PUBLICATION

Employment Verification Developments: A Vortex of Stress

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DHS has announced that it will move ahead with requiring use of E-Verify for federal contractors effective September 8, 2009, but will retract the Bush Administration's "safe harbor" regulation relating to Social Security "No-Match" letters. Some states continue to require E-Verify by state government contractors. DHS has shifted its focus from massive raids with deportations to targeted audits, fines and prosecutions of employers concerning I-9 compliance. DHS just announced audits of 652 employers. The Form I-9 version dated "2/2/09" and DHS "Handbook for Employers" have been in effect since April 3, 2009 and continue in effect despite the form's stated expiration of 6/30/2009.

Immigration remains a brutally complex and difficult political issue, with both parties' leadership interested in "comprehensive immigration reform" but with important interests in both parties tugging hard toward more enforcement and limitations. Congress and the Obama Administration are talking about starting a legislative process later this year or early next year. Think tanks on every side are pumping out position papers every day. Meanwhile, employers must run their businesses and manage risk in an ever-complex environment.

More Audits, Less Raids

In the midst of this, U.S. Immigration & Customs Enforcement (ICE) is an enforcement machine that must be directed. DHS has chosen to emphasize audits and penalties against employers who are not correctly using I-9s for verifying employees' authorization or who are knowingly hiring unauthorized workers. The quieter shift is away from large worksite raids accompanied by messy mass removals of undocumented workers and turmoil in their communities and families, in favor of larger, overt efforts against employers of such workers. ICE just issued 652 notices of audit to employers it appears to have targeted through various means. This represents a significant shift of resources toward the relatively time-consuming audit and fines process. ICE normally allows an employer three days for an audit, but often that is not enough time to complete an internal audit with appropriate corrections, and employers should self-audit regularly and carefully. DHS continues to threaten and pursue prosecutions in more serious cases.

E-Verify for Federal Contractors: On for September 8? Some States, Anyway.

In a news release on July 8, 2009, Secretary Napolitano announced that DHS will in fact implement President Bush's 2008 Executive Order requiring larger federal contractors to use E-Verify for all new hires and for some pre-existing workers, which we have discussed before. That rule will take effect on September 8, 2009, unless lawsuits or other political forces overtake the plan. On September 8, federal agencies will begin to insert language in certain federal contracts requiring the vendor to use E-Verify and to require certain subcontractors to use E-Verify. Affected federal contractors have numerous strategic and practical decisions to make in implementing an E-Verify program.

Meanwhile, some states have passed laws or executive orders requiring state government contractors to use E-Verify, including Arizona, Colorado, Georgia, Idaho, Minnesota, Mississippi, Missouri, Nebraska, Oklahoma, Rhode Island, South Carolina, and Utah. Most of these states' laws have already taken effect. Arizona, Mississippi, and South Carolina require all employers to use E-Verify by certain dates. Some affected employers have implemented E-Verify only for facilities affected by these rules, but others, seeing the inevitable, have begun broader E-Verify programs.

No-Match Letter Rule Coming off Table: Where Are We Left?

Simultaneously DHS announced that it will publish a rule retracting the DHS "safe harbor" rule concerning Social Security Administration "No-Match" letters. (And to show how confused things are, meanwhile, some legislators have proposed a law to block use of funds for withdrawing the rule.) SSA "No-Match" letters historically have informed employers about a mismatch between a worker's W-2 data and the data in SSA's database concerning the social security number reported for the worker. The rule would have required SSA to include in its no-match letters another letter from ICE stating that employers will be held responsible under immigration verification laws for ignoring a no-match letter. The regulation and ICE letter spelled out a process that the employer could follow to avoid such responsibility. The process involved checking records to correct internal mistakes, sending the worker to resolve the problem with SSA, and completing a new I-9 under conditions designed to be nearly impossible for an unauthorized alien (thus termination of the worker).

A federal court in San Francisco enjoined the rule from taking effect, that injunction remains today, and SSA has sent no such letters to employers since 2006. In 2008 DHS did a new rulemaking to fix the rule's problems, and in doing so stated that it has always been DHS' and former INS' position that an employer who ignores an SSA no-match letter is at risk for "constructive knowledge" that the worker involved is not authorized, exposing the employer to civil and criminal penalties. The rule was designed to help employers by clarifying what kind of response to a no-match letter will protect the employer from liability, since SSA only cares about allocating tax withholding to retirement accounts and gives no guidance about immigration consequences. It is not clear what effect withdrawal of the rule will have. Nothing appears to prevent DHS and prosecutors from trying to use against employers any failure to act on no-match letters, unless DHS' new rulemaking otherwise commits the government, which we do not expect. Ignoring SSA no-match letters, once they resume, remains dangerous, and employers should have carefully drawn employment verification policies including responses to various types of mismatch and similar notifications.

I-9 Form and Handbook

DHS published a new Form I-9. That form says "Rev. 02/02/09" at the bottom right corner, but in fact DHS delayed putting it into effect until April 3, 2009. On that date, a new 65-page Handbook for Employers also took effect, answering lots of previously unanswered questions about the surprisingly complex I-9 rules and process.

How We Can Help

Baker Donelson's Immigration Group regularly counsels employers on I-9 compliance. We perform private audits of I-9 documents, prepare compliance programs and policies, and train managers and workers in implementing those programs. We evaluate particular questionable documents and situations. We help employers decide whether and how to create or store I-9 forms electronically, to use Social Security Administration's Number Verification System, to participate in the Department of Homeland Security's E-Verify program, or to respond to information suggesting that a worker might not be authorized. We help federal and state contractors design and implement E-Verify programs in compliance with Executive Order 13465 as implemented in Federal Acquisition Regulations and various state laws and orders.

We defend sanctions actions by ICE for "paperwork" and "knowingly hire" violations of I-9 rules. We work with our strong Litigation Department to bring and defend claims against competitors based on employment of unauthorized aliens. Working with our Government Investigations and Litigation Group, we advise and defend employers and managers in increasingly common criminal investigations and proceedings relating to employment of aliens and employment verification rules.

When specifically requested, working with our Tax Department, we provide advice and coordinate with U.S. and foreign preparers concerning U.S. taxation of international companies doing business in the U.S., and concerning the U.S. taxation of international workers placed in the U.S. and abroad. Working with our Global

Business Group, we assist and defend clients in relation with "deemed" export licensing restrictions affecting foreign nationals and with the immigration implications of U.S. trade sanctions against certain countries.