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E-Verify Will Soon be Required for Federal Contractors

Major changes are on the way for federal contractors, who will soon be required to use the Department of Homeland Security's (DHS) E-Verify system to electronically verify the employment eligibility of many of their employees. Although Congress is in the process of evaluating the integrity and future of the [E-Verify Program](#) as it considers reauthorizing the program, the Administration pushed on with its enforcement agenda.

On Friday, June 6, President Bush issued an executive order that will require all federal contractors to use the E-Verify employment verification system once they enter into a contract with an Executive Department or Agency. Also, on June 9, DHS Secretary Chertoff announced that the Office of Management and Budget (OMB) had completed review of a rulemaking that will amend the Federal Acquisition Regulations (FAR) to impose the same requirement on all federal contractors. While it is not unusual for federal contractors to be held to different or higher standards than other U.S. employers, this is a major development and will have significant effects on federal contractors. This [GT Alert](#) discusses some of the issues raised by the executive order. A future *Alert* will discuss the new rule once it is published.

This executive order modifies executive order 12989, which was issued by President Clinton on February 13, 1996. The previous order required federal contractors to comply with the provisions of the Immigration and Nationality Act (INA) that forbid the employment of individuals who are not authorized to work in the U.S.

The key provisions of the new executive order are as follows:

"Executive departments and agencies that enter into contracts shall require, as a condition of each contract, that the contractor agree to use an electronic employment eligibility verification system designated by the Secretary of Homeland Security to verify the employment eligibility of: (i) all persons hired during the contract term by the contractor to perform employment duties within the United States; and (ii) all persons assigned by the contractor to perform work within the United States on the federal contract."

This means that there are two sets of employees for whom a federal contractor will have to verify employment eligibility. First, all employees hired by the contractor to work in the U.S. during the life of the contract. This means all new employees hired by the contracting entity, regardless of where they will work, or whether they will do any work on the contract, are included. The second group is all employees performing work on the federal contract, regardless of when they were hired. This means not only new employees, but pre-existing employees who will perform work under the contract. It is



not known how DHS will implement this provision, as the E-Verify program rules currently allow use of the system *only* for new hires. The executive order directs DHS to “administer, maintain, and modify” the designated system as appropriate, so it seems likely that the E-Verify program rules will have to be changed as a result of this order. This mandated re-verification of a current workforce creates a set of complex problems for the DHS’ U.S. Citizenship and Immigration Service (USCIS), the agency responsible for administering the E-Verify program. Will a separate Memorandum of Understanding and set of rules need to be quickly developed for federal contractors in order to comply with this new provision? Abuse and misuse of the program is already of great concern to many critics of E-Verify. Will the requirement of re-verifying current employees intensify such discrimination claims? The USCIS is working quickly to post a set of Frequently Asked Questions to their website in an effort to clarify these and many other questions on the minds of employers.

Applicability to Existing Contracts

The order applies to Departments and Agencies that “enter into contracts.” It is thus likely that the order will only apply to new contracts entered into after the order takes effect and not to contracts already entered into. Federal procurement and contracting officials may be encouraged to seek modifications to existing contracts rather than enter into new contracts for federal projects. If this option is pursued, both parties would still embark on bargaining to agree to modifications. Depending on the extent of the modifications, any attempt by one party to unilaterally impose new conditions (i.e. E-Verify requirements) on a contract would likely raise significant contract law issues as well.

In that light, the requirement to use E-Verify raises interesting legal issues on several levels beyond contractual obligations and negotiations. The Congressional Authorization for the E-Verify program is contained in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). It was IIRIRA, and its subsequent extensions, that gave the authority to create what was then known as the Basic Pilot Program and later became E-Verify. Section 402 of IIRIRA states that entities “may elect to participate” in the Program. It goes on to forbid mandatory requirement, stating that “Except as specifically provided...the Attorney General may not require any person or other entity to participate in a pilot program.” Certain immigration violators and federal government entities are specifically listed in IIRIRA as the entities that can be required to participate in the program that is now E-Verify. It remains to be seen whether a court will find that requiring federal contractors to use E-Verify on the basis of voluntary contractual agreements violates these provisions.

Who is a Contractor?

