

In This Issue:

November 2008

On November 14, the Department of Defense, General Services Administration and NASA published a final rule requiring some federal contractors to use E-Verify. The final rule differs in several respects from the proposed rule that was the subject of prior Littler ASAPs. For example, the threshold for coverage is now \$100,000. Several other provisions are now more employer friendly.

E-Verify Rule for Federal Contractors Published

By Jorge R. Lopez, David C. Whitlock, Alissa A. Horvitz, Joshua S. Roffman and Aimee Clark Todd

On November 14, 2008, the Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) published a final rule requiring certain federal government contractors to use the E-Verify system to confirm their employees' eligibility to work in the United States. The rule will be effective January 15, 2009. The final rule implements Executive Order 12989, as amended by President George W. Bush on June 6, 2008.

What Is E-Verify?

E-Verify (formerly known as the Basic Pilot/Employment Eligibility Verification Program) is an Internet-based system operated by the Department of Homeland Security (DHS), in partnership with the Social Security Administration (SSA), that allows participating employers to verify the employment eligibility of their newly hired employees in connection with the I-9 process. The federal government takes the position that E-Verify is the best means available for determining employment eligibility of new hires and the validity of their Social Security Numbers, although many outside these agencies have questioned the accuracy of the databases used by the program.

When Will the New Rule Take Effect?

Federal contracts awarded and solicitations issued after January 15, 2009, will include a clause committing the federal government contractor to using E-Verify, based on the time lines described below. Federal agencies must amend existing indefinite-delivery/indefinite-quantity contracts on a bilateral basis to include the clause for future orders if the remaining period of performance extends at least six months after the effective date of the rule. Affected contractors must enroll in E-Verify as a federal contractor, or if they are already enrolled, they must update their company profile as a federal contractor. Once the contract ends and if the company no longer has any qualifying contracts, then the company should update its company profile in E-Verify to reflect that it is no longer a federal contractor.

What Has Changed from the Proposed Rule?

The rule includes several changes from the proposed version based on the large number of comments received from interested parties. In particular, the following provisions represent significant improvements in the rule:

- The time frames for enrollment and verification in E-Verify have been extended.
 - Employers who are enrolling in E-Verify for the first time must still enroll in E-Verify within 30 days of the contract award, but they now have 90 days from enrollment to begin using the system for new hires, whether or not those employees are assigned to work on the federal contract.
 - Employers who have already been enrolled in E-Verify for 90 days or more must initiate verification of all new hires, whether or not these employees are assigned to the contract, within three business days after the date of hire.
 - Employers who are already enrolled in E-Verify, but for less than 90 days, will have 90 days from the date of enrollment as a federal contractor to initiate the verification of new hires.
 - All employers must initiate verification of each employee assigned to the federal contract within 90 calendar days after date of enrollment or within 30 calendar days of the employee's assignment to the contract, whichever date is later.
- The final rule clarifies that support personnel engaged in indirect or overhead functions who do not perform substantial duties applicable to an individual contract are excluded from the definition of an "employee assigned to the contract."
- The rule allows employers to elect to use E-Verify for all employees hired after November 6, 1986, rather than only for new hires and employees assigned to a federal contract. Any employer exercising this option must initiate the verification of this portion of its workforce within 180 days of enrollment, or if the employer is already enrolled, within 180 days of giving notice to E-Verify Operations of this election. This option may be attractive to employers who cannot easily discern which employees are assigned to government contracts and which employees are not.
- The threshold has been raised so the rule applies to prime federal contracts with a value above \$100,000 (the simplified acquisition threshold). However, the threshold for subcontractors remains the same (subcontracts for services or construction with a value above \$3,000).
- The rule does not apply to contracts with performance terms of less than 120 days.
- Heads of Contracting Activity may waive E-Verify requirements after awarding a contract.

In addition, the following exemptions have been added to the rule:

- The following entities are required to verify only employees assigned to a covered federal contract:
 - Institutions of higher education;
 - State and local governments and federally recognized Indian tribes; and
 - Sureties performing under a takeover agreement entered into with a federal agency pursuant to a performance bond.
- The following types of employees are exempt from verification requirements:
 - Those who hold an active security clearance of confidential, secret or top-secret; and
 - Those for whom background investigations have been completed and credentials issued pursuant to the Homeland Security Presidential Directive (HSPD)-12.

The exemption of contracts for commercially available, off-the-shelf ("COTS") products being offered to the government with only minor

modifications from the form in which they are sold in the marketplace is specifically expanded to include food and agricultural products sold as bulk cargo.

Continued I-9 Compliance Is Required

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. Enrollment in E-Verify will not exempt employers from a worksite enforcement actions by DHS.

Employers 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 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 final regulation before the January 15, 2009, effective date.

.....
Jorge R. Lopez is a Shareholder in Littler Mendelson’s Miami office. David C. Whitlock is a Shareholder Aimee Clark Todd is Of Counsel in Littler’s Atlanta office. Alissa A. Horvitz is a Shareholder and Joshua S. Roffman is Of Counsel in Littler Mendelson’s Washington, D.C office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Lopez at jlopez@littler.com, Mr. Whitlock at dwhitlock@littler.com, Ms. Horvitz at ahorvitz@littler.com, Mr. Roffman at jroffman@littler.com, or Ms. Todd at atodd@littler.com.