

TOPIC:

E-VERIFY: Compliance for College and University Federal Contractors

INTRODUCTION:

Many colleges and universities perform contract work for the federal government. On June 6, 2008, President Bush issued Executive Order (EO) 13,465 [\[1\]](#). This EO mandates that covered federal contractors enroll in what had previously been a voluntary program to electronically verify the social security number and employment authorization of employees through a web-based E-Verify system [\[2\]](#).

The Department of Homeland Security (DHS) issued final regulations (the Rule) implementing the Executive Order on November 14, 2008 [\[3\]](#). These regulations became effective September 8, 2009 [\[4\]](#). The Rule generally requires federal contractors to enroll in and use the E-Verify system to check the employment authorization of all new hires and all existing employees assigned to covered federal contracts. Under the Rule, colleges and universities may also choose to E-Verify all their existing employees (as well as new hires) [\[5\]](#), or just those employees (newly hired and existing) assigned to covered federal contracts.

This Note discusses how the new E-Verify Rule applies to colleges, the compliance options, the risks, and best practices.

DISCUSSION:

What is E-Verify?

What is E-Verify? E-Verify is an internet-based system operated by the Department of Homeland Security (DHS) in partnership with the Social Security Administration (SSA). The system permits employers to electronically verify their employees' authorization to work in the United States. E-Verify has been in existence as a voluntary program since 1996 [\[6\]](#). It does not replace the existing I-9 identity and employment verification process that all employers, not just federal contractors, must use when hiring new employees. Rather, E-Verify supplements the existing I-9 process by comparing employee identification information against DHS' electronic records and SSA's name and social security number database [\[7\]](#).

Does the new E-Verify Rule apply to my college or university?

The final rule only applies to solicitations issued and contracts awarded pursuant to the Federal Acquisition Regulations ("FAR") after September 8, 2009 [\[8\]](#). In addition, the Rule requires that the contract contain language specifically requiring participation in E-Verify. Thus, the E-Verify Rule only applies to contracts awarded on or after September 8, 2009 that contain the FAR E-Verify clause [\[9\]](#). Certain existing indefinite-delivery/indefinite-quantity (IDIQ) contracts may also be subject to the Rule, if they are modified after the effective date [\[10\]](#).

The Rule requires the insertion of the E-Verify clause for prime federal acquisition contracts with a period of performance longer than 120 days and a value above the simplified acquisition threshold (\$100,000) [11]. Subcontracts are covered where such contracts flow from a prime contract that includes the E-Verify clause if those subcontracts are for services or for construction with a value over \$3,000 [12]. The Rule does not apply to contracts to be performed outside the United States or for acquisition of commercially available off-the-shelf (COTS) items [13].

The Rule's comments also clarify that the term "contract" as used in the Rule does not extend to federal grants and cooperative agreements [14]. The Rule only applies to acquisitions by the federal government and its agencies that are covered by the FAR. Because the FAR 's definition of "contract" explicitly excludes grants and cooperative agreements [15], they are not subject to the E-Verify Rule. 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 [16]."

If your university does not have a qualifying federal contract that contains the FAR E-Verify clause, the university is not a "federal contractor" subject to the Rule and E-Verify is not mandatory pursuant to federal law [17].

If my university signs a contract containing the FAR E-Verify clause, what is it obligated to do?

A university winning a bid on a federal contract with a FAR E-Verify clause on or after September 8, 2009 must enroll in the E-Verify program within 30 calendar days of the contract award date. A university, as does any other federal contractor, enrolls by signing a memorandum of understanding (MOU) [18] with DHS. At the time of enrollment, the university must decide which employees it will E-Verify. As a general rule, federal contractors with qualifying contracts are required to verify the employment eligibility of all employees assigned to the contract and all new hires, whether they work under the contract or not. But certain contractors, such as colleges and universities [19] and state and local governments, have the option of limiting the use of E-Verify to employees (existing and new hires) assigned to covered federal contracts [20].

What employees are exempt from E-Verify?

Consistent with I-9 requirements under IRCA, all employees hired before November 7, 1986 are exempt from E-Verify and should not be queried under the system. In addition, the Rule exempts individuals who have been:

- previously verified by the employer under E-Verify;
- granted 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; or
- granted Homeland Security Presidential Directive (HSPD)-12 Security clearance [21].

