OUR PRACTICE

Certain Federal Government Contractors Must Use E-Verify

The U.S. agencies responsible for setting the general rules for federal government contracts have implemented in regulations an Executive Order requiring federal contractors to use the E-Verify system in addition to completing Form I-9. Employers need to determine whether they are federal contractors or subcontractors who will have contracts containing the "FAR E-Verify Clause" beginning January 15, 2009, whether to enroll in E-Verify now or wait until required by contract, and how to put necessary procedures and training in place by the time of enrollment.

Essential Requirements

Each new prime federal contract for at least $100,000 and 120 days performance period awarded or amended after January 15, 2009, and each indefinite contract with more than 6 months of performance remaining after January 15, 2009, other than certain contracts related to "commercial off the shelf" (COTS) items and certain agricultural products shipped as bulk cargo, must contain a requirement that the contractor will do the following:

- enroll with E-Verify within 30 days of contract award,
- use E-Verify
  - for any new hire within 90 days of E-Verify enrollment as a federal contractor and
  - for any existing worker performing any (even short-term or intermittent) substantial duties applicable to the contract (other than support work, such as general company administration or indirect or overhead functions) within 30 days of assignment to the contract (or 90 days after E-Verify enrollment, whichever is later), and
- impose the same requirements in any subcontracts for services (other than COTS-related services [not bulk cargo]) and construction in the U.S. that has a value of more than $3,000 and will be performed over at least 120 days. This requirement flows down to every tier of subcontract for such services or construction. The potential implications of this flow down on the broader economy are huge. It does not appear that parent, subsidiary and affiliated companies must participate unless they have their own federal contracts or are a subcontractor to the related entity.

Options

Just because a contract or subcontract involves the Federal Government does not mean that the FAR E-Verify Clause is or should be included in the contract. Contractors should consult their upstream contractor or the government contracting officer for clarification if necessary.

For reasons that are increasingly unclear, DHS generally prohibits employers from using E-Verify for existing employees; that is, once the employer enrolls in E-Verify, the employer may and must query E-Verify about each new employee from that time on. An employer who has or expects to have federal contracts may go ahead and enroll in E-Verify now or anytime, but it appears the employer will not be able to note itself as a covered federal contractor in its E-Verify "company profile" (through the "Maintain Company" page) and thereby to begin verifying existing employees until it actually becomes party to a contract or subcontract containing the federal government E-Verify clause after January 15, 2009. This is the only basis allowing an employer to use E-Verify for existing employees as opposed to new hires following E-Verify enrollment.

In response to some employers' concerns about the difficulty of keeping track of which workers are associated with covered contracts, the rule now allows any federal contractor to elect, in its "Maintain Company" page in the E-Verify system, to verify all existing employees within 180 days of enrollment or election of this option. Only employers with a federal contract or subcontract containing the E-Verify clause may exercise this option.

The following types of employers who complained heavily about their problems with compliance have been given the option not to verify all new hires but instead to verify only new hires "assigned to" covered federal contracts:

- An institution of higher education;
- A State or local government or the government of a Federally recognized Indian tribe; or
- A surety performing under a takeover agreement entered into with a Federal agency pursuant to a performance bond.

Such an entity make this designation on its company profile in E-Verify when it designates itself as a federal contractor.

When an employer indicates to E-Verify that it is a federal contractor, all E-Verify "users" at the employer must take a federal contractor tutorial that explains the new policies and features that are unique to federal contracts.

If all federal contracts and subcontracts of an employer containing the E-Verify clause come to an end, the employer must either request termination from E-Verify or update its company profile through the "Maintain Company" page to reflect it is no longer a federal contractor, which will mean that the employer no longer can run any existing employees through E-Verify.

Other Exceptions

Naturally, the obligation only applies to workers in the U.S., including 50 States, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands. In keeping with existing I-9 rules, no contractor should use E-Verify for any worker hired before Nov. 6, 1986 (when I-9 rules were first imposed). No contractor is required to use E-Verify for workers whom it has already verified, who have active confidential, secret, or top secret level security clearance, or who have been issued HSPD-12 credentials. The head of a contracting agency may waive the requirement.

Compliance with E-Verify Rules

The increasing requirements by federal and state governments and private purchasers that an employer use E-Verify raise the stakes for compliance with the rules of E-Verify embodied in the "Memorandum of Understanding" an employer must agree to in order to access E-Verify. Under the new federal acquisition rules, an employer denied access to E-Verify by DHS or SSA must be referred for possible suspension or debarment from federal contracts.

Types of violations of E-Verify rules that might lead to access denial include failure to query the system for all required workers, use of E-Verify procedures for pre-employment screening of job applicants, failure to afford workers the procedures to resolve tentative non-confirmations, failure to safeguard and limit its use of E-Verify data, or non-cooperation with DHS audits or interviews about the employer's E-Verify compliance, or use of E-Verify for any purpose not authorized in the MOU.

To date, DHS has made very little if any use of its right to deny access, and the rules and procedures for such denial are not clear or tested. The more mandatory E-Verify use becomes, however, the more E-Verify

procedural compliance becomes critical, and employers may need to spend more resources on careful training and systems to ensure compliance.

How We Can Help

Baker Donelson's Immigration Group regularly counsels employers on I-9 compliance. We perform private audits of I-9 documents, prepare compliance programs, and train managers and workers in implementing those programs. We evaluate particular questionable documents and situations. We help employers decide whether and how to create or store I-9 forms electronically, to use Social Security Administration's Number Verification System, or to participate in the Department of Homeland Security's E-Verify program. We defend sanctions actions by ICE for "paperwork" and "knowingly hire" violations of I-9 rules. We work with our strong Litigation Department to bring and defend claims against competitors based on employment of unauthorized aliens. We advise and defend claims against competitors based on employment of unauthorized aliens. We advise and defend employers and managers in the increasingly common criminal investigations and proceedings relating to employment of aliens. We coordinate our Team's services closely with our firm's well-respected Labor and Employment Law Group and with our firm's White Collar Crime Group. We provide advice and coordinate with U.S. and foreign preparers concerning U.S. taxation of international companies doing business in the U.S., and concerning the U.S. taxation of international workers placed in the U.S. and abroad.