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Midwest Edition

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Minnesota Government Contractors Now Required To Use E-Verify Program

By Bonnie K. Gibson and Kerry L. Middleton

Minnesota has joined a growing number of states that have recently imposed new obligations on employers related to eligibility verification of new hires. Immigration reform is at the center of a national public policy debate. Congress recently considered federal legislation aimed at cracking down on illegal immigration and will almost certainly take up the issue again. In the meantime, state governments are entering the fray by passing laws designed to punish employers that hire illegal immigrants. Colorado, Georgia and Arizona have already enacted such laws. Other states are considering similar legislation. Now Minnesota has taken action in the immigration reform arena.

With Executive Order No. 08-01, Minnesota Governor Tim Pawlenty has mandated that certain state contractors must use the E-Verify Program to ensure that new hires are eligible to work in the U.S. under federal immigration laws. Contractors are also subject to contractual sanctions if they knowingly hire illegal immigrants. The governor has proposed legislation that would punish any Minnesota employer that knowingly hires a person who cannot work legally in the U.S. The Executive Order will take effect fifteen days after publication in the State Register and filing with the Secretary of State, which is anticipated shortly.

What is "E-Verify"?

E-Verify is a voluntary program run by the U.S. Department of Homeland Security that uses sophisticated computer analysis to compare information gathered from new hires with various government databases, including Social Security and immigration records. It is different from the Social Security Number Verification System that many employers use to support their payroll system. Use of that system for payroll purposes is not equivalent to or a substitute for participation in E-Verify. To participate in E-Verify, an employer must register and enter into a written agreement with the DHS, which includes these primary obligations:

- A promise that every new employee's Social Security number and immigration ID will be run through the program within three days of hire

- A promise not to use the system for pre-screening

- Advance notice to employees that the employer participates in the program

- Notation of a unique DHS-generated PIN number on or with the I-9 of each new employee

- In the event of "non-confirmation," a 10-day appeal process, during which the employer must allow the employee to continue to work

Multi-state employers can enroll nationwide or limit enrollment to certain hiring facilities only. The enrollment process is an online system that is completed in a matter of minutes. Employer staff responsible for making queries into the federal database must also review a tutorial and pass an online test before they are allowed access to the data base.

The Executive Order

Governor Pawlenty's Executive Order No. 08-01 is two-fold. First, the State of

Minnesota will begin using E-Verify to confirm the eligibility of newly-hired employees of the executive branch. Second, and more notable for private employers in Minnesota, all employers that have contracts with the state in excess of $50,000 have some new obligations concerning verification of employee eligibility. With respect to those contractors, the Governor's Order provides:

- The state will include language in its contracts with vendors and subcontractors requiring: (a) certification of compliance with the federal Immigration Reform and Control Act of 1986 for employees performing work in the U.S.; and (b) certification that the vendors/subcontractors do not knowingly employ persons in violation of the United States immigration laws.

- Vendors and subcontractors must certify that they have implemented or are in the process of implementing the E-Verify Program for new hires in the U.S. who will perform work on behalf of the State of Minnesota.

- The state will include language in its contracts that allows for termination of vendors if it is determined that they have knowingly employed ineligible workers in violation of the federal immigration laws.

In addition, Minnesota will establish procedures for recipients of business subsidies to certify compliance with the federal immigration laws and a scoring incentive in competitive programs for businesses that implement the E-Verify Program for new hires.

Proposed Legislation

Governor Pawlenty has also proposed comprehensive immigration reform legislation that would impact all Minnesota employers, not just government contractors. Among other things, the governor has asked the Minnesota legislature to pass a law that imposes penalties on employers that knowingly hire, employ or recruit illegal immigrants. The proposed penalties would include a fine up to $5,000 and business license suspension or revocation. Under the governor's proposal, an employer's voluntary use of E-Verify could be used as evidence that the employer did not knowingly hire an illegal immigrant.

Implications and Recommendations

The Executive Order raises some potentially thorny questions from a compliance standpoint. Minnesota government contractors are required to use E-Verify for any newly hired employee working on behalf of the State of Minnesota, whether the work is performed in Minnesota or elsewhere in the U.S. However, E-Verify does not allow for "employee-by-employee" participation. In other words, at a minimum, E-Verify requires employers to enroll a specified hiring site. Once enrolled, the employer must subject all new employees at the registered hiring site to be subject to an E-Verify query. It is unclear whether this provision means that contractors must enroll all hiring sites where staff servicing the Minnesota state contracts are located, even if they are located outside of Minnesota. The Order appears to require this, but such a requirement is quite far-reaching and could give rise to questions about the permissible scope of Minnesota's legal authority to regulate business outside its borders.

What the contractual language called for in the Order will look like also is not yet clear. However, state vendors and subcontractors can, presumably, expect to receive new contracts containing the newly-mandated language in the near future. In the meantime, government contractors should take the following steps:

1. Register for E-Verify -- directions for how to register are available at www.vis-dhs.com/EmployerRegistration. In light of the time necessary to complete the registration process, train personnel on the program, and make any necessary operational adjustments, employers are generally advised to register immediately.

2. Audit current I-9 forms to ensure they are accurate and complete.

3. As needed, train personnel on proper completion of I-9s. (Note: effective December 26, 2007, employers must use a modified Form I-9, available at www.uscis.gov/files/form/i-9.pdf.)

4. Review, revise and develop policies for storing and retaining I-9 documents.

Employers should consider seeking the advice of experienced employment and/or immigration law counsel to determine specific strategies and practices for complying with Executive Order No. 08-01.

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