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Top Five Immigration Items for 2008

Service

Business Immigration and Global Mobility

Item 1. NEW I-9 FORM. Employers should use the new form for *newly hired* employees. Additionally, USCIS has issued a new M-274 Handbook for Employers, available under Related Files.

Employers should:

Discard all copies of old *blank* I-9 forms to prevent inadvertent use

Require each *newly hired* employee to complete Section 1 of the form on the first day of employment

Retain the I-9 forms for all current employees and for certain former employees (Federal law requires forms to be maintained for three years after the date of hire or one year after the date of termination, whichever is later.)

Item 2. SOCIAL SECURITY 'NO-MATCH' LETTER REGULATION. The U.S. Department of Homeland Security's 'no-match' regulation is still on hold. The federal government has appealed the U.S. district court decision that prevented implementation of the rule and is also in the process of re-tooling the regulation for release around March. Reports indicate that the Social Security Administration will *not* send 'no-match' letters at this time, but may do so later in the spring. These delays have prompted legislative proposals in Congress, the most significant being **H.R. 4088, Save Act of 2007** (See Item 5 below), which would require 'no-match' information-sharing with the Department of Homeland Security.

Employers should:

Expect some resolution of the 'no-match' regulation by March and subsequent issuance of 'no-match' letters

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Be prepared to effectively address interim situations that charge the employer with 'no-match' equivalent information

Consult with counsel about the proper use of tools to correctly report wages and other strategies to avoid 'no-match' situations

Item 3. CONTINUED SCARCITY OF VISA SPONSORSHIP OPTIONS. Two of the government's most flexible temporary visa programs, the **H-1B** and **H-2B**, have numerical limits that continually fail to meet U.S. employers' needs.

H-1B VISAS FOR PROFESSIONAL WORKERS: The H-1B visa category permits employers to hire foreign workers for professional-level "specialty occupations" requiring the equivalent of a bachelor's degree. Examples include software engineers and chemists.

There is a "basic quota" of 65,000 H-1B visas each fiscal year (beginning Oct. 1) for all "quota subject" employers across the country. There is an additional "master's quota" of 20,000 for individuals who have earned at least a U.S. master's degree. These quotas are allocated on a first-come, first-served basis. Employers may file petitions six months in advance of Oct. 1 (about April 1). **Last year, the government received 119,000 petitions for the 65,000 basic quota slots *within the first two days petitions could be filed***! The master's quota was exhausted within 30 days – the quickest that quota had ever been reached.

There is little doubt that the basic quota will be exhausted on the first dates petitions are accepted. The only question will be what the odds of making the basic quota will be this year. **Despite an employer's best efforts, there is no guarantee a basic quota petition will be successful.** The prospects of making the master's quota are brighter, but that quota will probably be exhausted this year even more quickly than in 2007.

If an employer will consider candidates requiring H-1B sponsorship, it should *promptly*:

Identify whether it is a "quota exempt" employer or seeks to employ an individual who is exempt from the H-1B quotas. If the employer is an institution of higher education, a non-profit entity adequately affiliated with such an institution, or a qualifying non-profit research organization, any petition it files is exempt from the quota. Additionally, an individual who has held H-1B status within the last six years and has been counted against a prior quota is generally exempt.

Make a decision about H-1B sponsorship by mid-February to permit adequate time for preparing the petition and filing in early April.

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Identify alternatives to the H-1B visa if the petition is not accepted. There are other employment visa options available. International companies with foreign branches might be able to use the L-1, intra-company transferee visa. Other visa categories might be available for candidates from certain countries. Many employers have utilized the TN visa for professionals from Canada and Mexico. Other options include H-1B1 for citizens of Chile or Singapore and the E-3 visa for Australians.

Consider contacting Congress regarding the inadequate supply of H-1B visas

H-2B VISAS FOR NON-PROFESSIONAL POSITIONS: The H-2B visa category permits employers to hire foreign workers for jobs that are seasonal or associated with a peak need period (such as in the hotel/resort or landscaping industries).

There are a total of 66,000 visas available each year, allocated on a first-come, first-served basis, for all employers across the country. Employers may only start the H-2B sponsorship process 120 days in advance of the need. For example, a landscaping company in need of workers could start its required recruitment and filings with the government in December or January for the beginning of the season in March or April. An employer must complete paperwork with the state job service, the U.S. Department of Labor and then with USCIS.