Who are "assigned employees"?

"Assigned employees" are those in the United States performing work directly on the covered contract [22]. An employee is not performing work directly on the contract if the employee normally performs support functions, or indirect or overhead functions, such as secretarial, janitorial or administrative services, and such employee is not performing substantial duties on the contract [23].

What if it is too difficult to determine who is assigned to work directly under the covered contract?

If a university finds it cannot consistently and accurately determine who is working on a covered federal contract and complete the E-Verify query within the allotted time [24], it can instead elect to E-Verify all existing employees, including student workers. A university must complete this process within 180 days from

the time of election [\[25\]](#). Note that while E-Verify system programming previously did not allow a university to select the option to verify all existing employees, the DHS E-Verify team recently confirmed that it will modify the system in December 2009 to allow universities to select the option to verify all existing employees [\[26\]](#). Universities may want to consider disadvantages of making this election discussed below.

What does a university have to do after enrolling in the E-Verify Program?

- Continue to complete an I-9 Form for every new hire.
- Begin submitting a query to the E-Verify system on every new hire, no later than three (3) business days from the hiring date [\[27\]](#). If your university is not yet enrolled in E-Verify, it has a ninety (90) day phase-in period to do this [\[28\]](#).
- Query existing employees assigned to work under the federal contract within ninety (90) days from the contract award or thirty (30) days after assignment to the contract, whichever is later [\[29\]](#).
- If the 180 day option is selected, E-Verify all new hires within three days of hire and E-Verify all existing employees within 180 days of the election, and [\[30\]](#)
- Include E-Verify compliance clauses in covered sub-contracts and adopt procedures to ensure insertion of the E-Verify clause and E-Verify compliance.

In addition, the MOU that a university federal contractor signs to enroll in the new E-Verify system requires it to undertake the following responsibilities:

- Post a notice informing prospective employees that the university is an E-Verify participant.
- Post an Anti-Discrimination Notice issued by the Department of Justice Office of Special Counsel that is visible to prospective employees. Note, using E-Verify does not provide protection from claims of discrimination [\[31\]](#).
- Become familiar with the E-Verify User Manual. Any Employer Representative that performs queries must also complete the E-Verify tutorial.
- Write the E-Verify query # on the I-9 Form OR attach the E-Verify results to Form I-9 and retain them for the same duration as the form.
- Provide thirty (30) days notice to DHS before terminating participation in the E-Verify program.
- Properly handle receipt of notification from E-Verify that the system is initially unable to verify work authorization, commonly known as a Tentative Non-Confirmation (“TNC”), including advising the employee of TNC, referring the employee to the appropriate agency and continuing to employ the employee while the TNC is pending, unless the employer obtains other independent evidence of unauthorized status.
- Notify the government should the university continue to employ an individual after receiving a final determination that the employee is not authorized to work, commonly known as a Final Non-Confirmation (“FNC”) [\[32\]](#).
- Agree to allow the government to interview university employees and to make available for government inspection all of their E-Verify records, as well as, related I-9 and other personnel records [\[33\]](#).

What are the general guidelines for university employers using the E-Verify system?

- E-Verify procedures must be applied equally to all U.S. citizen and non-citizen employees.
- E-Verify should not be used to pre-screen employees. Use it only after a written offer of employment is accepted and a Form I-9 is completed.
- Unless the employer is a federal contractor, E-Verify can only be used to verify university employees hired after enrolling in the E-Verify program.
- E-Verify cannot be used to query existing employees unless the university has signed a qualifying federal contract.
- E-Verify queries must be conducted under the timelines set forth above, unless there is no social security number available for the employee.
- E-Verify does not relieve university employers of the I-9 employment eligibility verification

requirement.

- Form I-9 requirements remain the same with the exception that E-Verify participating employers can only accept “List B” identity documents that have a photograph.

All employers, universities included, should follow consistent I-9 procedures and audit I-9 records of all current employees for compliance with IRCA [34]. This advice also applies to those who choose to sign up voluntarily under E-Verify, because those employers agree, through the MOU, to site visits, employee interviews and the production of employment documentation.

