

E-VERIFY FOR FEDERAL CONTRACTORS: FINAL RULE MOVES FORWARD

November 4, 2008

On October 31, 2008, the Office of Management and Budget (OMB) completed its review of a final rule that would require most federal contractors to enroll in the E-Verify program as a condition of all federal contracts. The proposed rule was published in June 2008 for notice and comment. The final rule appears to be moving on a fast track, as it cleared OMB just two weeks after submission. The rule is based on an Executive Order which requires all employers who are federal contractors to enroll in and use the E-Verify system. It is unknown exactly when the rule will be published, but we expect it will be published in the near future, as it is widely reported that the Bush Administration is planning to implement a publish a large number of long-delayed regulatory changes prior to its departure from the White House in January 2009.

E-Verify is a controversial Internet-based system operated by the Department of Homeland Security (DHS) in partnership with the Social Security Administration (SSA). E-Verify allows participating employers to electronically verify the employment eligibility of their newly hired employees after completion of a Form I-9. E-Verify is free and is voluntary for most employers, though it requires employers to adopt certain new technologies and waive a large number of rights with respect to review of its I-9 records. Information about E-Verify, including how to enroll is available from USCIS at www.uscis.gov/E-Verify.

As originally proposed, the Federal contractor regulations would greatly expand the use of E-Verify. The present E-Verify program is expressly limited for the employment verification of new hires. In fact, employers are specifically barred from using E-Verify to “re-verify” the employment authorization or identity documents of existing employees. If the final rule is similar to the proposed rule, federal contractors will be required to use E-Verify to verify employment authorization for all new hires under a specified federal contract. However, employers will also be required to re-verify the employment authorization for all existing employees working under the same federal contract. Only federal contractors would be required to re-verify existing employees through E-Verify. Employers who do not contract with the federal government would not be permitted to enter existing employees into the E-Verify database. This bears repeating: E-Verify cannot be used to re-verify any employee’s ability to work even if the I-9 requirements dictate that a re-verification is mandated. E-Verify is only to be used for new hires.

While federal contractors are not required to immediately enroll in the E-Verify program, employers subject to this requirement should begin planning for E-Verify, and in particular how to identify employees subject to this new requirement. Care will be required, as employers will need to apply E-Verify for all new hires, regardless of whether the hire will work under a specified federal contract. However, only certain existing employees will be subject to the re-verification requirement for E-Verify.

Jackson & Hertogs is available to assist employers with E-Verify enrollment, as well as provide guidance and counseling on how employers may use E-Verify. Please contact your Jackson & Hertogs attorney if you have questions or need assistance with E-Verify.