



Q&A Session for 2009 Immigration Enforcement Webinar

Dear Webinar Participant:

Thank you for participating in the webinar held on September 29. We received numerous questions during our Q&A session – many more than we could answer on that day. Below you will find a summary Q&A of nearly all questions received. There are two broad sections: the first deals with I-9s from I-9 completion, to audits, to fines and No-Match letters; and the second deals with E-Verify and federal contractor issues.

Please excuse the delay in responding to all of your questions. However, there were many good and sometimes complicated questions to review and answer. If you posed a question and it is not shown below, it may be due to the fact the answer was duplicative. For further assistance with any unanswered questions, please contact any immigration attorney at Ogletree Deakins, the attorney with whom you normally work, or send an email to ImmigrationCompliance@OgletreeDeakins.com.

Please note that the information provided below is general in nature should not be considered legal advice applicable to your particular situation. You consult with your counsel before taking any particular course of action.

I-9 Completion, Audits/Raids and No-Match

Q: The I9 form we are using is dated 6/12/09 - just want to confirm this is acceptable?

A: We recommend you discontinue use of that form. It is likely fine, however it is not currently noted as one of the approved forms on the USCIS website. We recommend use of the form dated 08/07/2009, though the form dated 02/02/2009 is also acceptable.

Q: The copies should be kept with the form and out of the personnel file, correct?

A: Correct

Q: I understand that we are not to accept unexpired documents, so that this mean we cannot hire this person? Or how long should we wait for them to provide these documents?

A: Yes, you cannot continue to employ an individual who cannot properly complete the I-9 process by providing unexpired documents. An employer must review valid I-9 documents within three days of hire.

Q: What about an expired passport, can we still accept this document.

A: No. As noted in regulations and instructions for the new I-9, expired documents of any type are no longer valid for I-9 purposes.

Q: Earlier it was said that all documents had to be current and unexpired. Does this apply to the List B documents, i.e., State Driver License or ID Cards? The expiration date has been removed from the I-9 form under List B.

A: Any I-9 completed after April 3, 2009 must list only unexpired documents---including List B documents.

Q: Is it better to keep copies of the documents used for identification or to only keep the I-9 form that lists this information?

A: While there is no definitive answer, we are generally of the opinion that keeping copies of documents is the better approach. (Note that Colorado employers MUST keep copies according to a state law.) Copies can be used to correct certain I-9 mistakes and thereby prevent the imposition of certain I-9 fines. That is the primary reason for supporting the practice of copying documents.

Q: With the I-9, the employee does not have to have a Social Security number?

A. Correct – unless the employer uses E-Verify

Q: Do we have to recertify expired list B docs, or just list A?

A: List B documents never need to be recertified if they expire. List A documents evidencing a time limited employment authorization (such as Form I-766 employment authorization documents (EADs)) need to be reverified.

Q: What is your recommendation - keep copies of identification to attach to the I-9? Also, what if you have taken over the company's I-9 responsibility and copies of IDs were attached. Remove them?

A: We generally recommend photocopying documents to attach to the I-9. Whatever is done, be consistent. If the company policy changes and documents are no longer kept, make it clear with a memo to the I-9 files that a policy change was made on a given date and that going forward that docs will not be kept. Do not remove the docs from I-9s completed under the old policy.

Q: If a company hires an individual contractor or subcontractor, are they required to have paperwork for that individual. Realizing that if it were a company not an individual you would not need to. That company would be required to have the docs.

A: No, a company needed not complete an I-9 for any contractor providing services whether through a company or paid directly (i.e., a 1099 worker.) However, a company may still face I-9 liability for contract workers where it “knowingly” uses the services of an unauthorized worker, regardless of whether the individual worker is on the company’s payroll. Also, if a “contractor” worker is deemed to be an employee (the government may employ an “IRS-type” 20 factor test to determine whether a contract worker is misclassified and should legally be considered an employee), the government could assert that a contract worker is really an employee and therefore the “employer” should have completed an I-9. This is not a common occurrence. However, the government is mindful of situations where an employer uses contract workers and has investigated situations where employers have used unauthorized workers via contract.

