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LEGAL ALERT



## Legal Alert: Federal Contractors Will be Required to Use E-Verify Beginning January 15, 2009

11/14/2008

Beginning January 15, 2009, federal contractors and subcontractors will be required to use the U.S. Citizenship and Immigration Services (USCIS) E-Verify system to verify their employees' eligibility to work in the United States. A final rule scheduled to be published today (November 14) in the Federal Register amends the Federal Acquisition Regulation (FAR) to reflect this change.

The new rule implements the amendment to Executive Order 12989 signed by President Bush on June 6, 2008. As discussed in our June 13, 2008 Legal Alert, the amended Executive Order requires all federal contractors to use an electronic employment eligibility verification system designated by the Secretary of Homeland Security to verify the employment eligibility of their employees.

The new rule requires that all solicitations issued and contracts awarded after the effective date of the rule (January 15, 2009) include a clause requiring the contractors to use the E-Verify program to confirm the employment eligibility of all persons hired during a contract term, and to confirm the employment eligibility of all existing employees who are directly performing work under the covered contract. The new rule also provides that federal departments and agencies should amend, on a bi-lateral basis, existing indefinite delivery/indefinite-quantity contracts to include the clause for future orders if the remaining period of performance extends at least six months after the effective date of the final rule. Note that the language regarding existing contract amendment is directionary ("should") rather than mandatory ("must"), but may be interpreted by the OFCCP as mandatory. In the latter case, courts may be called upon to decide whether OFCCP has overstepped its bounds in requiring contractors to amend existing contracts.

The E-Verify requirement applies to contracts for \$100,000 or more, other than those for commercially available off-the-shelf items, and subcontracts for \$3,000 or more for services or construction. Employers awarded a federal contract will be required to enroll in the E-Verify program within 30 days of being awarded the contract. Additionally, they will be required to begin using the E-Verify system to confirm that all of their new hires and their employees directly working on federal contracts are authorized to work in the United States.

The new rule is similar to the proposed rule published in June 2008, but reflects some changes designed to lighten the burden on small businesses

and provide contractors with flexible means of complying with the basic requirement that all persons working on federal contracts be electronically verified.

We will provide you with more detailed information regarding the new rule in the near future. In the meantime, if you have any questions regarding the new rule or other business immigration related issues, please contact Joyce Fleming, [jfleming@fordharrison.com](mailto:jfleming@fordharrison.com), 404-888-3888 or Geetha Nadiminti, [gnadiminti@fordharrison.com](mailto:gnadiminti@fordharrison.com), 404-888-3940. If you have any questions regarding requirements applicable to federal contractors, please contact Karin Verdon, [kverdon@fordharrison.com](mailto:kverdon@fordharrison.com), 303-592-8865, or Karen Tyner, [kytyner@fordharrison.com](mailto:kytyner@fordharrison.com), 864-699-1134.