

American Council on Education



Office of the President

August 11, 2008

General Services Administration
Regulatory Secretariat (VPR)
1800 F Street, NW
Room 4035
Washington, DC 20405
ATTN: Laurieann Duarte

RE: FAR Case 2007-013

To Whom It May Concern:

I write on behalf of the undersigned associations to thank you for this opportunity to comment on the Proposed Rule on FAR Case 2007-013 (the “proposed rule”), which would amend the Federal Acquisition Regulations (FAR). The proposed rule is intended to carry out the June 6, 2008, Executive Order, which requires that federal agencies contract only with employers who use an electronic employment verification system. Specifically, the proposed rule would “require certain federal contractors and subcontractors to use the E-Verify system of the U.S. Citizenship and Immigration Service (USCIS) as the means of verifying that certain workers are eligible to work in the United States.”

The E-Verify requirements would be in addition to, not in lieu of, the existing requirement under the Immigration Reform and Control Act that all employers complete Form I-9, documenting that each new employee (both citizen and non-citizen) hired after November 6, 1986, is authorized to work in the United States. With these comments, we respectfully submit our concerns about the proposed rule.

Statement of Interest

The undersigned associations represent well over 2,000 American colleges and universities and more than 10,000 human resources professionals working in higher education. Colleges and universities employ 3.3 million workers nationwide, including hundreds of thousands of talented international scholars who work, study and conduct research at U.S. universities. Many of these institutions are contractors or subcontractors that would be subject to the rule. A number of our comments are similar to those expressed by the Human Resource Initiative (HRI) as well as those submitted by the American Council on International Personnel (ACIP).

General Comments

The undersigned associations and others in the higher education community continue to work with the Department of Homeland Security (DHS) and other federal agencies in efforts to enhance and improve our homeland security. Following September 11, 2001, we worked with the Department of State to bring about positive and effective changes in visa policy. We also worked with the Centers for Disease Control and the U.S. Department of Agriculture to implement changes with respect to select agents and with DHS concerning chemical facilities. We have worked with the Student and Exchange Visitor Program (SEVP) at DHS for several years on the continued development of the Student and Exchange Visitor Information System (SEVIS). The higher education community is unequivocal in its support of effective employment verification. It is in this spirit of cooperation that we offer the following comments with respect to the proposed rule.

Specific Concerns

- *The Proposed Rule Is Ultra Vires and Should Be Withdrawn*

The Immigration Reform and Control Act of 1986 (IRCA) and subsequent statutes creating and authorizing E-Verify¹ establish a framework for this program that conflicts with the proposed rule. Specifically, the proposed rule would *mandate* that contractors use the E-Verify program, contrary to the express intent of Congress that the program be voluntary, and would require employers to use E-Verify to verify *current* employees directly engaged in work under the contract, despite the fact that the law permits verification of only new hires.

IRCA requires all employers to verify and document the work eligibility for every *new hire* via the Form I-9 process. The Act excludes existing employees from this requirement. In doing so, IRCA carefully balances the employer's obligation to verify work authorization with the U.S. workers' rights to be free from discriminatory inquiries.

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which created the "Basic Pilot Program," now known as E-Verify. IIRIRA required participation in a pilot program only for executive branch departments and the legislative branch. It also limited the government's ability to mandate participation in a pilot program to situations where an employer had violated its employment verification obligations.

Thus, by mandating participation in E-Verify to contractors and requiring verification of existing employees, the proposed rule exceeds and circumvents statutory limitations placed on the program and therefore constitutes an *ultra vires* action. This

¹The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 created the Basic Pilot Program, the previous name for E-Verify, and the 2003 Basic Pilot Extension Act extended the program for five years.

conflict and express limitation on executive branch authority in this area is not circumvented by reliance on the Federal Property and Administrative Services Act. Federal courts have held that the Procurement Act cannot be used to advance goals that are in direct conflict with other federal laws, as is the case here. As a result, the proposed rule should be withdrawn and the Administration should revisit the requirements of the Executive Order.

- *The Government Must Take a More Measured Approach to E-Verify Enrollment Given Existing Error Rates and Current Usage*

As mentioned above, the higher education community supports an effective employment verification system. For this reason, we are concerned about the lack of accuracy of the E-Verify system. E-Verify supporters claim that approximately 0.5 percent of the name checks result in non-confirmations. As of June 9, approximately 67,000 employers were enrolled in E-Verify. That is roughly 1 percent of all employers in the country.

The proposed rule would require almost all federal contractors to use E-Verify. By some estimates, including that of the federal government, there are almost 170,000 federal contractors, more than double the number of employers currently enrolled in the program. We are concerned about the system's capacity to handle the new influx of employers and that the error rate could increase due to this addition. This could be particularly problematic for industries such as higher education, where annual hiring is focused in a concentrated and shorter time frame, specifically at the beginning of each academic term. This concern is exacerbated by the fact that the proposed rule also would require confirmation of existing employees, which would exponentially increase the number verifications USCIS would need to process in a short time frame.

Furthermore, we must respectfully question the 0.5 percent error rate that is claimed for E-Verify. E-Verify is based on the databases maintained by the Social Security Administration (SSA), which have an error rate of 4 to 5 percent. We are perplexed at how a system based on databases with 4 to 5 percent error rates could have a *much lower* error rate than those upon which it is built. This would mean E-Verify somehow corrects and compensates for errors in the SSA databases. Since higher education employs a substantial number of work-authorized foreign nationals, we are even more concerned with the estimated SSA error rate of up to 10 percent for those individuals.