Q: What is the legal way to verify out of state employees if we don't have a branch in their area?

A: Use a local agent to handle it (employment agency for example) or plan on having this done during an initial orientation. Other possible choices for local agents: co-employees, a notary public or employees of federally bonded banks.

Q: Is it legal for Section 2 to be corrected by another person other than the employer who initially reviewed and examined the documents from the employee?

A: If that person is not available, the auditor can correct and date and initial the correction indicating it was done due to an internal audit.

Q: What suggestions do you have when an employee brings ID that does not have a photo on it? Do you recommend that offer letters be modified to "suggest" a photo ID from List B?

A: If you are using E-Verify you can tell them in correspondence that one of there verification docs they must bring on their first day must include a photo. Otherwise, you cannot require a photo ID. It is always the employee’s choice of which acceptable Form I-9 documents (one from List A or one from List B + one from List C) to present.

Q: What corrections can be made on the I-9 forms (reference slide 15)

A: Most corrections can be made to the existing Form I-9. However, where the existing I-9 was so poorly completed that the employer is essentially required to re-do the process, it is recommended that a new, currently valid I-9 Form be used. This may be the case where the employer failed to properly confirm an individual's employment authorization at the time of completing the original I-9 – (example, the employer failed to record the proper documents in Section 2 of the Form I-9 and also did not attach photocopies of the Form I-9 documents.)

Q: During a self audit we have discovered copies of over documentation accompanying the I-9. What is the best way to correct this?

A: X through either List A or List B and List C response to make it correct and write "internal audit, date and initials" beside each correction. Alternatively, you may forego writing the words "internal audit" on the Form I-9 itself and prepare a memo to retain with the Forms I-9 documenting that an internal audit was completed and the date of the audit.

Q: If a mistake is made in the I-9 are you able to use white-out or must you line out and if necessary use a new form

A: Do not white out errors on the I-9 - cross out the mistake clearly and neatly and initial/date any correction. It is advisable that the employer make Form I-9 corrections (when same can be made on the existing Form I-9) in a different colored ink and initial/date the date of the correction.

Q: So what if an employee begins writing in list A, but then crosses out one line, initials it and proceeds completing list B and list C. Is that considered an offense?

A: Employee corrections do not necessarily mean a violation has occurred – however, it should be clearly and neatly marked through and initial and dated by reviewer so they know it was a correct at the time. Note also that an employee cannot complete Section 2 or make corrections to Section 2 of the Form I-9. Only the employer or the employer's designated agent may complete Section 2 or make corrections to Section 2.

Q: How can corrections be made on an electronic form?

A: Print the form, make corrections, and reenter the corrected version as an attachment to the original form.

Q: When you use electronic I-9s do you need to retain paper versions too?

A: Only if you feel you need a back up to your technology.

Q: What address should be in the address field for the I-9 as we have different locations (would it be the regional office or corporate office location?)

A: Where the person who completes section 2 is located.

Q: Regarding to making changes, a social security number is not written in, but we have the copy of the SS card. Can the employer write in the information?

A: No

Q: When should we use the Preparer's/translator section on the I-9

A: Whenever someone other than the newly-hired worker participates in completing the I-9, for example, when the employee cannot speak English or is otherwise unable to complete the form due to physical disability.

Q: Once an I-9 document expires, do you need to have them complete a new I-9 form?

A: Only if work authorization expires as well. If the employee has a time-limited employment authorization (checked box "3" in Section 1 of the old Form I-9---now box "4"), the employee must be reverified wherein the employee presents current proof of employment authorization (all documents presented must be unexpired) and by completing a new Form I-9---attaching it to the existing I-9. In general, U.S. citizens and lawful permanent U.S. residents do not need to be reverified---even if the documentation presented at the time of hire (e.g. drivers license or I-551 resident alien card) has an expiration date. (NOTE – all verifications and reverifications must be done using an I-9 dated 02/02/2009 or later.)

