

EMPLOYMENT LAW ALERT:

Federal Contractors Must Use E-Verify Starting September 8, 2009

An August 26th decision in *Chamber of Commerce of the United States of America v. Napolitano* upheld the legality of Executive Order 13464 and its implementing regulation, meaning that federal contractors and subcontractors must use “E-Verify” – beginning with contracts awarded or modified on and after September 8, 2009.

On June 6, 2008, President Bush issued Executive Order 13465, “Economy and Efficiency in Government Procurement through Compliance with Certain Immigration and Nationality Act Provisions and the Use of an Electronic Employment Eligibility Verification System.” It provided that “Executive departments and agencies that enter into contracts shall require, as a condition of each contract, that the contractor agree to use an electronic employment eligibility verification system designated by the Secretary of Homeland Security to verify the employment of: (i) all persons hired during the contract term by the contractor to perform employment duties within the United States; and (ii) all persons (**new and existing employees**) assigned by the contractor to perform work within the United States on the federal contract.” The Federal Acquisition Regulation (FAR) was amended to require federal contractors to use E-Verify. After lengthy litigation regarding the legality of the Executive Order and FAR, the court ruled that the regulations are valid. Emergency efforts taken last Friday to further derail the implementation of the executive order and regulations were unsuccessful.

Thus, the final rule became applicable to contractors on September 8, 2009. Under the final rule, employers are required to enroll in E-Verify if and when they are awarded a federal contract or subcontract that requires participation in E-Verify as a term of the contract. When a contractor wins the bid on a federal contract that contains the FAR E-Verify clause, the contractor and any covered subcontractors on the project are required to enroll in the E-Verify program within 30 calendar days of the contract or subcontract award date. If the contractor has been using E-Verify for more than 90 days, it has 90 days from the contract award date to begin using E-Verify for each employee already on staff who is assigned to the contract, but must initiate verification of new hires within three business days of their start date.

The rule requires the insertion of the E-Verify clause into prime federal contracts with a period of performance longer than 120 days and a value above the simplified acquisition threshold (\$100,000), with certain exceptions. Comments to the FAR indicate that financial institutions are *not* covered by the FAR, at least under their current financial agency agreements.

The E-Verify requirement must also be included in indefinite-delivery/indefinite-quantity contracts modified after

September 8, 2009 if the remaining period of performance extends at least six months after September 8, 2009, and the amount of work or number of orders expected under the remaining performance period is substantial. The rule only covers subcontractors if a prime contract includes the clause. For subcontracts that flow from those prime contracts, the rule extends the E-Verify requirement to subcontracts for services or for construction with a value over \$3,000. The rule applies only to employees working in the United States, which is currently defined to include the fifty States and the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands.

United States Citizenship and Immigration Services (USCIS) has published information and [frequently asked questions](#) on its website regarding application of the rule.

If you have questions about E-VERIFY, please contact the Dickinson attorney with whom you normally work or a member of the firm's Employment and Labor Law Practice Group at employmentlaw@dickinsonlaw.com.

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