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Executive Order Requires All Federal Contractors to Use E-Verify

By Aimee Clark Todd

President George W. Bush signed an amendment to Executive Order 12989 on June 6, 2008, that requires all federal contractors to use E-Verify. This action is a continuation of the recent trend at both the federal and state levels to mandate E-Verify enrollment, which was designed as a voluntary program. The full text of the Executive Order is available online.

Contract Requirements

The amendment to the Executive Order requires federal departments and agencies that enter into contracts to include, as a condition of each contract, a provision that the contractor agree to use an electronic employment eligibility verification system designated by the Secretary of Homeland Security (currently E-Verify) to verify the employment eligibility of:

1. all persons hired during the contract term by the contractor to perform employment duties within the United States; and
2. all persons assigned by the contractor to perform work within the United States on the federal contract.

These requirements will become effective once an implementing regulation is published. A Proposed Rule is expected to be published in the Federal Register in the next two weeks. The Rule should clarify at least two major issues identified with the Executive Order:

1. Whether the Executive Branch intends the amended provisions to apply only to new Federal contracts going forward, or whether a policy

will be developed to implement the requirement for all contacts already in existence; and

2. How will the Executive Order, requiring employers to use E-Verify for existing employees assigned to work under a federal contract, be reconciled with the terms of the E-Verify program that specifically instructs employers to use the program only for new hires.

Background on E-Verify

This Executive Order joins many actions in the past year that have been taken to expand and mandate E-Verify enrollment. Eight states now require E-Verify enrollment for certain employers and U.S. Immigration and Customs Enforcement has linked E-Verify enrollment to certain immigration-related employment benefits. In spite of these requirements, U.S. Citizenship and Immigration Services still touts E-Verify as a “voluntary” program.

E-Verify (formerly known as the Basic Pilot/Employment Eligibility Verification Program) is an Internet-based system operated by the Department of Homeland Security (DHS) in partnership with the Social Security Administration (SSA) that allows participating employers to electronically verify the employment eligibility of their newly hired employees in connection with the I-9 process. The federal government takes the position that E-verify is the best means available for determining employment eligibility of new hires and the validity of their Social Security Numbers, although many

outside agencies have questioned the accuracy of the databases used by the program.

Action Items for Employers

As noted above, these requirements will not become effective until regulations are published implementing the provisions of the Executive Order. In the meantime, employers should evaluate their current contracts with federal departments and agencies to determine which locations and employees will be affected by the rule. Employers who enroll in E-Verify must sign an agreement that gives the government broad access to the company's records, including I-9 records. For this reason, we also recommend that employers: (1) audit current I-9's for accuracy and completion; and (2) as needed, train personnel on proper completion, storage, and retention of I-9 forms.

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