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New Rule Would Require Government Contractors to Use E-Verify System

July 2008

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A new proposed rule would require companies receiving new government contracts, subcontracts, or delivery orders to use the U.S. Citizenship and Immigration Services' ("USCIS") E-Verify system to verify that certain employees are eligible to work in the United States. The purported objectives of the proposed rule are to avoid inefficiencies that flow from contracting with employers that use unstable workforces and the costs of disruptions to Federal contract performance that result when unauthorized aliens are found in, and removed from, workforces supporting Federal contracts.

The Federal Acquisition Regulation ("FAR") Councils published the proposed rule on June 12, 2008, implementing Executive Order 13465. The proposed rule would apply to solicitations and contracts issued after the effective date of the final rule and would cover employees in the United States (defined as the 50 States and the District of Columbia, Guam, Puerto Rico and the U.S. Virgin Islands). In addition, agencies would be encouraged to amend existing indefinite-delivery/indefinite-quantity contracts so that the E-Verify requirement would apply to future orders. Contracts or subcontracts either below the micro-purchase threshold or for commercial off-the-shelf items would be exempt.

Under the new proposed rule, contractors and subcontractors would be required to use E-Verify to verify the employment eligibility of current employees in the United States assigned to work on a covered Federal contract within 30 days of the contract award, and all new hires or newly assigned employees within three days. The proposed rule would not apply to any employees hired before November 6, 1986 because these employees are not subject to employment verification under Section 274a of the Immigration and Nationality Act ("INA").

The E-Verify program is a web-based system operated by USCIS in conjunction with the Social Security Administration ("SSA"). The program automatically verifies an individual's employment eligibility, either confirming the employee's eligibility to work in the United States or generating a "tentative non-confirmation" notice for any employee whose eligibility the system cannot verify. An employee may contest a tentative non-confirmation notice within eight workdays.

To use the system, an employer must enter into a Memorandum of Understanding ("MOU") with the Department of Homeland Security ("DHS") and SSA, agreeing to abide by legal hiring procedures and other terms and conditions as well. Under the MOU, employers must agree, *inter alia*, to:

- Comply with Form I-9 procedures and complete, retain, and make available Forms I-9 for inspection;
- Provide employees with tentative non-confirmation notices, which the employees may contest if they choose;
- Not take adverse action against an employee, to include terminating the employee, based upon the employee's employment eligibility status while SSA or DHS are processing verification requests, unless the employer obtains knowledge that the employee is not authorized to work;
- Not discriminate unlawfully against any individual in hiring, firing or recruiting practices because of his or her national origin, or in the case of a protected person (such as a refugee

- or an individual granted asylum), because of his or her citizenship status; and
- Allow DHS and SSA to make periodic visits to review records related to the E-Verify program.

Employers are entitled to rely upon the results of the E-Verify process. Confirmation of an employee's employment eligibility status through E-Verify creates a rebuttable presumption that the employer has complied with Section 274a of the INA. Conversely, continued employment of an employee after receiving a final non-confirmation creates a rebuttable presumption that the employer has violated Section 274a.

The proposed rule is distinct from the current E-Verify program in that it requires employers to use the system to verify the employment eligibility status of certain *existing* employees (i.e., those assigned to work on government contracts), whereas the current program does not permit this. In addition, the proposed rule would require government contractor, and subcontractors to use the system to verify the status of all new hires, not just those assigned to government contracts.

The cost of the proposed rule is estimated at \$107 million in the initial year, and \$550.3 million between 2009 and 2018. The anticipated costs include start-up costs associated with the E-Verify registration, training costs for employees who use the system, the costs of actual entry of verification data, and employee replacement costs. The comment period for the proposed rule ends on August 11, 2008.