



Legal Alert: Federal Contractor E-Verify Rule Goes Into Effect on September 8, 2009

8/26/2009

This is a reminder that the federal contractor E-Verify rule that amends the Federal Acquisition Regulations (FAR) to require certain federal contractors and subcontractors to enroll in and use the E-Verify system is scheduled to take effect on September 8, 2009.

The rule's implementation has been delayed on four prior occasions (see our June 9, 2009 Legal_Alert discussing the delays). However, the remaining obstacle to implementation of the E-Verify rule – the federal lawsuit initiated by the U.S. Chamber of Commerce challenging the rule – has been overcome as the U.S. District Court issued its ruling on August 25, 2009 and dismissed the lawsuit, clearing the way for implementation of the rule.

What Happened With The Federal Lawsuit Challenging the Rule?

Ruling in favor of the government, the court held, among other things, that Executive Order 13465 and the E-Verify rule do not violate the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which prohibits the Secretary of Homeland Security from requiring any person or entity to use E-Verify. The court noted that even if this provision of IIRIRA applies to the President and FAR Council, the Executive Order and E-Verify rule do not require anyone to use E-Verify since "the decision to be a government contractor is voluntary and no one has the right to be a government contractor." The court also found that the Executive Order and E-Verify rule are consistent with the Procurement Act because the President's explanation for how the Executive Order promotes efficiency and economy in procurement was reasonable and rational. Additionally, the court held that nothing in IIRIRA prohibited the President from requiring federal contractors use E-Verify to verify the employment eligibility of current employees, rejecting the plaintiffs' arguments to the contrary. Although the district court's decision could be appealed, at this point the ruling means that the Obama Administration's plan to implement the E-Verify rule on September 8, 2009 will go forward without additional delay. See our July 9, 2009 Legal Alert discussing the Administration's plan to implement the rule.

Who Is Subject To The Federal Contractor E-Verify Rule?

Beginning September 8, 2009, the requirement to enroll in and use the E-Verify system will apply to federal contractors awarded a qualifying contract. A qualifying contract is a prime federal contract that:

- is awarded on or after the effective date of the E-Verify rule,
- exceeds the minimum acquisition threshold of \$100,000,
- has a performance period in excess of 120 days, and
- contains the E-Verify clause specified by the rule.

Generally, existing federal contracts that a company has been awarded prior to September 8, 2009 will **not** subject a company to the E-Verify requirement. It is the award – after the rule's effective date – of a new federal contract that contains the specified E-Verify clause that will trigger the requirement to use E-Verify. The sole exception being certain indefinite delivery/indefinite quantity (IDIQ) contracts that will last more than more than six months beyond the effective date of the E-Verify rule and that are modified on a bilateral basis to include the E-Verify clause.

The E-Verify requirement also applies to subcontractors who have a subcontract that flows down from a prime federal contract that contains the E-Verify clause, provided the subcontract is for services or for construction with a value of over \$3,000.

Certain types of federal contracts are specifically exempted from coverage, including contracts where all the work is performed outside the United States, or contracts for the acquisition of commercially available off-the-shelf (COTS) items (or minor modifications to a COTS item) and related services.

When Do We Need to Begin Using E-Verify?

Once the E-Verify rule goes into effect, new qualifying federal contracts will contain the specified E-Verify clause and contractors will be subject to the requirement to use E-Verify on all new hires as well as current employees directly working on the federal contract.

Within 30 calendar days from the award of a federal contract or subcontract containing the E-Verify clause, the contractor must enroll in the E-Verify system. For contractors new to the E-Verify system, the contractor then has an additional 90 calendar days to use the E-Verify system to initiate verification queries for employees already on staff who will be working on the contract and to begin using the system to verify all newly hired employees. After this 90-day phase-in period, contractors will be required to initiate verification of all newly hired employees within three business days after their start date.

The rule also provides contractors the option to verify the entire workforce, both new hires and existing employees – including those not assigned to a federal contract. If the contractor elects this "wall-to-wall" option, it must notify the Department of Homeland Security (DHS) through the E-Verify system and must initiate an E-Verify query for each employee in the contractor's entire workforce within 180 days of notifying DHS.

Failure to comply with the E-Verify requirement could result in the suspension or cancellation of a federal contract and/or debarment from future federal contracts.

Employers' Bottom Line

If you are a federal contractor or subcontractor on a federal government project, the requirement to use E-Verify on your workforce may apply to you starting as early as September 8, 2009. Ford & Harrison attorneys can help you determine whether the E-Verify requirement will apply to you and then take the appropriate steps to meet these requirements. If you have any questions regarding this issue or need assistance in updating your policies and procedures, please contact the Ford & Harrison attorney with whom you usually work or the author of this Alert, Charles Roach, a partner in our Minneapolis office at croach@fordharrison.com or 612-486-1631.