Finally, DHS has stated that it engages in “data mining”, which means that DHS actively reviews individual employer’s activity in E-Verify to ensure compliance. As a result, investigations are more likely to happen than they would under the old I-9 complaint based audit system. As a result, employers that participate in E-Verify are advised to diligently follow all E-Verify rules and to establish detailed training and compliance programs to ensure continued compliance [35].

Are there disadvantages to participation in the E-Verify Program?

Some of the most potentially significant disadvantages for universities that participate in E-Verify are:

- The high error rates [36] and unresolved privacy and identity theft concerns [37] affecting the government databases on which E-Verify relies.
- Possible increased exposure to investigations and worksite enforcement actions. Participation in E-Verify does not provide a safe harbor from worksite enforcement. Instead, the MOU contains provisions which allow for the federal government and designees to conduct site visits, have full access to employment records, and interview employees. By entering into the MOU, the employer may arguably be waiving its Fourth Amendment rights and allowing the government free access to employment records.
- For those universities electing to enroll all employees, not just those working on federal contracts, the increased administrative burden created by large numbers of foreign national employees entering a semester-based hiring system is significant. Many of these foreign nationals are F-1 and J-1 students in the Student Exchange Visitor Information System (SEVIS). At present, the SEVIS system does not fully link up with the E-Verify system. As a result, foreign national students often receive initial TNCs. Universities may also face increased TNCs for non-student foreign national employees having work-authorized visas such as the H-1B because E-Verify has similar inaccessibility problems with the Computer Linked Applicant Information Management System (CLAIMS) used to verify work-authorized visas. Together, these issues could produce an immense administrative burden at the beginning of a term, when most hiring takes place [38].
- Federal contractors will also have additional burdens for qualifying subcontracts and they must develop procedures to comply with the rule, including, for example, assuring that the E-Verify clause is inserted into all such contracts.

Is there any pending, anticipated or current legislation or litigation that could also impact a university’s obligation to participate in E-Verify?

Yes. Both pending federal legislation, as well as current and pending state legislation, may impact a university’s obligation to participate in E-Verify. For instance, a bill currently making its way through Congress would expand the number of employers required to use E-Verify [39].

Because the E-Verify program is temporary in nature, it must be renewed periodically by Congress. On October 29, 2009, President Obama signed into law an extension of the E-Verify program until September 30, 2012 [40].

E-Verify to be included in any such immigration reform.

A growing patchwork of state laws also require employers to participate in E-Verify. These laws can be divided 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 loss of business licenses and the ability to conduct business in the state, loss of state contracts as well as civil fines and penalties [\[41\]](#).

The U.S. Chamber of Commerce is also challenging the Rule in court on the grounds that the President exceeded his authority in promulgating the Rule. The lawsuit alleges that the Rule exceeds the authority granted by Congress to the Executive Branch when the E-Verify program was created [\[42\]](#). It 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 the 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. On August 26, 2009, the U.S. District Court for the Southern District of Maryland held that the Rule was valid because the President has broad discretion to regulate government contracting under the Procurement Act; the Rule did not contravene IIRIRA since “entities can simply choose not to be a government contractor and thus will not be forced to use E-Verify;” and, while IIRIRA only refers to E-Verify for new hires, nothing in IIRIRA “explicitly prohibits the Executive Branch from using E-Verify for current employees [\[43\]](#).” On September 9, 2009, the Fourth Circuit Court of Appeals denied the Appellant’s motion for an injunction pending appeal without specifying its reasoning [\[44\]](#).

What practical steps should colleges and universities take to prepare for E-Verify and the Federal Contractor Rule?

