

10 Ways Contractors Can Foster E-Verify Compliance

Law360, New York (May 31, 2013, 5:24 PM ET) -- "Yes, we use E-Verify." "Of course, our company is in compliance, we did an I-9 audit a few years ago — isn't that the same as E-Verify?" "I know this is not an issue, because I remember being told we addressed all I-9 and E-Verify issues." "No, the general counsel's office doesn't handle immigration issues."

You get the picture. Many companies simply do not take immigration compliance seriously. This failing usually does not come from a disinterest in compliance, but rather from a threshold failure to understand the intricacies involved in immigration issues or the potential exposure that could result from noncompliance. Only when faced with government investigations, public scrutiny or other negative impacts on the business do the right people in the right places start to pay attention. When they learn that federal contractors can be suspended or debarred for failing to adhere to immigration and E-Verify related issues that attention is heightened.

It has been almost three years since the Federal Acquisition Regulation E-Verify clause (FAR 52.222-54) for federal contractors went into effect in September of 2009. E-Verify is a free, Internet-based system that electronically verifies the work eligibility of new employees by comparing the Form I-9 related information employees submit with the records of the Social Security Administration and the U.S. Department of Homeland Security.

Close to 450,000 employers are now enrolled in E-Verify. While the government does not charge contractors to use the program, companies should be cognizant of the operational costs associated with E-Verify, including costs connected to training, monitoring, and verifying compliance with the system. In the case of federal contractors, E-Verify must be used to verify all new employees as well as existing employees assigned to a contract. However, there is also an option available to verify an entire existing workforce upon receipt of a qualifying federal contract.

Not every federal contract, however, will be subject to the FAR E-Verify requirements. FAR 52.222-54 exempts federal 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 (currently \$150,000); contracts that have a duration of less than 120 days; and contracts where all work is performed outside the United States.

As defined in FAR 2.101, a COTS item is: (1) a commercial item, (2) that is sold in substantial quantities in the commercial marketplace, and (3) that is offered to the Government without modification as the product is available in the commercial marketplace. There are other employee-related exemptions that federal contractors should be familiar with, including employees hired before Nov. 7, 1986, employees with specific security clearances, and employees that have previously been processed through E-Verify by the federal contractor.

Compliance Is Non-Negotiable

To date, the government has been fairly lackadaisical in its review of compliance in the E-Verify arena. Accordingly, it is not surprising that E-Verify compliance may not fall very high on a federal contractor's list of legal concerns. However, with a comprehensive immigration reform package that includes a mandatory E-Verify provision and new laws percolating in the states, contractors should reconsider their priorities. Increased enforcement is likely and a proactive review of current E-Verify related processes, including subcontractor flow-down, and other policies is recommended.

In fact, U.S. Citizenship and Immigration Services (USCIS), the agency that runs the E-Verify program, has beefed up its Monitoring and Compliance Branch's activity to review to detect, deter, and reduce misuse, abuse, and fraud. And who can blame it? The agency clearly wants to be in a position to provide detailed E-Verify data and good-looking numbers to Congress as the immigration debate heats up in Washington, D.C. Fortunately for USCIS, ample funding has been designated for the program. As a result, participants have benefited not only from an extraordinary increase in E-Verify resources and training aides, but also from immensely improved technology used in the system.

It is no surprise that along with the increased funding comes increased monitoring of usage. In fact, USCIS site visits and desk reviews appear to have escalated. A number of companies recently have received calls informing them they are not in compliance with E-Verify procedures. The calls are friendly and are sometimes coupled with an "offer of assistance" in the form of a USCIS visit. By the way, it is an offer you cannot refuse without being viewed as uncooperative — not a good thing for a government contractor.

Such visits and calls from the USCIS' Monitoring and Compliance Branch are to be taken very seriously. Accordingly, federal contractors not only should review and revise, but truly understand, the processes they have in place for E-Verify as well as the entire Form I-9 process. Such processes also should be tested periodically for accuracy and efficacy. Federal contractors should want to know whether their E-Verify policies actually are working in the field the way they are written on the paper. Nothing a company is doing should be a surprise to the general counsel's office, and nothing in the E-Verify reports should read like a foreign language to the individuals charged with overseeing the system.

History Is Cyclical

The pace of E-Verify implementation picked up incredibly in June of 2010 when the General Services Administration announced a mass modification of all Federal Supply Schedule contracts that mandated the incorporation of E-Verify. Federal contractors continued to do their best to comply promptly, but oversights and omissions were inevitable.

Almost three years later, things are quieter on the E-Verify front, but the obligations and risks remain. While Immigration and Customs Enforcement certainly reviews E-Verify matters, we have seen few if any reviews of federal contractor programs. But this soon will change. The DHS likely will refocus and retool its worksite with a particular focus on E-Verify and other types of immigration compliance if the system is made mandatory for all U.S. employers. After all, USCIS no longer will have to sell its system. Everyone will buy it; there is no one else to buy it from, and there will be no choice but to buy it. It will be just a matter of when one buys. Government contractors, as the first purchasers of E-Verify, should expect to be among the first noncompliance “examples” when the time comes.

The Realities of E-Verify for Federal Contractors

There is no doubt that E-Verify is a best practice. However, it is not a replacement for background checks and other post-employment screenings and safeguards monitoring the system. In fact, the E-Verify system is still very much prone to identity theft, and must internally be monitored for misuse and overall compliance. While the government agrees that E-Verify usage creates a “rebuttable presumption” that a company has not knowingly hired an unauthorized alien, there still can be problems. In fact, employers may face civil and criminal liability if, based upon the totality of the circumstances, it can be established that they knowingly hired or continued to employ unauthorized workers.

