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IMMIGRATION COMPLIANCE UPDATE: THE FOUR MOST IMPORTANT THINGS EMPLOYERS SHOULD KNOW RIGHT NOW

1. ICE INCREASINGLY SEEKS TO CRIMINALLY PROSECUTE EMPLOYERS

Under the Bush administration, the focus of worksite enforcement actions was arresting illegal aliens. Under the Obama administration, however, the focus of the Department of Homeland Security ("DHS") has shifted to criminal prosecution of employers. DHS made this clear in an April 30, 2009, memorandum setting out its worksite enforcement strategy and in a corresponding U.S. Immigration and Customs Enforcement ("ICE") Worksite Enforcement Fact Sheet.

In fiscal year 2008, ICE made more than 1,100 criminal arrests, 135 of which involved employers, as part of its worksite enforcement program. DHS seeks to increase criminal prosecutions of employers in the future, explicitly stating in its April 30 memorandum that "[a]bsent exigent circumstances, ICE offices should obtain indictments, criminal arrest or search warrants, or a commitment from a U.S. Attorney's Office (USAO) to prosecute the target employer before arresting employees for civil immigration violations at a worksite."

Historically, manufacturing, construction, meatpacking, restaurant, and service industries were the main targets of worksite enforcement actions. Going forward, however, DHS and ICE have made clear that employers from *any* industry may be subject to worksite enforcement actions if they fail to comply with immigration laws. Therefore, rather than focusing on a particular industry, ICE has indicated that it will focus on egregious violators and on violations that compromise national security.

In addition to increased criminal enforcement against employers by DHS and ICE, a bill was recently introduced in the House to increase statutory criminal penalties for knowingly hiring unauthorized aliens. Current criminal penalties include fines of up to $3,000 for each unauthorized alien and/or up to six months in prison for a pattern or practice of violations. Under the bill proposed on February 22, 2010

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(Criminal Penalties for Unauthorized Employment Act of 2010 (H.R. 4627)), these penalties would increase to up to one year in prison and a $2,500 fine per violation. The bill also proposes even steeper penalties for repeat offenders: up to two years in prison and a $5,000 fine per violation for an individual with one prior conviction of the same offense, and up to five years in prison and a $10,000 fine for individuals with more than one prior conviction of the same offense.

With the increased focus on criminal prosecutions of employers, employers in all industries must vigilantly comply with immigration laws to avoid worksite enforcement actions and the potential for fines and imprisonment.

2. FORM I-9: NOT JUST MINISTERIAL PAPERWORK

Form I-9 audits by ICE rose sharply in the past year. In July of 2009, ICE announced 652 Form I-9 audits, more than the total number of Form I-9 audits performed in *all* of fiscal year 2008. This was followed by the announcement of another 1,000 audits in November of 2009 and the recent announcement on March 2, 2010, that ICE will be conducting another 180 Form I-9 audits, this time in the states of Louisiana, Mississippi, Alabama, Arkansas, and Tennessee.

Even employers with dedicated human resources departments may still have technical errors on their Forms I-9, which can lead to problems during an ICE audit. Civil penalties for Form I-9 violations can add up quickly. A poultry processing company was recently fined more than $500,000 for such violations. Moreover, ICE is using Form I-9 audits as an investigative technique, meaning an audit could be a precursor to a criminal investigation and prosecution.

Employers can take proactive steps to try to prevent problems in the event of an ICE audit by implementing an immigration compliance program that includes training on how to properly fill out the Form I-9, expressly details retention requirements, and includes periodic self-audits to correct existing technical errors. A comprehensive immigration compliance program not only helps employers consistently comply with immigration laws but also goes a long way toward a good faith defense if the employer ever faces an enforcement action.

