

[Alerts and Updates]

E-Verify and No-Match Update: The Obama Administration Speaks

July 13, 2009

On July 8, 2009, U.S. Department of Homeland Security (DHS) Secretary Janet Napolitano announced the Obama administration's support for the E-Verify federal contractor provision, while pledging to rescind the controversial Social Security No-Match regulation. However, the U.S. Senate quickly responded, passing a measure on July 9 designed to block DHS's rescission of the No-Match rule. In other E-Verify news, the U.S. Senate voted 55-43 to provide permanent funding for the program in the DHS FY 2010 Appropriations Bill,¹ and four more states—Georgia, Mississippi, South Carolina and Utah—mandated E-Verify usage for certain state employers on July 1, 2009.

E-Verify for Federal Contractors Set to Begin on September 8, 2009

In putting the full support of the White House behind the September 8, 2009, implementation of E-Verify for federal contractors, Secretary Napolitano called the program "a smart, simple and effective tool that reflects our continued commitment to working with employers to maintain a legal workforce."

In our [June 2, 2009 Alert](#), we reported that implementation of the federal contractor E-Verify requirement had been delayed for a third time, until September 8, 2009, based on an agreement between the parties to an ongoing federal court lawsuit—*Chamber of Commerce of the United States of America v. Napolitano*—that has challenged the rule. This lawsuit continues, and it is unknown at this time how this latest announcement from the White House will affect the proceedings.

Under the final rule, E-Verify program participation will become a federal contract requirement for all new contracts commenced after September 8, 2009. The regulation covers federal contractors, regardless of size, holding a contract with a period of performance longer than 120 days and a value above \$100,000. Subcontractors will be required to participate in E-Verify if they provide services or construction with a value of more than \$3,000. Also included are those contractors who receive American Recovery and Reinvestment Act funds.

Current usage of the program is increasing due to new E-Verify requirements at the state level. In June 2009, U.S. Citizenship and Immigration Services (USCIS) reported more than 130,000 participating employers, and in FY 2009, starting October 1, 2008, more than 5.6 million queries had been run. In FY 2008, there were 6.6 million queries, more than double the 3.27 million queries in FY 2007.

At present, federal contractors should be aware that they are obligated to comply with the E-Verify requirements *only* when they become parties to a federal contract that includes the E-Verify provision. This will not occur before September 8, 2009; and while implementation seems more likely now that the Obama administration has given its support, the ongoing lawsuit may still affect the ultimate fate of the regulation.

No-Match Update

In the July 8 press conference, Secretary Napolitano also announced that DHS will be proposing new regulation to rescind the 2007 No-Match Rule, which was blocked by court order shortly after issuance and has never taken effect. The rule established procedures

that employers could follow if they receive Social Security Administration (SSA) No-Match letters or notices from DHS that call into question work eligibility information provided by employees. These notices most often inform an employer many months or even a year later that an employee's name and Social Security Number provided for a W-2 earnings report do not match SSA records—often due to typographical errors or unreported name changes.

The intended withdrawal of the No-Match regulation may be encouraging news for employers, as the rule contains a complex "safe-harbor provision" that would have required employers to take adverse action against employees who were flagged by SSA and would have held employers liable for mismatches, subjecting them to knowing-hire violations if the procedure outlined in the regulations was not followed exactly. However, on July 9, 2009, the Senate approved an amendment to the DHS appropriations bill, which would forbid the department from using any funds to rescind the rule. If the amendment becomes law, DHS would be prevented from further delaying implementation of the No-Match regulation. The Senate passed the DHS appropriations bill on July 10, 2009, and the bill is now headed to a conference committee for reconciliation of the House and Senate versions.

Senate Shows Support for E-Verify

Also on July 8, 2009, the U.S. Senate approved an amendment offered by Sen. Jeff Sessions (R-Ala.) to the DHS FY 2010 Appropriations Bill. The amendment included provisions to permanently reauthorize E-Verify and to codify the Federal Contractor rule. In order for the program to become permanent, the Senate would have to approve the entire DHS Appropriations Bill and reconcile it with the House version, which had only a two-year extension of E-Verify and no Federal Contractor provisions.

Four More States Implement E-Verify

On July 1, 2009, Georgia, Mississippi, South Carolina and Utah became the latest states to require E-Verify participation for certain state employers.

- **Georgia:** All state contractors and subcontractors must use E-Verify if the contract is for the physical performance of services within Georgia. This is an enlargement of coverage from prior law, under which only state contractors with 100 or more employees were required to participate.
- **Mississippi:** The new law immediately requires all employers with 100 employees or more to participate in E-Verify. The law will expand to include employers with 30 or more employees in July 2010 and all employers in July 2011.
- **South Carolina:** Employers with 100 employees or more must either participate in E-Verify or only hire employees who possess or qualify for a South Carolina driver's license (or other state license with similarly strict requirements). In July 2010, this law will expand to include all employers.
- **Utah:** State contractors and subcontractors must use E-Verify or the Social Security Number Verification Service (SSNVS) if the contract is for the physical performance of services within Utah.

For Further Information

If you have any questions about E-Verify, the federal contractor E-Verify requirement or the ongoing federal court litigation, please contact any of the [attorneys](#) in our [Employment, Labor, Benefits and Immigration Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

Note: 1. Department of Homeland Security Appropriations Act for Fiscal Year 2010, H.R. 2892, 111th Cong. (1st Sess. 2009).