

NOT READY FOR PRIME TIME AND NOT A MAGIC BULLET

New Executive Order and Proposed Rule Require Federal Contractors to Use Basic Pilot/E-Verify

JULY 2008

On June 9, 2008, President George W. Bush signed an executive order (EO) requiring certain public and private federal agency contracts to include a provision mandating use of the severely flawed Basic Pilot/E-Verify employment eligibility verification program. On June 12, the administration published a proposed amendment to the Federal Acquisition Regulation (FAR) intended to implement the EO. The amended FAR would require federal contractors and subcontractors to use Basic Pilot/E-Verify to verify the employment eligibility of all employees hired after the contract is signed, regardless of whether they do any work under the contract. In addition, it would require contractors and subcontractors to use Basic Pilot/E-Verify to reverify the employment eligibility of all their existing employees who are assigned to contracts covered by the mandate. The new rules would impose a burden on at least 200,000 federal contractors and affect the livelihoods of at least 4 million of their employees. This sweeping change requires mandatory participation in a system that independent evaluations have found to be seriously flawed, plagued by inaccuracies, and subject to substantial rates of employer abuse, some forms of which are expressly illegal.

The FAR proposed changes were included in a Federal Register notice published on June 12, 2008.¹ ***The deadline for submitting comments on the proposed regulations is August 11, 2008.***² Information on submitting comments is available on NILC's website.³

The executive order and the proposed rule exceed the executive branch's authority and violate federal law.

- Federal law does not allow Basic Pilot/E-Verify to be used to reverify the employment eligibility of existing employees. Under the statute that created the Basic Pilot, which the U.S. Department of Homeland Security (DHS) rebranded as "E-Verify" in August 2007, employers may use the program only to verify employees' employment eligibility within the first three days of hire. Mandating that federal contractors reverify existing employees who are assigned to a federal contract would violate the statute.
- The president cannot unilaterally change the Basic Pilot/E-Verify law. Only Congress has the authority to change the Basic Pilot/E-Verify statute.

¹ 73 FR 33374-81 (June 12, 2008).

² For a more detailed explanation of the EO and proposed rule, *see* E-VERIFY WILL SOON BE REQUIRED FOR FEDERAL CONTRACTORS (Greenberg Traurig LLP Immigration Alert, June 2008), available at www.nilc.org/immsemplymnt/ircaempverif/GTAlert_E-Verify.pdf. NILC is preparing *model comments* to the proposed rule; they will be posted at www.nilc.org/immsemplymnt/ircaempverif/index.htm#model.

³ *See* www.nilc.org/immsemplymnt/ircaempverif/index.htm#eol.



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- Congress deliberately made Basic Pilot/E-Verify a voluntary program. The statute authorizing Basic Pilot/E-Verify explicitly establishes that the program is voluntary, and, except for certain limited circumstances set out in the statute, it prohibits federal agencies from requiring employers to use the program. Since it was enacted, numerous legislative efforts to make the program mandatory have either stalled or failed because of the inherent problems in the existing program that have gone unresolved. Mandating participation in the program violates the express command of Congress.
- This violation of federal law will have a sweeping effect. The EO and proposed rule do not apply only to private employers. They also compel public entities that contract with the federal government, such as state, county and local governments, schools, hospitals, and other public institutions, to use Basic Pilot/E-Verify even if these entities have decided that the program is harmful to their citizens and employees.

The executive order and the proposed rule encourage employers to violate the law, which will result in discrimination and profiling against workers, and in their termination.

- The administration is using scare tactics to bully employers into using a flawed and error-prone system. The proposed rule states, “Contractors that use E-Verify to confirm the employment eligibility of their workforce are much less likely to face immigration enforcement actions.” This statement reaches well beyond contractors; it sends a message to the business community that employers who do not use the voluntary Basic Pilot/E-Verify program will be singled out for worksite raids and other enforcement.
- The EO and proposed rule will lead to an increase in employer abuse of Basic Pilot/E-Verify. The 2007 Westat evaluation of Basic Pilot/E-Verify found “substantial” employer abuse of the program. Requiring participation in the program by federal contractors without addressing these violations effectively permits employers to continue abusing the program and violating employee rights. Moreover, it increases the possibility that employers will use the program for purposes other than employment, such as for trying to verify students’ or patients’ immigration status.
- Violations of employee rights and discrimination against lawful immigrant workers will increase due to unchecked preemployment screening. Almost half (47 percent) of all employers using Basic Pilot/E-Verify improperly run workers’ information through the system before their first day at work. The system contains no practical or technological mechanism to prevent this from happening. With more than 200,000 federal contractors subject to the EO, thousands of them could be violating federal laws.
- The EO and proposed rule will drive up rates of employer failure to inform employees of erroneous determinations and deprive workers of due process. At least 9.4 percent of employers using Basic Pilot/E-Verify fail to notify employees when the program initially flags them as not employment-eligible. Workers have the right to know about and contest findings related to their ability to work. Requiring hundreds of thousand of federal contractors to participate in this program without enhancing its worker protections will effectively allow many federal contractors to violate workers’ legal rights.
- The EO and proposed rule will lead to increased discrimination and an unwillingness to hire workers who look or sound “foreign.” Government-commissioned reports have already shown that some employers who use Basic Pilot/E-Verify engage in illegal employment practices, and

evidence suggests that such employers, when hiring, may discriminate against workers who look, dress, or sound “foreign” or have “foreign-sounding” names.

