



# QUARTERLY BYTES

FEES & BURGESS, P. C.



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## Final Rule Requiring Federal Contractors to Use E-Verify Effective September 8, 2009

Fees & Burgess, P.C., Emphasizes:

E-Verify, formerly known as the Basic Pilot Program, is an internet-based system operated by the Department of Homeland Security in partnership with the Social Security Administration. E-Verify allows employers to electronically verify the employment eligibility of their newly hired employees.

While in office, President Bush signed Executive Order 12989 requiring certain federal contractors to use an electronic employment eligibility verification system. Executive Order 12989 was amended by Executive Order 13465 on June 6, 2008. Specifically, Executive Order 13465 states: "Executive departments and agencies that enter into contracts shall require, as a condition of each contract, that the contractor agree to use an electronic employment eligibility verification system designated by the Secretary of Homeland Security to verify the employment eligibility of: (i) all persons hired during the contract term by the contractor to perform employment duties within the United States; and (ii) all persons assigned by the contractor to perform work within the United States on the Federal contract." Then Secretary of Homeland Security, Michael Chertoff, designated E-Verify as the electronic employment eligibility verification system to be used.

The final rule implementing Executive Order 13465 requires federal contractors to agree, through language inserted into their federal contracts, to use E-Verify to confirm the employment eligibility of all persons hired during a contract term, and to confirm the employment eligibility of federal contractors' current employees who perform contract services for the federal government within the United States. Specifically, federal contractors with contracts worth over \$100,000 and that have a performance period of over 120 days will have to use E-Verify to confirm the employment eligibility of all persons hired to work on the contract, and all new and existing employees directly performing work on the contract. Additionally, prime contractors must include a clause mandating the use of E-Verify in all subcontracts over \$3,000 for services or construction. Contracts that are for commercially available off-the-shelf items are exempt from the rule. Companies awarded a contract with the federal government will be required to enroll in E-Verify within 30 days of the date of the contract award. Companies then must initiate verification of existing employees or new hires assigned to the federal contract within 90 days of enrollment in E-Verify. After the 90-day period, companies must verify each newly hired employee within 3 business days of their start date.

**General Civil Litigation**

**Commercial Law & Litigation**

**Municipal Law & Litigation**

**Police Civil Liability Defense**

**Employment Law & Litigation**

**Construction Litigation**

**Corporate Law & Government Contracting**

**Insurance Defense**

**Railroad Law**

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## **Final Rule Requiring Federal Contractors to Use E-Verify Effective September 8, 2009 *continued from page 1...***

The implementation of this final rule has been delayed several times and is the subject of litigation. Currently, however, federal contracts awarded and solicitations issued after September 8, 2009, will include a clause committing federal contractors to use E-Verify.

For more information, please go to <http://www.uscis.gov>.

### **LITIGATION SPOTLIGHT**

## **The United States Supreme Court Addresses Reverse Discrimination in Ricci v. DeStefano**

New Haven, Connecticut, uses objective examinations to identify which firefighters are best qualified for promotion. After the results of one such examination to fill vacant lieutenant and captain positions showed that white candidates had outperformed minority candidates, the city came under public scrutiny. Confronted with arguments both for and against certifying the test results – and threats of a lawsuit with either option – the city discarded the test results because of the statistical racial disparity. White and Hispanic firefighters who passed the examination, but who were denied a chance at promotions because the city refused to certify the test results, sued the city, alleging it had violated Title VII of the Civil Rights Act of 1964. Specifically, plaintiffs alleged they were disparately treated on account of their race. The city responded that, had the test results been certified, it would have faced liability under Title VII for adopting a practice that had a disparate impact on minority firefighters.



In a close 5-4 decision, the United States Supreme Court held the city's action in discarding the test results violated Title VII. The Supreme Court noted Title VII prohibits intentional acts of discrimination based on race, as well as policies or practices that are not intended to discriminate, but have a disproportionately adverse impact on minorities (*i.e.*, disparate impact discrimination). The Supreme Court also noted, however, that an employer may defend the policy or practice resulting in a disparate impact if it is "job related for the position in question and consistent with business necessity." If the employer meets that burden, plaintiff may still succeed by demonstrating the employer refused to adopt an available alternative practice that has a less disparate impact and still serves the employer's needs.