Aside from deciding whether the institution must participate under state law or under federal law as a federal contractor, colleges and universities, because of their often decentralized nature, should strive to develop consistent policies to comply with I-9 and E-Verify requirements. The key issues these policies should address include:

- Determining whether the institution must participate and, if so, the legal basis of their participation, state law requirements or federal contractor requirements;
- Auditing existing I-9 files. This is especially important if the university is obligated or decides to participate in E-Verify because the MOU requires the institution to produce I-9 and related records, even for those employees unrelated to E-Verify that are not afforded presumptive protection under E-Verify;
- Updating I-9 policies to require that any “List B” document contain a photo, if the institution participates in E-Verify;
- If the university is subject to the Federal Contractor Rule, deciding which E-Verify option to elect (i.e., 180 day option for all workers or the university exemption requiring E-Verify only for employees (new hires and existing) assigned to the covered contract);
- Developing a process to identify and track potential/subject federal contracts;
- Developing a process to track those employees assigned to federal contracts, assuming the 180 day option is not selected;
- Identifying a Human Resources (HR) employee with overall responsibility for covered federal contracts and E-Verify compliance for such contracts;
- Developing a process to track employees assigned to contracts queried under E-Verify (the current USCIS position is that such employees should only be run through E-Verify once);
- If the institution decides to participate in E-Verify, determining whether to conduct queries internally or through a designated agent [\[45\]](#);

- Deciding whether to use 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 [\[46\]](#);
- Deciding whether the I-9 and E-Verify process should be conducted by departments/smaller groups or by a central HR unit;
- Even if the process is conducted in a decentralized manner by departments, assign a central employee with overall responsibility for I-9 process and E-Verify;
- Even if E-Verify queries are conducted by departments, consider having a central HR unit deal with any E-Verify non-confirmation. This is recommended to insure a uniform process and handling and avoidance of possible discrimination charges;
- Determining which individuals should be designated E-Verify program administrators and E-Verify users [\[47\]](#);
- Developing an initial training program and E-Verify launch procedures;
- Conducting on-going periodic I-9 and E-Verify training both for new employees and as a refresher for current employees;
- Developing a process for ensuring that the E-Verify clause is included in applicable subcontracts.

To 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 also advised to consider these issues because increasingly institutions are being required to participate in E-Verify pursuant to state law.

CONCLUSION:

The E-Verify Rule presents several compliance challenges for universities. These include deciding whether they want to participate in federal contracts governed by the Rule and, if so, determining which option concerning E-Verification of new hires and existing employees to select. In order to best ensure compliance, it is also recommended that universities establish policies and procedures that include regular audits as well as I-9 and E-Verify training. An effective compliance program is essential, as failure to comply with the Rule may result in debarment from receiving future federal contracts.

FOOTNOTES:

FN1. See Exec. Order No. 13,465, 73 Fed. Reg. 33,285 (June 11, 2008). This order revised Exec. Order No. 12,989, 61 Fed. Reg. 6,091 (Feb. 15, 1996), titled "Economy and Efficiency in Government Procurement Through Compliance With Certain Immigration and Naturalization Act Provisions." Among other things, Exec. Order 13,465 amended the title of Executive Order 12,989 to "Economy and Efficiency in Government Procurement through Compliance with Certain Immigration and Naturalization Act Provisions *and the Use of an Electronic Employment Eligibility Verification System*" (italics added).

FN2. This significantly expands the federal government's longstanding policy barring federal agencies from contracting with employers who violate the Immigration and Reform Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.), by employing unauthorized workers or discriminating against U.S. workers. See 8 U.S.C. §§ 1324a -1324b.

FN3. See FAR Case 2007-013, Employment Eligibility Verification, [73 Fed. Reg. 67,651 \(Nov. 14, 2008\)](#) (to be codified at 48 C.F.R. pts. 2, 22, and 52).

FN4. The Rule's implementation date was initially set for January 15, 2009, 60 days after the Rule was published in the Federal Register. See *id.* at 67,651. However, the effective date of the Rule was delayed several times (to May 19, 2009, June 30, 2009, then finally September 8, 2009) so that President Barack

Obama's Administration could review the Rule and briefing could take place in a lawsuit filed by the U.S. Chamber of Commerce in federal court in Maryland requesting that the Rule be declared invalid. On July 8, the Administration indicated its full support of the Rule, and on August 26, the federal court upheld the Rule and dismissed the suit by the Chamber. Although the Chamber appealed the ruling and requested expedited consideration of its emergency motion to enjoin the Rule pending appeal, the federal court denied the motion. The Rule thus became effective September 8, 2009. [See infra](#).

