(1)(A) if the Employer continues to employ an employee after receiving a final nonconfirmation; and (5) no person or entity participating in E-Verify is civilly or criminally liable under any law for any action taken in good faith based on information provided through the confirmation system. DHS reserves the right to conduct Form I-9 compliance inspections during the course of E-Verify, as well as to conduct any other enforcement activity authorized by law.

7. The Employer agrees to initiate E-Verify verification procedures for new employees within 3 Employer business days after each employee has been hired (but after both sections 1 and 2 of the Form I-9 have been completed), and to complete as many (but only as many) steps of the E-Verify process as are necessary according to the E-Verify Manual. The Employer is prohibited from initiating verification procedures before the employee has been hired and the Form I-9 completed. If the automated system to be queried is temporarily unavailable, the 3-day time period is extended until it is again operational in order to accommodate the Employer's attempting, in good faith, to make inquiries during the period of

unavailability. In all cases, the Employer must use the SSA verification procedures first, and use DHS verification procedures and photo screening tool only after the SSA verification response has been given.

8. The Employer agrees not to use E-Verify procedures for pre-employment screening of job applicants, in support of any unlawful employment practice, or for any other use not authorized by this MOU. The Employer must use E-Verify for all new employees, and for certain current employees as described in paragraph 16 if the Employer is a Federal contractor. Except as provided in paragraph 16, the Employer will not verify only certain employees selectively or verify employees hired before the date this MOU is in effect. The Employer understands that if the Employer uses E-Verify procedures for any purpose other than as authorized by this MOU, the Employer may be subject to appropriate legal action and the immediate termination of its access to SSA and DHS information pursuant to this MOU.

9. The Employer agrees to follow appropriate procedures (see Article III.B. below) regarding tentative nonconfirmations, including notifying employees of the finding, providing written referral instructions to employees, allowing employees to contest the finding, and not taking adverse action against employees if they choose to contest the finding. Further, when employees contest a tentative nonconfirmation based upon a photo non-match, the Employer is required to take affirmative steps (see Article III.B. below) to contact DHS with information necessary to resolve the challenge.

10. The Employer agrees not to take any adverse action against an employee based upon the employee's perceived employment eligibility status while SSA or DHS is processing the verification request unless the Employer obtains knowledge (as defined in 8 C.F.R. § 274a.1(l)) that the employee is not work authorized. The Employer understands that an initial inability of the SSA or DHS automated verification system to verify work authorization, a tentative nonconfirmation, or the finding of a photo non-match, does not establish, and should not be interpreted as evidence, that the employee is not work authorized. In any of the cases listed above, the employee must be provided the opportunity to contest the finding, and if he or she does so, the employee may not be terminated or suffer any adverse employment consequences until and unless secondary verification by SSA or DHS has been completed and a final nonconfirmation has been issued. If the employee does not choose to contest a tentative nonconfirmation or a photo non-match, then the Employer can find the employee is not work authorized and take the appropriate action.

11. The Employer agrees to comply with section 274B of the INA by not discriminating unlawfully against any individual in hiring, firing, or recruitment or referral practices because of his or her national origin or, in the case of a protected individual as defined in section 274B(a)(3) of the INA, because of his or her citizenship status. The Employer understands that such illegal practices can include selective verification or use of E-Verify except as provided in paragraph 16 below; discharging, refusing to hire, or assigning or refusing to assign to federal contracts qualified employment eligible employees because they appear or sound "foreign"; and premature termination of employees based upon tentative nonconfirmations. The Employer further understands that any violation of the unfair immigration-related employment practices provisions of the INA could subject the Employer to civil penalties pursuant to section 274B of the INA and the termination of its participation in E-Verify. If the Employer has any questions relating to the anti-discrimination provision, it should contact OSC at 1-800-255-7688 or 1-800-237-2515 (TDD).

12. The Employer agrees to record the case verification number on the employee's Form I-9 or to print the screen containing the case verification number and attach it to the employee's Form I-9.

13. The Employer agrees that it will use the information it receives from the SSA or DHS pursuant to E-Verify and this MOU only to confirm the employment eligibility of employees as authorized by this MOU. The Employer agrees that it will safeguard this information, and means of access to it (such as PINS and passwords) to ensure that it is not used for any other purpose and as necessary to protect its

confidentiality, including ensuring that it is not disseminated to any person other than employees of the Employer who are authorized to perform the Employer's responsibilities under this MOU.

14. The Employer acknowledges that the information which it receives from SSA is governed by the Privacy Act (5 U.S.C. § 552a(i)(1) and (3)) and the Social Security Act (42 U.S.C. 1306(a)), and that any person who obtains this information under false pretenses or uses it for any purpose other than as provided for in this MOU may be subject to criminal penalties.

