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Mid-Year Immigration Compliance Update

Services

Business Immigration and Global Mobility

Labor & Employment

Professional

TONI H. BLACKWOOD
KANSAS CITY:
816.983.8000
TONI.BLACKWOOD@
HUSCHBLACKWELL.COM

Revival of Administrative I-9 Audits

In April 2009, the Department of Homeland Security (DHS) announced that Immigration & Customs Enforcement (ICE) would shift away from large-scale raids and toward administrative investigations of employers. On July 1, 2009, ICE issued Notices of Inspection to over 650 employers requesting production of all I-9 forms and substantial amounts of employment-related information, all within three days. Going forward, ICE is expected to routinely utilize administrative I-9 audits to target an increased number of employers. This represents a sea-change in policy because only 503 of these notices were issued in all of 2008.

The administrative audits will focus on detecting the employment of unauthorized workers and other compliance issues, including "paperwork" compliance. Significant civil penalties are possible for employing unauthorized workers and even for paperwork violations. Debarment from federal contracts is possible for violations, as are criminal penalties against the employer, management and HR personnel. Employers that receive a Notice of Inspection may be required to produce extensive documentation within three days, to include: required I-9 forms, I-9 policies and training records, payroll tax records, Social Security "no-match" letters, independent contractor and subcontractor rosters, business entity documents, and business licenses.

If an employer has received a Notice of Inspection or any other immigration-related governmental inquiry, its representatives should contact legal counsel as soon as possible.

Update on the “Expiring” I-9 Form

The Department of Homeland Security has directed employers to continue using the current version of the I-9 Form, in spite of the form's June 30, 2009, expiration date. Employers should also be aware of two related I-9 resources. The government recently published an improved, updated 65-page manual to aid with the I-9 process. Additionally, the government encourages employers to make the Spanish-language version of the I-9 Form available as a reference to aid in proper completion of the English language form.

Abandonment of the Social Security "No-Match" Regulation

In August 2007, the Bush Administration finalized a controversial regulation that required an employer to take action if notified of a problem with an employee's Social Security Number. A coalition of unlikely allies, to include the U.S. Chamber of Commerce and the AFL-CIO, brought suit in federal court. Implementation of the regulation has been delayed for almost two years.

The Obama Administration recently announced it will abandon any efforts to implement this regulation. While this change may benefit employees, this announcement is not great news for employers. ICE has and will continue to equate knowledge of a Social Security Number no-match with constructive knowledge that an employee is not authorized to work in the U.S. The abandonment of the regulation also eliminates the effectiveness of the "safe harbor" process employers could follow to minimize liability.

Prudent employers should continue to follow up on all Social Security "no-match" situations and document their efforts to resolve these problems. Each of these instances is fact-specific, so employers should consult with legal counsel to determine appropriate courses of action.

E-Verify Updates

The "E-Verify" program was created in 1996 and provides a means for employers to perform a secondary verification of a new employee’s work authorization. Private employers are not required to use E-Verify, unless subject to certain requirements under federal or state law. If subject to E-Verify, the employer must, after completing a new hire’s I-9 form, make an electronic verification check over the Internet to verify Social Security Administration account and immigration service data. Employers must verify all newly-hired employees in covered work locations and must make verification inquiries within three days of the hiring. In about 5% of cases, the E-Verify electronic query does not result in a confirmation and the system generates a "Tentative Nonconfirmation." The E-Verify employer must then work closely with the employee to attempt to resolve the problem. If unable to resolve the nonconfirmation, the employer must end the employment relationship. To participate in the system, E-Verify employers are required to waive Fourth Amendment rights and grant open access to immigration and employment records.

E-Verify can impact numerous aspects of an employer's business operations, including hiring practices, training and time-off policies, and terminations. For example, if a newly-hired employee does not initially clear the E-Verify system, an employer cannot withhold training or job assignments and must grant time-off to visit the local Social Security or immigration office. The government does not mandate that an employer pay for such absences, but advises that an E-Verify employer not engage in discriminatory practices with respect to time-off policies. Federal statutes attempt to provide blanket protection for an employer that must terminate the employment based upon a "Final Nonconfirmation," but the extent of such protection has not been tested in court.

Employers should be aware of two current issues relating to E-Verify.

Federal Contractor Regulation

In November 2008, the federal government finalized its regulation requiring certain federal contractors to utilize E-Verify. Implementation of the regulation has been delayed by a lawsuit filed in federal court by the U.S. Chamber of Commerce, the Society for Human Resource Management and others to enjoin the federal government from implementing this regulation. It is difficult to predict if and when the regulation will go into effect. Although the government has agreed to another delay until September 8, 2009, DHS Secretary Napolitano stated that the regulation will be fully implemented at that time. Additionally, members of Congress are attempting to hasten and expand the implementation of the regulation legislatively.

The regulation requires affected employers to use E-Verify for newly-hired employees and to re-verify existing employees providing services under the contract. **Affected contractors will be notified of specific requirements during the process of seeking or maintaining a qualifying federal contract and will have varying periods of time to implement the requirements of the regulation.**

The regulation generally covers prime contracts exceeding $100,000 in value; involving work performed in the U.S.; involving a performance period of 120 days or greater; and for "indefinite delivery/indefinite quantity" contracts with performance periods extending beyond September 2009, if potential exists for additional, substantial business in the remaining period. The regulation also covers subcontracts of $3,000 or greater in value for commercial or non-commercial services performed in the U.S. and construction services.

