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Final E-Verify Rule for Government Contractors Issued

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On November 13, 2008, the Federal Acquisition Regulation ("FAR") Councils issued their final rule requiring certain government contractors to use the Department of Homeland Security, U.S. Citizenship and Immigration Services' ("USCIS") E-Verify system to verify that certain of their employees are eligible to work in the United States.^[1] The new rule goes into effect January 15, 2009, and applies to contracts awarded after that date.

The E-Verify program, formerly known as the Basic Pilot/Employment Eligibility Verification Program, is a web-based system operated by USCIS in conjunction with the Social Security Administration ("SSA"). The program automatically verifies an individual's employment eligibility, either confirming the employee's eligibility to work in the United States or generating a "tentative non-confirmation" notice for any employee whose eligibility the system cannot verify. An employee may contest a tentative non-confirmation notice within eight workdays. Before an employer can use the E-Verify system, it must enroll in the program and agree to a non-negotiable E-Verify Memorandum of Understanding ("MOU") with the DHS and SSA, agreeing to abide by legal hiring procedures and other terms and conditions as well.

The FAR Councils published their proposed rule on June 12, 2008, implementing Executive Order 13465.^[2] We described and analyzed the proposed rule in our July 2008 Legal Update, [New Rule Would Require Government Contractors to Use E-Verify System](#) by Richard J. Vacura and Keric Chin. The purported objectives of the proposed rule were to avoid inefficiencies that flow from contracting with employers that use unstable workforces and the costs of disruptions to federal contract performance that result when unauthorized aliens are found in, and removed from, workforces, supporting federal contracts.

The final rule differs from the proposed rule in certain significant ways. According to the USCIS press release, these changes reflect the more than 1,600 public comments received in response to the proposed rule. The Final Rule also reflects some changes from the proposed rule that "are designed to lighten the burden on small businesses who decide to accept federal contracts, and to provide contractors with flexible means of complying with the basic requirement that all persons working on federal contracts be electronically verified."^[3]

1. The final rule extends the enrollment timeline for federal contractors using the E-Verify Program for the first time from 30 to 90 calendar days. It also extends to 30 calendar days from three business days the period after initial enrollment for contractors to initiate verification of existing employees who have not previously gone through the E-Verify system when they are newly assigned to a covered federal contract. Certain other timelines are extended as well.
2. The E-Verify clause need only be included for prime contracts above the simplified acquisition threshold of \$100,000 instead of the micro-purchase threshold of \$3,000.
3. The E-Verify clause need not be included into prime contracts with performance terms of less than 120 days.
4. Institutions of higher learning, state and local governments, sureties performing under a takeover agreement entered into with a federal agency pursuant to a performance bond, and federally recognized Indian tribes need only verify employees assigned to a covered federal

contract.

5. Employees who hold an active security clearance of confidential, secret, or top secret are exempt from verification requirements.
6. Contractors have the option of verifying all employees of the contractor, including any existing employees not currently assigned to a government contract.
7. The exemption for contracts related to items commercially available off-the-shelf ("COTS") are expanded.
8. The Head of the Contracting Activity may waive E-Verify requirements after contract award in "exceptional circumstances," either temporarily or for the period of performance.

This new E-Verify rule for government contractors is just one example of stepped up enforcement of worksite immigration rules that began in earnest after Congress failed to agree on the comprehensive immigration reform package desired by the Bush administration. Stay tuned for our December 2008 Employment Law Commentary, which will detail the increased enforcement activity, provide tips on how to avoid becoming a government enforcement target, and discuss what to expect on the immigration front from the Obama administration.

Footnotes

[1] http://federalregister.gov/OFRUpload/OFRData/2008-26904_PI.pdf.

[2] See 73 FR 33837, June 13, 2008.

[3] USCIS Update, November 13, 2008