15. The Employer agrees to allow DHS and SSA, or their authorized agents or designees, to make periodic visits to the Employer for the purpose of reviewing E-Verify -related records, i.e., Forms I-9, SSA Transaction Records, and DHS verification records, which were created during the Employer's participation in the E-Verify Program. In addition, for the purpose of evaluating E-Verify, the Employer agrees to allow DHS and SSA or their authorized agents or designees, to interview it regarding its experience with E-Verify, to interview employees hired during E-Verify use concerning their experience with the pilot, and to make employment and E-Verify related records available to DHS and the SSA, or their designated agents or designees. Failure to comply with the terms of this paragraph may lead DHS to terminate the Employer's access to E-Verify.

16. The Employer understands that if it is a Federal contractor it must verify the employment eligibility of any "assigned employee" (as defined in FAR 22.1801) in addition to verifying the employment eligibility of all newly hired employees as otherwise provided in this MOU. The Employer shall initiate E-Verify verification procedures for each employee who is an assigned employee as of the effective date of this MOU within 30 days after such date. For any employee who becomes an assigned employee subsequent to the effective date of this MOU, the Employer shall initiate E-Verify verification procedures within three business days after the date an employee has become an assigned employee, or within 30 days of the award of the contract to which the employee is assigned, whichever is later. The Employer may use a previously completed Form I-9 as the basis for initiating E-Verify verification of an assigned employee as long as that Form I-9 complies with paragraph 5 and the employee's work authorization has not expired, and as long as the Employer has reviewed the Form I-9 with the employee to ensure that the employee's stated basis for work authorization has not changed (including, but not limited to, a lawful permanent resident alien having become a naturalized U.S. citizen). If the Form I-9 does not comply with paragraph 5 or the employee's basis for work authorization has expired or changed, the Employer shall complete a new I-9 consistent with paragraph 5. If the Form I-9 is otherwise valid and up-to-date but reflects documentation (such as a U.S. passport or Form I-551) that expired subsequent to completion of the Form I-9, the Employer shall not use the photo screening tool described in paragraph 5, subject to any additional or superseding instructions that may be provided on this subject in the E-Verify Manual. Nothing in this paragraph shall be construed to require a second verification using E-Verify of any assigned employee who has otherwise been verified as a newly hired employee under this MOU, or to authorize verification of any existing employee by any Employer that is not a Federal contractor.

17. The Employer understands that if it is a Federal contractor, its compliance with this MOU is a performance requirement under the terms of the Federal contract or subcontract, and the Employer consents to the release of information relating to compliance with its verification responsibilities under this MOU to contracting officers or other officials authorized to review the Employer's compliance with Federal contracting requirements.

### **ARTICLE III**

#### **REFERRAL OF INDIVIDUALS TO THE SSA AND THE DEPARTMENT OF HOMELAND SECURITY**

##### **A. REFERRAL TO THE SSA**

1. If the Employer receives a tentative nonconfirmation issued by SSA, the Employer must print the tentative nonconfirmation notice as directed by the automated system and provide it to the employee so that the employee may determine whether he or she will contest the tentative nonconfirmation.
2. The Employer will refer employees to SSA field offices only as directed by the automated system based on a tentative nonconfirmation, and only after the Employer records the case verification number, reviews the input to detect any transaction errors, and determines that the employee contests the tentative nonconfirmation. The Employer will transmit the Social Security Number to SSA for verification again if this review indicates a need to do so. The Employer will determine whether the employee contests the tentative nonconfirmation as soon as possible after the Employer receives it.
3. If the employee contests an SSA tentative nonconfirmation, the Employer will provide the employee with a referral letter and instruct the employee to visit an SSA office to resolve the discrepancy within 8 Federal Government work days. The Employer will make a second inquiry to the SSA database using E-Verify procedures on the date that is 10 Federal Government work days after the date of the referral in order to obtain confirmation, or final nonconfirmation, unless otherwise instructed by SSA or unless SSA determines that more than 10 days is necessary to resolve the tentative nonconfirmation..
4. The Employer agrees not to ask the employee to obtain a printout from the Social Security Number database (the Numident) or other written verification of the Social Security Number from the SSA.

