

February 26, 2009

Update on New I-9 Form and E-Verify:

New I-9 Form

The U.S. Citizenship and Immigration Services (“USCIS”) has published an interim final rule which includes revisions to the I-9 Form and will become effective April 3, 2009. The interim final rule initially was effective February 2, 2009, but the USCIS delayed implementation by 60 days to provide the Department of Homeland Security time for further consideration of the rule. The USCIS has also reopened the period for public comment until March 4, 2009. The Department of Homeland Security has yet to issue the official new I-9 Form.

According to the current form of the interim final rule new hires will continue to be required to execute an I-9 Form and present their employers with a document or a combination of documents to verify identity and confirm employment authorization. Further, the new I-9 Form will continue to set forth three categories of documents that may be accepted, alone or in combination but the lists of acceptable documents will be modified. The most significant revisions to the I-9 Form will be as follows:

- Only *unexpired* documents may be used for verification. For example, an expired U.S. Passport is no longer an acceptable document under List A. However, a document containing no expiration date, such as the Social Security Account number card, will be deemed unexpired and is acceptable.
- List A will be updated to allow foreign passports with machine-readable immigrant visas containing “pre-printed temporary I-551 notations,” which were previously referred to as “stamps”. The Department of Homeland Security issues these temporary I-551 notations to Lawful Permanent Residents to serve as temporary documentation of LPR status while the individual is waiting for the actual Form I-551.
- The Form I-688 (Temporary Resident Card) and Forms I-688A and I-688B (Employment Authorization Cards) will be removed from the list of acceptable document and will now be considered “expired” for those who previously received and presented such forms. Employees who formerly received the three removed forms must now complete and submit a Form I-766 (new Employment Authorization Card).
- Citizens of the Republic of Marshall Islands (RMI) and the Federated States of Micronesia (FSM) no longer need to obtain an employment authorization document (Form I-766). RMI and FSM citizens admitted to the United States as non-immigrants in accordance with the Compact of Free Association between the

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U.S. and the RMI or FSM may present valid RMI or FSM passports with evidence of their admission to satisfy the I-9 Form requirements.

Notably, as it is currently drafted the interim rule not only applies to new hires, but also to employees whose employment authorization or employment authorization documentation expires on or after *February 2, 2009*. Although the effective date of the interim final rule and the new I-9 form has been delayed until April 3, 2009, employers should now be requiring employees to submit unexpired documentation in accordance with the rule.

Use of E-Verify by Federal Contractors

Pursuant to recently issued regulations, most federal contractors entering into or renewing contracts (and subcontracts for services and construction valued over \$3,000) on or after January 15, 2009 must use the E-Verify system to confirm that all new hires are eligible to work in the United States. Although the new rule became effective January 15, 2009, implementation has been delayed until May 21, 2009.

E-Verify is a free internet-based electronic employment eligibility verification system developed by the Department of Homeland Security and the Social Security Administration. E-Verify is a supplement, not a replacement, for other employment eligibility verification requirements.

Although E-Verify must be used to confirm all new hires, the rule does not apply to all incumbent employees. Federal contractors must use E-Verify to confirm that *current* employees specifically “assigned to [a] federal contract” are authorized to work in the U.S. However, subject to limited exceptions, a federal contractor may only use E-Verify to register current employees who are *not* assigned to a federal contract if E-Verify is used to register the contractor’s entire existing workforce. An employee is not considered to be “assigned” or directly performing work under a contract if the employee normally performs support work, such as indirect or overhead functions, and does not perform any substantial duties applicable to the contract.

Further, institutions of higher learning are only required to use E-verify for employees actually assigned to a federal contract, and are not otherwise required to E-verify all newly hired employees. Likewise, contracts that are for commercially available off-the-shelf (COTS) items, including items that would be considered COTS but for minor modifications, such as office supplies, do not by themselves subject the employer to E-verify requirements.

The new rule requires federal contractors and covered subcontractors to insert an E-Verify clause setting forth their agreement to use the E-Verify system within new federal contracts and federal contracts that are open-ended with regard to quantity or delivery that will remain in effect for more than six months.

The new E-Verify clause will specify that E-Verify obligations are not triggered by:

- Contracts valued at less than \$100,000;
- Contracts for a period of performance less than 120 days;
- Contracts under which all work will be performed outside the United States.

Federal contracts will also specify deadlines for compliance. If the Contractor is *not* enrolled as a federal contractor in the E-Verify program at the time of the contract award, the following timelines will apply:

- federal contractors must enroll in the E-Verify program within 30 calendar days of contract award;
- Within 90 calendar days after the date of enrollment, federal contractors must use E-Verify to confirm employment eligibility *for all* new hires who are working in the U.S. within 3 business days after date of hire;
- For each current employee already assigned to a federal contract, federal contractors must initiate verification within 90 calendar days after the date of enrollment or within 30 calendar days of the employee's assignment to the contract, whichever date is later.

However, if a contractor has already been enrolled as a federal contractor in the E-Verify program for 90 calendar days or more at the time of the contract award, then the contract requires the Contractor to confirm the employment eligibility of new employees within three days of their date of hire. Previously enrolled federal contractors must also verify employment eligibility of *existing* employees within 30 days after their assignment to a federal contract or 90 days after the contract award, whichever is later.

Employers may withdraw from E-Verify upon 30 days notice at the conclusion of the contract.

Finally, a federal contractor that intends to register its entire workforce must notify the Department of Homeland Security and then begin verifying all employees within 180 days after the notification date.

To register for E-Verify on-line, go to <http://www.dhs.gov/everify>.

If you need assistance with the E-Verify enrollment process, complying with the new I-9 rule, or require any additional guidance, please contact John P. Keil at (212) 758-7600.

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