

Who is that worker? (Government Contractors and Forthcoming E-Verify Requirements)

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All employers have various requirements placed upon them when hiring new employees. Companies doing business with the Government have additional requirements for reporting and compliance in the realm of employment law. This last month the President began the process of creating an additional "new hire" requirement for employers that contract with the Federal government.

When any employer hires a new worker, there are a variety of actions that have to occur. Internally, you may have to report the hire to your automobile, worker's compensation, and liability insurance carriers; schedule them for training; arrange for a physical examination; or, perhaps conduct various internal background investigations. Basically, from the government's perspective if you had the new hire fill out a W-4, Employee Withholding Allowance Certificate, you were in fairly good shape...until 1986. Beginning on November 6, 1986, all employers were required to verify the employment eligibility and identity of all employees hired to work in the United States as part of the Immigration Reform and Control Act of 1986. The Immigration Reform and Control Act made all U.S. employers responsible to implement the law; employers were and still are required to complete Employment Eligibility Verification forms (Form I-9) for all employees, including U.S. citizens. But, that wasn't meant to be the last requirement placed upon employers by the Government. During the 1990's employers found they had to report new hires to a centralized state database. These systems were not really designed nor meant to enhance homeland security or prevent illegal immigration. The focus was on the enforcement of child support under the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996.

As a result of a recent Executive Order, there is going to be another reporting requirement for employers who are federal government contractors, as part of the war on terror and to control illegal immigration. It is an on-line system of the Department of Homeland Security – E-Verify. As of June 9, 2008, President George W. Bush has directed all federal departments and agencies to require contractors, as a condition of each future federal contract, to agree to use an electronic system to verify workers' employment eligibility. In response to this Executive Order, DHS Secretary Michael Chertoff designated E-Verify as the system of choice. On June 12, 2008, agencies responsible for supervising and regulating federal contracting began the process of instituting rules to implement this

directive.

DHS tells us on their website that, "**E-Verify** (formerly the Basic Pilot/Employment Eligibility Verification Program) is an online system operated jointly by the Department of Homeland Security and the Social Security Administration (SSA). Participating employers can check the work status of new hires online by comparing information from an employee's I-9 form against SSA and Department of Homeland Security databases. More than 69,000 employers are enrolled in the program, with over 4 million queries run so far in fiscal year 2008. E-Verify is free and voluntary, and is the best means available for determining employment eligibility of new hires and the validity of their Social Security Numbers."

Some of the more interesting aspects of the President's Executive Order and the proposed rule include determining who will be required to comply. The preamble to the proposed rule provides that it will only apply to contractors and subcontractors whose employees are directly engaged in the performance of work under a covered contract. However, the actual proposed FAR language provides that it will apply to all contractor and subcontractor employees assigned to the contract, which could be interpreted more broadly. Unfortunately, the proposed regulation does not contain a definition of either term, although a reasonable interpretation might be that if the labor cost is allocated to a direct labor cost pool for the contract or subcontract, then those employees would fit within the E-Verify requirements.

Other significant provisions of the proposed Rule are:

- Generally, required in all contracts and subcontracts over the micro-purchase threshold of \$3000.
- Not required in contracts limited to the purchase of commercial off the shelf products (COTS) or items that would be COTS but for a minor modification.
- Employers will have 30 days to enroll in E-Verify from date of contract award and must continue to use the system for the length of the contract.
- Will only apply to solicitations made and contracts awarded after the effective date of the final Rule – except for indefinite-delivery/indefinite-quantity contracts that have a period of performance which extends more than 6 months from the Rule's effective date.
- Must verify employment eligibility of not only new hires, but all existing employers that are directly engaged in work on the contract or subcontract.
- Employers who cannot be verified have specific due process protections.
- Employers participating in E-Verify under the new regulations will be shield from liability for immigration violations, under some circumstances.

The proposed rule will not take effect for a few months and may be

changed as a result of the comment and review process. Comments are being accepted by the FAR Secretariat until August 11, 2008. Once the comments are considered, the Rule, in some form will become effective. Still, it may be prudent to begin planning for implementation now.

Prior to the Executive Order, E-Verify was a completely voluntary system at the Federal level, though more and more states have been making it compulsory. It is already compulsory either for all employers or for only employers contracting in the public sector in Arizona, Colorado, Georgia, Mississippi, North Carolina, Oklahoma, Rhode Island, South Carolina and Utah. By executive order of the governor, some Minnesota employers must participate in E-Verify. In Tennessee, the use of E-Verify shields employers from legal liability if they are found to have hired an illegal alien. The actual scope, requirements, effective dates and details of each state's enactment is beyond the scope of this Alert. For more information about your specific compliance requirements, please contact your Holland and Hart lawyer.

Our best prognosis is that the FAR Rule will be adopted with very little change and likely a very broad reach. Federal Government contractors should begin now to consider how to implement the requirements of the proposed Rule, if they are not already subject to the requirement at the State level. Other employers, not engaged in federal contracting, need to know their compliance requirements and ensure that they are fulfilling their required obligations.

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