At present, the law does not require private employers to utilize E-Verify or to re-verify existing employees due to federal contracting arrangements. If an employer will be subjected to the E-Verify mandate under this regulation, it will be notified by the government. In anticipation of this requirement, an employer's I-9 forms should all be completed accurately within the first three days of employment. Once that process is in order, an affected employer should be ready to create a network

of personnel who will handle the additional burdens placed upon E-Verify employers. Affected employers should have ready access to the I-9 forms of all existing employees if required to perform reverifications for those who would provide services under a covered contract.

Data Mining & Enforcement

Effective June 22, 2009, the U.S. Department of Homeland Security officially implemented efforts to use database mining tools to conduct suspicionless searches of employers' electronic E-Verify records. DHS's Monitoring and Compliance Branch will use these tools to identify perceived patterns of non-compliance. DHS employees may then conduct on-site investigations or refer matters to Immigration & Customs Enforcement to conduct covert civil or criminal investigations.

If an employer has not yet adopted E-Verify, it should be mindful of law enforcement uses of the system if considering a voluntary election. An employer that has already used E-Verify should conduct a review of its electronic records to identify any patterns or specific instances of concern and make efforts to correct those deficiencies. Corrective action may include providing additional training to company personnel, case-by-case follow-up with specific individuals, or even restructuring an employer's E-Verify network of users to insure proper oversight.

State & Local Immigration Laws

Twenty-three states, including Missouri, Nebraska, Tennessee and Colorado, have enacted some form of law relating to the employment of unauthorized workers. These laws can significantly affect employers operating in multiple states. Many of these laws have their own investigative and enforcement procedures and impose a variety of state-level penalties, such as the loss of business licenses.

Missouri's immigration law, which went into effect on January 1, 2009, empowers the Attorney General to investigate complaints and prosecute Missouri businesses that are accused of employing unauthorized workers. The Attorney General can request that an employer produce copies of an employee's identity documents, which must be produced within 15 days. Failure to produce documents in a timely manner can result in the temporary loss of business licenses. To date, little has been reported of any investigative or enforcement activities in Missouri, but we anticipate that the Attorney General's office will actively enforce the state's law this fall.

One of the common requirements of state laws is an E-Verify mandate. Any employer operating in Arizona must use E-Verify in that state. Employers with over 100 employees in either Mississippi or South Carolina must use E-Verify within the respective state. Several other state laws require that employers awarded government contracts, grants, tax credits or loans use E-Verify.

Nebraska is the latest state to adopt a state immigration law with E-Verify requirements. Effective October 1, 2009, Nebraska state agencies and political subdivisions are required to use E-Verify. In addition, E-Verify use will be required of every state or local governmental contractor and subcontractor and any applicant for state tax incentives.

The following is a general list of states that require use of E-Verify under certain circumstances:

State	State Contracts	Local Govt. Contracts	State Govt. Funds	Local Govt. Funds
Arizona	X	X	X	X
Colorado	X	X	X	
Georgia	X	X		
Minnesota	X		X	
Mississippi	X	X		
Missouri	X	X	X	X
Nebraska (as of 10/1/09)	X	X	X	
Oklahoma	X	X		
Rhode Island	X			
South Carolina	X	X		
Utah	X	X		

Prior to taking action based upon a state or local law, an employer should work with legal counsel to determine whether or not a requirement to use E-Verify is triggered, or if an alternate, less intrusive means of compliance exists. For example, Colorado provides an alternate means of certification to government agencies in lieu of E-Verify use. Similarly, if an employer receives a state or local government immigration-related inquiry, its representatives should contact legal counsel as soon as possible.

Comprehensive Immigration Reform

President Obama and key members of Congress have identified comprehensive immigration reform as one of the top three legislative priorities for 2009. Senator Charles Schumer of New York stated that he expects an immigration bill to be ready by Labor Day. Many anticipate that the 2009 bill will include many of the provisions in a bill passed by the U.S. Senate in 2006.

Three key provisions in the bill could impact employers:
(a) the grant of legal status to unauthorized workers, who constitute 5% of the U.S. workforce

(b) mandatory use of E-Verify, or a similar system, for new **and** existing employees

(c) increased penalties for employing unauthorized workers

In addition, employers and their sponsored workers may get some relief from the long waits to complete the "green card" process, but the sponsorship of new foreign workers could also become more difficult.

What This Means to You

It is uncertain if a comprehensive immigration reform bill will pass this year or be delayed until 2010 or beyond. If the government ratchets up enforcement without granting legal status to unauthorized workers, employers will bear much of the burden of identifying the millions of unauthorized workers and then terminating their employment. Employers should ensure I-9 processes and records are in order and be prepared for more change.

Employers have much at stake and should consider communicating with members of Congress about the potential impact of the immigration reform debate.

Contact Info

Husch Blackwell attorneys have represented a number of clients in ICE investigations and enforcement actions and are able to provide a unique level of service in this area. We have also assisted clients with the development and implementation of multi-state compliance plans, training for management and key employees, and self-audits of I-9 records to minimize immigration-related risks and liabilities.

If you have any questions, please contact Toni Blackwood at 816.983.8152 or one of our Immigration attorneys within the Labor & Employment department:

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