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Immigration Update: Department of Homeland Security Increases Enforcement Directed at Employers

By Nancy-Jo Merritt and Matthew J. Martinez

In the last three months, the Department of Homeland Security (DHS), via Immigration and Customs Enforcement (ICE), and U.S. Citizenship and Immigration Services (USCIS), has signaled the government's intention to focus enforcement on the employment relationship. Recent developments suggest that DHS intends to put its money where its mouth is. Specifically, several new initiatives have been implemented that could alter the landscape of workplace compliance, including:

- The re-institution of I-9 inspections;
- The revision of the Form I-9;
- Mandatory E-Verify for federal contractors; and
- H-1B fraud investigations.

I-9 Inspections

ICE announced the re-institution of I-9 inspections, which have been mostly absent for the last ten years, indicating that it had recently served notices of inspection on 652 businesses nationwide. According to ICE, renewed emphasis on I-9 audits illustrates its "increased focus on holding employers accountable for their hiring practices and efforts to ensure a legal workforce," and is part of a long-term strategy to deter illegal employment. ICE's new enforcement guidelines represent a shift in focus from workplace raids to increased criminal prosecution of businesses hiring illegal immigrants.

Preparation is Key. These notices serve as a good reminder to employers to always be prepared for an ICE inspection. Employers should be conducting internal I-9 audits, carefully reviewing their hiring practices, and ensuring that HR receives regular compliance training. Internal I-9 audits often reveal that some I-9 forms have not been completely filled out, or that certain employees have not been re-verified after their work visas have expired. It is much easier to correct these common mistakes now, rather than under the weighty pressure of an ICE audit.

In addition to internal I-9 audits, businesses should establish written I-9 and E-Verify policies and procedures that are uniformly practiced and enforced throughout the company, and that the appropriate individuals are designated and trained to handle a visit from ICE.

New I-9 Forms

Note that the I-9 Form was revised on February 2, 2009, reducing the number of acceptable documents, and was recently amended to reflect a new revision date of August 7, 2009. Employers may use the Form I-9 with the August 7, 2009 date or the February 2, 2009 revision date for new hires. The I-9 form and the handbook for employers are available at www.uscis.gov/i-9 or by calling USCIS' toll-free forms line at 800-870-3676.

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E-Verify for Federal Contractors

Effective September 8, 2009, federal contractors and subcontractors are required to use the E-Verify system to verify their employees' eligibility to work in the United States if their contract includes the Federal Acquisition Regulation (FAR) E-Verify clause.

The E-Verify federal contractor rule extends use of the E-Verify system to cover federal contractors and subcontractors, including those who receive American Recovery and Reinvestment Act funds. Applicable federal contracts awarded and solicitations issued on or after today will include a clause committing government contractors to use E-Verify.

Companies awarded a contract with the E-Verify clause must enroll in E-Verify within 30 days of the contract award date. E-Verify must be used to confirm that (1) all new hires, whether employed on a federal contract or not, and (2) existing employees directly working on these contracts, are legally authorized to work in the United States.

More information on the new FAR requirement is available on the E-Verify website at www.dhs.gov/e-verify.

H-1B Investigations

USCIS is finally beginning to use the millions of dollars it has received over the last decade from the \$500 "fraud fee" in the H-1B and L-1B programs. Contract "investigators" have been hired to conduct 250,000 site visits to H-1B employers to verify if the H-1B employee is working for the employer and performing the work described in the H-1B petition.

The USCIS contract investigators are showing up at worksites to question employers and their H-1B workers. While we believe that USCIS has an exaggerated view of the amount of fraud with respect to the use of H-1B work authorization, it's a good idea to take a look at your H-1B employment processes to make sure that they are in compliance with the regulatory requirements.

Wages: H-1B employees must be paid the higher of the "prevailing wage rate" or the wage rate being paid U.S. workers in that location in the same job category. The prevailing wage rate is found on the Labor Condition Application, which was included with the H-1B petition when it was submitted to USCIS.

The PAF: H-1B employers must keep an H-1B "Public Access File" (PAF) available for review by USCIS or the Department of Labor. The PAF was prepared prior to the beginning date of employment and should include the required documents as of the date the H-1B employment begins. We suggest that you audit your PAF files to be sure they are up to date.

End of Employment: Finally, if an H-1B worker's employment ends before the expiration date of the approved period of employment, the employer must notify USCIS (by mail is sufficient). In addition, the employer must offer to pay the cost of the return (transportation only) of the H-1B worker to his or her home country. There are no regulations covering this requirement; we recommend that the offer of a one-way ticket to the employee's home country be available for a period of 2-4 weeks after the final day of employment. Other types of arrangements may be appropriate, but the employer should be consistent with respect to all H-1B employees, irrespective of the location of their native country.



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