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## New Immigration Requirements For Federal Contractors

### E-Verify mandated and debarment added as new tool in the ICE toolbox

Over 17 months have passed since Department of Homeland Security Secretary Michael Chertoff expressed his frustration with Congress' inability to pass comprehensive immigration reform to a room full of stakeholders. The business community, trade associations and union leaders all sat hushed, mulling over the positive implications of his statement. Any hope the Government finally understood that "enforcement only" policies did not work was fleeting as Secretary Chertoff



immediately went on to proclaim that the Federal Government would lead by example and announced a set of 26 reforms the Administration would immediately pursue to address the nation's immigration challenges.

That was August 2007 and the Government has not backed down. The [final Social Security No Match](#) regulation was published even in the face of a district court injunction, and increased enforcement without reform continues unchecked. While the Barack Obama transition team notes that "Immigration raids are ineffective: Despite a sevenfold increase in recent years, immigration raids only netted 3,600 arrests in 2006 and have placed all the burdens of a broken system onto immigrant families," and plans to "Bring people out of the shadows stating that Obama and Biden support a system that allows undocumented immigrants who are in good standing to pay a fine, learn English, and go to the back of the line for the opportunity to become citizens"<sup>1</sup> the new administration will likely focus on enforcement actions against employers and beef up administrative related compliance reviews.

Meanwhile, efforts continue to effectuate the current administration's agenda, including requiring higher compliance standards for Government contractors than are currently mandated under federal immigration law. On November 14, 2008, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council published a final rule impacting federal contractors, which will become effective on January 15, 2009.

<sup>1</sup> <http://www.change.gov/>

The rule requires all Government contractors to use the [E-Verify program](#) to verify the work eligibility of certain employees. The regulation also provides an avenue for a Government contractor to run their entire workforce through E-Verify should they choose to do so, a retroactive application of the program that until now violated existing law and practice.

Aside from the obvious mandate to use the E-Verify program, there are further implications of the Government contractor final rule when reviewed in tandem with Executive Order (EO) 12989. The use of the EO itself denotes a reawakening of dormant debarment authority against employers that violate worksite compliance requirements. In September 2008, Immigration and Customs Enforcement (ICE) notified [seven companies](#) that they may be debarred from Government contracting based on immigration compliance violations. This notification marked the first time ICE chose to utilize a tool that, for all intents and purposes, was dormant for over 12 years. Actual use of its debarment authority indicates that ICE has drawn a line in the sand marking an increasingly severe worksite enforcement strategy. This event is not a complete surprise, as ICE has continued to break any lasting ties to the legacy Immigration and Naturalization Service’s (INS) less-aggressive policies. Beginning in 2007, under DHS Assistant Secretary Julie Myers<sup>2</sup> leadership, ICE began to target bad faith actors and egregious employers using criminal charges, fines and forfeitures with pronouncements of this commitment made repeatedly by Secretary Myers. While enforcement of employer compliance with Federal immigration laws was certainly heightened during her tenure, as of today, I-9 and employment compliance is still at the bottom of the totem pole for many companies as evidenced by the fact that many companies:

The image shows a scan of the Employment Eligibility Verification (E-Verify) form, Form I-9. The form is titled "Employment Eligibility Verification" and includes instructions for employers and employees. It contains several sections for providing personal information, such as name, address, date of birth, and social security number. There are also sections for employer information and a section for the employee to sign and date the form. The form is a standard document used by employers to verify the identity and employment authorization of their employees.

- have General Counsel offices that do not understand the importance of ensuring budgeting for audits;
- have human resources departments that are sorely understaffed and lack control of the I-9 employee verification process; and
- lack uniform protocols and are in dire need of training regarding the I-9 process, including how to identify fraudulent documents using the reasonable person standard.

Fortunately, as ICE’s endeavors are publicized and increase in number, more and more companies are prioritizing I-9 compliance and beginning to reduce the serious exposure by training the trainers and educating those on the front lines.

Assistant Secretary Myers stated that the goal of the new strategy “is to create a culture of compliance.”<sup>3</sup> Of course, this was not a new goal for the federal government. Long before DHS was even conceived, in 1996 President Clinton signed Executive Order 12989, granting agencies the authority to debar Government contractors that employed individuals who lack proper employment authorization. On June 6, 2008, President

<sup>2</sup> Julie Myers stepped down from her post on November 15, 2008

<sup>3</sup> [http://www.businessweek.com/bwdaily/dnflash/content/aug2008/db20080819\\_105143.htm?campaign\\_id=rss\\_daily](http://www.businessweek.com/bwdaily/dnflash/content/aug2008/db20080819_105143.htm?campaign_id=rss_daily)

Bush signed Executive Order 33285, amending Executive Order 12989 and mandating that all Federal agencies require all Government contractors to use “an electronic employment eligibility verification system designated by the Secretary of Homeland Security to verify the employment eligibility” of certain classes of employees. Only three days later, Secretary Chertoff officially designated E-Verify as the “electronic employment eligibility verification system that all federal contractors must use” as required by Executive Order 33285.