Q: With the I-9, the employee does not have to have a SS#?

A: That is correct for I-9 purposes. The employee need not provide a Social Security number (see the I-9 instructions stating that it is voluntary to provide UNLESS the employer is participating in E-Verify). For I-9 Section 2 purposes, a Social Security card is just one of the many documents an employee may present (for Form I-9 purposes) at the time of hire. Also, employees sponsored for temporary work visas (e.g. H-1B, TN, L-1) often enter the U.S. without a Social Security Number---and it may take a few weeks after entry to the U.S. before the Social Security Administration issues the Social Security Number. However, the employees sponsored for the specific work visa are authorized to work in the interim (before receipt of the Social Security Number) and the employee should not be "benched" while waiting to receive the Social Security Number.

Q: Is it better to keep copies of the documents used for identification or to only keep the I-9 form that lists this information?

A: Of course, an employer must always complete an I-9 for each employee. Except for employers in Colorado, the employer has the option of attaching the documents used for verification. Whatever decision is made, it should be applied in all cases.

While only Colorado employers are required to photocopy the Form I-9 work authorization documents presented by employees (and the E-Verify photo tool requires employers to keep copies of I-766 Employment Authorization Documents and/or I-551 Resident Alien cards), employers may wish to adopt a policy in which going forward the employer will attach photocopies of the Form I-9 work authorization documents presented by the employee. Three rationales supporting this choice: 1) Aids the employer in its self-audits---can make corrections to Section 2 of the Form I-9 in many instances without asking the employee to re-present Form I-9 documents; 2) Would-be substantive Section 2 Form I-9 violations are merely procedural violations if the employer attaches photocopies of acceptable Form I-9 documents; and 3) If the employer anticipates becoming a federal contractor subject to the E-Verify requirements of the amended FAR rule, the employer with attached photocopies of unexpired acceptable Form I-9 documents may be in a better position to E-Verify existing employees assigned to the federal contract.

Q: Would having all employees complete new I-9 forms for each employee be compliant? What happens if we don't have I-9s from when employees were originally employed?

A: Although we would not generally recommend that an employer engage in requiring all current employees to complete new I-9s, there is no explicit prohibition on doing so. (In fact, certain employers who will be subject to the new federal contractor/E-Verify regulation may be completing new I-9s for their entire workforce.) Among the concerns with completing new I-9s: the process can be onerous, certain employees may need to be dismissed or furloughed while securing proper documents, dismissed or furloughed employees may assert discrimination claims, the process might be particularly difficult in a union environment, and completing new I-9s cannot cure all errors in previously completed I-9s.

If no I-9 was completed for an employee, complete one immediately (unless the employee was hired prior to 11/7/1986).

Q: What would be the types of paperwork violations that lead to fines?

A: Paperwork violations can be either substantive or technical/procedural – the latter can be corrected by an employer (even after a government audit) and not subject the employer to fines. Examples of substantive failures include: not completing the I-9; failure to ensure the individual provides his/her name and checks a box in Section 1;

failure to provide the title, identification number and/or expiration date of a document in List A, B, or C (unless a photocopy is attached); and failure to sign the attestation in Section 2. Examples of technical/procedural violations include: failure to ensure the individual provided a maiden name, birth date and/or address in Section 1; failure to provide the title, business name and address in Section 2; and failure to provide the date of hire in Section 2.

Q: Will this presentation provide any of the "how-to's" or tips or techniques for auditing?

A: The exact process involved in an I-9 audit will vary based upon the employer (size, number of locations, etc.), the desired level of compliance and the amount of resources an employer wishes to commit. The basics of an I-9 self-audit include reviewing each I-9 for accuracy and completeness, listing out any deficiencies and making corrections to the I-9 documents. The key to any I-9 audit is deciding on the process and ensuring meticulous review of the documents by an individual who is well-versed on I-9 requirements. Employers may decide to use internal personnel or seek outside assistance either to conduct the entire I-9 audit or merely to train internal personnel to conduct the audit. Ogletree Deakins offers a flexible program known as I-9 AudiTrax (see <http://www.ogletreedeakins.com/uploads/I-9AuditTraxOverview2009.pdf>) which provides employers with the ability to develop a custom appropriate I-9 audit approach.

