E-Verify Requirements Affecting North Carolina Construction Contractors

By Stephanie U. Roberts

This article discusses several key immigration law issues that affect the construction industry in North Carolina and with which North Carolina construction attorneys should become familiar.

What Is E-Verify? | E-Verify is a free, Internet-based system operated by the Department of Homeland Security (DHS) and U.S. Citizenship and Immigration Services (USCIS) that is intended to verify employee authorization to work on particular projects. Contractors working on federal contracts and companies with 100 or more employees in North Carolina are already required to use E-Verify. However, as of July 31, 2013, private employers in North Carolina with just 25 or more employees in North Carolina must verify the work authorization of new hires through the E-Verify system, regardless of whether the construction project on which they are working is a federal contract.

Changes in E-Verify Requirements Effective July 31, 2013 | In addition to employers with 100 or more employees in North Carolina who must already use E-Verify, after July 31, 2013, North Carolina law requiring compliance with the E-Verify system will impact construction industry employers with 25 or more employees in North Carolina (“Affected Employers”) in several ways. First, Affected Employers must use E-Verify to check work authorization for their new employees (i.e. individuals that the employer treats as employees from a tax standpoint) by inputting information from that employee’s Form I-9. Second, an Affected Employer who has never used E-Verify will have to enroll the company in the system, and will then receive an email containing login instructions, user ID and password. Third, E-Verify users for the Affected Employer must take the federal contractor tutorial. Fourth, an Affected Employer may not initiate verification procedures through E-Verify before an employee has been hired and the Form I-9 is completed, but must initiate verification within 3 business days of the employee’s completion of the Form I-9. Fifth, Affected Employers participating in E-Verify must post the notice provided by DHS in a prominent place that is clearly visible to prospective employees and all employees who have been verified through E-Verify. And sixth, Affected Employers must maintain the record of the work verification through the duration of the worker’s employment and for one year after the employment has ceased.

North Carolina Prime Contractors on Federal Projects with Performance Periods Longer Than 120 Days and a Value Above $100,000 | Prime contractors for projects taking more than 120 days and $100,000 to complete have to ensure that their subcontractors are following E-Verify requirements. The general rule is that unless the subcontractor is a material supplier only and not subject to the E-Verify federal contractor rule, a federal contractor must ensure that its subcontractors enroll in and use E-Verify if: (i) the prime contract includes the Federal Acquisition Regulation (FAR) E-Verify clause; (ii) the subcontract is for commercial or noncommercial services or construction; (iii) the subcontract has a value of more than $3,000; and (iv) the subcontract includes work performed in the United States, Washington, D.C., Guam, Puerto Rico, or the U.S. Virgin Islands.

In this regard, the prime contractor should provide general oversight to subcontractors to ensure that they meet the E-Verify requirement. How can a prime contractor do this? Prime contractors may enroll in E-Verify as “E-Verify employer agents” in order to verify their subcontractors’ employees. However, this means taking on additional legal responsibilities and risks that should be borne by the subcontractors, not the general contractor. Instead, as proof of enrollment, the subcontractor should provide you with a copy of its “Edit Company Profile” page in E-Verify, which can be printed directly from E-Verify. This page will contain proof that the subcontractor is enrolled in E-Verify. Further, prime contractors must take reasonable measures to ensure that all covered subcontracts at every tier incorporate the FAR E-Verify clause at FAR 52.222-54, and can do this by reviewing the subcontracts before they are signed.

When do subcontractors have to enroll in and initiate E-Verify? The first time a contractor enters into a federal contract, the employer must enroll its company within 30 days of the contract award date, and must initiate E-Verify within 90 days of enrollment for all employees directly performing work on the project and all employees hired after the federal contract award date. After the initial 90-day phase in period, information for new hires must be entered in E-Verify within three business days of their start date. Prime contractors may be subject to fines and penalties if they knowingly continue to work with a subcontractor who is in violation of the E-Verify requirement.

Conclusion | As North Carolina has “adopted” federal E-Verify requirements, prime contractors working on state or private contracts meeting the federal contracts criteria are likely to eventually be required to take appropriate measures to ensure their non-material supply subcontractors are using the E-Verify system or are at least maintaining I-9 compliance. As a means of adding a layer of protection for contractor’s businesses with the use of subcontractors on purely private construction contracts, you should consider advising your contractor clients to request that their subcontractors verify their I-9 compliance for employees working on the site.

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End Note | 1. Employers must complete and retain accurate Form I-9s for all employees. Make sure your clients are using the most current I-9 Form that was issued on March 8, 2013 (old forms could only be used until May 7, 2013). Some of the changes include the following: the I-9 is now two pages, expanded instructions, and new fields for email address, phone number and foreign passport in Section 1.