VENABLE LLP

government contracts special update

A PUBLICATION OF VENABLE'S GOVERNMENT CONTRACTS AND LABOR AND EMPLOYMENT TEAM

January 2009

AUTHORS

Rebecca Pearson
repearson@Venable.com
202.344.8183

Jeff Chiow
jchiow@Venable.com
202.344.4434

Brian M. Hudson
bmhudson@Venable.com
202.344.8203

Kristine A. Sova
kasova@Venable.com
212.808.5662

Mandatory E-Verify for Federal Contractors on Hold Until February 20, 2009 Pending Court Challenge

Summary: Five industry groups, including the Chamber of Commerce of the United States of America and Associated Builders and Contractors, Inc., have challenged a new rule that amends the Federal Acquisition Regulation (FAR) to require that federal contractors and subcontractors use the U.S. Citizenship and Immigration Services' (USCIS) E-Verify system starting Jan. 15, 2009. In a letter to the DOJ trial counsel, the industry groups agreed to proceed with an expedited hearing in Federal District Court in Maryland. According to the letter, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed that "no federal contract solicitation issued prior to February 20, 2009, and no contract award issued prior to that date will contain the [mandatory E-verify clause]. In addition, employers cannot enroll in the E-Verify program as a 'Federal Contractor' prior to February 20, 2009." The parties expect a ruling on their cross-motions for summary judgment by that date. On January 9, 2009 the judge approved the parties' expedited schedule. A Federal Register notice postponing implementation of the rule was published on January 14, 2009. Federal contracts awarded and solicitations issued after Feb. 20, 2009 will include FAR 52.222–54 requiring government contractors to use E-Verify. If implemented, the new rule will except contracts for commercial off-the-shelf items and related commercial services. The E-Verify clause, FAR 52.222–54, Employment Eligibility Verification, requires covered contractors to ensure that all existing employees directly working on federal contracts and all new hires, regardless of whether they are working directly on federal contracts, are authorized to legally work in the United States. Contractors who are unable to comply may have their Memorandum of Understanding with the Department of Homeland Security terminated, be denied access to the E-Verify System, or be referred to a suspension and debarment official. In *Chamber of Commerce of the United States of America v. Chertoff*, five industry groups have challenged E-Verify as violating the Illegal Immigration Reform and Immigrant Responsibility Act of 1996's ("IIRIRA") "express statutory prohibition against requiring 'any person or other entity to participate in a pilot program' such as E-Verify." Chamber Complaint.

Background: Citing his authority under the Federal Property and Administrative Services Act of 1949 (FPASA), President Bush issued an

Executive Order on June 6, 2008 which amended an earlier Executive Order signed by President Clinton. The amended Order required federal government contractors, as a condition of each contract entered into with the federal departments and agencies, to electronically verify the employment eligibility of all persons assigned to perform work within the United States on federal contracts. The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council published a proposed rule on June 12, 2008 and a Final Rule ("Rule") on November 14, 2008, which implements the President's Order in light of over 1600 comments to the proposed rule. On December 23, 2008, the following industry associations challenged the mandatory nature of E-Verify in Maryland District court: the Chamber of Commerce, Associated Builders and Contractors, Inc, Society for Human, Resource Management, American Council on International Personnel, and American Council on International Personnel.

Summary of New Requirements: The new employment verification requirements are governed by a Memorandum of Understanding (MOU) which all participating contractors must enter into, the terms of which are not negotiable. The Final MOU is available at http://www.uscis.gov/files/nativedocuments/MOU.pdf. Firms may register for the E-Verify Program on-line. Instructions at https://www.vis-dhs.com/employerregistration/.

- **Employers must only run E-verify queries for persons after an offer of employment has been extended.** Pre-screening of applicants is considered a discriminatory hiring practice.

- **E-verify employers must still satisfy their obligation to complete and process an Employment Eligibility Verification Form (Form I-9).** They must, however, demand verification documents with photos—photos are not required for I-9 verification. An E-verify confirmation of employment eligibility provides a rebuttable presumption that the employer has not violated section 274A(a)(1)(A) of the Immigration and Nationality Act (INA). An unsuccessful Everify query results in a "Notice to Employee of Tentative Nonconfirmation." At that point, the worker must indicate whether he or she intends to contest the nonconfirmation. If the worker decides to contest the results, a "Referral Letter" is generated with instructions on how to contest the nonconfirmation. The worker then has eight (8) Federal Government workdays to visit a Social Security Administration (SSA) office or call USCIS (depending on the basis of the discrepancy) to try to resolve the matter.

- **While awaiting final resolution of a contested nonconfirmation, employers may not terminate or otherwise take adverse action against the worker.** If the worker fails to contest the tentative nonconfirmation, or if SSA or USCIS is unable to resolve the discrepancy, the employer will receive a notice of final nonconfirmation, and the worker's employment may be terminated. An employer may choose to retain an employee after final notice of nonconfirmation. But it is subject to a civil penalty between $500 and $1000 if it fails to notify DHS of its decision to continue employment, and if the employee is subsequently found to be an unauthorized alien, the employer is subject to a rebuttable presumption that it has knowingly violated INA section 274A(a).

- **Application:** Starting Feb. 20, 2009, the clause at FAR 52.222–54, Employment Eligibility Verification, must be inserted in all federal government contracts above the simplified acquisition threshold ($100,000), and all related subcontracts greater than $3000. The rule appears to be limited to the contracting entity that signs the contract. The preamble to the Rule states "[w]hoever signs a contract is the contractor. Only the legal entity that signs the contract and is bound by the performance obligations of the contract is covered by this E-Verify term." 73 Fed. Reg. at 67,669 (emphasis added). However, immediately following this statement, the Rule provides that "[i]f ambiguity remains, this issue will have to be handled on a case-by-case basis consistent with traditional FAR principles." *Id*. At this time, DHS does not appear to intend to expand coverage of the E-Verify rule to parent companies.