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**LITIGATION SPOTLIGHT****The United States Supreme Court Addresses Reverse Discrimination  
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Additionally, the Supreme Court observed that, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional, disparate impact (here, discarding the test results), the employer must have a *strong basis in evidence* to believe it will be subject to disparate impact litigation if it fails to take the race-conscious action.

In applying the law to the facts of the case, the Supreme Court first recognized that the city's rejection of the test results simply because the higher scoring candidates were white, and without further justification, was expressly prohibited by Title VII. The Supreme Court then considered whether the city met the strong-basis-in-evidence standard, thus excusing its race-conscious action. The Supreme Court concluded it did not. That is, despite the fact the city was faced with a *prima facie* case of disparate impact discrimination, there was no strong basis in evidence that the city would have been liable under Title VII had it actually certified the test results. This is because the city could only be liable under Title VII if the examination at issue was not job related and consistent with business necessity, or if an equally valid, less discriminatory alternative existed. Here, the Supreme Court found there was no substantial evidence the examination was deficient in either respect. Thus, the strong-basis-in-evidence standard was not satisfied. Finally, the Supreme Court noted that the fear of litigation alone could not justify the city's actions to the detriment of the individuals who passed the exam and qualified for promotions. Consequently, the Supreme Court ultimately held that, because the city had no strong basis in the evidence to believe it would be liable for disparate impact discrimination, discarding the test results was impermissible race discrimination under Title VII.

This case demonstrates the tight rope an employer must walk when navigating Title VII in the context of work-related examinations. Employers must be careful to consider the effects of their actions with respect to all races in the work place in doing so.

Ricci v. DeStefano, 129 S. Ct. 2658 (June 29, 2009).





**HR CORNER**

**Department of Labor Issues Proposed Regulations Governing Obama Executive Order 13496**

On January 30, 2009, President Obama issued Executive Order 13496 (Order) governing notifications to employees of their rights under federal labor laws. Per the terms of the Order, all government contractors must flow-down contract language in their subcontracts regarding certain contractor obligations related to federal labor laws. More specifically, government contracts must include a clause drafted by the Department of Labor which provides specific instructions for contractors to notify employees of their collective bargaining rights. This Order effectively reverses the executive order issued by President Bush which required notices reminding employees that they are not required to join a collective bargaining unit, commonly referred to as the “Beck Notice.”

In accordance with the Order, the Secretary of Labor published a proposed rule on August 3, 2009, providing the Department of Labor’s suggested regulations to implement the Order. These regulations provide additional detail regarding the responsibilities of government contractors. This includes contract language describing the specific notice that contractors must post for their employees.

As with most federal regulations related to government contracting clauses, the proposed regulations include certain exceptions to the Order’s requirements, including exceptions for small contracts where the simplified acquisition threshold is below \$100,000 and where the contracts are issued pursuant to solicitations issued prior to the effective date of the final rule. However, note that subcontractors are still covered by the Order, even if their contract is below the simplified acquisition threshold, where their performance is essential to the contract. The notice language provided in the regulations must be quoted verbatim in every contract, subcontract, and/or purchase order related to the prime contract (meaning that the clause may not be made part of the contracts by incorporation or reference).

The key provision of the required employee notice language states that “[i]t is the policy of the United States to encourage collective bargaining and protect the exercise by workers of full freedom of association, self organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid and protection.” Furthermore, the notice expressly states that under federal law, employees have the right to organize a union, join a union, strike, and/or picket. The notice also provides contact information at the National Labor Relations Board for employees who believe that their rights have been violated.

The regulations allow enforcement of the Order’s requirements through compliance evaluations by the Department of Labor. Such evaluations may include on-site visits to monitor contractor posting obligations and a review of specific contract language. As with most requirements for government contractors, failure to follow the mandates of the Order and its implementing regulations may result in debarment.



**HR CORNER**

**Department of Labor Issues Proposed Regulations Governing Obama Executive Order 13496 *continued from page 4...***

Please note that the regulations are still in draft form. The Department of Labor is currently seeking comments related to its proposed regulations, after which a final regulation will be published.

The proposed Department of Labor regulations are available at: <http://www.dol.gov/federalregister/PdfDisplay.aspx?DocId=22984>.