- The EO and proposed rule will discourage federal contractors from hiring lawfully present immigrants. Foreign-born employees are 30 times more likely than native-born ones to be misidentified by Basic Pilot/E-Verify as not eligible to work. Mandating use of the program will pressure federal contractors to give preference in hiring to applicants they believe “look like” U.S. citizens.
- Discrimination claims based on national origin or perceived national origin could increase. The Equal Employment Opportunity Commission (EEOC) recently reported that job bias claims filed against employers reached record highs in 2007 and that national origin–based charges filed with EEOC increased by an alarming 12 percent in 2007 from the previous year. Mandating federal contractors to use Basic Pilot/E-Verify without addressing the problem of discriminatory practices by employers could lead to an increase in these claims.

The EO and the proposed rule are bad public policy because they mandate federal contractors to use a flawed pilot program.

- Basic Pilot/E-Verify isn’t ready for prime time. The shortcomings and pitfalls of Basic Pilot/E-Verify have been well-documented through government reports, independent evaluations, and congressional hearings. Mandating use of the program without resolving these deficiencies is simply bad policy.
- Mandating use of an inaccurate system means that up to 8 percent of all federal contractor employees could potentially be initially misidentified as not eligible to work. According to a June 10, 2008, report from the Government Accountability Office, only 92 percent of employees whose information is run through Basic Pilot/E-Verify are immediately confirmed as eligible to work. This is due, in part, to inaccuracies in the DHS and Social Security Administration (SSA) databases on which Basic Pilot/E-Verify relies — inaccuracies related to individuals’ names, dates of birth, and what their work authorization, immigration, or citizenship status actually is. These inaccuracies mean that, because of the EO, hundreds of thousands of employees who are, in fact, eligible to be employed in the U.S. could be wrongfully issued a “tentative nonconfirmation” notice.
- The president’s issuance of “midnight regulations” is an abuse of power and demonstrates the administration’s belief that it is not accountable to the law. In May 2008, the Bush administration pledged to avoid issuing any new regulations after June 1, 2008, except in “extraordinary circumstances.” No extraordinary circumstances warrant the unlawful expansion of a flawed pilot program.
- Making Basic Pilot/E-Verify mandatory will further distract the Social Security Administration from its core mission of administering critical benefits programs. As of January 2008, over 750,000 Social Security cases were awaiting decisions on disability claims, with an average wait time per case of 499 days. Over 50 percent of people who call a local SSA field office with inquiries receive a busy signal. Since Basic Pilot/E-Verify relies on sometimes outdated or erroneous information in SSA databases, requiring federal contractors to use it could result in a massive overload to SSA systems as workers try to correct their records.
- This is more than a small step towards a full-blown, mandatory Basic Pilot/E-Verify. In the past six months, the administration has proposed regulations that pressure employers to use Basic Pilot/E-Verify by making the benefits employers derive from those programs contingent on enrollment in the Basic Pilot/E-Verify. This includes changes to the H-2A and H-2B visa

category requirements, the Optional Practical Training guidelines, and now the federal contractor program. The administration is attempting to make the program mandatory for all employers through regulatory action; the latest proposed rule is a step closer to that ill-advised goal.

The EO and proposed rule are bad economic policy.

- Mandating use of Basic Pilot/E-Verify does not negate the law of supply and demand and will drive undocumented workers further into the underground economy. The idea that any electronic employment eligibility verification system could eliminate our economy's demand for workers is naïve; employers that need workers will continue to hire them "off the books," if forced to do so. The Congressional Budget Office recently estimated that mandatory use of Basic Pilot/E-Verify by all U.S. employers would lead to an increase in undocumented workers being paid outside the tax system, which over a 10-year period would result in a loss of \$17.3 billion in federal revenue. Businesses that contract with the federal government comprise a significant percentage of U.S. employers. Making Basic Pilot/E-Verify mandatory without providing a path to authorized status for our existing unauthorized work force will divert billions of dollars into the underground economy and push more workers deep into those shadows.
- Imposing costs on federal contractors of at least \$100 million in the first year and between \$550 to \$670 million during the next 10 years will have a disproportionate effect on small businesses and their ability to contribute to the economy. The proposed rule anticipates that every one of the 324,250 small businesses registered to do business with the federal government at the contractor or subcontractor level will be impacted. Small businesses employ approximately half of the entire U.S. workforce and have generated 60 to 80 percent of net new jobs annually over the last decade. These businesses (many of which are immigrant-, minority-, or family-owned), already struggling in the current economy, will face additional burdens and unanticipated problems if they are required to use Basic Pilot/E-Verify, potentially harming their ability to create new jobs and revenue.⁴

FOR MORE INFORMATION, CONTACT

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⁴ For more information about the importance of small businesses to the U.S. economy, *see* FAQs: ADVOCACY SMALL BUSINESS STATISTICS AND RESEARCH (U.S. Small Business Administration), <http://app1.sba.gov/faqs/faqIndexAll.cfm?areaid=24>.