Executive Order 12989 states that “contracting agencies should not contract with employers that have not complied with section 274(a)1(A) and 274(a)(2) of the Immigration and Nationality Act [INA].” So potential debarment for immigration violations is really nothing new. Since 1996, the Government has had the authority to debar a contractor found to have either knowingly hired an unauthorized worker or continued to employ an alien who was or became unauthorized to work. However, this power was rarely used between 1996 and September 2008. During this time few, if any, companies were considered for debarment pursuant to Executive Orders 12989 or its successor, EO 33285. Unlike ICE’s current strategy, legacy INS approached worksite enforcement from a much different and gentler perspective. With a new and “improved” agency, the government is now utilizing all of its authority to secure compliance.

To that end, although no one knows exactly how many Government contractors and their employees fall within the purview of the new regulations, Secretary Chertoff predicted that the policy changes could affect “hundreds of thousands, if not millions, of workers.”<sup>4</sup> What we now know is that companies are taking a significant business risk by only marginally complying with the law. Spending the time and money to ensure immediate and exemplary compliance is now truly non-negotiable for any company wishing to do business with the Federal Government.

Further it is critical that companies establish procedures for rolling out or improving existing programs, audit protocols and other best practices with the assistance of experienced counsel.

Exemplary compliance now includes close monitoring of one’s workforce and the projects to which employees are assigned and working. It also includes I-9 training, reviews, in-house audits and E-Verify maintenance management. Government contractors with multiple entities must be aware of, and closely analyze, the business entities selected to pursue Government contracts. Even more important will be the vetting of potential subcontractors whose practices could expose the company to liability. Going forward, these and related issues must be carefully considered and additional measures taken before accepting any Government contract. The following information will help Government contractors better understand the impact of the new rule and therefore assist them in determining whether it is in the company’s best interest to pursue a Government contract.

<sup>4</sup> [http://www.dhs.gov/xnews/releases/pr\\_1213101513448.shtml](http://www.dhs.gov/xnews/releases/pr_1213101513448.shtml)

## WHAT DOES THE NEW RULE DO?

The rule amends the Federal Acquisition Regulation (FAR) by requiring all Government contracting offices to include contract language requiring contractors to use the E-Verify system to verify the employment authorization of employees “assigned to the contract,” as well as all new hires. This language will be included only in contracts subject to the new rule; see additional explanation below.

Compliance with this new E-Verify rule will be considered a performance element. The terms that must be included as performance elements under the new contracts are the following:

- **If the contractor is not already enrolled in E-Verify**, the contractor must enroll in the E-Verify program within **30** calendar days of the date a contract is awarded. Within **90** days of enrollment, the employer must then use E-Verify to verify the employment authorization of **all “New Hires,”** regardless of whether they are assigned to the contract, within **3** days from the date of hire. Additionally, each existing employee *assigned to the contract* must be verified within **90** calendar days of *enrollment*, or **30** days from the employee’s assignment to the contract, whichever date is later.
- **If the contractor has been enrolled in E-Verify, but for less than 90 days**, the employer must within **90** days of enrollment use E-Verify to verify the employment authorization of **all “New Hires,”** regardless of whether they are assigned to the contract. Once the employer institutes this policy, all new hires must be verified within **3** days from the date of hire.
- **If the contractor has been enrolled in E-Verify for more than 90 days**, the contractor must use E-Verify for **all “New Hires,”** regardless of whether they are assigned to the contract. All new hires must be verified within **3** days from the date of hire. The contractor must also verify all existing employees *assigned to the contract* within **90** days of the *contract award*, or **30** days from the assignment, whichever is later.



## WHAT CONTRACTS ARE SUBJECT TO THE NEW RULE?

The rule applies to every contract the FAR governs. It is important to note that FAR does not cover all contracts with Government entities. The FAR applies to all “acquisitions” as defined in FAR Part 2, except where expressly excluded. The rule applies to solicitations issued and acquisition contracts awarded after the effective date of the final rule, January 15, 2009. While it will not apply to many existing contracts based on this, the rule makers were clever in directing contracting officers to amend existing contracts that are indefinite delivery/indefinite quantity (ID/IQ) contracts. The amendments will include the clause for future orders, if the remaining period of performance extends at least six months beyond January 15, 2009, the effective date of the rule, and the amount of work or number of orders expected under the remaining performance period is substantial.