3. E-VERIFY: THE SLOW PROGRESSION FROM VOLUNTARY TO MANDATORY

E-Verify is the federal government's free, internet-based program for employers to electronically verify whether their employees are authorized to work in the U.S. For most employers, E-Verify is still voluntary and allows for the verification of new employees only. However, this is slowly starting to change. In Arizona, Mississippi, and South Carolina, *all* employers are either currently required to use E-Verify for new hires, or will be required to use E-Verify shortly, as some of the states' laws take effect in phases. Other states, such as Georgia, Minnesota, and Rhode Island, have imposed laws more limited in scope, requiring use of E-Verify by state agencies and state contractors.

The federal government has also amended the Federal Acquisition Regulation to require use of E-Verify by federal contractors if (1) the contract was awarded after September 8, 2009; (2) it is a prime contract with a performance period longer than 120 days and a value greater than $100,000 or a lower-tier contract that exceeds $3,000 for services or construction; (3) all or a portion of the contract will be performed in the U.S.; and (4) the contract is not for commercially available off-the-shelf items or items that would be considered such but for minor modifications. In addition, existing indefinite-delivery/indefinite-quantity contracts may be amended to require the federal contractor to use E-Verify if the performance period goes beyond March 8, 2010, and a substantial amount of work or number of orders is expected during the performance period. Failure to comply with the E-Verify clause can result in suspension or debarment.[1]

There is also some momentum in Congress to make E-Verify mandatory on a national scale for all employers. On January 21, 2010, a bipartisan group of House members introduced a resolution that included such a plea. With pressure from

1 Another important note with regard to the E-Verify clause in federal contracts is that it requires employers to verify *existing* employees, not just new hires, who work on the federal contracts containing the clause. In addition, when a federal contractor enrolls in E-Verify, it has the option, but is not required, to verify *all* of its existing employees, regardless of whether they work on the federal contract containing the E-Verify clause. This sharply contrasts with non-federal contractors enrolled in E-Verify, who are strictly *prohibited* from using it to verify existing employees.

President Obama and the public to pass comprehensive immigration reform legislation in the next year, required participation in E-Verify may not be very far off.

Regardless of whether an employer is currently enrolled in E-Verify, it is worth understanding the basics of the process. First, the employer (or a designated agent) enters information from an employee's Form I-9 to begin the verification process. This needs to be done within three days of hire, unless a federal contractor is verifying an existing employee pursuant to a federal contract containing the E-Verify clause. E-Verify checks the employee's information against the Social Security Administration's ("SSA") and DHS's databases. If everything checks out, E-Verify will confirm that the employee is authorized to work. If there is a discrepancy, E-Verify will indicate that there is a tentative nonconfirmation, either from SSA, DHS, or both. The employer must confirm that there were no data entry errors in the information submitted to E-Verify and provide the employee with a written "Notice to Employee of Tentative Nonconfirmation" as soon as possible. The employee must indicate on the notice whether or not he/she contests the nonconfirmation, and both the employer and employee must sign the notice. If contested, the employer must print a "Referral Letter" from E-Verify and provide it to the employee. This letter has information on how to resolve the discrepancy. The employee then has eight federal government working days from the referral date to initiate the process of resolving the problem with SSA and/or DHS. After this eight-day period, SSA and/or DHS will electronically transmit the result of the referral to the employer within 10 federal government working days. Potential results include confirmation that employment is authorized, final nonconfirmation, or notification of continuance (indicating that more time is needed to resolve the issue).

The employee may not be terminated while SSA and/or DHS is/are processing the case (unless the employer otherwise obtains knowledge that the employee is unauthorized to work in the U.S.). If uncontested, or if the employee fails to resolve the discrepancy, a final nonconfirmation will be issued, and the employee may be terminated. If an employee is not terminated after a final nonconfirmation, the employer must notify DHS. Failure to notify DHS may result in a penalty of $550 to $1,100 per failure. Furthermore, if an employee is not terminated after a final nonconfirmation and the employee is later found to be an illegal alien, the employer is subject to a rebuttable presumption that it knowingly employed an illegal alien.