FN5. All covered contractors have this option ("the 180 day option"). [See infra](#) for a discussion of recent confirmation from E-Verify/DHS that universities may elect the 180 day option and that this option will be added to the system for universities in December 2009.

FN6. The first iteration began as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), P.L. No. 104-208, 110 Stat. 3009 (1996). That Act created a "Basic Pilot Program" to test in five states a web-based system to verify the employment authorization of employees by comparing the documents presented in conjunction with the I-9 process to the information contained in the government databases. Employers only participated voluntarily and, even then, could only use the system to verify new hires, not the existing workforce. In 2003, the Basic Pilot Program was expanded so that employers in all 50 states could voluntarily participate. In 2007, the program was re-branded "E-Verify." As a pilot program, E-Verify must be renewed periodically by Congress. Most recently, the 2010 Department of Homeland Security Appropriations Act, signed into law on October 28, 2009, extended E-Verify for another three years, until September 30, 2012. See Department of Homeland Security Appropriations Act of 2010, Pub. L. No. 111-83, 123 Stat. 2142.

FN7. E-Verify employers have additional Form I-9 requirements that other employers do not have. These requirements include: (1) accepting only a List B document that contains a photo; (2) requiring that an employee have a social security number at the time of making the query in E-Verify; and (3) writing the E-Verify query number on top of the I-9 Form or attaching a print-out of the query confirmation to the I-9.

FN8. See *supra* note 4.

FN9. See FAR Case 2007-013, Employment Eligibility Verification, 73 Fed. Reg. at 67,679. The Federal Acquisition Regulations apply exclusively to acquisitions by the federal government. See FAR 1.104 (explaining that the Federal Acquisition Regulations apply "to all acquisitions as defined in [Part 2](#) of the FAR, except where expressly excluded"); 2.101(b)(2) (defining acquisition 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"). Thus, if a federal contract does not involve an acquisition by the federal government, the contract will not implicate the Rule.

FN10. The Rule provides that the IDIQ contracts 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." FAR Case 2007-013, Employment Eligibility Verification, 73 Fed. Reg. at 67, 685.

FN11. 48 C.F.R. § 22.1803.

FN12. 48 C.F.R. § 52.222-54(e).

FN13. 48 C.F.R. § 22.1803. The regulations also exempt items that would be COTS items - but for minor modification, items that would be COTS if they were not bulk cargo, and certain commercial services related to the COTS purchase. *Id.*

FN14. See FAR Case 2007-013, Employment Eligibility Verification, 73 Fed. Reg. at 67,669, 67,679. A

“grant” is defined as “an award of financial assistance that, consistent with 31 U.S.C. 6304, 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.” 31 C.F.R. § 20.650.

A “cooperative agreement” is defined as “an award of financial assistance that, consistent with 31 U.S.C. 6305, 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.” 31 C.F.R. § 20.620.

FN15. See FAR 2.101.

FN16. FAR Case 2007-013, Employment Eligibility Verification, 73 Fed. Reg. at 67,669. For a more detailed discussion of these exemptions as well as additional types of contracts exempt from E-Verify, see “E-Verify and the Federal Contractor Rule for Colleges and Universities” by Elise A. Fialkowski at pp. 15-18. The article can be found at www.worksite-enforcement.com under the E-Verify subheading.

FN17. Although a university will not be required to enroll in E-Verify pursuant to federal law in the absence of a qualifying federal contract, there is a growing number of state laws that require employers to enroll in E-Verify. *See infra*. In addition, should the “non-federal contractor” university opt to enroll on a voluntary basis or pursuant to state law, that university may only use E-Verify to verify new employees.

FN18. The MOU can be found at this [link](#).

FN19. 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.”

FN20. The reason the Rule adopts the exemption for institutions of higher learning permitting them to avoid having to E-Verify all new hires is because of the large number of students with intermittent employment. The preamble to the Rule states: “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.” FAR Case 2007-013, Employment Eligibility Verification, 73 Fed. Reg. at 67,682.

FN21. See 48 C.F.R. §§ 22.1802(c), 52.222-54(d).

FN22. See 48 C.F.R. § 22.1801 (defining “employee assigned to the contract”).

