



The New E-Verify Requirements for Federal Contractors

June 16, 2008

An Executive Order signed by President Bush on June 6 and a proposed rule published on June 12 set forth new requirements that federal contractors and subcontractors use the E-Verify program to assure that their employees are authorized to work in the U.S. The new requirements will be imposed by including clauses in government contracts; accordingly, the requirements will not apply to an employer until that employer enters into a contract with the E-Verify clause.

E-Verify is a free Internet-based system operated by the U.S. Citizenship and Immigration Service in coordination with the Department of Homeland Security (DHS) and the Social Security Administration (SSA). The program allows participating employers to electronically verify the employment eligibility of their newly hired employees in connection with the I-9 employment verification process. Although E-Verify historically has been a voluntary program, the President's action accelerates a trend at the federal and state levels to require E-Verify enrollment and use by employers. More information is available on the E-Verify page of our website.

The Executive Order, E.O. 12989, will be implemented via the Federal Acquisition Regulation (FAR). The Order's effect and scope will not be fully determined until a final rule amending the FAR takes effect. The rule issued on June 12 by the federal civilian and defense acquisition authorities, which requires and defines the contract clause mandated by E.O. 12989, is only a proposed rule (73 Fed. Reg. 33,374). Comments on the proposed rule may be filed through August 11, 2008.

What the Order Requires

E.O. 12989 requires federal departments and agencies that enter into contracts with employers to include a clause by which the contractor agrees to use E-Verify to verify the employment eligibility of the following:

- *New Hires* — all persons hired during the contract term by the contractor to perform employment duties within the United States; and
- *Assigned Employees* — all persons assigned by the contractor to perform work within the United States on the federal contract.

In addition, the proposed FAR amendment includes a subcontractor flowdown provision. Contractors will be required to include provisions in subcontracts that require subcontractors to use the E-Verify program for contracts involving domestic commercial services or construction.

The proposed amendment to the FAR differs in one significant respect from the requirements that apply to employers that voluntarily participate in the E-Verify program. Currently the terms of the E-Verify program instruct employers to use the program only for new hires. Under the proposed FAR amendment, current employees assigned to work in the U.S. under a covered contract also must be verified. DHS is in the process of revising E-Verify system materials to reflect the duties federal contractors will assume once the rule becomes effective.

The new requirement to use E-Verify includes several exceptions. Workers employed under a contract who work outside the U.S. are not covered. In addition, the requirement does not apply to contracts or subcontracts that are valued at \$3,000 or less or that are for commercially available, off-the-shelf items.

How Employers Should Proceed

E.O. 12989 will impact covered employers only when they enter into a contract with a federal agency that contains a clause mandating E-Verify enrollment. In the meantime, we recommend that employers determine whether they are parties to any contracts with federal departments and agencies and, if so, evaluate the contracts to determine which locations and employees will be affected by the rule. Also, employers that enroll in E-Verify must sign an agreement that gives the government access to the company's I-9 records. Accordingly, we recommend that employers 1) audit current I-9's for accuracy and completion; and 2) train personnel on proper completion, storage, and retention of I-9 forms.

In addition, employers are required to comply with any state and local requirements concerning E-Verify that are currently in force. Finally, the E-Verify program is not a substitute for any other employment eligibility verification requirements.

If you have any questions or would like to discuss any aspect of the amendment to the Executive Order, please do not hesitate to contact one of the members in our Labor and Employment Group.

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