At the very least, the existing error rates and capacity concerns suggest that the government should take a more measured or phased approach in increasing E-Verify participation, rather than a wholesale conversion that will encompass almost all government contractors within a very short period.

- *Before Mandating E-Verify, the Government Must Provide Recourse for False “Non-confirmation”*

The threat of increased error rates is amplified by the current lack of recourse employees and employers have in the event of a false non-confirmation. Short of interacting with DHS until a false non-confirmation is corrected, employees and employers have no recourse for such a situation. Most employees, including those in the higher education community, do not have the time and resources necessary to repeatedly engage with the DHS until errors are corrected. We are particularly concerned as many of our members hire short-term employees consistently, such as undergraduate students for semester-long work-study positions and graduate students for research and teaching assistantships.

If E-Verify is to be mandated for federal contractors, DHS must implement a system to address false non-confirmations much more efficiently and expeditiously.

- *The Rule Fails to Account for Problems International Personnel Have Encountered Obtaining Social Security Numbers*

The higher education community also is concerned about the potential impact of this rule on international personnel at our colleges and universities who face delays in securing Social Security Numbers (SSNs). In the past, we have heard from our members that many international employees were incorrectly denied SSNs by the SSA. Many who eventually received SSNs did so only after repeated interventions by institutions and the process took, in too many cases, several months. It is not out of the realm of possibility that these delays could last as long as a student worker or a staff member was employed by the institution. These individuals could be employed in a range of positions, from short-term work-study jobs in smaller offices to long-term research projects in large laboratories. The delays could jeopardize both the individuals and employers. The problem is particularly acute for international graduate students who are employed under an assistantship.

In an effort to address the situation, any final rule should ensure that the SSA and, even more important, the SSA field offices, be properly trained to ensure that these delays and inappropriate denials of SSNs would not occur again. In addition, special considerations and procedures should be developed for authorized foreign workers who encounter delays in securing SSNs and the contractors who employ them. Among other things, any final regulation should permit contractors to hire foreign workers who have applied for a Social Security Number but not yet received one. Contractors would be required to complete the regular I-9 process and obtain evidence the individual applied for a Social Security Number, but would not need to process the foreign worker through E-Verify until the person received Social Security Number.

- *Requirement to Re-Verify Existing Employees Poses Administrative Problems*

As mentioned above, the proposed rule would require contractors to use E-Verify to verify existing employees who are “directly engaged in performance of work under the covered contract.” In addition to contradicting current law, this requirement will require employers to put in place substantial tracking processes. In normal circumstances this would impose considerable burdens and take months, if not years, to plan and implement. The proposed rule, however, would permit employers only 30 days after the contract award to verify employees assigned to the contract; and, after that, employers would only have three days to verify any employee assigned to the contract. This limited time frame is impracticable, even under optimum circumstances, and would undoubtedly bring about unnecessary confusion.

As stated above, we believe this requirement conflicts with existing law and is, therefore, *ultra vires*. If the government decides to proceed with it as part of the final rule, irrespective of these legal issues, we suggest it at least revisit the timetables imposed on contractors. Contractors should have a minimum of 90 days following the award of the contract to verify employees working on the contract and thereafter have 30 days to identify and verify employees assigned to a contract. The government should also provide additional flexibility with respect to how to administer the new requirements. For example, some employers may find it easier to verify all existing employees and new hires, rather than attempt to distinguish between those who are and who are not working on federal contracts, thus ensuring compliance.

- *Effective Date*

Based on the numerous aforementioned challenges, we recommend an effective date of at least 120 days following publication of the final rule.

- *Expiration of Program*

In its current form, as a pilot program, E-Verify is scheduled to expire in November. The final rule should not be issued until Congress has had an opportunity to determine the future of E-Verify.

- *Application to Federal Grants*

The final rule needs to clarify the extent to which the rule affects federal grants and grant recipients.

- *Liability for Subcontractor Compliance*

Colleges and universities serve as both primary contractors and subcontractors on countless federal contracts. We are very concerned that the proposed rule is silent on the issue of primary contractor liability for violations committed by subcontractors. The

higher education community firmly believes that colleges and universities should not be held liable for potential violations of subcontractors that they may employ with respect to E-Verify. We believe that the vast majority of prime contractors share these views.

We ask that the final rule explicitly state that primary contractors would *not* be held liable for E-Verify violations committed by subcontractors.

Conclusion

We reiterate our support for effective efforts to enhance homeland and national security. The higher education community works with the federal government to improve a number of processes and procedures to bring about such a result.

We must express, however, our serious reservations about this new proposed mandate that would be placed on federal contractors. We respectfully ask that you reconsider these changes to the Federal Acquisition Regulations.

Sincerely,



Molly Corbett Broad
President

MCB\ksm

On behalf of:

American Association of Community Colleges

American Association of State Colleges and Universities

American Association of University Professors

American Council on Education

Association of American Universities

Association of Jesuit Colleges and Universities

Council on Governmental Relations

College and University Professional Association for Human Resources

EDUCAUSE

National Association of College and University Business Officers

National Association of State Universities and Land-Grant Colleges

National Association of Student Financial Aid Administrators