FN23. For a more detailed discussion of “assigned employee,” see “E-Verify and the Federal Contractor Rule for Colleges and Universities” by Elise A. Fialkowski at pp. 10-11. The article can be found at www.worksite-enforcement.com under the E-Verify subheading.

FN24. After the 90-day phase-in period, initial queries on new hires must be made within 3 days or within 30 days for existing employees assigned to the contract.

FN25. Although the regulation states that a contractor may elect to verify all employees hired after November 6, 1986 and shall initiate verification of all such existing employees “within 180 calendar days of (i) Enrollment in the E-Verify Program; or (ii) Notification to E-Verify Operations of the Contractor’s decision to exercise this option...” (48 C.F.R. § 52.222-54(b)(4)), the October 21, 2009 Supplemental Guide for Federal Contractors (“Supplemental Guide”) suggests that the choice must be made at enrollment: “NOTE: If you choose to verify your entire existing workforce in E-Verify, you must verify all of your existing employees except those that are exempt Once you decide either to verify the entire workforce or to verify only those employees assigned to a contract with the FAR E-Verify clause, you are not permitted to change that decision.” USCIS, *E-Verify Supplemental Guide for Federal Contractors (M-574A)* 16 (Oct. 21, 2009) (emphasis added). The Supplemental Guide can be found at this [link](#). Various groups are seeking clarification and/or modification of this guidance as it is not only inconsistent with the regulations, but it is inconsistent with the rationale underlying the 180 day option—to allow contractors that find it difficult to identify those assigned to the contract the option of querying the entire workforce.

FN26. See November 25, 2009 Response by the DHS E-Verify team to inquiry regarding university option to verify employment eligibility of all existing employees by Elise Fialkowski. The correspondence can be found at www.worksite-enforcement.com under the E-Verify subheading.

FN27. 48 C.F.R. §§ 22.1802(b)(2), 52.222-54(b)(1)(ii), 52.222-54(b)(2)(i)(A) & (B).

FN28. 48 C.F.R. §§ 52.222-54(b)(1)(ii). If your university is already enrolled in E-Verify, but not designated as a federal contractor in the system, update the university’s profile in the system and designate it as a federal contractor within 30 days of the of the covered contract award.

FN29. 48 C.F.R. § 52.222-54(b)(2)(ii).

FN30. 48 C.F.R. § 52.222-54(b)(4).

FN31. 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 partially because such claims are often based heavily upon facts. In addition, the Office of Special Counsel has confirmed that an employer can only rely on a “good faith” defense if the employer used the E-Verify system correctly. In other words, if the university used E-Verify to query an existing employee before it was a federal contractor, for example, it could not rely on the E-Verify result to avoid a discrimination claim.

FN32. There are civil penalties of \$550-\$1,100 for failure to notify. In addition, if the university continues to employ the individual after a Final Non-Confirmation, there is a rebuttable presumption of a violation of the Immigration and Nationality Act (INA) Section 274A, relating to employment of unauthorized workers, subjecting the employer to additional fines and penalties.

FN33. To date, USCIS has refused to limit that portion of the MOU to requests for documentation/information related to E-Verify queries. This means 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. But also recognize, that DHS has always had authority to audit I-9 and payroll records under the Immigration Reform and Control Act. 8 USC § 274A (e).

FN34. If the employee was previously verified in E-Verify, update or reverify this employee in accordance with Form I-9 regulations, such as when their biographical or immigration status changes. These employees may not be reverified in E-Verify.

Employers have two options for updating existing employees on Form I-9. The first option is to complete new Forms I-9 for those existing employees that need to be verified, applying the current Form I-9 rules. Verifying all employees in the same way helps to avoid possible discrimination claims. This approach has the added benefit of being the same process used for newly hired employees.

The second option is to complete new Forms I-9 when necessary and update existing ones when allowable. Do this by reviewing your employees' previously submitted I-9 Forms to determine which employees must be verified on a new Form I-9; and which can be verified by updating their existing Form I-9. When this option is selected, a new Form I-9 must be completed if the employee: presented an expired document on a previous Form I-9; is an alien whose employment authorization stated in Section 1 of Form I-9 has expired; presented a List B document that did not have, or you are unable to tell if it had, a photo; was at the time of attestation a Noncitizen National of the U.S; had a change in immigration status; changed his name; or did not comply with I-9 requirements when the form was previously completed.