On Jan. 3, USCIS announced that the quota of 66,000 visas had been exhausted. This means that spring and summer businesses will not have a chance to file paperwork with the USCIS. For example, a hotel with a peak summertime load, which would otherwise have started the process in February, has no opportunity to sponsor H-2B workers. Unless Congress acts to increase the quota or reinstates a key exemption, employers that have used this program in past years are simply out of luck.

Affected employers should consider contacting the U.S. Senate and House of Representatives regarding the need to increase availability of H-2B visas.

Item 4. IMMIGRATION CORPORATE COMPLIANCE PLANS: Immigration enforcement efforts continue to expand at the federal and state levels. In particular, employers in **Missouri** should expect an increase in enforcement efforts in 2008. Assistant Secretary of Immigration & Customs Enforcement Julie Myers recently announced the creation of the Missouri Gateway Task Force, which will be a combination of federal, state and local law enforcement working with U.S. attorneys to pursue enforcement. Myers also announced an increase in the number of staff assigned to "old-fashioned" I-9 audits across the U.S. to facilitate the pursuit of criminal cases.

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In response to the government's renewed efforts, an employer should have a plan for compliance in place, regardless of the size or type of business, including answers to the following questions:

What are the employer's relevant legal requirements (federal, state, or as a government contractor or aid recipient)?

How will the employer's employment eligibility verification requirements be satisfied?

What tasks need to be performed and when?

Who will have responsibility for these tasks and how will they be trained?

How will the employer periodically review and confirm that these requirements are being satisfied?

How will I-9 records be maintained and, when permitted by law, destroyed?

How will the employer respond to inquiries about employment eligibility verification from the government and other third parties?

If an employer does not have an immigration compliance plan in place, we can help develop one. If an employer already has a plan in place, we can assist with periodic reviews and recommend updates to ensure continued compliance with the law.

Item 5. FEDERAL AND STATE LEGISLATIVE ACTION: Significant congressional action concerning immigration is likely to remain on hold until next year. In the meantime, state legislatures across the country will continue to pursue state-level immigration measures.

Federal – Congress will need to address the extension of statutory authority of **E-Verify/Basic Pilot**, which is set to expire this year. Otherwise, absent demands for relief in the areas of H-1B, H-2B or nurse visas, there is only one bill that seems to have any significant support, **H.R. 4088, Save Act of 2007**. This bill is an enforcement-only measure that, among other things, would require:

Mandatory use of E-Verify/Basic Pilot (Only 33,000 U.S. employers are currently enrolled – roughly half of 1%)

Each employer to re-verify its entire workforce using E-Verify/Basic Pilot

Stringent mandates on the roughly 8.6 million Social Security number 'no-match' cases – an employer would be required to correct a no-match within 10 business days or terminate the employment of the employee in question.

This bill does nothing to provide any type of status for the estimated 5% of the U.S. workforce that presently lacks work authorization.

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Employers concerned about the potential impact of H.R. 4088 may contact Congress to relay any concerns.

State – Employers that do business in **Arizona** are now required to use E-Verify/Basic Pilot. Although there is no penalty for failing to enroll, the state law extends a carrot - use of E-Verify/Basic Pilot provides a rebuttable presumption that the hiring decision did not violate the state-level penalties for employing unauthorized workers. Litigation challenging the legitimacy of the state's law is currently pending, but the outcome remains uncertain.

The **Missouri** Legislature will consider four bills relating to employment eligibility verification:

House Bill 1346 - Styled after Oklahoma's controversial state immigration law

House Bill 1381 – Styled after Arizona's controversial state immigration law

House Bill 1434 – Affects recipients of public finance (state-administered tax credits, loans, etc.)

Senate Bill 858 – Includes provisions affecting all employers and public finance recipients

Notable features of the bills include:

Requirements for an employer to use E-Verify/Basic Pilot and strong disincentives for failure to do so

A prohibition on employment of unauthorized workers with an enforcement scheme involving the suspension of business licenses by the Missouri Department of Labor, the secretary of state and local governments

Creation of causes of action for discriminatory discharge of U.S. workers based on allegations that an employer utilizes unauthorized workers

Imposition of broad, state-level immigration requirements relating to the use of contractors

The main problem for employers is that these proposals impose strict liability, zero-tolerance standards upon employers that significantly exceed the standard set by federal law. Employers that make good-faith efforts to comply with federal law may still run afoul of aggressive state laws.

Affected employers should assess the potential impact these proposals may have on their operations in Missouri and consider contacting Missouri state senators and representatives to relay any concerns.

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