

Client Alert



A report for clients and
friends of the Firm
January 2009

Proskauer Obtains Stay of Implementation of E-Verify Regulation

Federal contractors and subcontractors can temporarily breathe a sigh of relief and delay implementing use of the Department of Homeland Security's ("DHS") E-Verify System. The E-Verify System is designed to check whether new hires are eligible to work in the U.S. Pursuant to an Executive Order that was to have become effective on January 15, 2009, the final rule would have required contractors to begin use of E-Verify for new hires and to reverify any current employees working on existing contracts. Implementation of the final rule has now been suspended until February 20, 2009.

The decision to suspend the rule was a result of a legal challenge filed by Proskauer Rose LLP on December 23, 2008 on behalf of the U.S. Chamber of Commerce and four other associations. Proskauer's winning litigation team working on this matter includes Larry Lorber, David Grunblatt, James Segroves, and Malcolm Harkins III. The lawsuit, encaptioned *Chamber of Commerce of the United States of America, et al. v. Chertoff, et al.*, is pending in the U.S. District Court for the District of Maryland. It requests that the court declare the rule invalid and permanently enjoin it from becoming effective, on the grounds that neither the President nor the DHS had the authority to mandate use of E-Verify by government contractors, because Congress specifically prohibited the mandating of the use of the E-Verify System in the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). Other grounds for the challenge include the burden that the rule imposes on employers and the inaccuracy of the database used by DHS. The Department of Justice agreed to suspend the Rule on January 7, 2009 on behalf of the Federal Acquisition Regulations ("FAR") Councils.

As background, on November 14, 2008, the challenged rule was published to amend the FAR and to implement President Bush's June 2008 Executive Order mandating electronic employment eligibility verification by federal contractors through E-Verify. E-Verify is an Internet-based System administered by U.S. Citizenship and Immigration Services ("USCIS") that allows employers to voluntarily verify the employment eligibility of their employees based on the information provided by the employee on his or her Form I-9. E-Verify checks this information electronically against records contained in DHS and Social Security Administration ("SSA") databases. E-Verify combines DHS data with records from the SSA to determine whether a new hire is eligible to work in the U.S. The verification does not replace the employer's gathering of documents to complete the Form I-9—both that form and some mode of verification of a new hire's eligibility to work in the U.S. are legally required. E-Verify is a process that an employer can utilize to verify work eligibility of a new hire after completion of the I-9 so long as the employer uses E-Verify for all new hires.

The complaint filed by Proskauer challenges the government's use of an Executive Order coupled with federal procurement law to make E-Verify mandatory for federal contractors with projects exceeding \$100,000 and for sub-contractors with projects exceeding \$3,000. The lawsuit also challenges the rule's requirement that contractors reverify the employment eligibility of any current employee assigned by the contractor to perform work within the U.S. on the federal contract because such "reverification" of current employees is barred by the IIRIRA.

Given the burdens the rule would have imposed, the stay represents an enormous intermediate victory for government contractors. We will continue to keep you posted as the litigation proceeds. In the meantime, if you have any questions on this or other government contracting issues, please contact your Proskauer relationship attorney, or any of the attorneys in Proskauer's Government Relations and Government Contract Compliance Practice Group.

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Proskauer's Government Relations and Government Contract Compliance Practice Group advises clients that are government contractors regarding their obligations under Executive Order 11246 (and similar state and local laws). Those obligations require contractors to establish affirmative action plans, to take active steps to combat discrimination in the workplace, and to recruit, retain and promote diverse individuals based on merit. If you have any questions about government contracting compliance, please contact one of the lawyers listed below:

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