

## In This Issue:

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Rhode Island has joined the ranks of many states across the country mandating E-Verify usage for its contractors and, following publication of the Rhode Island Department of Administration's emergency regulation in October, contractors and proposed contractors must comply.

## Rhode Island Issues E-Verify Regulations and Begins Enforcement

By George P. Kostakos and Lisa A. Cottle

On March 27, 2008, Rhode Island Governor Donald Carcieri signed an Executive Order requiring state agencies, as well as companies, contractors and vendors doing business with the state, to use E-Verify, the federal immigration program, to confirm the legal status of all employees. The measure also allows the state to inform individuals whose identity has been stolen and directs the Rhode Island State Police and the Department of Corrections to work with the U.S. Immigration & Customs Enforcement (ICE) to enforce federal immigration law via the Section 287(g) program. See Littler's ASAP - *ICE and Local Police Join Forces to Ramp Up Immigration Enforcement*. Pursuant to emergency regulations issued October 17, 2008, the Rhode Island Department of Administration began enforcing the Executive Order's E-Verify requirement effective immediately.

The Executive Order includes, among others, the following provisions:

1. The Department of Administration is required to register and use E-Verify to electronically verify that new hires in the Executive Branch are legally eligible for employment and to confirm the validity of their Social Security numbers. Further, the Department of Administration must use E-Verify to ensure that all employees of the Executive Branch are legally eligible to be employed in the U.S.
2. The Department of Administration requires all companies, contractors and vendors doing business with the State of Rhode Island to register and use E-Verify to ensure that their employees are working legally.
3. State agencies in the Executive Branch are authorized to notify those individuals whose identities are stolen or used improperly in order to enable them to receive any benefit, including child care, health care, welfare or a driver's license.
4. ICE will train the State Police to access federal databases, process immigration prisoners and transport them to detention facilities via the Section 287(g) program.

On July 29, 2008, the Department of Administration mailed Vendor and Bidder Certifications to all of its existing contractors. In the Certification, the contractor is required to attest to its E-Verify registration and compliance with Executive Order 08-01. The state further mandated that the contractor return its signed and notarized Certification to the Department within 45 days. Immediately thereafter, however, the American Civil Liberties Union (ACLU) and related parties filed a lawsuit in Rhode Island's Superior Court to enjoin the Department from enforcing Executive Order 08-01. The court denied the ACLU's request for an injunction on September 15, 2008. However, the court simultaneously ordered the Department of Administration to promulgate an E-Verify rule utilizing the public notice and comment requirements set forth in the Administrative Procedures Act and held that, until this E-Verify rule is promulgated, the Department will be prohibited from terminating any existing contracts based solely on the basis of the vendor's failure to certify its compliance with Executive Order 08-01.

Effective October 17, 2008, the Department of Administration began enforcing the E-Verify component of Executive Order 08-01 pursuant to *Emergency Regulations Re: Requirement to Register With and Utilize Federal E-Verify Program* filed with Rhode Island's Secretary of State on the same day. Final rulemaking will be completed following a hearing on similar proposed regulations set for December 3, 2008. The emergency regulation is scheduled to expire on February 14, 2009.

Under the Emergency Regulations, the term *contract* is defined as "all types of agreements including, but not limited to, State grants; orders for the purchase or disposal of supplies, services, construction, or any other item; awards; contracts of fixed-price, cost or incentive type; contracts providing for the issuance of job or task orders; letter contracts; purchase orders; Master Price Agreements; Agency Price Agreements; and, construction management contracts." Similarly, *contractor* means "any person having a contract with any Executive Branch entity ..., which consists of 'any department, commission, council, board, bureau, committee, institution, agency, authority or other entity, together with their respective officers and employees, under the supervision or control of the Chief Executive of the State government, including the Board of Governors for Higher Education and Board of Regents-Elementary and Secondary Education.'"

These broad regulations extend not only to existing or new contractors and subcontractors, but also to those *proposing* to enter into a business relationship with the State of Rhode Island. As the state only recently issued these Emergency Regulations, they are not yet subject to challenge.

In the meantime, Rhode Island employers working on public contracts should be on the lookout for correspondence from the Department of Administration regarding the E-Verify registration and certification requirements. If you have been contacted by the Department of Administration regarding your obligation to register with E-Verify, you should work with legal counsel to properly complete the necessary Rhode Island registration and certification requirements. If you have not been contacted by the Department of Administration, and you believe that you may be subject to Executive Order 08-01, you should work with your purchasing agent and your legal counsel to determine whether you are required to enroll in E-Verify and, if so, the proper method of fulfilling this requirement.

Executive Order 08-01 is one more of many recent legal actions by states across the country mandating E-Verify usage that have withstood judicial scrutiny in the face of compelling federal preemption and other legal arguments. Consequently, employers are well-advised to take notice of these new, stringent, and varied state requirements. Executive Order 08-01 may be only the tip of the iceberg of increasing immigration-related regulation that employers will face in the coming years.

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