PUBLICATION

More Mixed But Strong Signals about Employment Verification

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On the same day, ICE leadership sent mixed messages about enforcing I-9 rules. ICE's leader publicly promised more I-9 audits than the recently announced 650, with administrative fines and criminal prosecutions to follow. But ICE withdrew a "safe harbor" regulation for employers who receive a "no match" letter. Meanwhile, serious enforcement continues and the risk of noncompliance is high.

John Morton, newly appointed Assistant Secretary of U.S. Immigration & Customs Enforcement within the Department of Homeland Security, stated yesterday (as reported in the Wall Street Journal) that ICE is preparing to conduct I-9 audits on more employers, even beyond the 650 ICE recently served with notices nationwide. Morton stated that ICE will systematically impose fines on violators, who could also face criminal charges. This almost obscures a move away from larger worksite raids that have been politically criticized by many supporters of the current Administration.

On the same day, DHS sent a different, confusing signal by proposing to withdraw a Bush Administration rule that provided employers, who sometimes receive a "no match" notification about a worker, a "safe harbor" from the inference of "constructive knowledge" of the worker being an unauthorized alien if the employer follows a set of steps to clear up the mismatch. The rule had not yet taken effect, partly due to pending litigation by business and labor interests.

Implementing the safe harbor rule would mean resumption of SSA no-match letters (withheld since 2006) with letters from ICE threatening consequences of ignoring the letters. That would put more employers officially on notice of unauthorized workers, which many interests wish to delay until comprehensive immigration reform (including legalization). But now employers who actually receive "no-match" notifications from various sources will continue to face the prospect of those notifications being used as evidence in administrative and criminal charges, and they will not have the benefit of clear protection from a governmentally outlined course of action.

Meanwhile, reports continue of criminal charges, pleas and trials of employers and their managers for hiring and employing unauthorized aliens, and for "knowingly" accepting false documents or submitting false data to the government about forged or stolen identities. Employers must evaluate their hiring and verification practices to manage the risk of meaningful enforcement.

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 International 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.