## ARE THERE ANY CONTRACTS THAT ARE EXEMPT FROM THE RULE?

Yes, the exemptions include:

- contracts for what is known as “commercially available off-the-shelf items” (COTS). This would include prime contracts for agricultural products shipped as “bulk-cargo” that would have otherwise been categorized as COTS;
- prime contracts under the simplified acquisition threshold of \$100,000;
- prime contracts with performance terms of less than 120 days;
- contracts that do not include any work performed in the United States; and
- contracts that are outside the scope of the FAR.

There are also exceptions for higher education institutions, state and local governments, Federally-recognized Tribes and Sureties. Under the final rule, these entities are only required to use E-verify to check the employment eligibility of employees assigned to the covered Government contract.

#### WHAT EVENT TRIGGERS THE REQUIREMENT TO USE E-VERIFY?

A solicitation and subsequent contract award triggers the requirement to enroll in E-Verify. See above for time frame for enrollment and verification.

#### WHICH EMPLOYEES MUST BE VERIFIED USING E-VERIFY?

The rule applies to all “new hires” and existing employees performing “direct work” in the United States under a contract, hired after November 6, 1986. This means that ***all employees*** who ***perform direct work under a Government contract***, regardless of whether they are new hires or existing employees, must be verified through



E-Verify. An employee is *not* considered to be performing “direct work” under the contract if the employee normally performs support work (such as indirect overhead functions) and does not perform any substantial duties applicable to the contract. This provides an exception and clarification

confirming that contracting employers do not have to E-Verify their entire existing workforce once they are subject to this new rule.

Interestingly, the final rule, unlike the proposed rule, provides contractors with the *option* of verifying ***all*** existing employees regardless of whether they are assigned to the contract. ***Any contractor choosing this option must notify DHS and initiate verifications for the entire workforce within 180 days of the notice, presumably to ensure that this is done properly.*** This came as a surprise to many who had voiced concerns following the publication of the proposed rule and its provisions which in a limited context allowed the use of E-Verify for existing employees. Prior to the executive order and this rule, employers were *prohibited* from using

E-Verify to re-verify existing employees. This is a true watershed moment as this rule marks the first time that the Government will allow large numbers of workers to be re-verified and run through the E-Verify database, despite the fact that they are not changing jobs and have already completed the employment verification through the I-9 process. To implement this change, USCIS has modified the E-Verify Memorandum of Understanding (MOU), as well as its website and training materials. It appears that they were forced to develop a two-tier E-verify program to ensure that companies do not abuse this strong tool.

#### ARE THERE ANY EXEMPT EMPLOYEES?

Yes, any employee who holds an active security clearance of confidential, secret or top secret; and

Any employee who has gone through a background investigation and had credentials issued pursuant to the Homeland Security Presidential Directive (HSPD) - 12.

#### ARE SUBCONTRACTORS REQUIRED TO USE E-VERIFY?

The E-Verify requirement clause must be included in all subcontracts meeting the specified requirements. Accordingly, all subcontractors must also verify *all existing employees* directly performing work under the covered contract. This is known as a “subcontractor flow down” from the prime contractor. In order for the flowdown to be imposed the prime contract must be covered. Government contractors will be required to flow down the E-Verify requirement to subcontractors under a Government prime contract if the subcontract:

1. is for commercial or non-commercial services or construction;
2. exceeds \$3,000; and
3. includes work performed in the United States.

The responsibility for the flow down lies with the prime contractor, not the subcontractor. In other words, the prime contractor must seek to ensure that the E-Verify language is included in the subcontract, although it is unclear to what extent a prime contractor can actively “police” the subcontractor’s compliance. It remains to be seen how the subcontractor’s obligations will be enforced, but third party audit certifications and other creative compliance vehicles should be considered when feasible.

#### WHAT ARE THE PENALTIES FOR NON-COMPLIANCE?

Since compliance with the revised E-Verify MOU will also be a performance element of the contract, one consequence for noncompliance may be that the contractor may be denied access to the E-Verify system. Government contractors are also required to consent to releasing information related to its compliance with the verification responsibilities. It will be interesting to see, given the administration’s current immigration enforcement priorities, if this information and potential non-compliance will be shared with ICE under a forthcoming memorandum of understanding. E-Verify, after all, is administered by and under the jurisdiction of ICE’s sister agency, the U.S. Citizenship and Immigration Services (USCIS). USCIS serves the agency providing



services and benefits, the kinder gentler agency of the two, given this fact, USCIS currently has meager monitoring and compliance tools, and even less ability to enforce its findings.

