CLIENT ALERT

New Executive Order and Proposed Rule Require Government Contractors to Use "E-Verify" System

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On June 6, 2008, President Bush issued an amendment to Executive Order 12989 (EO 12989), requiring federal contractors to use the electronic "E-Verify" system to confirm the employment eligibility of certain of their employees and new hires. In a remarkable demonstration of coordination, on June 12 the Federal Acquisition Regulation Council (FAR Council) issued a proposed rule that would, once finalized, implement the newly-announced amendments. These actions dramatically expand use of the E-Verify system, participation in which has been strictly voluntary to-date, and represent the latest, most aggressive, step in the Administration's effort to combat illegal immigrants in the workforce.

The E-Verify system is an on-line system that prompts employers to enter information provided by an employee on his/her I-9 Form. The system is designed to provide, within three to five seconds, a verification that a match has been found in the Social Security Administration (SSA) or the Department of Homeland Security's (DHS's) databases or a notification that there was no match. E-Verify is run by the U.S. Citizenship and Immigration Services (USCIS) in partnership with the SSA. Under the program, if there is no match, the employer receives a "nonconfirmation" notice and is required to provide the employee with a written notice of that fact. The employee is then required to indicate on the notice whether he or she wishes to contest the nonconfirmation and, if he or she wishes to contest, the employer issues a second notice to the employee and the employee has eight days to visit an SSA office or call the USCIS to resolve the discrepancy. If the employee contests the nonconfirmation, the employer is prohibited from terminating or taking other adverse action against the employee while the final resolution is pending.

Use of E-Verify has been controversial, drawing fire from immigration advocacy groups and other entities critical of inaccuracies in the system. The State of Illinois, for example, recently enacted a law prohibiting employers from using E-Verify, claiming that E-Verify is not sufficiently accurate and is prone to error, in violation of workplace privacy laws. DHS is challenging that law, and Illinois has agreed not to enforce the prohibition against E-Verify during the course of DHS's lawsuit. Similarly, a number of immigration advocacy groups also claim that E-Verify is too inaccurate and riddled with errors to serve as a tool to identify unauthorized workers.

Under the amendments to EO 12989, Federal departments and agencies must now require -- as a condition of a contract -- that the contractor agree to verify electronically the employment eligibility of: (i) new hires hired during the term of the contract and (ii) any existing employees "assigned" to perform work on the contract. While many of the details surrounding this new requirement, including whether the obligations extend to subcontractors, were left unanswered by the amendments, the June 12 proposed rule issued by the FAR Council clarifies at least some of the requirements.

Under the proposed rule, federal government contractors would have 30 days after award of a new contract to enroll in the E-Verify system and to verify employment eligibility of employees assigned to the new contract. After this initial start-up phase, all newly hired employees (regardless of whether they will work on the contract) and any existing employee (except those hired

before November 6, 1986) who "directly perform[s] work" on the contract would have to be verified within three days. Excepted from the amendments and the requirements of the proposed rule are (1) contracts for "commercially available off-the-shelf" (COTS) items; and (2) employees who perform work on the contract outside of the United States. The proposed rule would also require contractors to flow these requirements down to subcontractors with subcontracts over$3,000 "for services or for construction." Finally, the proposed rule would permit the head of a contracting activity to waive the clause in exceptional circumstances.

All comments on the proposed rule should be submitted to the FAR Secretariat by August 11, 2008.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Kris D. Meade
Partner – Washington, D.C.
Phone: +1 202.624.2854
Email: kmeade@crowell.com

Rebecca L. Springer
Partner – Washington, D.C.
Phone: +1 202.624.2569
Email: rspringer@crowell.com