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JANUARY 2009

LABOR & EMPLOYMENT DEPARTMENT/IMMIGRATION PRACTICE

ALERT

E-VERIFY FOR FEDERAL CONTRACTORS POSTPONED UNTIL FEBRUARY 20, 2009

By Alka Bahal and Ian W. Siminoff

On January 8, 2009, the federal government voluntarily agreed to postpone, until **February 20, 2009**, implementation of the Executive Order and related federal procurement law that require federal contractors and certain subcontractors to use E-Verify to verify the work eligibility of new employees as well as those directly involved in the federal contract. The rule was previously set to go into effect on Thursday, January 15, 2009. The postponement means that none of the special obligations for federal contractors outlined in the rule, including the inclusion of the E-Verify clause in contract solicitations or awards, will be implemented before February 20, 2009.

For more information on the E-Verify rule for federal contractors, please see Fox Rothschild's November 2008 *Alert* "Federal Contractors Required to Use E-Verify System Effective January 15, 2009."

The decision to postpone implementation of the final rule is in response to a federal lawsuit filed on December 23, 2008, by the U.S. Chamber of Commerce and other parties (plaintiffs) against the U.S. Department of Homeland Security and the Civilian Agency Acquisition Council alleging, primarily, that the government exceeded its authority by mandating the use of the E-Verify program (formerly called the Pilot Program), because the law expressly prohibits requiring "any person or other entity to participate in a pilot program" (Section 402(a) of the Illegal Immigration and Reform and Immigrant Responsibility Act of 1996 (IIRIRA)).

The plaintiffs also contend in the suit that the E-Verify requirement:

(1) is prohibited by the Federal Property and Administrative Services Act of 1949

(2) exceeds the statutory authority of the E-Verify program

(3) is unconstitutional as outside the executive branch's legislative authority

(4) violates the Regulatory Flexibility Act

(5) was not implemented pursuant to proper procedure because the revised Memorandum of Understanding (MOU) was not published in the Federal Register.

The suit seeks to have President Bush's Executive Order declared illegal and void, and to permanently enjoin its enforcement.

The government asserts that it has not mandated participation in the E-Verify program because employers are not required to be government contractors or subcontractors.

The parties are expected to file expedited briefs with the court arguing why the rule should or should not be allowed to be implemented, and it is possible that the judge will issue a decision prior to the February 20, 2009, implementation date.

In a January 9, 2009, press release, Randy Johnson, Vice President of Labor, Immigration and Employee

Benefits at the U.S. Chamber, stated, "although we hope to resolve the litigation in an expeditious manner, the postponement of the rule will help ensure that the court is not unduly rushed to weigh the serious legal questions in this case."

DHS spokesman Russ Knocke expressed the government's opinion, however, that "the brief pause in implementation" will not change the rule, "which will remain legally final and binding."

Given the current status, we recommend that federal contractors and subcontractors continue to work to finalize arrangements to determine the applicability of the new rule, prepare for its implementation (with appropriate plans for roll-out and staffing), and review and audit current I-9s to confirm present compliance with applicable immigration laws until the court makes its final determination.

Fox Rothschild LLP will continue to monitor the status of the litigation and its affect on the rule closely and will provide updates as soon as they become available.

Fox Rothschild can provide appropriate guidance to employers regarding immigration compliance and related issues. If you have further questions regarding these or other legal issues, please contact:

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