Remember, a federal contractor’s participation in E-Verify does not provide a safe harbor from worksite enforcement. The U.S. Department of Justice’s Office of Special Counsel also takes E-Verify violations very seriously and continues to open investigations involving abuse of the system. Unlike its sister agencies, the OSC has taken a keen interest in reviewing E-Verify related matters. Most notably, many of the OSC’s investigations do not involve malice in intent but rather accidental misuse of the system.

Best Practices for Federal Contractors

While not an all-inclusive list, federal contractors would be well served by considering the following proactive steps:

1. Provide biannual training to anyone who is a user in the system. As E-Verify ramps up its site visits and desk reviews, compliance is more important than ever. Ensure your I-9 compliance is also in shape, as the I-9 data feeds into the E-Verify system.
2. Verify your company has a viable policy established to flow down the E-Verify requirement to your subcontractors, vendors. E-Verify usage is a “flow down” requirement; prime contractors are required to take steps to ensure that subcontractors for services or construction of more than \$3,000 also implement the rules. Regardless of the size of your company, verify this process and take the extra step of seeing how it works in practice.
3. Create a subcontractor verification system. While the scope of a prime contractor’s “flow down” responsibilities to subcontractors and identifying which subcontracts are subject to E-Verify were not clearly defined in the FAR regulation, many believe merely having a copy of the “E-Verify Enrollment Page” of the subcontractor will not be enough when things go wrong.
4. Carefully review the E-Verify exemptions. Limited exemptions for COTS contracts, contracts where work is performed outside of the United States, and for employees with specific active security clearances exist but are often harder to segregate and rely on than general usage of E-Verify. Consistency is key in deciding when to use E-Verify.

5. Review overall immigration and visa compliance. In today's world, it is simply not acceptable for employers, particularly large ones, to rely on an "off-the-shelf" compliance approach. Policies, electronic I-9 and E-Verify systems all must be vetted and monitored. Audits that review overall immigration compliance programs should address E-Verify compliance risk factors. Moreover, an independently audited immigration compliance program, preserves attorney-client privilege and could protect employers from debarment or involuntary suspension from the E-Verify program. Specifically such a review should include the company's Form I-9s, visa processes and E-Verify reports.

6. Review E-Verify usage. Do not assume everything is working the way it is supposed to. Someone needs to roll up their sleeves, and get dirty; ensure all users are closing case correctly and ensure all users know how to process Tentative Non-Confirmation notices. Reviewing E-Verify reports should be an ongoing, frequently completed task for someone in the organization. If you use an electronic I-9 system, it is even more important that you review the status of cases as well as historical data as often as possible. E-Verify only works well if a company first understands the importance of Form I-9 compliance.

7. Review your memorandum of understanding with the USCIS. The E-Verify program requires companies to agree to certain conditions upon enrolling in the system via the MOU. Do not take these responsibilities lightly. Ensure the specifics of the E-Verify agreement are accurate and up to date. For example, does the company still have two hiring sites? Is the company no longer performing E-Verify from the centralized location noted in the MOU? Almost three years after the FAR E-Verify clause went into effect, we still run across government contractors that are not enrolled in the E-Verify program or not correctly enrolled. We also routinely run across large prime contractors that have not adequately implemented their E-Verify program and flow-down procedures.

8. Consider the impact of E-Verify as it pertains to any union presence the company may have. A careful review of the National Labor Relations Board claim that use of E-Verify should be bargained is something to be carefully reviewed by federal contractors and their affiliates.

9. Ensure you track employees assigned to contracts if your entire workforce was not E-Verified at the onset. It is critical to have someone charged with knowledge of which employees are assigned to a contract within the meaning of the regulations and a system in place to E-Verify any legacy employees that have not previously undergone verification.

10. Review E-Verify in the context of your current corporate structure or in terms of a merger, acquisition or other restructuring. A careful assessment of a federal contractor E-Verify-related responsibilities and the associated timelines involved during any restructuring must be carefully considered. It is also important to analyze which affiliated entities are considered under government contract for purposes of the E-Verify clause. An affiliate or subsidiary with a different employer identification number may not necessarily be subject to the E-Verify provisions.

Debarments and Other Penalties

Federal contractors will continue to be responsible for E-Verify compliance for the foreseeable future. The consequences of a failure to use the E-Verify program leading to the loss of current and future federal contracts should not be downplayed. Federal contractor compliance with the E-Verify MOU is a performance requirement under the terms of the federal contract.

As such, termination of the contract for failure to perform is one potential consequence of noncompliance with the MOU. Suspension or debarment, of course, also may be a potential consequence where the violation suggests the contractor is not responsible. Indeed, the E-Verify program's suspension and debarment enforcement activities are being ramped up. The DHS already ranks high on the agency list for debarment numbers, leading with a significant number of nonprocurement FAR debarments. In fiscal year 2012, ICE alone debarred 142 businesses and 234 individuals. Federal contractors need to take this enforcement activity seriously as it likely will increase in the face of mandatory E-Verify.

In short, now is the time for companies proactively to review internal policies, perform the necessary risk assessments, conduct the Form I-9 exposure as well as anti-discrimination audits, and then take ownership of any changes or improvements that need to be made.

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