Q: Regarding tips for I-9 audits, we are a University and process many international student I-9's. International program office takes copies of all documents and attaches to I-9 form.

This is done without completing the actual I-9 form, but rather just attaches documents. Is this ok?

A: No – any employer should complete the I-9 fully regardless of whether the documents are copies and attached. While copying documents can be used to prevent the assessment of fines for certain pieces of missing information on the I-9s, blank I-9s with attached photocopies would subject employers to fines in the event of a government audit.

Note also that employers should have a single policy regarding photocopying documents presented for verification – one segment of the company should not follow an alternate procedure.

Q: Are you seeing ICE enforce against smaller (100 employees or less) employers or are they targeting the larger employers?

A: Employers of all sizes have been subject to ICE audits. The recent July 1 audit blitz seemed to skip the very largest of employers. Our firm assisted several employers, including those which employ less than 100 persons.

Q: In doing an audit, if we have multiple locations, where should the I-9 be kept if the HR responsibility and file is located off-site -- where the employee is located or where the file is?

A: An employer may retain I-9s wherever they like, provided they can be presented within three days of a government audit request. As an ICE audit will commonly cover only a given location (and because an employer wants to keep the audit limited to a single location), an employer may prefer to retain the I-9s at each worksite. However, some large companies also maintain them with document retention departments in one location to ensure better control over I-9 processes.

Q: If while conducting an I-9 audit, there are many employees with expired documents based on the date that we did the audit, do we need to get updated documents.

A: In general, an employer only needs to obtain updated documents where an employee previously presented documents evidencing time limited employment authorization (and thus reverification is required.)

Q: How long do we have to keep no-match letters?

A: There is no specific retention requirement in the law. We do recommend that employers make some sort of follow-up on No-Match letters and retain those documents for a period of at least five years.

Q: When we receive the Approval Notice/Action copy that an EE's work visa has been extended, is this attached to the I-9 along with reverification?

A: You should complete a reverification by completing Section 3 or completing Sections 1 and 2 on a new I-9 form which should then be stapled to the original I-9. In the case of an employee extending an employment authorized status such as an H-1B or L-1, the employee will present a current passport along with the extended I-94, which should be attached to the bottom of the Approval Notice. (NOTE that all reverifications must be completed on a current I-9 Form dated on or after 02/02/2009.)

Q: We used to get numerous No Match Letters, however, the past few years they have almost come to a halt... Should we be concerned?

A: No. No-Match letters have not been sent as a result of the lawsuit contesting the validity of the No-Match regulation published in August 2007. Now that the No-Match regulation has been abandoned and the lawsuit has become moot, the letter will likely be

sent again next March. We recommend a follow-up on No-Match letters – they should not be ignored.

Q: do they target companies that usually have illegal aliens employed, such as construction companies

A: Yes. Although there is no specific data detailing the industries targeted by ICE for I-9 audits/investigations, companies in labor-intensive industries with large number of unskilled/low-skilled positions anecdotally seem to be subject to the most enforcement activities.

Q: How does ICE view overdocumentation on I9 forms?

A: Overdocumentation may be deemed a discriminatory activity (“document abuse”) that may subject a employer to investigation and fines from the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC).

Q: Are ICE raids concentrated in certain industries?

A: Yes, anecdotal evidence suggests that is the case. Companies subject to raids over the past few years have included food processors, manufacturers, construction companies and cleaning contractors. Note that the Obama Administration has moved away from large-scale raids in favor of more widespread audits/investigations.

Q: Bernhard -- do you risk discrimination claims for failure to rehire on the basis of national origin/citizenship etc. if you do not rehire the employee who comes back after an ICE raid post-arrest (the suspected government spy scenario)?