**PROTECTIVE MEASURES**

**“WHICH CAME FIRST . . .”**

When two companies contract, and one is required to make the other an “insured” under its policy, which of the two insurance companies is required to provide primary, instead of excess, coverage? In other words, which comes first?

In Colony Ins. Co. v. Georgia-Pacific, L.L.C., 2009 WL 2343673 (Ala. Jul. 31, 2009), the Alabama Supreme Court reiterated that the answer to that question depends on the exact language in each policy. Colony Insurance Company (Colony) insured a company installing a roof at Georgia-Pacific, L.L.C. (G-P). The roofer was required to name G-P as an additional insured on the Colony policy. An employee of the roofer fell and was killed. G-P demanded Colony provide a defense and indemnity for the claims made against it. Colony claimed its duty to defend and indemnify was proportional, based on its coverage and the coverage provided by G-P’s excess insurance carrier.

The Court reviewed the two policies. The excess insurance policy specifically stated it was secondary to any insurance coverage of whatever nature. Colony’s policy did not contain the same provision. Because the determination of which insurance coverage is primary is based on the “exact language” of the policy, the Court concluded Colony’s policy provided primary coverage, and G-P’s insurer only provided excess coverage.

In short, companies should read their insurance policy carefully to determine exactly which company will bear the risk of litigation and which company’s insurer must defend and indemnify as a primary insurer.





## Fees & Burgess, P.C. — Calendar of Events

*Fees & Burgess, P.C., is proud to present, or participate in the presentation of, the following upcoming seminars:*

September 9, 2009 — Birmingham, Alabama, [\*Wage & Hour Master Class\*](#), presented for, and sponsored by, M. Lee Smith Publishing, Inc. One day packed with updates, interaction, and answers to your payroll-policy concerns.

September 16, 2009 — Huntsville, Alabama, [\*Delivery Terms and Allocation of Risk in Commercial Contracts under Incoterms and the U.C.C.\*](#), this webinar will give participants an understanding of the meaning of various delivery terms under both Incoterms 2000 and the Uniform Commercial Code (UCC), including changes to the UCC eliminating previously used delivery terms, and the trend toward using delivery terms under Incoterms 2000 under domestic agreements.

Attendees will have access to a downloadable version of the PowerPoint presentation describing the attributes of Uniform Commercial Code delivery terms, and 4 groups of 13 Incoterms delivery terms, and the opportunity to ask questions regarding the subject matter at the end of the presentation.

Coordinate now with your colleagues and get the biggest "bang for your buck"! [Register here.](#)

September 30, 2009 — Madison, Alabama, [\*ABC Labor/Human Resources Law Update\*](#), sponsored by Associated Builders & Contractors of North Alabama, Inc., and presented by attorneys from the law firm of Fees & Burgess, P.C.

This program will provide critical and timely updates on new developments including:

- New Family Medical Leave Act regulations, certifications, and other requirements
- New amendments to the Americans with Disabilities Act
- Employee Free Choice Act updates
- Current status of E-Verify and I-9 Requirements
- Genetic Information Non-discrimination Act (GINA)
- Pending Executive Orders Encouraging and Supporting Union Activity
- Alabama HB362 Firearms in Parking Lot
- Lilly Ledbetter Fair Pay Act, and other pending legislation

Approved for 1.5 HRCI accreditation hours. E-mail [sarah@abcnalabama.org](mailto:sarah@abcnalabama.org), or call 256-355-1168 regarding registration.

For more information on these and other seminars, please go to <http://www.feesburgess.com/category/events-seminars/> or contact Sylvia Taylor at [staylor@feesburgess.com](mailto:staylor@feesburgess.com).



**SPEAKERS**

Fees & Burgess, P.C., provides speakers, training programs, seminars, and webcasts for various trade associations; business groups; and clients. For information regarding a program contact Sylvia Taylor at [staylor@feesburgess.com](mailto:staylor@feesburgess.com).

**NEWSLETTERS**

Fees & Burgess, P.C., also publishes *F&B HR Corner*, focusing on human resource issues; and *F&B SCM Memo*, focusing on the supply chain management industry. To receive any of these e-newsletters, please e-mail Sylvia Taylor at [staylor@feesburgess.com](mailto:staylor@feesburgess.com) with your contact information.

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