August 11, 2008

VIA ELECTRONIC MAIL:  http://www.regulations.gov

General Services Administration
Regulatory Secretariat
1800 F Street, NW
Room 4035
Washington, DC 20405

Re:  Federal Acquisition Regulation; FAR Case 2007–013, Employment Eligibility Verification.

Dear FAR Secretariat:

The Society for Human Resource Management (SHRM) is pleased to submit the following comments in response to FAR Case 2007-013, issued by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) on behalf of the General Services Administration, Department of Defense, and the National Aeronautics and Space Administration, and published in the Federal Register on June 12, 2008 (73 Fed. Reg. 33374 (June 12, 2008)).

The Society for Human Resource Management (SHRM) is the world’s largest association devoted to human resource management. Representing more than 245,000 members in over 140 countries, the Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

The proposed rule amends the Federal Acquisition Regulation (FAR) to mandate that federal contractors use E-Verify to check the employment eligibility of all newly hired employees of the contractor or subcontractor and all employees assigned to work on the federal contract. Employment verification is part of HR’s core workplace administrative responsibilities and SHRM members, as HR professionals, are committed to hiring only work-authorized employees. For this reason, SHRM advocates that any
The Proposed Rule Disregards Congressional Intent

Creation of a uniform national system was the key principle underlying Congressional enactment of the Immigration Reform and Control Act of 1986 (IRCA) which requires all U.S. employers to verify the work authorization of all employees hired after November 6, 1986 (8 U.S.C. 1324a et seq.). Grandfathered under the statute, are employees hired prior to November 6, 1986. Employers are prohibited from requiring these employees to complete the Form I-9. HR professionals, particularly those who hire in multiple jurisdictions, need to rely on a uniform, national system of employment verification. In constructing IRCA, Congress specifically pre-empted state and local laws imposing civil or criminal sanctions upon employers who hired undocumented workers.

Despite the provisions pre-empting state and local sanctions, IRCA has been undermined in the last several years by a variety of state laws requiring some or all employers to participate in E-Verify, to complete additional verification paperwork, or take other measures to ensure the legal status of their workforce. Employers with operations in multiple jurisdictions are struggling to keep abreast of these conflicting mandates. By creating a new obligation that applies only to a subset of employers, the proposed rule contravenes Congressional intent and further degrades the federal preemption that is already under attack.

In 1996, Congress established three voluntary pilot programs to test alternate methodologies for employment verification in section 404(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1324a note). One of those programs, initially known as “Basic Pilot,” ultimately became E-Verify. Congress required participation in a pilot program only for executive branch departments and the legislative branch. In addition, Congress permitted the Department of Homeland Security (DHS) to mandate participation in a pilot program only if an organization violated its employment verification obligations under section 274A of the Immigration and Nationality Act (INA). For all other employers, enrollment in E-Verify is voluntary. By mandating that federal contractor’s use E-Verify, the proposed rule disregards Congressional intent that the program was created by statute as a voluntary pilot program.
As a result, we do not believe that the government has the Constitutional authority to mandate use of a voluntary program.

In addition, as noted previously, IRCA requires all employers to complete a Form I-9 for each *new hire* beginning after November 6, 1986. IRCA carefully balanced an employer’s obligation to verify work authorization with a U.S. workers’ right to work and to be free from discriminatory inquiries about work authorization status (8 U.S.C. 1324b). The Department of Homeland Security’s handbook providing instructions on completing the Form I-9 advises that “employers may not verify selectively and must verify all new hires…” to be in compliance (*Handbook for Employers, Instructions for Completing the Form I-9*, U.S. Department of Homeland Security, M-274 (Rev. 11/01/2007) N, p. 20 [http://www.uscis.gov/files/nativedocuments/m-274.pdf](http://www.uscis.gov/files/nativedocuments/m-274.pdf), last checked 08/11/08)). The proposed rule however, mandates that federal contractors determine which employees are currently assigned to an active contract and check their employment eligibility through E-Verify. By requiring federal contractors to verify existing employees assigned to a specific contract, the proposed rule violates the plain language of IRCA, which limits verification to new hires.

In addition, selective verification of existing employees increases an employer’s exposure to allegations of discrimination based on document abuse, citizenship status discrimination, national origin discrimination or other bases protected by Title VII. Reports from Arizona, where state law requires employers to use E-Verify, already suggest the some employers are improperly re-verifying existing employees – whether on a uniform or selective basis. This violates the existing Memorandum of Understanding (MOU) between an employer and the federal government and has led to discrimination charges being filed with the Office of Special Counsel for Unfair Immigration-related Employment Practices. The proposed rule will further the confusion about re-verification and open the door to more charges of discrimination by employers.

**The Proposed Rule Does Not Fix E-Verify’s Shortcomings**

The proposed rule requires federal contractors to enroll in the E-Verify system within 30 calendar days of the contract award and begin using it to verify the employment eligibility of newly hired employees and those assigned to the contract. The proposed rule, however, does nothing to fix the known shortcomings of E-Verify.

SHRM supports efforts to improve the current process of employment verification by creating a secure, efficient and reliable system that will help prevent unauthorized employment, a root cause of illegal immigration. Mandating the use of E-Verify by federal contractors and subcontractors without first fixing its underlying problems will only exacerbate the difficulties employers and employees have encountered when using the system.

One of the major shortcomings of the current I-9 process is the use of false or stolen documents. Fraudulent identity documents are used with increasing frequency
with E-Verify and severely limit its effectiveness. E-Verify cannot detect many forms of document fraud or identity theft because it cannot confirm the identity of the individual presenting the documents. The system can only verify that the identity information presented on the documents provided matches information in the Social Security and Department of Homeland Security databases.

