



June 2, 2009

Special Alert:

**Federal Government Seeks Additional Delay in
Implementation of Federal Contractor E-Verify Rule**

On May 29, 2009, the federal government requested an additional 70 days to review a regulation issued last year by the Bush Administration (the “Final Rule”) that would impose an E-Verify requirement on all government contractors. This extension request, made in connection with a lawsuit filed by the US Chamber of Commerce in the U.S. District Court in Maryland to enjoin the Final Rule, is the latest in a series of delays in the implementation of the Final Rule. If granted, the motion would extend the implementation date to September 8, 2009, a delay of 200 days since the Final Rule’s initial promulgation.

The Final Rule originally was published on November 14, 2008. See 73 Fed. Reg. 67,651. It represented an amendment to the Federal Acquisition Regulations and outlined the steps necessary to implement Executive Order 13465, issued by President Bush in June 2008. The Executive Order and the Final Rule seek to require all entities entering into contracts with the federal government and specifically with the Department of Defense, General Services Administration and NASA, to verify through E-Verify the identity and employment eligibility of employees tasked with fulfilling the contract.

Immediately following publication of the Final Rule, the US Chamber of Commerce and other groups sued to enjoin enforcement of the Final Rule claiming, among other things, that the Executive Order and Final Rule were unconstitutional because they made a voluntary program mandatory on employers seeking federal contracts, and would impermissibly require employers to use E-Verify on existing employees as well as new hires. When E-Verify was first introduced, it explicitly prohibited employers from utilizing it on existing employees as a way of safeguarding them from unlawful workplace discrimination.

Since the lawsuit was filed, implementation of the Final Rule has been delayed three other times, most recently to June 30, 2009. The struggle over the federal contractor E-Verify provisions are emblematic of the overall struggle the federal government has had with

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immigration policy in balancing immigration enforcement with immigration benefits and the interests of the business community. While many employers claim that the administrative costs and compliance issues outweigh the benefits gained by utilizing E-Verify, many of those employers have already had to face situations where an E-Verify requirement has been imposed by state legislatures. Since 2006, more than half of the state legislatures have imposed some type of E-Verify requirement on employers doing business in the state. Most notably, since January 1, 2008, all Arizona employers have been required to utilize E-Verify on all newly hired employees or face the revocation of their business licenses. The Arizona law has recently survived challenges in the federal courts claiming that it was unconstitutional. The Arizona law was implemented by then-Governor Janet Napolitano, who is now Secretary of Homeland Security.

A decision on the motion is expected shortly.

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