

Immigration Compliance Alert

E-Verify Requirement Back on Schedule for Federal Contractors/Subcontractors, Effective September 8, 2009

The U.S. District Court recently issued a decision clearing the way for new regulations to go into effect on September 8 that will affect many federal contractors and subcontractors. Unless exempt, all prime federal contracts awarded and solicitations issued after September 8 must include a clause mandating the use of "E-Verify" for all employees hired during the contract period as well as for all existing employees assigned to perform work under the contract. The same clause also will be required in subcontractors' contracts valued at over \$3,000 for services or for construction. E-Verify is an electronic employment eligibility verification system operated by the U.S. Department of Homeland Security ("DHS"). E-Verify allows employers to electronically confirm the biographical and immigration data of their employees by utilizing DHS and Social Security Administration ("SSA") databases.

Exemptions from this new federal contractor rule exist for (1) contracts of fewer than 120 days in duration, (2) contracts for commercial off-the-shelf ("COTS") products, (3) prime contracts valued at less than \$100,000 and (4) contracts for services performed outside of the United States. Some existing "indefinite delivery/indefinite quantity" ("IDIQ") contracts will be subject to modification to include the E-Verify requirement. Different obligations apply if the employer is an institution of higher education, a state or local government or in other limited circumstances.

Employers awarded a federal contract that includes the E-Verify clause will be required to enroll in E-Verify within 30 days of the contract award date and must verify new employees and employees directly working on federal contracts

within 90 days thereafter. Employers who have already been enrolled in E-Verify for more than 90 days are required to continue to verify newly hired employees within three business days of their start date, but have 90 days from the effective award date to begin using E-Verify for each employee already on staff who is or will be performing work on a covered federal contract. Federal contractors required to use E-Verify will also have the option of reverifying the work authorization of all employees, which is not currently permitted. In the event that an employer elects to reverify all employees, the employer must notify DHS and must initiate verification of the entire workforce within 180 days of its notice to DHS.

To use E-Verify, an employer must enter into a Memorandum of Understanding with DHS and SSA. After enrollment, an employer must enter each employee's identity and employment eligibility information into the online government system. If the E-Verify system is unable to confirm an employee's status, the employer will receive a "tentative nonconfirmation" notice and must give the employee eight days to settle the discrepancy with DHS or SSA. During this time, an employee may continue working. In the event that the discrepancy cannot be resolved or the employee chooses to not contest the finding, a final nonconfirmation will be issued and the employee may be terminated. An employer must advise DHS if it elects to continue to employ the employee despite the final nonconfirmation, and a rebuttable presumption is created that the employer is knowingly employing an unauthorized employee. The Federal Acquisition Regulations provide federal officials with the authority to terminate a federal

contract or to recommend suspension or debarment proceedings for companies that knowingly hire undocumented workers or do not comply with E-Verify requirements.

We strongly recommend that employers conduct an internal audit of their I-9 records to resolve any issues before they are required to reverify current employees who will be assigned to federal contracts. This will help ensure that the employer maintains accurate I-9 data before submitting this information to the federal government.

In the event that you believe your organization may be subject to these new regulations, please contact your Vedder Price attorney to assist you in determining whether you will be required to register for E-Verify and to assist you in auditing your I-9 records, enrolling in E-Verify, executing the required Memorandum of Understanding with DHS and SSA and training your HR professionals.

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