A: Such an employee can always bring a claim whether valid or not. It is difficult to provide a more definitive opinion as these circumstances tend to be quite fact-specific.

Q: What are your recommendations for auditing multiple locations when the hiring is done at each of these sites?

A: We recommend oversight of I-9 audits by a centralized person/team. Involvement of local personnel at each location depends upon the I-9 knowledge-level of personnel, though oversight is always recommended to ensure consistency, completeness and accuracy.

Q: We are a hospital who brings in contracted workers, employed by other organizations. What is our responsibility for insuring they follow the law in regard to their I-9 and hiring practices?

A: As noted above, a company may have I-9 liability for knowingly using the services of unauthorized workers, even if they are contractors. Therefore, we recommend that vendor contracts contain affirmation and indemnification clauses whereby the contract company confirms compliance with I-9 requirements. In certain circumstances, you may consider going even further by requiring the vendor to provide evidence of performing I-9 audits, including independent certification of their I-9 records.

Q: Why must the I9 be maintained out of the employee file? And what is the reasoning for only keeping it for three years on active employee and/or one year after termination?

A: Reasons for keeping I-9 records separate include: privacy issues, prevention of discrimination claims, and inability to separate them if an ICE audit occurs.

The retention requirements are derived from the regulations.

Q: Are we required to obtain an I-9 form for independent contractor(not Federal)?

A: No. However, if a job site/user would like to monitor whether the independent contractors employees appear to be employment authorized, it may do so (especially if same is a term of the contract). If the job site/user elects to review the employment authorization documents or Forms I-9 of the independent contractor's employees, it must ensure that none of the independent contractor's employees assigned to perform work/services are without documentation that authorizes U.S. employment---or otherwise it runs the risk of a finding that it is aiding/abetting the employment of unauthorized workers (Wal-Mart situation).

Q: If audited, what types of mistakes on I-9s does ICE look for? Missing info, items written in the wrong place, start date and date listed in section 1 not coinciding? Are those types of mistakes \$1000 fines for each?

A: ICE will look at these as paperwork violations - wrong place and insignificant info missing will be the lower end of the scale – overdocumentation or a blank section 2 is likely to be the higher end (fines for these types of violations ca range from \$110 to 1100 per I-9.) ICE's primary focus is to see that the employer has an I-9 for every employee and that the issue of whether the employee is authorized to work (and the identity has been reasonably reviewed) has been vetted (no substantive Form I-9 violations). ICE also reviews the employer's Forms I-9 to see if there are any procedural (non-substantive or "paperwork") violations, though fines may not be levied in those instances.

Q: Please elaborate on the paragraph pertaining to charges even in cases where there is no evidence hiring personnel knew of the illegal status of the workforce (slide 13)

A: An employer who does not have direct knowledge that a worker is unauthorized may still face some types of liability. Constructive knowledge (i.e., the employer should have known the person was illegal based on information available to them) might give rise to liability, particularly fines. Examples of constructive knowledge might include not completing an I-9 at all, the employee requests immigration sponsorship, or the employer sees inconsistencies in name, photo or document and the person presenting it.

Q: What are the fines for not having accurate documents for EAD re-verification and the employee continue to work?

A: This would clearly be an I-9 violation and the employer would be subject to a fine. Where an employer continues to knowingly employ someone who is no authorization to work, this is considered a more serious violation. ICE increased its fines in March 2008--and the new minimum penalty for knowingly employing an unauthorized worker is \$375 (first time violation) per worker and the maximum penalty (first time violation) is \$3200 per worker.

Q: It was stated do not ignore Social Security No-Match letters now that the regulation has been abandoned; what will happen if nothing is done about the employee continuing working?

A: If you choose to ignore no-match letters, the IRS has the authority to assess monetary penalties, though it generally does not. ICE (DHS) may use the failure to act as evidence toward a finding of knowledge or "constructive knowledge" that a company is employing an unauthorized worker. A common theme among the employers that are targeted for ICE audits/investigations are those that have high incidences of Social Security No-Match letters. During an audit, ICE will often requests copies of the employer's Social Security No-Match letters and any correspondence of its follow-up measures.

