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# Immigration Law

## Alert

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## Federal Contractors Will Soon Be Required To Use E-Verify To Confirm Employees' Work Authorization

By Isabel R. Machado, Esq.

On June 9, 2008, President George W. Bush signed amended Executive Order 12989 to require government contractors, as a condition of each future federal contract, to utilize an electronic employment verification system to confirm the work authorization of employees hired during the term of the contract and all employees working on federal contracts. Upon the signing of the Executive Order, the Department of Homeland Security immediately designated E-Verify as the electronic employment eligibility verification system that contractors must use to comply with the directive.

In accordance with the Immigration Reform and Control Act of 1986 (IRCA), employers must verify the identity and employment eligibility of all persons they hire. It is unlawful for employers to knowingly hire or continue to employ a person who is not authorized to work in the United States. Employers are required to complete and maintain an I-9 form for each employee. Form I-9 requires employees to provide employers with documentation establishing both identity and eligibility to work in the United States. For government contractors, the use of E-Verify expands this I-9 obligation to further verify the legal status of its employees.

E-Verify is operated by the U.S. Citizenship and Immigration Service in partnership with the Social Security Administration. It is a free Internet-based system that purportedly allows employers to immediately confirm the legal status of its new hires. Federal departments and agencies have been using E-Verify to check the status of the federal workforce. Other employers have used E-Verify on a voluntary basis. E-Verify electronically compares information entered on Form I-9 with records contained in the government's database to verify the identity and employment eligibility of employees. Employers are not currently permitted to go back and verify existing employees' work authorization. However, if the regulations proposed by the Department of Homeland Security on June 12, 2008, are made final, federal contractors may be required to use E-Verify for existing employees, in addition (*cont'd* ➔)

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to new hires.

If E-Verify does not confirm authorization for lawful employment, the employer must promptly provide the employee with written notice of the non-authorization. The employee must choose whether or not to challenge the tentative nonconfirmation. If the employee challenges the nonconfirmation, the employee may continue to work but must take specific steps to correct the mismatch with the Social Security Administration and / or the Department of Homeland Security. The Department of Homeland Security claims that 99.5% of qualified employees are automatically cleared by E-Verify.

Although the amendment to Executive Order 12989 did not specifically address subcontractors, the proposed regulations issued by the Department of Homeland Security impose such obligations on certain subcontractors. Subcontractors who perform commercial or noncommercial services and / or construction in excess of \$3,000 in the United States will also be required to utilize E-Verify to confirm work authorization, if the rule becomes final.

The Department of Homeland Security announced that by requiring government contractors to use E-Verify, it ensures "...the federal government only does business with companies that agree to verify the legality of their new hires and further, that the specific employees tapped to perform contract services in the United States for the federal government are authorized to work in this country."

The Department of Homeland Security issued proposed regulations with respect to the implementation of this amendment to Executive Order 12989 on June 12, 2008. Public comment on the proposed rule will be accepted for 60 days and the final regulations may materially differ from the proposed rule. Until the rule becomes final, participating in E-Verify remains voluntary.



*The material in this Immigration Alert is for information purposes only and is not intended as legal advice. If you have any questions concerning this Alert, please contact Isabel R. Machado (imachado@lindabury.com). For biographical information on our attorneys, see our web site at www.lindabury.com.*



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