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E-Verify Required For Certain Federal Contractors

Pursuant to a recently published final rule, certain federal contractors and subcontractors will be required to enroll in and participate in E-Verify starting February 20, 2009. E-Verify is a controversial internet-based program administered by the Department of Homeland Security ("DHS") in participation with the Social Security Administration ("SSA"). The system allows employers to electronically verify the eligibility of their employees to work in the United States.

Federal Contracts Subject To The New Regulation

Effective February 20, 2009, a clause will be included in most federal contracts requiring contractors and subcontractors to use E-Verify to confirm the employment eligibility of new employees hired during the term of the contract and existing employees performing services directly under the contract in the United States. Federal contracts exempt from the E-Verify requirement include the following:

- Contracts valued at \$100,000 or less;
- Contracts with performance terms of less than 120 days;
- Contracts for commercially available off-the-shelf items or items that would be commercially available off-the-shelf items but for minor modifications;
- Contracts where no work will be performed in the United States, Guam, Puerto Rico or the U.S. Virgin Islands; or
- Subcontracts valued at \$3,000 or less for services or construction.

Existing indefinite-delivery and indefinite-quantity contracts with a remaining performance period of six months or longer will be modified to include the E-Verify clause for orders after February 20, 2009.

Enrolling In And Participating In E-Verify

Contractors and subcontractors participating in E-Verify for the first time will have 30 calendar days to enroll in the program once a federal contract is awarded and 90 calendar days from the date of enrollment to begin electronically verifying employees through E-Verify. Employers already participating in the E-Verify program at the time a contract is awarded will have 30 calendar days to verify employees newly assigned to a federal contract. Once enrolled in E-Verify for more than 90 days, employers must use the program to confirm the employment eligibility of newly hired employees within 3 business days of the date of hire.

The enrollment process for E-Verify requires an employer to register and sign a Memorandum of Understanding ("MOU") with DHS agreeing to, among other things, abide by legal hiring practices and waive significant rights employers currently have with respect to the inspection of Form I-9 records. The MOU provides DHS and SSA the authority to visit employers and inspect records without the notice requirements employers otherwise are entitled to receive prior to government inspections. The MOU remains in effect indefinitely after termination of a federal contract unless the employer formally withdraws from E-Verify.

The E-Verify rule applicable to federal contractors greatly expands the use of E-Verify. To date, E-Verify has been a voluntary program limited to verifying the employment of new hires and has expressly prohibited the re-verification of employment authorization of existing employees. The federal contractor rule now specifically requires most contractors to re-verify the employment authorization of existing employees performing services directly under a federal contract and allows employers the option of verifying the employment eligibility of all existing employees hired after November 6, 1986.

Employers can learn more about the E-Verify program and enrollment process at <https://www.vis-dhs.com/EmployerRegistration/StartPage.aspx?JS=YES>. The E-Verify MOU is available for viewing at <http://www.uscis.gov/files/natedocuments/MOU.pdf>.

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