

“What keeps you up at night?”

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Federal government delays implementation of rule requiring federal contractors to use E-Verify until September 8, 2009

By Matthew L. Salm

The federal government recently announced that it will delay the implementation of the final rule requiring federal contractors to use the E-Verify employment verification system until September 8, 2009. This marks the fourth postponement since the final rule was first published in the Federal Register on November 14, 2008.

In June 2008, President Bush signed an amendment to Executive Order 12989 requiring federal contractors to use E-Verify to confirm the employment eligibility of all new employees hired during a contract term and all existing employees assigned to work on the federal contract. This new requirement would apply to all federal contractors with contracts in excess of \$100,000 and subcontractors with projects greater than \$3,000.

The mandatory use of E-Verify by federal contractors was slated to take effect January 15, 2009, but a lawsuit was filed in the United States District Court for the District of Maryland by the U.S. Chamber of Commerce and four co-plaintiffs challenging the amendment to Executive Order 12989. An agreement between the plaintiffs in this suit and the federal government moved the implementation date to February 20, 2009. Two subsequent postponements pushed the applicability date back to June 30, 2009. In a motion recently filed in the pending lawsuit, the government announced that it will further postpone the applicability date of the final rule until September 8, 2009. According to the filing, this fourth delay will allow the Obama administration additional time to review the challenged policy.

E-Verify is a free, Internet-based employment verification system operated by the Department of Homeland Security (“DHS”) in conjunction with the Social Security Administration (“SSA”). The system allows employers to search and compare the information provided by an employee on the Form I-9 against more than 480 million records in DHS and SSA databases to confirm that the employee is in fact eligible to work in the United States. Results are generally returned within seconds and it is estimated that over 122,000 employers currently use the E-Verify

system. According to DHS statistics, 94.2% of E-Verify queries are automatically verified as eligible to work in the United States.

Supporters perceive the employment verification system as a useful tool to enforce immigration laws. On the other hand, critics argue that E-Verify is inaccurate, time consuming and poses an undue burden on employers. While the E-Verify program was set to expire on March 6, 2009, the federal budget signed by President Obama on March 4, 2009 extended the program through the end of September 2009. In light of the criticism surrounding this program and pending litigation, there is much speculation about the future of the E-Verify system.

Saul Ewing will continue to track these changes and provide updates of all pertinent developments.

This Alert was written by Matthew L. Salm, an Associate in the firm's Labor, Employment and Employee Benefits Practice Group. Matthew can be reached at 410.332.8603 or msalm@saul.com. This publication has been prepared by the Labor, Employment and Employee Benefits Practice Group for information purposes only.

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