FN35. In May 2009, the Department of Homeland Security (DHS) proposed two regulations that would further allow for an expansion of data mining and enforcement activities based upon E-Verify. See Proposed rulemaking amending the Privacy Act, Freedom of Information Act regulations (DHS Docket No. DHS-2009-0013), 74 Fed. Reg. 23,957 (May 22, 2009); Notice of Privacy Act system of records (DHS Docket No. DHS-2009-0015), 74 Fed. Reg. 24,022 (May 22, 2009). In these regulations, DHS announced that it intends to establish a system of records, the Compliance and Tracing and Monitoring System (CTMS), in order to mine the E-Verify data to support monitoring and compliance activities.

FN36. Early in the new Administration, 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)." Department of Homeland Security Press Release, Secretary Napolitano Issues Immigration and Border Security Action Directive (Jan. 30, 2009), *available at* http://www.dhs.gov/ynews/releases/pr_1233353528835.shtm.

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, USA Today reports that Intel, one of the largest U.S. employers, had found that 12% of its 1,360 workers hired between January and July 2008 were initially rejected by the E-Verify system. Moreover, Intel challenged the 143 rejections and all of the workers were found to be legal U.S. workers. See Thomas Frank, "Use of Federal Database for ID Checks Hits Some Bumps," USA Today, Feb. 6, 2009, *available at* http://www.usatoday.com/news/nation/2009-02-05-immigration_N.htm.

FN37. 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: "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 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.” Draft Letter from DHS Data Privacy and Integrity Advisory Committee to Secretary Janet Napolitano and Acting Chief Privacy Officer John W. Kropf (Feb. 2, 2009), AILA InfoNet Doc. No. 09020362 (last visited March 10, 2009).

FN38. The student TNCs, for example, must be resolved by calling DHS within an eight day period. USCIS has reported that they are actively working on improving the communication between SEVIS and E-Verify to limit the number of such TNCs, but that process is not yet complete.

FN39. On July 23, a bipartisan group including Senate and House members reintroduced the SAVE Act (H.R. 3308 and S. 1505), which would phase in mandatory use of E-Verify over four years starting with the federal government, federal contractors and large employers.

FN40. See Department of Homeland Security Appropriations Act of 2010, Pub. L. No. 111-83, 123 Stat. 2142.

FN41. 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. Currently, 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 because they required 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 E-Verify or (2) employ only workers who, at the time of employment, had a valid South Carolina driver's license or identification card, were eligible to obtain a South Carolina driver's license card, or possessed a valid driver's license from another state where the license requirements are at least as strict as South Carolina. See “E-Verify and the Federal Contractor Rule for Colleges and Universities” by Elise A. Fialkowski for a more detailed summary of current and pending state laws. The article can be found at www.worksite-enforcement.com under the E-Verify subheading. Detailed summaries of this legislation and reports on upcoming state laws are also available at www.worksite-enforcement.com.

FN42. See *Chamber of Commerce v. Napolitano*, Civil Action No. 8:08-cv-03444-AW (S.D. Md., Aug. 26, 2009) (Memorandum Opinion); *Chamber of Commerce v. Napolitano*, Civil Action No. AW-09-2006 (4th Cir. Sept. 9, 2009) (order denying motion for injunction pending appeal).

FN43. See *Chamber of Commerce v. Napolitano*, Civil Action No. 8:08-cv-03444-AW (S.D. Md., Aug. 26, 2009) (Memorandum Opinion).

FN44. See *Chamber of Commerce v. Napolitano*, Civil Action No. AW-09-2006 (4th Cir. Sept. 9, 2009) (order denying motion for injunction pending appeal).

FN45. A university may elect to contract with a designated third party agent with I-9 software that interfaces directly with the E-Verify system so that the I-9 information does not have to be retyped into E-Verify. If a university elects this option, it must sign a different MOU, “The E-Verify Program for Employment Verification Memorandum of Understanding for Employers Using a Designated Agent,” in which the university, the designated agent and the Department of Homeland Security are all parties. If a designated agent is selected, the designated agent will perform the employment verification queries for the university.