## **B. REFERRAL TO THE DEPARTMENT OF HOMELAND SECURITY**

1. If the Employer receives a tentative nonconfirmation issued by DHS, the Employer must print the tentative nonconfirmation notice as directed by the automated system and provide it to the employee so that the employee may determine whether he or she will contest the tentative nonconfirmation.
2. If the Employer finds a photo non-match for an employee who provides a document for which the automated system has transmitted a photo, the employer must print the photo non-match tentative nonconfirmation notice as directed by the automated system and provide it to the employee so that the employee may determine whether he or she will contest the finding.
3. The Employer agrees to refer individuals to DHS only when the employee chooses to contest a tentative nonconfirmation received from DHS automated verification process or when the Employer issues a tentative nonconfirmation based upon a photo non-match. The Employer will determine whether the employee contests the tentative nonconfirmation as soon as possible after the Employer receives it.
4. If the employee contests a tentative nonconfirmation issued by DHS, the Employer will provide the employee with a referral letter and instruct the employee to contact the Department through its toll-free hotline within 8 Federal Government work days.
5. If the employee contests a tentative nonconfirmation based upon a photo non-match, the Employer will provide the employee with a referral letter to DHS. DHS will electronically transmit the result of the referral to the Employer within 10 Federal Government work days of the referral unless it determines that more than 10 days is necessary.
6. The Employer agrees that if an employee contests a tentative nonconfirmation based upon a photo non-match, the Employer will send a copy of the employee's Form I-551 or Form I-766 to DHS for review by:
  - Scanning and uploading the document, or

- Sending a photocopy of the document by an express mail account (furnished and paid for by DHS).

7. The Employer understands that if it cannot determine whether there is a photo match/non-match, the Employer is required to forward the employee's documentation to DHS by scanning and uploading, or by sending the document as described in the preceding paragraph, and resolving the case as specified by the Immigration Services Verifier at DHS who will determine the photo match or non-match.

#### **ARTICLE IV**

#### **SERVICE PROVISIONS**

The SSA and DHS will not charge the Employer for verification services performed under this MOU. The Employer is responsible for providing equipment needed to make inquiries. To access the E-Verify System, an Employer will need a personal computer with Internet access.

#### **ARTICLE V**

#### **PARTIES**

A. This MOU is effective upon the signature of all parties, and shall continue in effect for as long as the SSA and DHS conduct the E-Verify program unless modified in writing by the mutual consent of all parties, or terminated by any party upon 30 days prior written notice to the others. Any and all system enhancements to the E-Verify program by DHS or SSA, including but not limited to the E-Verify checking against additional data sources and instituting new verification procedures, will be covered under this MOU and will not cause the need for a supplemental MOU that outlines these changes. DHS agrees to train employers on all changes made to E-Verify through the use of mandatory refresher tutorials and updates to the E-Verify manual. Even without changes to E-Verify, the Department reserves the right to require employers to take mandatory refresher tutorials. An Employer that is a Federal contractor may terminate this MOU when the Federal contract that requires its participation in E-Verify is terminated or completed. In such a circumstance, the Federal contractor must provide written notice to SSA and DHS. If an Employer that is a Federal contractor fails to provide such notice, that Employer will remain a participant in the E-Verify program, will remain bound by the terms of this MOU, and will be required to continue use of the E-Verify procedures to verify the employment eligibility of all newly hired employees.

B. Termination by any party shall terminate the MOU as to all parties. The SSA or DHS may terminate this MOU without prior notice if deemed necessary because of the requirements of law or policy, or upon a determination by SSA or DHS that there has been a breach of system integrity or security by the Employer, or a failure on the part of the Employer to comply with established procedures or legal requirements. The Employer understands that if it is a Federal contractor, termination of this MOU by any party for any reason may negatively affect its performance of its contractual responsibilities. Some or all SSA and DHS responsibilities under this MOU may be performed by contractor(s), and SSA and DHS may adjust verification responsibilities between each other as they may determine.

C. Nothing in this MOU is intended, or should be construed, to create any right or benefit, substantive or procedural, enforceable at law by any third party against the United States, its agencies, officers, or employees, or against the Employer, its agents, officers, or employees.

D. Each party shall be solely responsible for defending any claim or action against it arising out of or related to E-Verify or this MOU, whether civil or criminal, and for any liability wherefrom, including (but not limited to) any dispute between the Employer and any other person or entity regarding the applicability of Section 403(d) of IIRIRA to any action taken or allegedly taken by the Employer.

E. The employer understands that the fact of its participation in E-Verify is not confidential information and may be disclosed as authorized or required by law and DHS or SSA policy, including but not limited to, Congressional oversight, E-Verify publicity and media inquiries, determinations of compliance with Federal contractual requirements, and responses to inquiries under the Freedom of Information Act (FOIA).

F. The foregoing constitutes the full agreement on this subject between the SSA, DHS, and the Employer.

G. The individuals whose signatures appear below represent that they are authorized to enter into this MOU on behalf of the Employer and DHS respectively. The SSA has agreed that DHS's signature to the MOU shall also constitute SSA's agreement to its terms and conditions.

**To be accepted as a participant in E-Verify, you should only sign the Employer's Section of the signature page. If you have any questions, contact E-Verify Operations at 888-464-4218.**

**Employer**

\_\_\_\_\_  
Name (Please type or print) Title

\_\_\_\_\_  
Signature Date

**Department of Homeland Security – Verification Division**

\_\_\_\_\_  
Name (Please type or print) Title

\_\_\_\_\_  
Signature Date

