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## **ILW.COM Seminar - Back to School III Advising Colleges and Universities on Immigration Issues Amendments to E-Verify – At a Glance**

- I. Proposed rule to Amend Acquisition Regulation to Require Contractors to Use E-Verify, published in Federal Register June 12, 2008 (73 FR 33374). Now at OMB; initially expected to be effective 2009, but rumored to be effective as early as November 1, 2008
- II. Application of limitation on Federal contractors traces to the Federal Property and Administrative Services Act of 1949 which allowed prescription of policies and directives for the purpose of providing the federal government with an “economical and efficient” procurement system.
- III. E-Verify began as a voluntary Basic Pilot out of IIRAIRA in 1996.
- IV. All departments of the Executive Branch were required to participate in E-Verify as part of their hiring process per Executive Order (EO) 12989 (61 FR 6091, February 15, 1996) on the theory that unauthorized aliens make a contractor’s workforce less stable and reliable than those who don’t employ unauthorized aliens. An EO of June 6, 2008 (Economy and Efficiency in Government Procurement Through Compliance with Certain Immigration and Nationality Act Provisions and Use of an Electronic Employment Eligibility Verification System), required Federal agencies to use E-Verify for this reason and to “avoid the cost of disruptions to Federal contract performance when unauthorized aliens must be removed from Federal contractor workforce.” (73 FR 33375)
- V. Highlights of the rule: Mandatory E-Verify would apply to commercial and noncommercial contracts for goods or services (except those under \$3,000 for commercially available off the shelf (COTS) items or those which would be COTS items but for minor modifications. Would not apply to contractors at embassies, consulates or military bases in foreign countries. Would apply to those employees “assigned to” and “directly engaged in” performing work under a covered contract. QUERY: What do “assigned to” and “directly engaged in” really mean? The proposed rule would require an employer to:
  - A. Enroll in E-Verify within 30 calendar days of a contract being awarded and use it within 30 calendar days thereafter to verify

employability of their employees assigned to the contract at the time of enrollment

- B. If the contractor is already enrolled in E-Verify, use E-Verify within 30 calendar days of contract award to verify employment eligibility of their employees assigned to the contract
- C. Following this initial period, initiate a verification query within three business days of employee hire or assignment to a contract (where the contract was awarded more than 30 days prior)
- D. Rule would apply to flow down subcontractors
- E. Applies to solicitations issued and contracts awarded after the effective date of the final rule in accordance with FAR 1.108(d). Under the final rule, departments and agencies should amend existing indefinite delivery or quantity contracts to include the clause for future orders if the remaining period of performance extends at least six months after the effective date of the final rule and the amount of work or number of orders expected under the remaining performance period is substantial. (73 FR 33375 – 76)
- F. “In exceptional cases, the head of the contracting activity may waive the requirement to insert the clause at 52.222-XX, Employment Eligibility Verification, for a contract or subcontract or a class of contracts or subcontracts. This waiver authority may not be delegated.” (73 FR 33376)
- G. All employees then need an I-9 completed – I-9 form to be amended requiring photo IDs for proof of identification. Some employees will have two I-9s, one before and one after a federal contract is awarded.
- H. Rule would not apply to pre-11/6/1986 hires or employees who have already been E-Verified
- I. If employer obtains confirmation of the identity and employment eligibility of an individual in compliance with E-Verify, a rebuttable presumption is established that the employer has not violated INA sec. 274(A)(1)(a). (73 FR 33376)
- J. If after final non-confirmation an employer continues to employ an alien who is subsequently found to be unauthorized, there is a rebuttable presumption that it knowingly employed an unauthorized alien. (Id.)
- K. No one participating in E-Verify is liable under any law for action taken in good faith reliance on information provided through the confirmation system. (Id.)

VI. Memorandum of Understanding (MOU) between contractor, with DHS and SSA before participation in E-Verify – employer must:

- A. Agree to abide by current legal hiring procedures and ensure no employee is unfairly discriminated against as a result of E-Verify.

Violation = termination from E-Verify. QUERY: How does E-Verify affect breach of contract? Termination of contract?

- B. Allow DHS and SSA, their authorized agents or designees, to make periodic visits to the employer to review E-Verify related records (I-9s, employment records, DHS verification records) and interview employees concerning their experience with E-Verify
- C. E-Verify is not intended as a primary means of enforcing immigration law, but the MOUs inform participating employers that program information may be used to assist enforcement of the INA and federal criminal laws.
- D. Requires an employer to notify DHS if it continues to employ an alien after receiving final non-confirmation and provides civil money penalties (\$500 - \$1,000 per violation) for failure to do so
- E. CIS and ICE are currently working on an agreement for purposes of establishing a referral process, rather than the current ad hoc referral for E-Verify issues (Q&A on E-Verify Program Administration and the Memorandum of Understanding, June 16, 2008, AILA Doc. No. 08061761).
- F. Requires passage of an online tutorial with a pass rate of 71%
- G. Provides for a contractor with an opportunity to negotiate the terms of the MOU. Cost of compliance includes a line item for the contractor's attorney to read the MOU. It should include the cost to negotiate an acceptable MOU. QUERY: Just how negotiable is the MOU?

VII. Objections to Mandatory E-Verify in comments by AILA and the SBA

- A. The proposed rule exceeds authority under IRCA and IIRAIRA by making E-Verify mandatory; Congress intended it to be voluntary.
- B. The MOU unreasonably requires employers to give up fourth amendment Constitutional rights against unreasonable search and seizure.
- C. The database is error prone, misidentifying authorized workers. Even if percentages are low, numbers are high.
- D. Numbers of affected workers and contractors, and cost of participation are grossly underestimated. (SBA estimates that 1.4 million small employers will be affected, compared with the 165,000 identified by DHS – a 10 fold discrepancy (Office of Advocacy of the U.S. Small Business Administration Comment on FAR E-Verify Proposed Rule, October 24, 2008, AILA Doc. No. 08102468); 54 million workers currently are employed on government contracts (AILA's Comment on Federal Contractor E-verify Proposed Rule, August 13, 2008, AILA Doc. No. 08081366) including large and small businesses. We don't really know how many employees will be affected, but it is significantly larger than government estimates.

- E. No mention is made in the information about or in the proposal on the effect on big business, but the onus on employers is greater the larger the employer due to the complex detail of compliance. The larger the number of workers the larger the onus on an employer.
- F. Potential for employer abuse, intentional, unintentional misuse or neglect due to complexity
- G. Technology privacy and security concerns are not addressed. DHS Secretary Chertoff publicly denounces the use of SS#s by those undocumented aliens to whom they do not belong; nowhere in the proposed rule is there any acknowledgement or prophylactic methods to avoid misuse or hacking of the E-Verify database, which would expose sensitive information including SS#s of tens of millions of Americans as a result of the government.
- H. Jeopardizes the livelihood of authorized workers
- I. Creates a less stable U.S. workforce for Federal contractors
- J. It reverses Congress' efforts to streamline the employment verification system.
- K. Government has no experience with electronic verification of so many workers. The Pilot Program verified only 4% of newly hired U.S. workers. The sheer volume, untested could result in massive errors.