

Federal Government Issues Final Rule Requiring Federal Contractors to Use E-Verify System

November 20, 2008

On November 13, 2008, the federal government issued a final rule that requires all federal contractors, as a condition of any future federal contract, to use the government's controversial Internet-based electronic employment eligibility verification system ("E-Verify") to verify the employment eligibility of their workers. The rule was issued just five months after a similar proposed rule was published that elicited more than 1,600 public comments. The rule marks the first time the federal government has required private employers to use E-Verify to verify the eligibility of its workers, which until now had been made available to employers on a voluntary basis. The final rule takes effect on January 15, 2009, so employers may want to begin preparing now for the challenges posed by E-Verify.

E-Verify is the federal government's Internet-based system that allows employers to electronically verify the employment of newly hired workers. Prior to the issuance of this rule amending E-Verify regulations, E-Verify was strictly voluntary for private employers, although several states require E-Verify enrollment for certain employers. Many employers have been hesitant to use the system, however, and E-Verify has been roundly criticized by some business groups, immigrants' rights groups and civil liberties advocates for its perceived shortcomings. Concerns include the financial and legal burdens for employers using E-Verify, the potential for employer liability resulting from use of the system, the system's accuracy and reliability, and E-Verify's capability to handle large numbers of employment eligibility inquiries in an efficient manner.

The new rule requires, as a condition of nearly all prime contracts with a period of performance longer than 120 days and a value above \$100,000, as well as subcontracts for services or construction worth more than \$3,000 that flow from a prime contract that includes the E-Verify clause, that the contractor use the E-Verify system to verify the employment eligibility of: (1) workers hired during the contract term; and (2) workers performing work on the federal contract. The latter requirement is notable because it departs from E-Verify's current rules, which allow employers to only use E-Verify to verify the employment eligibility of *new hires*; the proposed rule expands the use of E-Verify to *current employees* assigned to perform work within the United States on a federal contract or subcontract. Contractors must enroll in E-Verify within 90 days of the contract award and use the system for the duration of the contract. Contractors have 30 days following the assignment of existing employees to a covered federal contract to initiate verification of those employees.

The new E-Verify regulation applies to contracts awarded after January 15, 2009, and departments are required to amend existing indefinite delivery or indefinite quantity contracts to include the E-Verify requirement for future orders if the remaining period of performance extends at least six months after January 15.

Before the new requirements go into effect, employers may want to ensure that their I-9 employment eligibility verification documentation, policies and procedures are up-to-date by conducting internal I-9 audits and regular I-9 training for personnel responsible for I-9s, developing written I-9 compliance policies and reviewing their I-9 tickler system to ensure that it is working effectively and accurately.

For Further Information

If you have any questions about E-Verify, the revision of your employment policies and procedures relevant to E-Verify, or otherwise preparing to use E-Verify, please contact any [attorney](#) of the [Employment & Immigration Practice Group](#) or the attorney in the firm with whom you are regularly in contact.