Unauthorized workers are using stolen Social Security numbers, fake birth certificates and fraudulently obtained but “legitimate” photo IDs to bypass the system and gain employment. Even the E-Verify photo tool cannot detect whether the document actually relates to the person presenting it – as a fraudulent photo could already be in the system – as has been the case in several well-publicized situations. This leaves all employers vulnerable to sanctions for identity theft, through no fault of their own. At the same time, the lack of certainty and the threat of government-imposed penalties may lead some employers to delay or forego hiring legal workers who are eligible. In either case, the costs are high for both U.S. employers and legal workers.

Second, E-Verify relies on information contained in the Social Security Administration database that has a 4.1 percent error rate, according to the Social Security Administration’s Office of the Inspector General. Moreover, the estimated error rate for naturalized citizens is as high as 10 percent. These errors result in legally-authorized individuals being improperly denied employment as well as non-work authorized individuals being improperly verified by the system. Several employers using E-Verify have been raided by DHS resulting in a severe disruption to their business operations because non-work authorized individuals were improperly cleared by E-Verify. These false positives mean that employers have little if no assurances in using the E-Verify system. Given the seriousness of sanctions, the government should not burden employers and employees with a system containing such a degree of inaccuracy.

Many U.S. citizens and legal residents could be denied employment due to bureaucratic errors if all of the estimated 169,000 U.S. employers with federal contracts were to use the system. We should not place human resource professionals and their employers in the middle – subjecting them to stiff penalties if they mistakenly hire an unauthorized worker, while exposing them to potential lawsuits if they deny employment to a legal worker – all because of faulty government data and processes.

Third, HR professionals believe that any electronic employment verification program designed to increase efficiency and administrative ease should eliminate the paper-based requirements. E-Verify is not fully electronic because it requires employers to continue to analyze paper documents and complete the Form I-9. Only after completing the Form I-9 can an employer enter the employee’s data into E-Verify. This duplication causes administrative difficulties, and, as mentioned earlier, contributes to identity theft.
The Proposed Rule Imposes Unreasonable Implementation Costs

The proposed rule requires all employers with federal contracts to enroll in E-Verify within 30 days of the contracts award; to use E-Verify within 30 calendar days going forward to verify the employment eligibility of employees assigned to the contract; and to thereafter initiate verification of all newly hired employees and those newly assigned to the contract within three business days. In addition, contractors must “flow down” the requirements to use E-Verify to subcontractors. These requirements will result in significant personnel and monetary costs. These costs, when coupled with unreasonable timeframes for implementation and harsh penalties for errors in compliance, make implementation of this rule unreasonably difficult for federal contractors.

The proposed rule requires an employer to enroll and verify all new hires regardless of whether they are assigned to a federal contract. This means that a multi-billion dollar business with thousands of employees would be required to implement a costly new verification system across the country even if only a small division of the company has a federal contract. Not only does this requirement impose a cost on federal contractors, its broad reach lacks connection to federal procurement law. In addition, the rule proposes to require an employer to confirm the employment eligibility of “all existing employees who are directly engaged in the performance of work under the covered contract.” The rule requires employers to determine, within 30 days of entering into a federal contract, which employees are assigned to the contract, have already been run through E-Verify as new hires, or have already been run through E-Verify because of their work on a different contract. The employer must then identify which remaining employees must than be verified for work authorization using E-Verify.

For large employers, determining which employees fall into these categories will be difficult. Employers will have to absorb the cost of requiring HR to review thousands of personnel files to identify the employees requiring verification through the system. The proposed rules’ requirement to identify which employees must be run through E-Verify will lead to one of two inevitable conclusions: employers will either not be able to comply with the rule or will simply run all employees through E-Verify because it is too difficult and costly to identify the employees covered by the rule.

The proposed rule also states that the Contractor “shall flow down the requirement” to use E-Verify to subcontractors. This has been an issue of great discussion during the debates over comprehensive immigration reform. SHRM’s consistent position during these debates and in response to this proposal remains the same that — employers should be held accountable only for their own hiring decisions, not those of their subcontractors. Requiring otherwise subjects employers to liability for actions outside their control. The subcontractor requirement also leads to the practical difficulty of determining who falls within the definition of a subcontractor under the rule. Many employers hold contracts with delivery companies, suppliers, maintenance companies, and others who may perform work in support of the federal contract. It is
unclear from the proposed rule whether these subcontractors would also be required to enroll in E-Verify.

In addition, the rule imposes unreasonable timeframes on employers. The time estimates presented in the proposed rule grossly underestimate the time required by an employer to fully understand and comply with their obligations under E-Verify. We have heard from some larger employers that implementation of E-Verify, including consulting legal counsel, reviewing the MOU, registering with E-Verify, and training employees, can take 12-15 months. By selling the program as “fast and simple” to use, the government is creating unrealistic expectations and increasing the risk that employers will misunderstand and misuse the program, especially in the area of re-verification of existing employees.

Finally, given the complexity that implementation of this rule may cause federal contractors, the penalties provided in the proposed rule will lead to draconian results. The proposed rule states that violation of the terms of the MOU is grounds for terminating the employer’s participation in the program. If the Government’s goal is to encourage widespread voluntary participation in E-Verify, then the program should maintain its flexibility and current spirit of cooperation. Terminating an employer’s participation in the program would result in violation of the FAR rules and loss of the federal contract. As such, the proposed rule’s penalty provision could put well-intentioned employers out of business.

In light of the concerns expressed in these comments, we urge you to withdraw the proposed rule. Thank you for the opportunity to comment and your consideration of SHRM’s views.

Yours truly,

Michael P. Aitken
Director, Government Affairs