Employment Edge 91st Edition (Immigration Issue) - Two Recent Immigration Law Developments Affect Employers

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Amendments To The Federal Acquisition Regulation Require Contractors To Use E-Verify To Verify Employment Eligibility of Employees

Beginning January 15, 2009, certain federal contractors and subcontractors will be required to use E-Verify, an Internet-based system run by the U.S. Citizenship and Immigration Services of the Department of Homeland Security (DHS) in partnership with the Social Security Administration (SSA). E-Verify allows registered employers to electronically verify the employment eligibility of newly hired employees in accordance with a Memorandum of Understanding between the employer, DHS, and SSA. The government estimates that approximately 168,000 federal contractors and 3.8 million employees will be affected by the amendments to the Federal Acquisition Regulation ("FAR").

FAR will apply to all prime federal government contracts that exceed $100,000 unless: the period for performance is less than 120 days, the contract pertains to work that will be performed outside the United States, or it involves commercially available off-the-shelf (COTS) products or related services. Previously awarded indefinite supply or service contracts with more than six months outstanding as of January 15, 2009 will also be affected by FAR if the remaining performance or number of orders under the contract is substantial. FAR will also apply to construction and service subcontracts related to prime contracts which contain an E-Verify clause if the value of the subcontract exceeds $3000. Contractors who enter into subcontracts covered by FAR must include the E-Verify requirements in the subcontracts.

FAR requires covered federal contractors that do not currently use E-Verify to enroll in the program within 30 days of being awarded a contract. Within 90 days of enrollment in E-verify, the contractor will have to verify all new hires within three days of the new employee's start date. All existing employees who are assigned to perform work under the contract must be verified within the later of 90 days after enrollment in E-verify or 30 days after assignment. Employees whose employment eligibility has already been verified by the contractor using E-Verify, who have active U.S. security clearances or have undergone a DHS background check, or who were hired by the contractor before November 6, 1986, are exempt from FAR. To avoid the administrative difficulty of determining which employees must be verified through E-Verify, FAR provides that

contractors may use E-Verify to check the employment eligibility of their entire workforce. Additionally, if the contractor is an institution of higher education, a state, local, or federally-recognized tribal government, or a surety performing under a takeover agreement with a federal agency, the contractor may verify only those employees who are assigned to work under the contract.

FAR gives federal officials the authority to terminate a federal contract or recommend suspension or debarment for companies that knowingly hire undocumented workers or that fail to comply with the requirements of FAR.

Status Of The "No-Match" Rule

On October 28, 2008, the DHS published a revised "No-Match" Rule which sets forth recommended procedures for employers to follow after receiving a No-Match Letter from the SSA or a Notice of Suspect Documents from DHS. The No-Match Rule creates a "safe harbor" from a finding of constructive knowledge for employers who do not have actual knowledge of a worker's unauthorized status and who consistently follow the specific procedures for responding to a No-Match Letter or Suspect Documents Notice set forth in the Rule.

Initially, the No-Match Rule was scheduled to take effect on September 14, 2007; however, in opposition to the Rule, various labor and business organizations, with the support of the American Civil Liberties Union and the National Immigration Law Center, filed a lawsuit on August 28, 2007. On October 10, 2007, a federal judge in California issued a preliminary injunction indefinitely blocking implementation of the Rule and barring the SSA from sending out No-Match Letters while the lawsuit regarding its legality is pending.

The revised No-Match Rule is intended to address the California Court's concerns. It does not alter the substance of the original rule. However, it does attempt to clarify three aspects of the Rule, which include:

1) if an employer cannot resolve the mismatch after completing an internal records check, the employer must notify the employee of this fact within 5 days after the record check is concluded

2) the Rule does not apply to workers hired before November 6, 1986

3) the "safe harbor" steps laid out in the Rule do not impose any obligations on the employer to make or retain any new documentation or records

Although the revised No-Match Rule became effective on October 28, 2008, the California Court's injunction is still in force. For this reason, DHS cannot implement or take any action under the No-Match Rule until the conclusion of the California legal proceedings.

If you have any questions about these new rules, or other immigration or employment law questions, please contact Casey Nolan or another member of Gray Plant Mooty's Employment, Labor & Higher Education law practice group.

This article is provided for general informational purposes only and should not be construed as legal advice or legal opinion on any specific facts or circumstances. You are urged to consult a lawyer concerning any specific legal questions you may have.