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Final E-Verify Rule Amends FAR for Federal Contractors

A final rule published November 14 amends the Federal Acquisition Regulation (FAR) and, as of **January 15, 2009**, will require many Federal government contractors to begin using the U.S. Citizenship and Immigration Services' "E-Verify" system to confirm that their employees are lawfully authorized to work in the United States. Under the new rule, covered contractors will be required to use the electronic system to verify the employment eligibility of all new hires during the contract term and to confirm the employment eligibility of all employees (existing or new) who directly perform work under the covered contract.

Under the rule, Federal contracts awarded and solicitations issued after January 15, 2009 with a value of more than \$100,000 and a period of performance longer than 120 days will include a clause requiring contractors to agree to use E-Verify for covered employees. Subcontracts for services or construction with a value of more than \$3,000 that flow from a covered contract must also include the requirement. Contracts for commercially available off the shelf (COTS) items or items that would be COTS but for minor modifications are not covered. Existing indefinite delivery or indefinite quantity contracts with a remaining period of performance extending at least six months beyond January 15 must similarly be amended to require the use of E-Verify.

Formerly referred to as the "Basic Pilot Program," E-Verify is an internet-based system operated by the U.S. Citizenship and Immigration Services, which is part of the Department of Homeland Security (DHS), in partnership with the Social Security Administration (SSA). E-Verify is free to employers and provides an automated link to federal databases to help employers determine the eligibility of new hires and the validity of Social Security numbers once employees have completed a Form I-9 for the employer. The program is currently voluntary, with approximately 92,000 employers participating.

The proposed rule to amend the FAR was issued June 12, 2008 and drew more than 1,600 public comments. Approximately 1,000 of the responses were critical of the proposed rule. As a result, the final rule does include several changes from the proposed rule. Among these changes:

- The final rule requires insertion of the E-Verify clause for prime contracts above the simplified acquisition threshold (\$100,000) instead of the micro-purchase threshold (\$3,000).
- The final rule clarifies that the E-Verify clause does not need to be inserted into prime contracts with performance terms of less than 120 days.
- The final rule modifies the contract clause to clarify that institutions of higher education, state and local governments, and federal Indian tribes only need to use E-Verify to confirm the eligibility of employees assigned to a covered Federal contract.
- The final rule allows Federal contractors to screen all employees through E-Verify, including any existing employees who are not assigned to a covered contract, provided that the contractor notifies DHS and initiates verification of its entire workforce within 180 days of such notice.

Among the many concerns raised during the comment period that have not been addressed in the final rule is the fact that, although the E-Verify program previously prohibited employers from using the system to check the employment eligibility of employees hired before registration with E-Verify, the new rule implements the Executive Order's unprecedented requirement that contractors use E-Verify not only for new hires but also to confirm the employment eligibility of all existing employees who are assigned to work on a covered federal contract.

There is great uncertainty regarding how these requirements will be enforced under President-elect Obama's administration, and whether the rule will face revision, rescission, or court challenge in the near future. For now, however, the final rule has been issued and federal contractors can expect to be required to enroll in the E-Verify program as early as January 15, 2009.

Contractors not enrolled in E-Verify at the time of a contract award will be required to enroll within 30 calendar days of the contract award. Other transitional timing requirements imposed by the final rule include:

- Contractors not enrolled in E-Verify at the time of a contract award must begin using E-Verify to verify the employment eligibility of all new hires within 90 calendar days of enrollment.
- Contractors enrolled in E-Verify at the time of a contract award must immediately begin using E-Verify to verify employment eligibility of all new hires, but only if the contractor has been enrolled for 90 calendar days or more. Contractors enrolled less than 90 calendar days must begin using E-Verify to verify the employment eligibility of new hires within 90 calendar days of enrollment.
- All contractors, regardless of whether they are enrolled in E-Verify at the time of a contract award, must begin using E-Verify to verify the employment eligibility of employees assigned to the contract within 90 calendar days of enrollment or within 30 calendar days of the employee's assignment to the contract, whichever is later.

Among other requirements, employers who enroll in E-Verify must sign an agreement, referred to as a "Memorandum of Understanding," allowing DHS and SSA to periodically visit and review records related to E-Verify and employee work authorization, specifically including the employer's I-9 files. Venable urges federal contractors to take this opportunity to

review their existing I-9 files and to reassess their current employment eligibility verification (I-9) practices to ensure compliance with immigration laws. Our attorneys are experienced in these areas and are available to assist government contractors with E-Verify and in the broader verification compliance process.

Venable's Upcoming Client Webinar on More Big Changes Coming to Labor and Employment Law

There is a broad consensus that major changes are coming to many aspects of labor and employment law in the newly elected Obama administration. Venable attorneys have been actively monitoring recent developments and their likely impact on employers of all sizes and industries. We will share our knowledge with interested employers in a nationwide webinar to be held on **December 16, 2008**. Those interested in attending Venable's webinar should register with Angela Brown at ambrown@Venable.com or call 202.344.4983.

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