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PRESIDENT BUSH SIGNS EXECUTIVE ORDER REQUIRING FEDERAL GOVERNMENT CONTRACTORS TO PARTICIPATE IN E-VERIFY;

E-Verify is the Joint U.S. Department of Homeland Security (DHS) and Social Security Administration (SSA) Program for Electronic Verification of Employment Eligibility

On Monday, June 9, 2008, the White House issued a Press Release announcing that President Bush signed an amendment to [Executive Order 12989](#), which will require employers contracting with the federal government to participate in an electronic employment eligibility verification program. In a companion [Press Release](#) issued by the U.S. Department of Homeland Security (DHS), DHS Secretary Chertoff designated the E-Verify system, formerly known as the Basic Pilot Program, as the electronic system in which participation will be required for compliance with the Executive Order.

Upon implementation of the Executive Order, which is expected in the coming months, employers seeking federal contracts will be required to participate in E-Verify, at least for the duration of contract fulfillment, and as a condition for the award of each new contract in the future.

Basic E-Verify Process & Requirements

E-Verify is a web-based system for the electronic verification of employment eligibility which draws upon a database maintained jointly by the U.S. Department of Homeland Security (DHS) and the Social Security Administration (SSA). Employers enter a new employee's employment eligibility information into the system. The system then matches the information against information in the database regarding the employee and his or her work-authorized status. The system then confirms work authorization or issues an initial "non-confirmation". The new employee must be provided notice of the non-confirmation and a period of 90 days in which to resolve the apparent discrepancy in data with the Social Security Administration. For employees who are only newly-authorized to work, or employees who have recently married and changed their names, the necessary data confirming work authorization may not yet be entered into the database by the responsible Federal Government agency, and additional follow-up efforts would be required in order to resolve the discrepancy so that the employer would be able obtain a confirmation through the E-Verify system within the specified period of time.

Enrollment is "free" in that there are no enrollment fees; however, employers do experience hidden costs. Personnel must undergo training in system use and procedural compliance, which for a large organization can amount to substantial internal costs. Additionally, employers participating in the E-Verify program are required to enter into a Memorandum of Understanding (MOU), or contract, with DHS and SSA. The typical MOU

requires employers to “self-report” even inadvertent violations, for which penalties are assessed. The MOU requires a forfeiture of certain rights regarding searches and seizures.

Finally E-Verify does not replace or substitute for an employer’s existing obligation to comply with Form I-9 Employment Eligibility regulations. An employer participating in E-Verify must continue to maintain Form I-9 records and complying with the Form I-9 verification process.

DHS Claims E-Verify Is Fast and Accurate; Critics Disagree

While the DHS reports that 99.5% of authorized workers are “cleared automatically” by E-Verify, critics are concerned that the system is not prepared for the increased query volume that would result from widespread usage once E-Verify participation is required. Critics further point to high error rates, up to 8%, in the government data comprising the database, noting that such high error rates will likely lead to greater rates of “mismatches” and non-confirmations, even when the worker is authorized. Eligible workers, both U.S. citizens and foreign nationals authorized to work in the United States, will be dependent on Federal Government agencies such as U.S. CIS and the SSA to timely update government records related to their name, Social Security Number, and employment-authorized status. For additional information on the database error rate and the impact on E-Verify queries, a recent [CATO Institute Report](#) provides further discussion and analysis as well as statistical data.

Participation in E-Verify is already mandated by some state governments for some or all employers doing business in the state or contracting with the state. Until now, at the federal level, E-Verify participation has been voluntary.

Advantages of E-Verify Participation

Employers considering E-Verify participation, or for whom participation will be required, should carefully consider both the advantages and disadvantages of program participation.

Employers participating in E-Verify will be eligible to compete for Federal Government contracts, whereas those employers declining participation will be ineligible by virtue of the President’s Executive Order.

Another advantage of E-Verify is that participation enables an employer’s F-1 Optional Practical Training (OPT) employees with degrees in science, technology, engineering, or mathematics (STEM) disciplines to apply for additional extensions of their F-1 OPT employment authorization for continued employment in a STEM occupation utilizing their degree. F-1 students with qualifying degrees and employment may apply for an additional 17 months of OPT employment authorization, which can ensure continuity of employment authorization when H-1B visa numbers are not available. Additionally, because the extension opportunity is afforded only to employees of E-Verify employers, employers participating in E-Verify may find that participation affords a distinct recruiting advantage, particularly in industries experiencing shortages of qualified workers.

Additionally, while not alone sufficient to warrant a decision to participate in E-Verify, early enrollment in a program that is likely to become mandatory in the future for most employers, if not all, could be deemed advantageous. Voluntary enrollment when it can be approached in a controlled manner after internal Form I-9 audits and proper personnel training may be preferable to forced participation at an inconvenient and unpredictable time in the future.

**Employers Should Engage Counsel to Conduct Form I-9 Audits & Policy Assessments
Prior to Enrolling in E-Verify**

Ultimately the decision to participate in E-Verify will be a business decision that only authorized, fully informed and counseled company officials can make. If E-Verify is applied to existing workforces, as Executive Order 12989 indicates it will be, it may lead to mass firings and inability to complete existing contracts. On the other hand, employers who wish to continue bidding federal contracts do not appear to have a choice. Employers making the decision to participate in E-Verify, whether voluntarily or based on a condition of doing business, should do so only after consulting qualified legal counsel and carefully reviewing internal policies and procedures regarding Form I-9 Employment Eligibility Verification compliance. Employers with high rates of noncompliance, or with policies and procedures that do not effectively engender compliance, may expect higher than average risk of civil and criminal liability as a result of latent violations which would be uncovered in any Federal Government Form I-9 investigation. While perfect compliance may be practically impossible, good faith compliance evidenced by the implementation of policies and procedures designed to ensure consistent compliance can be achieved.

Tindall & Foster attorneys specializing in Form I-9 and workforce compliance and employer sanctions regularly assist employers in the development of policies and procedures designed to ensure higher future Form I-9 compliance rates. Tindall & Foster attorneys are also experienced in performing pro-active audits of historical Form I-9 records and identifying remediation measures which can be taken to reduce existing liability. With the assistance of qualified counsel, it is possible to reduce existing liability by hundreds of thousands of dollars in potential civil penalties while establishing a good faith defense based on corrective measures to avoid potential criminal penalties which may be imposed for a pattern and practice of violations.

When considering E-Verify enrollment, contact your Tindall & Foster attorney for important information on reducing existing liability and implementing policies and procedures to increase future compliance and prepare for the hidden costs of E-Verify participation.