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A proposed regulation has been published clarifying the Executive Order mandating that all federal contractors enroll in E-Verify. Among other terms, the proposed rule adopts an expansive definition of federal contractor.

Proposed Regulation Addresses Mandatory Use of E-Verify for Federal Contractors

By David C. Whitlock

On June 6, 2008, President Bush signed an Executive Order that will require all federal contractors to use the E-Verify system to confirm the lawful status of all workers assigned to work on federal projects in the United States. See Littler's June 2008 ASAP *Executive Order Requires All Federal Contractors to Use E-Verify*. On June 12, the government issued a proposed regulation changing the Federal Acquisition Regulation to implement the terms of the Executive Order. The proposed rule will be open for comments until August 11. After the responsible federal agencies analyze that commentary, a final rule will be published in the Federal Register, and it will likely take effect 30 days later.

The proposed regulation adopts a much more expansive definition of *federal contractor* than that used for affirmative action compliance under Executive Order 11246. In the proposed regulation, federal contractor is defined as any entity providing the federal government at least \$3000 worth of goods or services in the United States. The proposed rule exempts contracts to provide commercially available, off-the-shelf products that do not require significant modification.

Unlike existing E-Verify requirements, which do not permit an employer to verify the legal status of current employees, the proposed rule requires contractors to verify all new hires (regardless of whether they work on the federal contract or not), as well as all employees assigned now or in the future to work on the federal contract. As a result, federal contractors will need to identify and verify those current employees who actually perform work connected to a federal contract or project. While this may be fairly simple in some cases, e.g., construction workers building a federal facility, it may be far less

clear in other cases, e.g., legal, accounting, HR, and other administrative support personnel working for the same construction company.

The E-Verify requirement will apply to existing indefinite term/indefinite quantity contracts if there is substantial work to be performed or goods to be provided within six months following the effective date of the final rule. All new contracts and renewals will contain language requiring contractors to use E-Verify. The requirements will "flow down" to subcontractors providing \$3000 worth of services or construction in the United States.

Once the final rule is effective, federal contractors not already enrolled in E-Verify will have 30 days to enroll and another 30 days to verify the status of existing workers assigned to the federal contract. If the federal contractor is already enrolled in E-Verify when the rule becomes final, that contractor will have 30 days to verify its existing workers assigned to the contract. After the initial implementation period, all new hires must be verified within three business days from the date that they are hired or the date that they are assigned to work on the contract.

Contractors should note that the use of E-Verify does not relieve employers from the requirement that they complete I-9 forms properly. Use of E-Verify does require that any identity documents (List A or List B I-9 documents) contain a photograph. In addition, once enrolled in E-Verify, an employer must report to DHS if it continues to employ an individual after receipt of a final nonconfirmation notice stating that the individual is not employment authorized. Continuing to employ such a person exposes the employer to a fine ranging from \$500 to

\$1000. Of course, this fine is in addition to the civil monetary penalty or criminal sanction that can be levied against an employer for knowingly employing an illegal alien.

Employers that enroll in E-Verify are already subject to heightened scrutiny. This will likely be the case for the foreseeable future. The government's rationale for imposing this rule upon federal contractors stems from the belief that contractors employing illegal workers provide a less stable and secure workforce for government projects. Since enforcement efforts are already targeted at what are perceived to be critical infrastructure employers, it is likely that federal contractors will receive even more scrutiny going forward. As a result, since most enforcement efforts begin with an I-9 audit, employers would be well served to review their I-9 compliance and do everything possible to improve it.

Employers should contact experienced legal counsel with any questions about the proposed regulation or for assistance in drafting a comment before the August 11 due date.

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