- **Exceptions.**
    - The new rule does not apply to contracts for:
        1) Commercial Off The Shelf (COTS) items;
        2) items that would be COTS items, but for minor modifications; and
        3) items that would be COTS items if they were not bulk cargo (e.g. mark and count agricultural products).
    - There is also an exemption for commercial services that are part of the purchase of a COTS item (or an item that would be a COTS item, but for minor modifications); and that are performed by the COTS provider if the COTS provider normally performs such services. The Rule does not state whether commercial services that are part of the purchase of items in the third category–those that would be COTS items if they were not bulk cargo–are covered.
    - The requirement is waived for contracts that will be performed outside the United States or which last for less than 120 days.
    - Existing indefinite-delivery/indefinite quantity (IDIQ) contracts should be modified, on a bilateral basis in accordance with FAR 1.108(d)(3) to include the clause for future orders if performance extends at least six months after the final rule effective date and there is "substantial" work left on the contract.

The Final Rule limits applicability to certain entities

- Institutions of higher education, State and local governments, and Federally Recognized Indian Tribes need only verify employees assigned to a covered Federal contract, not new hires.

- The same relaxed requirement applies to sureties performing under a takeover agreement entered into with a Federal agency pursuant to a performance bond.

- Employees with an active security clearance and employees who have completed background investigations under Homeland Security Presidential Directive (HSPD-12) need not be verified.

Federal Lawsuits related to E-Verify

Recent litigation highlights flaws and potential concerns over E-Verify, but at present, do not affect the mandatory nature of the rule for those contractors who have contracts which include FAR 52.222–54.

- **Illinois.** Because of concerns over reported flaws in E-Verify, including accuracy and time it took to get results, Illinois passed Section 12(a) of the Illinois Right to Privacy in the Workplace Act, which prohibits employers from voluntarily enrolling in E-Verify until DHS can conduct 99 percent of such investigations and return the final results within three days. DHS sued Illinois in federal court and the case is still pending. Illinois has agreed that it will not penalize employers simply for participating in E-Verify, at least until the lawsuit is finished.

- **Maryland.** Five industry groups levied the following challenges, among others which are now being addressed in an expedited proceeding in the Federal District Court by agreement of the parties:

    - The mandatory nature of the new rule violates IIRIRA's express prohibition on requiring entities to comply with pilot programs and therefore are expressly prohibited by IIRIRA.
    - The rule exceeds the statutory authority for the E-Verify program, which plaintiffs contend is limited "to employment verification of new hires in connection with the Form I-9 process."
    - Defendants Failed to Publish the Revised Memorandum of Understanding in the Federal Register.

Discussion and Practitioner Tips:

- **Understand and comply with obligations.** This new mandatory requirement imposes affirmative obligations and financial burden on employers who choose to do business with the federal government that may extend well beyond their federal business. Before proposing on a federal government contract or agreeing to a subcontract which flows down the requirements of E-Verify, employers should ensure that they are willing to accept the obligations and burdens that compliance requires.

- **Understand and comply with necessary safeguards.** Employers, especially those who experience greater workforce turn-over, will have to ensure not only that they verify all covered persons, but that they have adequate safeguards for the personal information that they are obligated to store and share with USCIS inspectors. Additionally, employers must give workers notice of their rights. And they must understand and ensure that hiring personnel understand the prohibitions against discriminatory hiring, pre-screening and taking adverse action prior to receipt of a final nonconfirmation notice.

- **Review corporate structure.** For now, DHS is not seeking to extend the rule beyond the contracting entity. Organizations who will have difficulty complying may wish to review their corporate structure to determine whether a different corporate structure might limit application of the rule.

This requirement implicates Government Contracts, Labor & Employment and Information Privacy Law and possibly other substantive areas. Venable has skilled practitioners in each of these areas and can provide excellent depth of analysis for employers facing this new mandate.

For more information on E-verify, the DHS website www.dhs.gov/e-verify provides a Frequently Asked Questions document and links to other relevant resources including the Final Rule.

Venable office locations

BALTIMORE, MD
750 E. PRATT STREET
NINTH FLOOR
BALTIMORE, MD 21202
t 410.244.7400
f 410.244.7742

LOS ANGELES, CA
2049 CENTURY PARK EAST
SUITE 2100
LOS ANGELES, CA 90067
t 310.229.9900
f 310.229.9901

NEW YORK, NY
ROCKEFELLER CENTER
1270 AVENUE OF THE AMERICAS
TWENTY-FIFTH FLOOR
NEW YORK, NY 10020
t 212.307.5500
f 212.307.5598

ROCKVILLE, MD
ONE CHURCH STREET
FIFTH FLOOR
ROCKVILLE, MD 20850
t 301.217.5600
f 301.217.5617

TOWSON, MD
210 ALLEGHENY AVENUE
TOWSON, MD 21204
t 410.494.6200
f 410.821.0147

TYSONS CORNER, VA
8010 TOWERS CRESCENT DRIVE
SUITE 300
VIENNA, VA 22182
t 703.760.1600
f 703.821.8949

WASHINGTON, DC
575 SEVENTH STREET NW
WASHINGTON, DC 20004
t 202.344.4000
f 202.344.8300