

August 8, 2008

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## MEMORANDUM

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### **Mandatory Electronic Verification (“E-Verify”) Required for Federal Contractors**

On June 6, 2008, President Bush issued an Executive Order which requires federal contractors and sub-contractors to use “E-verify” to confirm the employment eligibility of its workers, including Form I-9 compliance. Under this Executive Order, all Federal contractors and some sub-contractors will be required to use the E-Verify program employment eligibility verification for any new hires and all existing employees who will directly work on the federal contract. Employers who receive federal dollars will need to have valid immigration compliance, and should immediately consider a Form I-9 audit of their records by an immigration law professional, as often required by the federal government contractors. Several of our clients have already retained this law firm for the necessary immigration and Form I-9 compliance, now required for federal funds.

The mandatory E-verification requirements would apply to any company that does business with the U.S. government, regardless of size and including private contractors and sub-contractors. The rule contains a “subcontractor flow-down” provision which means that the E-Verify requirement would be mandatory for sub-contractors under the federal contract if the contract award is for: (i) commercial or non-commercial services or construction jobs in excess of \$3,000; and (ii) includes work performed in the U.S.

Federal contractors must begin using E-Verify once federal regulations are written to carry out President Bush’s Executive Order, which we expect will be issued very shortly. While this executive order currently affects federal contracts, it is likely that many states will follow suit and start requiring state contractors to participate in the program as well.

### **Why is Immigration Compliance Important?**

The Immigration and Customs Enforcement (“ICE”) has escalated its worksite enforcement investigations. There are an estimated 11-15 million undocumented workers in the U.S. and ICE is focused on finding violations of criminal statutes and hiring of illegal aliens by employers. There has been a 50% increase in recent raids, particularly targeted at the construction, restaurant, agriculture, food processing, hotel industry or businesses that employ unskilled or semi-skilled workers. Many employers mistakenly believe that they are not in violation of immigration laws if they employ the workers through a subcontractor or sub-sub contractor. There is a “strategic shift” in enforcement actions and recent changes in immigration laws no longer insulate companies from liability if its sub-contractors actions.

In today’s uncertain enforcement environment, employers must be proactive and keep up with the changes in the law. The old rule of “if it ain’t broke, don’t fix it” does not work anymore. Non-compliance with immigration laws and regulations could lead to loss of government contracts, revocation of business licenses, forfeiture of property, fines and even prison sentences. A written company policy

which lays out how the company plans to ensure compliance with federal, state, and local immigration laws may be critical in case of a government audit or raid as it provides evidence that the company takes its Form I-9 obligations and compliance issues seriously.

### **What is “E-Verify”?**

E-Verify is a free on-line program jointly run by the Department of Homeland Security (DHS) and the Social Security Administration (SSA) and administered by the U.S. Citizenship and Immigration Services (USCIS). Under E-Verify<sup>1</sup>, the employer submits information provided on an employee’s Form I-9 and the on-line system checks SSA and DHS database<sup>2</sup> to verify the employment eligibility of the new hire and validity of the SSN provided by the employee. DHS will usually respond within 24 hours with one of the following results: Employment Authorized: the worker is authorized to work; SSA Tentative Non-Confirmation; there is an ‘information mismatch’ with SSA; or DHS Verification in Process. If the electronic query matches SSA and DHS databases, employers would get a system confirmation which must then be kept with the employee’s Form I-9 records. If the employee information does not match, employer would receive a “Tentative Non-confirmation” notice. At this point, employer and employee must take additional steps within a certain time to resolve the issue. If employer receives a “Final Non-confirmation”, it may terminate the employee and not have any civil or criminal liability. If the employer decides not to terminate employment after receiving final non-confirmation, the employer must then notify DHS. Failure to do so would subject the employer to civil fines of between \$500 and \$1000

Under E-Verify, employers must register online and sign a Memorandum of Understanding with DHS. Employers must also permit DHS/SSA audits and visits. E-Verify is designed as a voluntary program for all employers (except federal contractors) and aims to reduce unauthorized employment. However, the E-Verify System is plagued with errors and not completely reliable as it cannot ascertain a prospective employee’s right to work. Employers must assume the risk of taking an employment action against an employee based on potentially incorrect information in the DHS database.

In addition to mandatory participation in the E-Verify program, ICE advises employers to retain outside experts in immigration law to draft effective immigration compliance strategies. There is no “off-the-shelf” corporate compliance policy as it would vary for each employer depending upon the size of the company and the industry. The cost of creating and implementing a compliance plan is a fraction of the risk of not having one in place. Employers must continually audit and review their compliance policies and procedures and evaluate compliance measures on an on-going basis with their immigration and employment counsel.

For more information about the foregoing or other immigration queries, please contact:

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<sup>1</sup> [www.dhs.gov/E-Verify](http://www.dhs.gov/E-Verify)

<sup>2</sup> There are over 444 million records in the SSA database, and over 60 million records in DHS immigration database