Q: What if you hire temps from a temp agency and they end up being Illegal Aliens, who is responsible for that?

A: We noted that liability for contracted workers (not employees) can exist for using their services when an employer "knows" of their unauthorized status. Please review the steps we suggested regarding contracts with vendors as such liability could extend to the employer that used them. Certainly the temp agency would have liability/exposure if it knowingly employed illegal aliens. The job site company (the temp agency's customer/user) could have liability/exposure if it has knowledge that the assigned temp agency employees are not authorized for U.S. employment (which is what occurred in the Wal-Mart matter discussed during the presentation).

Q: Where can companies get an outline of the process for ICE Raid?

A: The PowerPoint provides basics during an ICE raid. (Note that a raid is different from an audit and are less common under the current administration.)

E-Verify and Federal Contractor Issues

Q: Can you complete the E-Verify once you give a contingent offer of employment?

A: E-Verify cannot be used as a pre-screening tool. If a contingent offer is made (for example, contingent on drug screening, background check, etc.), then E-Verify can be used.

Q: What does COTS stand for?

A: **C**ommercially **A**vailable **O**ff **T**he **S**helf. COTS contracts are not subject to the new regulation requiring certain federal contractors to use E-Verify.

Q: Are federal grantees (i.e., stimulus grants, etc.) subject to E-Verify? Or Medicare contractors?

A: No. Such contracts should not contain the E-Verify clause.

Q: It is my understanding that the parent and subsidiary companies must create their own accounts and login's, etc., which means that any E-Verify administrators would need a separate login for each company- correct?

A: Correct

Q: If an employee is not directly related to the federal contract (i.e. Human Resources Personnel that hire those employers that are working on the contracts), do they also need to be run through E-Verify?

A: No – support/overhead personnel not directly performing work related to performance of the contract (like Human Resource Personnel) do not need to be E-Verified.

Q: On the point being discussed right now, what if a company has proposal, purchasing, invoicing, etc. functions of a federal contract which are performed by the main company, but the federal contract is with a specific subsidiary. Who must e-verify?

A: The main company may not be subject to the regulation requiring certain federal contractors (and subcontractors) to use E-Verify. Arguably, the main company is acting as a supplier, not a provider of “services or construction” and the E-Verify requirement therefore may not “flow through” from the prime contractor subsidiary. Further analysis of this arrangement is necessary to render a final opinion.

Q: If one contract in our company has the E-Verify clause in the Contract, all of our multiple sites are required to E-Verify?

A: Yes. If a company is party to a federal contract containing the E-Verify clause, all of its newly-hired workers (no matter where located in the United States) must be E-Verified. In addition, all existing employees performing work on the contract must be E-Verified.

Q: Are non-Federal Contractors required to use required to use E-Verify?

A: No. E-Verify is generally voluntary. Certain states require employers to use E-Verify (e.g., Arizona and Mississippi), certain state and local government contractors to use E-Verify (e.g., Georgia, Missouri and Colorado), or require employers to perform additional I-9 verifications (South Carolina and Colorado).

Q: Can existing contracts be modified to include the clause requiring E-Verify, or only new contracts?

A: Existing contracts can be modified. For example, existing IDIQ (indefinite-delivery/indefinite-quantity) contracts may be modified on a bilateral basis to include the E-Verify clause.

Q: We have clients that we work with that have required us to participate in E-Verify because of their contracts. How do we find out if we should go back and do the rest of our current workforce?

A: Only employers that are federal contractors (prime contractors or flow-down subcontractors receiving federal contract or subcontract with the E-Verify clause inserted by the federal contracting officer) may E-Verify existing employees (as opposed to new hires). If the prime contractor has not received a federal contract with the E-Verify clause on or after September 8, 2009, the prime contractor cannot compel the subcontractor to E-Verify its existing workforce. In non-federal contractor situations,

only new hires can be E-Verified and only if you agree to do so as part of your agreement with the a contractor.