In an effort to balance valid concerns, the data privacy gurus have all but tied E-Verify's hands for improving the system. As a result, E-Verify's ability to ferret out abusers and egregious offenders remains only partially implemented. Last, but certainly not least, failure to comply with the new, and existing, rules could lead to debarment. Debarment is intended to ensure that the Government only does business with responsible contractors. Although not intended as punishment, in the real world, debarment can and often does have a devastating impact on Government contractors.

The information provided below is meant to help businesses further understand the debarment process, the consequences of being debarred, and the means by which a business can minimize the possibility of a debarment.

#### DEBARMENT

The following information could be essential to Government contractors and the viability of their businesses. The [seven potential debarments](#) recently announced may only be the tip of the ICEberg for debarments arising from the coinciding of EO 12989, the proposed changes to the FAR, and the Administration's new fervor in exercising its debarment authority. Remember that debarment applies to all Federal Government contract opportunities, including those at the Department of Defense, the Department of Transportation, the Department of Health and Human Service and all other Federal Government agencies. Debarment from federal contracts impacts eligibility for state and local government contracts since many states and localities will not award contracts to companies who have been debarred by the Federal Government. In fact, a senior ICE official recently stated that his agency would consider debarring companies that were not even Government contractors. Debarment would also limit other opportunities for these contractors, including eligibility for Government loans as well as state and local government agency contracts.

#### WHAT BUSINESSES ARE SUBJECT TO DEBARMENT

All Government contractors that do business with the Executive Branch are subject to the FAR, and may therefore be debarred. A contractor, as defined in FAR 9.403, is "any individual or other legal entity that conducts any business, or is expected to conduct any business, with the Government as an agent or representative of another contractor."



## WHAT IS DEBARMENT?

### *A. Definition*

FAR Subpart 2.1 defines debarment as, “excluding a contractor from Government contracting and Government-approved subcontracting for a reasonable, specified period.”

### *B. Effect on Future Contracts*

In practice, a company, will have its name entered into the [Excluded Parties List System \(EPLS\)](#). The EPLS is a web-based system that lists parties suspended, debarred, proposed for debarment or otherwise excluded from receiving Government contracts, subcontracts, and federal financial and non-financial assistance and benefits. The company also will be immediately prohibited from competing for new Government contracts, *unless* the agency head provides compelling reasons for allowing that company to compete for future contracts. Additionally, the debarred contractor may not provide services to the Government as a subcontractor through non-debarred contractor, *unless* the agency head provides compelling reasons in writing to do so.

### *C. Effect on Non-Debarred Contractors When Subcontracting*

Government contractors are prohibited from entering into a subcontract in excess of \$30,000 with any debarred contractor. If a Government contractor chooses to subcontract with any debarred contractor, it must notify the Government’s contracting officer, in writing, before entering into the subcontract. The written notice must include the name of the subcontractor and justify by compelling reasons the necessity of doing business with the debarred subcontractor, including proposed methods for protecting the Government’s interests while dealing with the debarred subcontractor. In practice, the Government rarely will approve doing business with a debarred subcontractor.

### *D. Scope of Debarment*

Generally speaking, the debarment is limited to those organizational units that the Secretary finds are not in compliance with the INA’s employment provisions.

### *E. Length of Debarment*

The ICE Suspension and Debarment Official determines the length of the debarment, which should be commensurate with the seriousness of the violation. However, FAR 9.406-4 states that debarments under the INA are for one (1) year. The regulations also state that the debarment may be extended for an additional period if the Secretary of Homeland Security determines that the contractor continues to be in violation of the employment provisions of the INA.

## THE DEBARMENT PROCESS

### *A. The Investigation*

EO 12989 provides authority to the Attorney General to use the procedures established pursuant to [8 U.S.C. 1324a\(e\)](#) to investigate contractors and determine whether they, or one of their organizational units, are in compliance with the employment provisions of the INA. However, with the establishment of DHS the Attorney General’s investigative authority was transferred to the DHS Secretary. Therefore, now whenever DHS

determines that a contractor is **not** in compliance with the INA's employment provisions, it must inform the appropriate contracting agency of this determination. Before transmitting the determination to the appropriate agency, DHS' decision is subject to judicial review, if requested by an affected party within 45 days.<sup>5</sup> However, once the decision has been transmitted to the agency, DHS' determination is no longer reviewable. The contracting agency must then use the procedures and standards prescribed by the FAR to determine what consequence, including debarment, the agency should impose on the contractor. Please note that for many contractors it will be important to preserve their rights for judicial review at the DHS investigation level, because often the contractor will have a better chance at avoiding debarment if the issues are resolved before the case reaches the contracting agency.

