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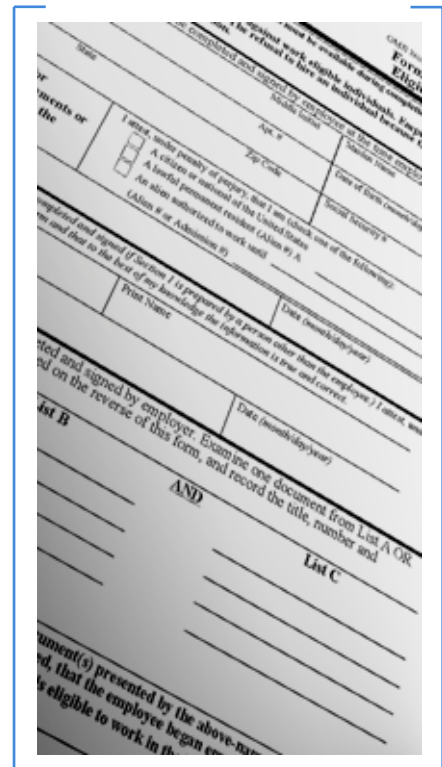
E-Verify and Federal Contractors – September 8th Implementation

What it Means for Your Business

This past May, the implementation of the Federal Acquisition Regulation (FAR) E-Verify requirement for federal contractors was postponed until September 8, 2009, with the agreement of the Department of Defense, General Services Administration and the National Aeronautics and Space Administration. This was the fourth such extension, but it seems that time has finally run out and the requirement will go into effect in the coming days.

The FAR E-Verify requirement will require a contractor, and any covered sub-contractors on a federal contract, to enroll in the E-Verify program within 30 calendar days of the contract or subcontract award date. The final rule applies to solicitations issued and contracts awarded after September 8, 2009, and which include the FAR E-Verify clause (73 FR 67704). Federal contractors may NOT use E-Verify to verify current employees until the rule becomes effective and they are awarded a contract that includes the FAR E-Verify clause.

The most recent legal challenge to the 2008 Executive Order 13465 seeking implementation of the FAR E-Verify requirement was dismissed by a federal judge on August 25, 2009. The suit, filed in the Southern District of Maryland by the U.S. Chamber of Commerce, Associated Builders and Contractors, Society for Human Resource Management, the American Council on International Personnel and the HR Policy Association in the District of Maryland, challenged the Executive Order and its regulatory authority. The plaintiffs sought declaratory and injunctive orders, based upon its argument that the rule and its requirements exceed governmental authority. (*Chamber of Commerce of the United States, et al. v. Janet Napolitano*, U.S. District Court for the District of Maryland Southern District, Civil Action No. AW-08-3444).



Judge Alexander Williams Jr. granted the government's Motion for Summary Judgment, ruling against most of the points raised by the plaintiffs. Click [here](#) for the Memorandum Opinion and Order.

Laura Reiff, co-chair of Greenberg Traurig's Business Immigration and Compliance Group, and Counsel for the Essential Worker Immigration Coalition, is not optimistic that an appeal of the most recent ruling will ultimately be granted. She believes that "federal contractors must take inventory of their personnel and set up standard operating procedures for handling the new regulation."

Action Required Under the Executive Order and Regulations

What follows are basic facts regarding the FAR E-Verify rule and steps federal contractors will need to take. For further details, companies should consult with legal counsel regarding the necessary internal steps that should be taken. Note that, contrary to what was previously understood about the E-Verify program, which did not allow for the re-verification of existing employees, under the new regulation there will be mandatory re-verification of existing employees in certain circumstances.

By September 8, 2009, federal contractors *not yet enrolled, or who have been enrolled for less than 90 days, in the E-Verify program AND* who have accepted federal contracts that extend over 120 days and are valued at \$100,000 or more, must:

- Enroll in the E-Verify program within 30 days from the date of contract award;
- Commence verifying all new hires within 90 days of enrolling in E-Verify; and,
- Initiate verification of all existing workers assigned to a new federal contract within 30 days, after the initial 90 day enrollment time frame.

Note that federal contractors currently enrolled in the E-Verify program for less than 90 days must initiate verification of existing workers assigned to a federal contract within 90 calendar days after date of enrollment or within 30 calendar days of the employee's assignment to the contract, whichever date is later.

Contractors who *have been enrolled in the E-Verify program for 90 days or longer* must:

- Continue to verify all new hires within three days of hiring;
- Verify all existing workers assigned to a new federal contract within 90 days from the contract award.

Subcontractors

The FAR E-Verify rule only covers subcontracts 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. Existing indefinite-delivery/indefinite-quantity contracts should be modified by Contracting Officers on a bilateral basis in accordance with FAR 1.108(d)(3) to include the clause for future orders if the remaining period of performance extends at least six months after the final rule effective date, and if the amount of work or number of orders expected under the remaining performance period is substantial.

Finally, if a federal contractor or subcontractor wishes to *re-verify its entire workforce* they will be given 180 days to do so. This option will include both new hires and existing employees, including those not assigned to a

federal contract. If a company elects to do this, they must notify the Department of Homeland Security. A federal contractor that chooses to exercise this option must initiate an E-Verify query for each employee in the contractor's entire work force within 180 days of updating its company profile.

We are currently awaiting additional guidance from the Department of Homeland Security regarding the FAR E-Verify requirement. We will provide updates accordingly.

What the Future Holds?

To understand the future, it is important to revisit the history of this rule to better understand the federal government's motivations. The new rule implements Executive Order 12989, as amended by President George W. Bush on June 6, 2008, directing federal agencies to require that federal contractors agree to electronically verify the employment eligibility of their employees. The amended Executive Order reinforces the policy, first announced in 1996, that the federal government does business with companies that have a legal workforce. The new rule requires federal contractors to agree, through language inserted in their federal contracts, to use E-Verify to confirm the employment eligibility of all persons hired during a contract term, and to confirm the employment eligibility of federal contractors and current employees who perform contract services for the federal government within the United States.

Recently, Homeland Security Secretary Janet Napolitano strengthened employment eligibility verification by announcing the administration's continuing support for the FAR E-Verify regulation and the importance of electronic employment verification programs such as E-Verify and IMAGE. Clearly there is a sense that worksite enforcement operations will continue and that the E-Verify and IMAGE programs designed to facilitate employment verification will continue to gain importance. Given the growing problem with identity theft, it is very likely that the government will continue to push biometrics and secure identification documents. A mandatory electronic employment verification program, with biometrics a key feature, isn't too far in the future. How these programs will be impacted by comprehensive immigration reform on Capitol Hill in the fall and into 2010 should be watched as well.

Greenberg Traurig's Business Immigration and Compliance Group has extensive experience in advising multinational corporations on how to minimize exposure and liability regarding a variety of employment-related issues, particularly I-9 employment eligibility verification matters. In addition to assisting in H-1B (Labor Condition Application) audits, GT develops immigration-related compliance strategies and programs and performs internal I-9 compliance inspections. GT has also successfully defended businesses involved in large-scale government worksite enforcement actions and Department of Labor Wage and Hour investigations. GT attorneys provide counsel on a variety of compliance-related issues, including penalties for failure to act in accordance with government regulations, IRCA anti-discrimination laws, and employers' responsibilities upon receiving Social Security Administration "No-Match" letters.

This *GT Alert* was written by [Montserrat Miller](#) and [Nicole Ezer](#). Questions about this information can be directed to Montserrat Miller (millermo@gtlaw.com; 703.749.1343) , Nicole Ezer (ezern@gtlaw.com; 713.374.3613) or your immigration professional listed below.

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