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Mandatory E-Verify for Federal Contractors Appears Likely; Senate Blocks DHS Plan to Rescind Contested "No-Match" Rule

On July 8, 2009, the Department of Homeland Security (DHS) announced that beginning September 8, 2009, federal government contractors must use E-Verify, an electronic Internet-based system, to verify the employment eligibility of its employees. E-Verify is free to all 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.

Despite the DHS's announcement, the regulations requiring federal contractors to use the E-Verify system still face legal challenges in federal court. A coalition of business groups filed suit against an earlier DHS proposed start date for the E-Verify mandate. The litigation, pending in Maryland federal court, had been stayed while awaiting DHS's announcement, and is now expected to move forward in light of the new announcement.

Meanwhile, Congressional action, although not yet final, may ultimately render the lawsuit moot. Soon after the DHS's announcement on July 8, the Senate approved an amendment (S.A. 1371) to the 2010 homeland security appropriations bill (H.R. 2892) that would make the E-Verify program, which is set to expire this fall, permanent and mandate that federal contractors use the system.

In the same July 8 press release, DHS announced its intention to rescind the controversial "no-match" rule that was issued in 2007, but never implemented because it is blocked by court order. The "no-match" rule obligates employers to follow certain steps to resolve discrepancies between employer and government records regarding employee social security numbers and employment authorization documents, or face liability. On July 9, however, the Senate approved by unanimous consent an amendment (S.A. 1375) to the 2010 homeland security appropriations bill that would effectively block DHS from rescinding the "no-match" rule. The amendment prohibits funds in the bill from being used to amend the "no-match" rule.

Implications for Employers

Because the Senate amendments modify the version of the homeland security appropriations bill approved by the House of Representatives, any differences will need to be ironed out before any changes become law.

While the fate of E-Verify for federal contractors and the "no-match" rule remains uncertain, these developments coincide with a series of recent moves that put more responsibility on employers for hiring legal workers.

On July 1, 2009, for example, U.S. Immigration and Customs Enforcement (ICE) launched what it termed a "bold, new initiative" by issuing notices to 652 businesses nationwide alerting them that ICE will be inspecting their hiring records to determine whether or not they are complying with employment eligibility verification (I-9) laws and regulations. By comparison, in 2008, ICE issued 503 similar notices for the entire year. ICE later announced on July 7, 2009 that it had reached a \$40,000 fine settlement with a major employer as a result of violations uncovered during one of its I-9 audits.

With immigration compliance at the forefront, Venable urges all employers to review their existing I-9 files and to reassess their current I-9 practices to ensure compliance with immigration laws and regulations. Venable attorneys stand ready to assist our clients with I-9 and E-Verify compliance.

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