Q: I thought the E-Verify program specified that it was not supposed to be used on existing employees.

A: Unless the employer is a federal contractor receiving a contract with the E-Verify clause (or a flow-down subcontractor receiving a subcontract with the E-Verify clause), existing employees should not be E-Verified. Congress recently attempted to amend E-Verify to allow employers to E-Verify existing employees—however the bill did not pass.

Q: If you have enrolled in E-Verify, who is considered "new employee"? For example, anyone hired from date of enrollment?

A: Yes, a "new" employee is anyone hired after enrollment with E-Verify.

Q: Can an employer E-verify non Federal contractors even though they are not required to complete an I-9?

A: An employer enrolled with E-Verify can only E-Verify new hires (from the date of enrollment) unless the employer is a federal contractor receiving a federal contract with the E-Verify clause on or after September 8, 2009—and the existing employee is either assigned to the federal contract or the employer has elected to E-Verify its entire workforce. Employers can only E-Verify its employees—and cannot E-Verify non-employees. However, employers that are concerned whether they are misclassifying employees as "independent contractors" may consider treating such independent contractors as "flow-down" subcontractors in the event the employer receives a federal contract with the E-Verify clause on or after September 8, 2009—and require the independent contractors to be E-Verified.

Q: If we anticipate receiving a contract with the FAR clause but do not have it yet, and we decide to verify the entire workforce, can we begin work on new I-9 forms now instead of waiting?

A: Yes, though we recommend you proceed cautiously and be certain to be fair and consistent in the process. As an alternative, if you are a federal contractor and waiting on this change, you can begin an internal I-9 audit to determine whether new I-9 forms are needed for employees with expired documents. You should also be familiar with the Immigration Reform & Control Act of 1986 which requires Form I-9 reverification in limited instances—e.g. the employee has a time-limited employment authorization and is not otherwise a lawful permanent resident or U.S. citizen.

Q: To E-Verify entire workforce when we receive the language for a contract - can we ask all existing TMs (employees) to bring in their I-9 documentation?

A: Yes, but it may not be necessary. The Supplemental E-Verify Guide for Federal Contractors published on September 8, 2009 suggests that revised or new Forms I-9 may be necessary to E-Verify existing employees in certain circumstances. This would seem to be necessary (at least in some cases) where the I-9 documentation originally provided has since expired. However, the Guide also curiously alludes to the possibility that the employer may contact DHS/USCIS customer service line to learn how it may reverify (via E-Verify) an existing employee who presented unexpired Form I-9 documentation at the time of hire that has since expired (we believe this is possible because document expiry dates are not always required fields in E-Verify and thus an individual may be E-Verified even based on certain expired documents if an employer simply leaves the document expiration date field blank.)

Q: If an employee was hired prior to when the I-9 was required to be completed, are we still required to E-Verify these individuals if we choose to verify all employees?

A: Hires prior to 11/7/2009 are likewise not required to be E-Verified.

Q: Can you elaborate on the submission of employee's SS#?

A: With respect to E-Verify, one of the main components of the E-Verify information checks is the employee's U.S. Social Security Number (and whether it matches the name of the employee). That is why employers using E-Verify can require newly-hired persons to indicate a Social Security number in Section 1 of the I-9. However, a Social Security Number is not required for U.S. employment authorization. An unrestricted U.S. Social Security card (a List C document) is one of many documents an employee may elect to present for Form I-9 purposes.

Q: How does the No-Match requirements differ from that if a company is enrolled in E-Verify?

A: The No-Match and E-Verify are two distinct process. However, they both rely on the accuracy of the Social Security database. An E-Verify "No-Match" shows up as a tentative non-confirmation. The No-Match letter usually arrives in March of each year. If you receive a No-Match letter, but the SS number previously cleared E-verify, you should still go through the same checks for errors and ask the employee to clear up the discrepancy.

