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IMMIGRATION PRACTICE
ALERT

Mandatory E-Verify for Federal Contractors Upheld; Set To Take Effect Sept. 8, 2009

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On August 26, 2009, a federal court in Maryland upheld the regulation requiring that federal contractors use E-Verify, the federal government's electronic employment verification program.

The November 2008 final rule published by the U.S. Department of Homeland Security (DHS) implementing President Bush's June 2008 Executive Order requiring all federal contractors and certain subcontractors to use the E-Verify system to verify their employees' authorization to work in the United States has been postponed four times in response to the litigation but will now take effect on September 8, 2009.

A coalition of business groups filed suit in U.S. District Court for the District of Maryland in December 2008 (*Chamber of Commerce of the United States of Am. v. Napolitano*, D. Md., No. 8:08-cv-03444-AW, 8/26/09). The U.S. District Court has now granted the federal government's cross motion for summary judgment, rejecting the chamber's argument that the requirements imposed by the executive order and regulation violate the Illegal Immigration Reform and Immigrant Responsibility Act's (IIRIRA) prohibition against requiring participation in the program.

Consequently, beginning September 8, 2009, all federal contracts awarded and solicitations will incorporate a clause committing all federal contractors with a contract performance period of longer than 120 days and a value exceeding $100,000 to enroll in E-Verify within 30 days of the contract award date. This rule also will apply to subcontractors providing services or construction in excess of $3,000.

E-Verify is an online database jointly administered by DHS and the Social Security Administration (SSA) that enables participating employers to verify the work authorization of newly hired employees by checking the information employees provide on their Form I-9 against both DHS and SSA databases. Although participation in E-Verify is voluntary in principle, certain federal contractors and their subcontractors are now obligated to participate as a condition to performing under their government contracts. Also, certain states now have laws, which have been challenged in some instances, that compel private employers to participate in E-Verify.

Beginning Sept. 8, federal contractors will be obligated to verify the work eligibility of (1) **all new employees** hired during the contract term, *not just employees hired to work on the federal contract*, and (2) **all existing employees assigned to work in the United States on the federal contract** using the E-Verify system.

The business groups involved in the lawsuit were disappointed by the ruling, but House Judiciary Committee ranking member Lamar Smith (R-Texas) said that the court's decision will protect U.S. workers as a "significant step forward to ensure that U.S. citizens and legal immigrant workers are not forced to compete with illegal immigrants for federally funded jobs."

Judge Alexander Williams, Jr. rejected all of the arguments made by the business groups, including arguments that the rule violated IIRIRA by mandating E-Verify use. Under IIRIRA, no person or entity may

be required to participate in a pilot program such as E-Verify. Williams wrote that "the decision to be a government contractor is voluntary" and "no one has a right to be a government contractor."

Though the rule requires federal government contractors to use E-Verify, "potential government contractors have the option not to contract with the government," and therefore no person or group is required to use E-Verify under the rule, Williams wrote.

The plaintiffs also argued that the statutory authority for E-Verify limits its use to employment verification for new hires, and the rule is invalid because it requires government contractors to use E-Verify to reverify the status of current employees working on federal contracts. Williams found that "nothing in IIRIRA explicitly prohibits the executive branch from using E-Verify for current employees" and if Congress intended for it to be illegal to use E-Verify for current employees, then Congress "should have made that clear under IIRIRA."

As part of the process of enrolling in the E-Verify system, federal contractors and subcontractors will have to sign a Memorandum of Understanding (MOU), which sets out the terms of agreement between their companies and DHS. The MOU imposes additional burdens on employers, such as providing for a shorter list of acceptable I-9 documents and tracking tentative nonconfirmations (a "nonconfirmation" is notice from DHS that an employee has not yet been confirmed as authorized to work under the applicable databases). The MOU also requires that participating employers grant the federal government the right to view certain employment records without a court order as well as enter the workplace and question employees with no advance warning.

It is still not clear what legal exposure participating employers will face for terminating employees or not hiring applicants based upon a final nonconfirmation that results from an error in the E-Verify database. Also, employers need to recognize that because the federal government tracks nonconfirmations in the electronic database system, the E-Verify system facilitates the government's enforcement activities, including I-9 audits, worksite enforcement raids and other I-9 and employment-related sanctions investigations.

Federal government contractors are subject to audits of their compliance with federal affirmative action obligations. Pursuant to a governmental work-sharing agreement, when the Office of Federal Contract Compliance Programs audits a company for affirmative action purposes, it also reviews I-9 form compliance. The new Executive Order increases contractor exposure to immigration enforcement actions and debarment.

Federal contractors and subcontractors now have limited time to prepare for the rule's implementation (with appropriate plans for rollout and staffing) or to review and audit current I-9s to confirm present compliance with applicable immigration laws until the court makes its final determination. We recommend that all employers with federal contracts act quickly to determine if the new E-Verify provisions will apply to their companies and establish a strategy for effectuating the E-Verify process throughout their companies.

SOCIAL SECURITY "NO MATCH" REGULATION TO BE RESCINDED

On August 19, 2009, the Department of Homeland Security's Immigration and Customs Enforcement (ICE) published a proposed rule in the *Federal Register* that would rescind the controversial August 2007 "Safe-Harbor Procedures for Employers Who Receive a Mismatch Letter," known as the "Mismatch" or "No-Match" Rule.

The original "No-Match" Rule created strict procedures within required timeframes for employers to follow upon receipt of a "no-match" letter from the SSA or DHS. These letters are sent to employers when employees' Social Security numbers do not match DHS records. Implementation of the rule had been blocked by court order in response to litigation and has never gone into effect.

DHS has stated that the rule is being rescinded because the Department has chosen to focus its enforcement efforts and resources on "increased compliance through improved verification, including participation in E-Verify, ICE Mutual Agreement Between Government and Employers (IMAGE) and other programs."

Following the change in presidential administrations, DHS Secretary Janet Napolitano conducted a review of existing programs and regulations

to determine areas for improvement. That review concluded that rescinding the no-match regulation "will better achieve DHS' regulatory and enforcement goals," according to DHS. DHS acknowledges that "opportunities for employment remain a primary motivation for aliens seeking illegal entry into the United States," but says it is a "more appropriate utilization of DHS resources" to focus on a series of enforcement and compliance efforts rather than pursuing the "no-match" regulation.

In the proposed rule rescinding the no-match regulation, DHS outlined the compliance and enforcement programs intended to be the focus of the department's efforts. DHS has indicated that it plans to focus on expanding E-Verify, which it considers an "essential tool for employers committed to maintaining a legal workforce."

Comments on the proposed rule will be accepted through September 18 and the rule may become final as soon as September 30.

For more information on the topics in this alert or if you require assistance with your company's immigration or employment issues, including IRCA compliance, I-9s, audits, visa processing or comprehensive immigration strategy, please contact the author, Alka Bahal, at 973.994.7800 or abahal@foxrothschild.com or any other member of our Immigration practice or Labor & Employment department.

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