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Client Bulletin #399

FEDERAL CONTRACTORS NOW REQUIRED TO USE E-VERIFY

Final Regulations Issued Today

By Cara Crotty, Columbia, SC & Penni Bradshaw, Winston-Salem, NC

In June of this year, President Bush amended Executive Order 12989, directing federal contractors to use the E-Verify system to ensure that all new hires and employees working on government projects are eligible to work in the United States. Today, the federal government issued the ***Final Rules*** implementing the E-Verify requirement.

The regulations apply to federal contracts awarded and solicitations issued after January 15, 2009, worth at least \$100,000 with a period of performance longer than 120 days. Subcontracts worth \$3,000 or more flowing from such prime contracts are also covered. Contracts for commercially available off-the-shelf items and for work performed outside the United States are not covered by these requirements.

Until now, the E-Verify system has been voluntary and used solely for verifying employment eligibility of new hires. Under the new rule, companies with covered contracts will need to use E-Verify not only for all new hires, but also to verify the employment eligibility of their employees who work directly on federal contracts. The latter are defined as employees hired after November 6, 1986, who are directly performing work in the United States under a contract that includes the clause committing the contractor to use E-Verify. It does not include employees normally performing support work, such as indirect or overhead functions, and who do not perform any substantial duties under the contract.

Companies awarded covered contracts will be required to enroll in E-Verify within 30 days of the contract award date. Companies will then have 90 days to begin using E-Verify for employees already on staff who are assigned to work on the federal contracts. After this 90-day phase-in period, employers must verify all new hires within three business days of employment. Employers may verify new hires after an offer of employment has been accepted (but before employment starts), but are not permitted to use the system to verify the employment eligibility of applicants.

Contractors have the option of verifying their entire workforce (new hires and all employees, even if not assigned to a federal contract), but they must notify the Department of Homeland Security through the "Maintain Company" page on the E-Verify system, and must initiate a query for each employee in the workforce within 180 days of notification. (*NOTE: We cannot provide a hyperlink to the "Maintain Company" page, because it requires the employer to log in.*)

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If a contractor is already using E-Verify, it is required to update its company information on the “Maintain Company” page to reflect that it is now a government contractor user. The DHS website offers more *information* on registering a company to use the E-Verify system.

Although use of the federal E-Verify system remains voluntary for all but covered federal contractors, a growing number of states have begun requiring their employers to use the system. Use of the I-9 Form without further verification does not ensure that new hires actually have work authorization, as there are an estimated 12 million undocumented persons in the United States, many of whom use fraudulent documents to obtain employment. There is, however, widespread acknowledgement that the E-Verify system is helping employers determine when individuals are unauthorized.

For additional information regarding these final regulations or assistance in compliance, please contact a member of Constangy's Immigration or Affirmative Action Practice Groups, or the Constangy attorney of your choice.

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