

CLIENT ALERT: Electronic Employee Verification and Revised Form I-9 Deadlines Delayed

President Obama's administration has delayed the implementation of both the E-Verify deadline and the required use of the revised Form I-9. While the E-Verify deadline applies to government contractors, the Form I-9 revisions will apply to all employers.

I. E-Verify Deadline for Government Contractors Delayed to May 21, 2009

The effective date of the final rule requiring federal government contractors to use "E-Verify," the electronic verification system designated by the Secretary of Homeland Security to verify the employment eligibility has been delayed until May 21, 2009. The program would apply to all new hires and existing employees assigned to perform work on federal contracts. All employers, including federal contractors, may choose to voluntarily enroll in E-Verify at any time without waiting for the effective date.

Electronic Employment Eligibility Verification

E-Verify is an Internet-based system operated jointly by the Department of Homeland Security ("DHS") and Social Security Administration ("SSA") that allows employers to verify the employment eligibility of their employees. Using information provided in an employee's I-9 form, E-Verify checks this information electronically against records contained in DHS and SSA databases.

Employers who receive non-confirmation of an applicant or employee's employment eligibility must take specified steps mandated under E-Verify to resolve the worker's status. Employers who hire or employ individuals not authorized to work in the United States face civil and criminal penalties.

E-Verify enrollment is free and voluntary for all employers, with limited exceptions. Some federal government contractors may be ordered to participate.

Previous Executive Order Requires Federal Contractors to Use E-Verify

On June 6, 2008, former President George W. Bush amended Executive Order 12989, making E-Verify participation mandatory for federal government contractors. The Executive Order directs all federal departments and agencies to require, as a condition of each federal contract, to agree to use an electronic employment eligibility verification system to verify the employment of all new hires and all existing personnel assigned by the contractor to perform work within the United States on the federal contract. The Obama administration extended the deadline to May 21, 2009, although it has not officially taken a position on the executive order.

Under the proposed new rule, employers would be required to enroll in E-Verify if and when they are awarded a federal contract or subcontract that requires participation in E-Verify as a term of the contract. The rule applies to prime federal contracts that last more than 120 days and are valued

above \$100,000. For subcontracts, the rule extends E-Verify requirements for services or construction with a value over \$3,000.

Usage of E-Verify also applies to indefinite-delivery/indefinite-quantity contracts if the remaining period of performance extends at least six months after the final rule effective date, and the amount of work or number of orders expected under the remaining performance is substantial.

Types of Federal Contracts Exempted

The rule exempts:

- Contracts that include only commercially available off the shelf items and related services;
- Contracts of less than the simplified acquisition threshold of \$100,000;
- Contracts of less than 120 days; and
- Contracts where all work is performed outside the United States.

Implementation of E-Verify for Covered Federal Contractors

Once an employer is awarded a covered contract or subcontract, the employer is required to enroll in the E-Verify program within 30 calendar days of the contract or subcontract award date. The employer has 90 days from the enrollment date to initiate verification queries of new hires and existing employees who are assigned to a federal contract. New hires must be verified within 3 business days after their start date.

Employers that have already enrolled in E-Verify and are later awarded a covered federal contract after the rule's effective date must update the company profile on the E-Verify system after the contract award. Once an employer is designated as a federal contractor, all E-Verify users will need to take a brief federal contract tutorial that explains the new policies that apply to federal contractors.

Once a covered contract has expired, an employer may terminate its participation in E-Verify.

Entities with Exceptions to E-Verify

Most federal contractors will be required to use E-Verify for all new employees, regardless whether the employees are assigned to a federal contract. Entities such as higher learning institutions, state and local governments, governments of federally recognized Indian tribes and sureties performing under a takeover agreement with a federal agency need only use E-Verify for employees assigned to a covered federal contract.

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Impact of E-Verify

The use of E-Verify is controversial. Employers considering implementing E-Verify voluntarily should consult with their employment attorney to discuss the possible implications of this government program. Enrollment in E-Verify brings with it additional aspects of government oversight into the workforce and should be considered carefully.

II. Effective Date for Using Revised Form I-9 Delayed Until April 3, 2009

On January 30, 2009, the United States Citizenship and Immigration Services ("USCIS") announced that it delayed the effective date for using the revised Form I-9. The revised Form I-9 will be required beginning on April 3, 2009. Employers who use the new form prior to April 3, 2009 could be subject to civil penalties. Prior to April 3, 2009, employers must use the Form I-9 with the following marking in the lower right hand corner: "Rev. 06/05/07."

Employers must complete a Form I-9 for all newly hired employees to verify their identity and authorization to work legally within the United States. The revised Form I-9 addresses the types of acceptable identity and employment authorization documents employees may present. It is anticipated that the USCIS (under President Obama) will use the delay to review the new form and employment verification requirements, which had been proposed under President Bush.

Both the proposed, revised Form I-9 and updates on its implementation are available from the USCIS website at www.uscis.gov.

It is anticipated that the administration will continue to review these regulations and I-9 form. You should consult with your attorney for the most current information.

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