

PUBLICATION

E-Verify Required for All Federal Contractors - Part of the Plan

June 16, 2008

The Bush Administration has taken three steps to begin to make good on a promise, made almost a year ago, to require all federal contractors to use E-Verify, part of a larger Administration plan to enhance immigration worksite enforcement within existing law. Federal contractors probably have several months to get ready to implement E-Verify, but the time has come to start.

Three Steps Just Taken

Step 1, Executive Order: On June 6, 2008, President Bush signed an executive order amending executive order 12989, requiring all federal agencies and departments to require federal contractors to use "an electronic employment eligibility verification system designated by the Secretary of Homeland Security to verify the employment eligibility" of the following classes of employees:

- All persons hired during the contract term by the contractor to perform employment duties within the United States; and
- All persons assigned by the contractor to perform work within the United States on the Federal contract.

The Executive Order directs relevant agencies to implement the new policy by amending the Federal Acquisition Regulations (FAR), the formal rules by which the federal government contracts for purchases of goods and services.

Step 2, DHS Designation: On June 9, 2008, DHS Secretary Michael Chertoff officially designated E-Verify as the electronic employment eligibility verification system that all federal contractors must use as required by Executive Order 12989. E-Verify is operated by U.S. Citizenship and Immigration Services (USCIS) and, with I-9 procedures, is the subject of discussion and links on a [special page](#) of Baker Donelson's Immigration Group.

Step 3, FAR amendment regulation: According to the Department of Homeland security press release on June 9, 2008, "Agencies responsible for federal acquisition regulations (FAR) will send a Notice of Proposed Rulemaking (NPRM) to the Federal Register today soliciting public comment on proposed changes to these regulations. Comments will be accepted for 60 days." It appears that the Executive Order's requirement will not take practical effect until the FAR is amended. That regulatory process is likely to take at least 90 days, and probably longer given the complexity of the requirement and the many comments that the public is likely to submit in the rulemaking process.

The regulation will need to clarify such thorny questions as the following:

- Whether all hiring facilities of a federal contractor must participate, or just the ones serving the federal government.
- Whether the requirement will cover existing contracts or just new ones.
- Whether subsidiary and affiliated companies or subcontractors must participate. An expansive approach to this question could quickly swallow most of the U.S. economy into E-Verify participation. Most large companies are federal government contractors, and the largest companies employ a

surprisingly high percentage of the U.S. workforce. The sudden mandatory inclusion of such a large number of workers into E-Verify will intensify the ongoing debate about whether the program can handle the volume. The biggest concern has been the staffing of the Social Security Administration, which must resolve the "mismatches" in the SSA database that reportedly affect more than 4% of all authorized U.S. workers.

- Whether covered employers must also use the Social Security Number Verification System to perform a more limited verification of existing workers, since E-Verify rules do not allow employers to verify workers hired before a company starts E-Verify participation for a particular location.

Part of a Plan

Requiring federal contractors to use E-Verify is part of the Administration's 10-point strategy for worksite enforcement within its August 10, 2007 Fact Sheet for "Improving Border Security and Immigration Within Existing Law." This was the one step in the strategy that had not been officially commenced. The published worksite enforcement strategy consists the following, word-for-word in bold font, followed by our comments for each:

- **"No-Match" Regulation That Will Help Employers Ensure Their Workers Are Legal And Help The Government Identify And Crack Down On Employers Who Knowingly Hire Illegal Workers.** Combined with the inclusion of a letter from ICE in every SSA "no-match" letter to employers warning them not to ignore the letter, the regulation was designed to describe the employers' procedures to obtain a "safe harbor" from a presumption of "constructive knowledge" if a the subject of the SSA letter turned out to be unauthorized. A federal court in California has enjoined the regulation for now, but DHS has issued a new proposed regulation to cure the court's concerns and is simultaneously appealing the court decision.
- **Publish A Regulation That Will Reduce The Number Of Documents That Employers Must Accept To Confirm The Identity And Work Eligibility Of Their Employees.** This happened in November 2007 and included the new I-9 form and Employer Handbook mentioned in a prior Baker Donelson Alert.
- **Raise The Civil Fines Imposed On Employers Who Knowingly Hire Illegal Immigrants By Approximately 25 Percent.** DHS published that regulation in March 2008. It is primarily a symbolic change, since ICE is focusing on criminal prosecution, not civil fines.
- **Continue To Expand Criminal Investigations Against Employers Who Knowingly Hire Large Numbers Of Illegal Aliens.** DHS has indeed done this and continues to publicize significant actions.
- **Commence a Rulemaking Process To Require All Federal Contractors And Vendors To Use E-Verify.** Check that one off.
- **Help States Make Greater Use Of E-Verify.** USCIS has pursued marketing programs for E-Verify in states that have begun to require it of all employers, such as Arizona and Mississippi and soon to be South Carolina. Many other states require state government contractors to use E-Verify, and now surely more will join in.
- **Bolster E-Verify By Expanding The Data Sources It Can Check.** This is meant to counter the complaints that E-Verify generates unnecessary "false negative" results, sending employees scrambling to correct errors in government databases and employers to track each worker's efforts to completion. USCIS announced, the day before congressional hearings on this issue a few months ago, that it had at least significantly squared naturalization records between DHS and SSA databases and had moved to a real-time database for newly entered temporary workers that previously had caused confusion. USCIS could be more transparent about other database issues and solutions afoot, but they are surely trying.
- **Seek Voluntary State Partners Willing To Share Their Department Of Motor Vehicles Photos And Records With E-Verify.** DHS has not yet announced any progress on this effort to take advantage of the REAL ID Act's plan to convert state ID systems into a de facto biometric national

identity database. The desired functionality can be seen in the photo tool by which E-Verify projects to an employer's computer screen the photo image from which the DHS permanent resident or employment authorization card presented by the worker was manufactured. The lack of progress probably has more to do with slow progress in state implementation of REAL ID than with lack of resolve by DHS.

Other aspects of the larger strategy include border security, interior enforcement, streamlining existing guestworker programs, improving existing immigration, and assimilation. The Administration has been equally determined to accomplish the goals set out for those areas. The Administration said what it would do, and it has been checking the list. The over-arching plan has been to demonstrate the previously-lacking will and ability to enforce immigration laws effectively while continuing to seek more comprehensive legislative reform, including more legal paths by which foreign nationals can obtain lawful status to do work that Americans have not wanted to do. For many legislators, this show of enforcement has been a precondition of any larger reform, and drying up use of illegal workers ostensibly will call attention to the need for legal workers. The questions remain whether vocal anti-immigration groups and the legislators they influence will recognize these changes as sufficient, and whether the need for more legal foreign workers will be sufficiently exposed, particularly as economic difficulties from credit crunches and fuel costs may mask the economic effects of tighter immigration enforcement. Employers are asking: "How much pain before gain?"

How We Can Help

Baker Donelson's Immigration Group regularly counsels employers on I-9 compliance. We perform private audits of I-9 documents, prepare compliance programs, and train managers and workers in implementing those programs. We evaluate particular questionable documents and situations. We help employers decide whether and how to create or store I-9 forms electronically, to use Social Security Administration's Number Verification System, or to participate in the Department of Homeland Security's "E-Verify" program. We defend sanctions actions by ICE for paperwork and "knowingly hire" violations of I-9 rules. We work with our strong Litigation Department to bring and defend claims against competitors based on employment of unauthorized aliens. We advise and defend employers and managers in the increasingly common criminal investigations and proceedings relating to employment of aliens. We coordinate our Team's services closely with our firm's well-respected Labor and Employment Law Group and with our Firm's White Collar Crime Group. We provide advice and coordinate with U.S. and foreign preparers concerning U.S. taxation of international companies doing business in the U.S., and concerning the U.S. taxation of international workers placed in the U.S. and abroad.