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The federal government has agreed to delay the effective date of the E-Verify federal contractor regulation announced in November until February 20, 2009. The delay raises the question of whether President-elect Obama will add it to his rescission list once he takes office.

Effective Date of E-Verify Federal Contractor Regulation Postponed Until February 20, 2009

By Jorge R. Lopez, Joshua S. Roffman and Lisa A. Cottle

On January 9, 2009, Angelo I. Amador, Director of Immigration Policy for the U.S. Chamber of Commerce, announced an accord reached with the federal government to delay the effective date of the E-Verify federal contractor regulation until February 20, 2009 – adding 36 days to the original deadline of January 15, 2009.¹ Employers everywhere are breathing a collective sigh of temporary relief, and some are wondering whether this deadline extension will put the E-Verify Executive Order on President-Elect Obama's rescission list, as the effective date has now been moved to after his Inauguration.

Amador's January 9 announcement of the temporary suspension came on the heels of a federal lawsuit filed on December 23, 2008 by the U.S. Chamber of Commerce and other parties ("the plaintiffs") against the U.S. Department of Homeland Security and the Civilian Agency Acquisition Council. The crux of the Chamber's lawsuit is that the E-Verify regulations violate an express statutory prohibition against mandating "any person or other entity to participate in a pilot program" such as E-Verify, as set forth in Section 402(a) of the Illegal Immigration and Reform and Immigrant Responsibility Act of 1996 (IIRIRA). The government agencies maintain that their rule-making does not run afoul of section 402(a). Moreover, the agencies contend that they have not mandated E-Verify participation because employers are not required to be government contractors or subcontractors.

The plaintiffs also contend that the E-Verify requirement:

- is prohibited by the Federal Property and Administrative Services Act of 1949;
- exceeds the statutory authority of the E-Verify program;
- is unconstitutional as outside the executive branch's legislative authority;
- violates the Regulatory Flexibility Act; and
- was not implemented pursuant to proper procedure because the revised Memorandum of Understanding (MOU) was not published in the Federal Register.

The U.S. Chamber of Commerce and its co-plaintiffs have asked the court to declare President Bush's Executive Order illegal and void and to enjoin permanently the defendants from enforcing the E-Verify regulation.

Since its publication, employers have been scrambling to understand the implication of the E-Verify regulation for their businesses and to prepare their management teams and resources for the impending January 15 deadline. To this end, the Chamber's January 9 announcement provides some relief in addition to giving employers hope that compliance with the E-Verify regulation may be further postponed, if not ultimately altogether unnecessary. This notwithstanding, employers should:

- continue taking steps to inventory all existing and proposed federal contracts to determine if they may become subject to the E-Verify requirement if imposed;
- organize staff and resources required for compliance;
- account for all existing employees' Forms I-9; and
- audit I-9s if needed.

Littler Mendelson, P.C. will continue to keep you informed regarding any developments regarding this and related matters.

For information about E-Verify's requirements for federal contractors, please refer to Littler's November 2008 ASAP, *E-Verify Rule for Federal Contractors Published*.

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¹ As of the publishing of this ASAP, the docket for the U.S. District Court for the District of Maryland did not contain any information regarding the accord.