Employers should be aware that, while participation in E-Verify creates a rebuttable presumption that an employer has not knowingly hired unauthorized aliens, it does not create a safe harbor. In addition, participation in E-Verify provides the government with additional means to investigate whether an employer is complying with immigration laws. First, in signing the Memorandum of Understanding as part of the enrollment process, an employer is agreeing to allow DHS and SSA to review the employer's Forms I-9, as well as other employment records, to interview employees, and to respond to requests for information from DHS. Second, DHS has created the Compliance Tracking and Management System to mine data from E-Verify to check for misuse by employers, including fraudulent use of alien numbers and Social Security numbers, termination of employees without waiting for final nonconfirmation, and failure to notify DHS when an employer continues to employ an employee who receives a final nonconfirmation.

These are important considerations for employers contemplating whether to enroll in E-Verify, or for currently enrolled employers seeking to understand their rights and responsibilities under the Memorandum of Understanding.

4. NO-MATCH REGULATION: GONE BUT NOT FORGOTTEN

On October 7, 2009, DHS rescinded its controversial "no-match" regulation. The no-match regulation was initially issued on August 15, 2007, and set out procedures employers could follow to avoid being deemed to have constructive knowledge that an employee was an unauthorized alien after receipt of a no-match letter from the SSA or a notice of suspect documents letter from DHS. The procedures involved the following steps with regard to no-match letters: (1) rechecking human resources records for any clerical errors and trying to resolve the issue with SSA within 30 days; (2) promptly re-verifying the information with the employee and asking the employee to resolve the issue with SSA within 90 days of the date the employer received the no-match letter

if the problem persisted; and (3) completing a new Form I-9 within three days, if the issue was not resolved in the initial 90-day window, based on newly presented documents from the employee, if the documents contained a photo and did not contain the disputed Social Security number.

The regulation set forth similar procedures for addressing a notice of suspect documents letter from DHS. Employers were instructed to (1) contact DHS within 30 days (but given up to 90 days to resolve the issue with DHS); and (2) if unable to resolve the issue within 90 days, complete a new Form I-9 within three additional days, based on newly presented documents from the employee, if the documents contained a photo and did not contain the disputed alien number.

While DHS termed these voluntary "safe harbor procedures," they appeared to employers as mandatory procedures that provided limited protection from enforcement actions. However, the regulation never went into effect as it was immediately challenged in court and enjoined. *See AFL-CIO v. Chertoff*, 552 F. Supp. 2d 999 (N.D. Cal. 2007). DHS under the Bush administration appeared ready to battle on in an attempt to enforce the regulation, but DHS under the Obama administration has opted to rescind it.

While the rescission appears on its face to be a success for all those that challenged the regulation, it is not unqualified. In announcing the rescission, DHS stated:

> DHS has not changed its position as to the merits of the 2007 and 2008 rules . . . . Receipt of a No-Match letter, when considered with other probative evidence, is a factor that may be considered in the totality of the circumstances and may in certain situations support a finding of "constructive knowledge." A reasonable employer would be prudent, upon receipt of a No-Match letter, to check their own records for errors, inform the employee of the no-match letter, and ask the employee to review the information. Employers would be prudent also to allow employees a reasonable period of time to resolve the no-match with SSA.

Safe-Harbor Procedures for Employers Who Receive a No-Match Letter: Rescission, 74 Fed. Reg. 51,447, 51,449 (Oct. 7, 2009). Therefore, while employers need not follow the precise procedures set forth in the no-match regulation, they should still formulate a standard procedure to address no-match letters as part of a comprehensive immigration compliance plan.

CONCLUSION

As criminal and civil worksite enforcement actions against employers steadily increase, there is no substitute for a comprehensive immigration compliance plan. All employers can benefit from such a plan, which can help ensure compliance with immigration laws and standardize procedures for addressing any issues or problems that may arise.

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