Note there are no absolute "No-Match requirements". On October 7, 2009, the Department of Homeland Security officially rescinded its controversial proposed Safe Harbor Regulation for Employers Receiving SSA No-Match Letters. However,

employers should have a protocol for handling SSA No-Match letters and other scenarios (e.g. 3rd party calls employer stating an employee is using his/her Social Security Number or payroll provider advises of a no-match) and the Proposed Safe Harbor Regulation provides a model for employers to follow: 1) employer first checks to see if there were any clerical errors in providing the information to SSA; 2) if no clerical error---afford the employee a reasonable time (perhaps more than 90 days?) to resolve the issue with SSA; and 3) if the employee is not able to resolve the issue within the employer's stated timeframe, the employer should take "reasonable" steps to reverify the employee's employment authorization (e.g. complete a new Form I-9 but not accept the Social Security Card in question) and/or termination (particularly if the employee discloses the number provided was false or purposefully misrepresented). Turning a blind eye to Social Security No-Match incidences increases the employer's risk to a potential ICE finding that the employer has/had "constructive" or actual knowledge that the employee in question is not authorized to work.

If an employer receives a tentative nonconfirmation from E-Verify, the employee has 8 government days to resolve the issue.

Q: COTS...?

A: COTS = Commercially available Off-The-Shelf items. Includes most food items and some basic supplies, like office supplies. Also, most slightly modified commercial items will be considered COTS.

Q: What if you are a staffing company that helps another company staff for their federal contracts?

A: You are a vendor and subcontractor and would be required to comply as any other subcontractor if the employees furnished to the federal contractor are assigned to work on the federal contract (and more than just filling overhead functions).

Q: Are non-Federal Contractors required to use E-Verify?

A: There are some state laws that may require certain employers to use E-Verify. Arizona and Mississippi have the broadest requirements. Certain state contractors in a large number of states (e.g. Georgia, Colorado and now Nebraska—to name a few) are required to use E-Verify to be eligible for participation as a state contractor.

Also, private parties may agree by contract to require participation in E-Verify (but only for new hires after enrollment---unless they are also federal contractors for purposes of FAR).

Q: What can we do if after "Employment Authorized" comes back from E-Verify, we find out that there was a significant data entry error such as a name discrepancy or wrong birthdate?

A: If the data entry error was not a result of the employee's misrepresentation of information, the employer should make sure the correct information was recorded on the Form I-9. If the information on the Form I-9 is incorrect, the Form I-9 should be corrected.

Q: Assume contract for lodging services performed in less than 120 days is exempt.

A: Generally, yes.

Q: So, smaller companies that do not do work for the Federal Government are not subject to E-verify and are exempt, correct?

A: E-Verify is generally voluntary. Federal contractors and employers in certain states may be required to use E-Verify. Arizona and Mississippi (phasing in by number of employees) have the broadest laws, requiring all employers in those states to use E-Verify.

Q: If a company wants to opt to E-verify all existing employees, does this election have to be made at the same time that the employer changes its profile to Federal contractor or can it defer this decision?

A: The E-Verify instructions indicate that the employer must mark its selection (to verify only those workers assigned to the contract or the entire workforce) when it enrolls in E-Verify (or changes its registration to a federal contractor.)

Q: Do E-Verify guidelines define a federal grant the same as a federal contract?

A: Federal grants not generally covered by FAR.

Q: If you decide to E-Verify your entire workforce (as a federal contractor), do you have to have a new I-9 for those employees employed longer than three years?

A: No one hired prior to 11/7/1986 needs an I-9. For others, if you cannot E-Verify based on the pre-existing I-9 due to expired documents, a new I-9 should be completed to allow for E-Verify. Employers also have the option of completing new I-9s for all employees (old I-9s need to be retained) and then complete E-Verify, rather than going through every old I-9 to determine whether new documents are needed to complete the E-Verify process.

Q: We receive several Federal grants in excess of \$100k. Therefore, is this grant award

the same as a Federal contract, as defined by E-Verify? We are trying to determine whether or not we need to verify all existing employees?

A: Federal grants are not generally included under FAR.