The existing executive order uses the definition of contractor found in the Federal Acquisition Regulations (FAR) at subpart 9.4. The FAR uses a very broad definition of this term. Under the FAR, “contractor” means any individual or other legal entity that:

1. Directly or indirectly (*e.g.*, through an affiliate), submits offers for or is awarded, or reasonably may be expected to submit offers for or be awarded, a government contract, including a contract for carriage under government or commercial bills of lading, or a subcontract under a government contract; or
2. Conducts business, or reasonably may be expected to conduct business, with the government as an agent or representative of another contractor.

The broad definition of the term “contractor” in the FAR is extremely troubling. While the previous executive order in effect restated current law that the employment authorization provisions of the INA must



be complied with, this new executive order imposes a much greater requirement. Thus the use of the term "may be expected to submit offers" or "may reasonably be expected to conduct business" is disconcerting. Defining the scope of which entities and sub-entities of a party entering into a contractual relationship must comply with the new requirement will be a major issue. Currently, a general contractor's task of ensuring I-9 compliance alone amongst its direct sub-contractors under the Immigration and Reform and Control Act of 1986 (IRCA) is daunting, so the additional of new layers of responsibility with such broad language is also troublesome.

It will be interesting to review the new regulation in comparison to the executive order and determine how the regulation will define the scope of who is a contractor for purposes of mandating the use of E-verify.

Applies Only to Executive Branch

The President may only direct the Executive branch through issuance of an executive order. While the Executive is by far the largest source of government contracts, the order does not apply to the federal courts (Judicial Branch) or to Congress (Legislative Branch). The scope of federal contracts with the Executive branch and its agencies is extremely broad and encompasses obvious employers such as national security and defense contractors working with DHS but also cleaning companies in Executive branch facilities, suppliers of office equipment and computers if pursuant to a contract, and even food workers in government cafeterias. The executive order also does not limit itself to contracts of a certain size, so even the smallest government contractor will be affected by this rule. The FAR regulation will speak to all federal contractors regardless of whether those contracts are with the Executive or another branch.

"A large part of our success in enforcing the nation's immigration laws hinges on equipping employers with the tools to determine quickly and effectively if a worker is legal or illegal," said Homeland Security Secretary Michael Chertoff.

Penalties for Noncompliance

Aside from the obvious consequence of termination of a contract the executive order does not specify any penalties for failing to comply with the requirement created once a contract is executed. However, executive order 12989 already contains debarment provisions for contracting employers who do not comply with the requirements of the INA. It is unclear how those debarment provisions will apply, as they are explicitly written to refer to the provisions of the INA, and the INA does not mandate use of an electronic verification system. The new executive order gives authority to the agencies responsible for the Federal Acquisition Regulations to issue regulations to implement the debarment authority to the extent necessary under the order. In light of this, it seems likely that the intent of the order is that at some future time there will be debarment consequences for failure to comply.

Readers should note that, similar to some state executive orders, this order does not name E-Verify as the required medium for electronic verification. The order requires that the Secretary of DHS "designate" the electronic verification system, and in fact, DHS so designated the E-Verify system on June 9.



What Comes Next?

DHS, along with the Agencies responsible for the Federal Acquisition Regulations, will have to iron out the details of how this requirement will be implemented. Standard contractual language will also have to be developed. Until this happens, federal contractors will not see this requirement in the contracts they bid for or enter into immediately. They can expect new language mandating the use of E-Verify to appear quickly.

In light of the upcoming elections it will be interesting to see how quickly these changes will be effectuated. As noted above, a regulation to impose similar requirements on federal contractors has been under review at the OMB since January 17, 2008, and was cleared on June 9. This Rule will almost certainly have a comment period in which the public can submit its reaction to the rule, followed by publication of an interim rule with an effective date thirty to sixty days after publication. It will be interesting to study the proposed rule and this order to determine whether there is significant overlap between them or whether they in fact impose conflicting requirements. It is unlikely that the reverification of current employees for federal contractors required by the order will be implemented until after the regulation is published in final form. We have been monitoring the progress of this Proposed Rule and will continue to do so.

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Greenberg Traurig's Business Immigration and Compliance Group has extensive experience in advising multinational corporations on a variety of employment related issues, particularly I-9 employment eligibility verification matters and minimization of exposure and liabilities. With former ICE and DHS team members on board, GT develops immigration related compliance strategies and programs, and performs internal I-9 compliance reviews. GT has successfully defended businesses involving large-scale government raids and audits. GT attorneys provide counsel on a variety of I-9 issues including penalties for failure to act in accordance with government regulations, anti-discrimination laws and employers' responsibilities upon receiving "No-Match" letters.



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