### *B. Debarment Proceedings*

Debarment is a discretionary, not mandatory, enforcement measure. However, if the agency concludes that debarment is appropriate, the FAR requires that the contractor being considered for debarment is notified of the basis for their proposed debarment. The contractor will then have 30 days to provide information or justification, in writing, in person, or through a representative, as to why it should not be debarred. Generally, the Government will make its debarment decision within 30 days after the receipt of any information or argument submitted by the contractor.

As with the seven recent debarment cases, noted above, the company may, within 30 days, challenge the contracting agency's debarment decision. But once there has been a final DHS determination that the contractor has not complied with the INA's employment provisions (and this has been transmitted to the contracting agency), that determination is no longer subject to review, although the contractor may still argue that debarment is not appropriate consequence for its non-compliance with the INA. See FAR 9.406-1 and 9.406-2(b). It cannot be ascertained whether any of these seven companies has decided to challenge the debarment as ICE has not further updated the public on the status of first companies selected for debarment.

### **REASONS FOR WHICH A FEDERAL CONTRACTOR MAY BE DEBARRED**

Pursuant to FAR 9.406-2(b)(2) and Executive Orders 12989 and 13286, there are at least four stated violations of the INA for which a Government contractor may be considered for debarment, including:

1. conviction of knowingly hiring unauthorized workers;
2. conviction of continuing to employ an alien who is or becomes unauthorized;
3. conviction of engaging in patterns and practices of knowingly hiring or continuing to knowingly employ unauthorized workers; or,
4. the issuance of a final order for a civil fine which reflects unlawful hiring or continuing to hire unauthorized workers.

It is the Government's stated policy, given the serious yet discretionary nature of the sanctions, to only use debarment when it is in the Government's public interest and not for the purposes of punishment. According to senior ICE worksite officials, guidance has gone out to the field narrowing down the use of debarment and

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<sup>5</sup> 8 U.S.C. 1324a(e)

illustrating examples when it should be considered. Pursuant to this new guidance, field agents will need to identify worksite compliance matters that rise to the level of such a proceeding and follow internal procedures to identify these cases to headquarters. In discussions with ICE it seems that even with the new found tools, ICE is still aware of the discretionary nature of debarment actions. The agency will consider the FAR's "mitigating factors" when deciding whether or not to exercise its debarment authority. FAR 9.406-1(a).

### MITIGATING FACTORS

The fact that there is a cause for debarment does not necessarily require that a contractor be debarred. Even if ICE does refer the matter to the contracting agency, there are mitigating factors that a debarring official will take into consideration when deciding whether it is necessary to debar a contractor to protect the Government's interests. These factors include the seriousness of the contractor's acts or omissions and any remedial actions the contractor may have taken. Among the factors that can be taken into consideration are the following:

1. Whether the contractor had an internal compliance program in place at the time of the violations or adopted such a program prior to the Government debarment investigation.
2. Whether the contractor brought the violations to the Government's attention in a timely manner;
3. The contractor's level of cooperation with the investigation and any court or administrative actions;
4. Whether the contractor has paid or agreed to pay all criminal, civil and administrative liability for the violations;
5. Whether the contractor has implemented or agreed to implement remedial measures;
6. Whether the contractor has instituted or agreed to institute new or revised review and control procedures.

### WHAT BUSINESSES NEED TO KNOW

It is important that contractors understand the serious nature of a potential debarment and to plan accordingly. This planning also needs to take into account new FAR regulations issued on November 12, 2008, that require a form of "self-reporting" of certain Government contract violations. See [GT Alert --- Government Contractors Must Now Self-Report Violations](#). Given the discretionary nature of debarment actions, it is imperative that businesses are proactive by doing all they can to take advantage of the mitigating factors, in addition to avoiding violations. It is important to establish a good faith defense before any actual violation occurs. The burden of arguing the applicability of mitigating factors to demonstrate that debarment is unnecessary will fall on the contractor.

When considered together with continuous changes to internal ICE policies, zealous worksite enforcement actions, and increased monitoring, every employer will want to place renewed emphasis on compliance and verification by reevaluating their current exposure, and taking the steps necessary to remodel where necessary. No longer can Government contractors ignore I-9 compliance and take the chance that their business will not be selected for an audit. Moreover, now that immigration related debarment (with debarment sometimes referred to as a "corporate death sentence" for Government contractors) has become a very real possibility, nothing

should be more important for such companies than to perform reviews and put in place or revise auditing policies and protocols. Even with the change in administration, employer-focused enforcement is certain to remain a priority.

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