The university, however, is still responsible for resolving tentative and final non-confirmations. Please note that the university cannot insulate itself from noncompliance liability by using a Third Party Agent.

FN46. A university may elect to use electronic I-9 software but still complete its own E-Verify query through the DHS website. The primary benefit of electronic I-9 software is that it reduces the error rate on completion of the I-9 Form. Many of the systems include so-called “self auditing” features that either flag missing and inconsistent information or do not allow the I-9 to be finalized in the system with missing/inconsistent information. Many programs also include management reporting features as well as reminder emails and tickler systems to monitor and track reverification as well as I-9 retention. Paperless “green” options with electronic signature and retention are also available.

FN47. Any person who will be responsible for completing E-Verify queries on behalf of the university must be designated and must complete a DHS Tutorial before being allowed to proceed. In addition, the university may designate a “Company Administrator” who is designated to oversee all pending queries and follow up items as a means of oversight, even though they will not have direct responsibility for queries submitted. This usually would be someone in the Provost’s Office or Counsel’s Office.

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RESOURCES:

Statutes and Regulations:

Federal

Executive Orders:

- [Executive Order 13465](#)
- [Executive Order 12989](#)

Statutes

- [Illegal Immigration Reform and Immigrant Responsibility Act of 1996 \(IIRAIRR\)](#)
- [Immigration and Control Act of 1986 §§1324a-b](#)

State Laws

- [National Conference of State Legislatures tracking state laws that require E-Verify](#)
- [E-Verify State-by-State Legislation Survey](#) by Elise A. Fialkowski.

Regulations

- [E-Verify Regulations, 48 CFR Parts 2, 22, and 52: Final Rule Implementing Amended E.O. 12989 \(E-Verify\)](#)
- [E-Verify Proposed Rule](#)
- [Federal Register: E-Verify - Delay of Effective Date](#)
- [E-Verify: Delay of Effective Date](#)
- [EVerify: Further Delay of Effective Date](#)

Agency Guidance:

E-Verify

- USCIS: [E-Verify Website](#)
- USCIS: [User Manual for Employers](#)
- USCIS: [E-Verify User Manual for Federal Contractors](#)
- USCIS: [E-Verify Supplemental Guidance for Federal Contractors](#)
- USCIS: [Frequently Asked Questions: Federal Contractors and E-Verify](#)
- USCIS: [E-Verify Memorandum of Understanding E-Verify MOU](#)
- USCIS: [Supplemental Questions & Answers: Extension of Optional Training Program for Qualified Students](#)

Form I-9 Resources

- [Form I-9 Interim Rule effective date delay](#)
- [Form I-9 Interim Rule](#)
- [Introduction of Amended I-9 and New Handbook for Employers](#) U.S. DOL, Office of Federal Contract Compliance Programs: [Procedures for Inspection of Form I-9 During Compliance Reviews](#)
- [Factsheet on Form I-9](#)
- [Handbook for Employers: Instructions for Completing the Form I-9](#) DHS: [Electronic Signature and Storage of Form I-9](#)
- [Guide to Selected U.S. Travel and Identity Documents](#) (Last page explains how to get hard copies for free.)
- [How to Order Guide to Selected U.S. Travel and Identity Documents](#)
- [Social Security Number Verification System](#)
- [Dear Colleague Letter: Changes to the Process for Assigning Social Security Numbers and Replacing Social Security Cards for F-1 Foreign Students](#)

No-Match Letters

- [Rescission of Final Rule--Safe Harbor Provision for Employers Receiving "No-Match" Letters](#)
- [Social Security's overview of "no match" process](#)

E-Verify Caselaw:

- [Chamber of Commerce of the U.S.A .et. al. v. Napolitano](#), Civil Action No. AW-09-2006 (4th Cir.)

- September 9, 2009 (denying motion for injunction pending appeal)
- [Chamber of Commerce of the United States of America, et al. v. Napolitano, et al.](#), Civil Action No. AW-08-3444 (S.D.MD, August 26, 2009)

NACUA Resources:

Resource Pages

- [E-Verify Resource Page](#)

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