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Labor and Employment Update: Hot Topics in Federal and State Employment Verification

By Nancy-Jo Merritt and Matthew J. Martinez

Déjà Vu: ICE Will be Inspecting I-9s Again

Immigration & Customs Enforcement (ICE) is quietly re-instituting its former practice of inspecting company I-9s. If you are visited by an ICE agent, remember that the statute requires at least three days notice prior to an inspection of the I-9 forms. ICE inspections are controlled by a Notice of Inspection, the NOI, which will list the extent of I-9s to be viewed. The inspection may properly include an administrative subpoena requesting company documents related to the I-9 review, such as a list of all current employees with their hire dates and copies of any documents attached to the I-9.

We have recently seen ICE requests for substantial additional documentation, including financial information, detailed payroll information and copies of Social Security Administration “no-match” notices. Whether ICE can properly request extensive documents that are unrelated to employment verification is an open question, but at the very least such requests raise concerns about relevance and confidentiality.

When the I-9s are returned, ICE will provide a list of employees it has identified as without work authorization. The notice may include photographs of the workers and will suggest a short time period within which to terminate the employment of those individuals.

The key to having the least intrusive I-9 inspection is careful management of the I-9 process. Your I-9s should be in good order and should be complete and properly filled out. It is wise to have an annual outside audit of your I-9s and the hire process, and regular training for the individuals in the company who manage the I-9 process. This is especially true in Arizona now that the Legal Worker Act is in effect. Your I-9s are your best defense against a federal or state charges of hiring an undocumented worker.

The DHS Releases Real I.D. Regulation

On January 11, 2008 the Department of Homeland Security (DHS) published a final rule establishing minimum security standards for state-issued drivers' licenses and identification cards. States are required by the rule to set uniform standards that “enhance the integrity and and reliability of drivers' licenses and identification cards, strengthen issuance capabilities, and increase security at drivers' license and identification card production facilities.

The underlying reason for Real I.D. is to address document fraud concerns by regularizing the requirements for the states. By December 31, 2009 the states must have upgraded the security of their license systems, to include a check on the status of applicants in order to ensure that documents used for access into federal facilities, commercial aircraft, and locations such as nuclear power plants will meet specific security requirements.

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Arizona Employer Sanctions Law Update

Pursuant to an agreement reached on Wednesday, January 16, 2008, there will be no prosecutions under the new law until after March 1, 2008. Judge Wake indicated that he would rule on the law by early February.

One of the issues under review is whether the law applies to all existing employees or only to those hired as of January 1, 2008. The law states that employers shall not intentionally or knowingly “employ” unauthorized aliens. Judge Wake suggested that the word “employ” could be read to mean “to hire” or “to utilize”, an ambiguity that the Legislature could resolve by clarifying the language. House Bill 2346 was introduced to address this very issue, which would change the law to state that an employer shall not “hire” an unauthorized alien, striking the verb “employ.”

Additional bills were introduced to amend other portions of the law:

- HB 2341 would make use of the E-Verify system optional, not mandatory.
 - HB 2342 would clarify that independent contractors are not employees and therefore not considered employees under the law.
 - HB 2343 would bar anonymous complaints, require that they be made in writing and contain the full name and address of the complainant, and specifically bar discrimination as a motivation for lodging a complaint.
 - HB 2344 would change the definition of “knowingly” hiring an illegal worker to mean the employer must have “actual or constructive knowledge that the person is an unauthorized alien.” It would also establish “beyond a reasonable doubt” as the standard of proof that prosecutors must demonstrate to successfully prosecute an employer.
 - HB 2345 would remove the state attorney general from the process.
- We will continue to monitor these developments and provide you with updates as events unfold.

Is Your Employee a New Hire under Arizona’s New Employer Sanctions Law?

Despite the uncertainty that has accompanied Arizona’s new employer sanctions law, one thing remains clear: not all “rehires” are “new hires”. Under the new law, employers are required to check the legal status of all new hires, but what about those instances where a worker was laid off for lack of work, took maternity leave, or was employed on a seasonal basis?

Section 274a.2(b)(1)(viii)(A) & (B) of 8 C.F.R. provides the relevant guidance in this area, which states that an individual is not a new hire if the individual is “continuing in his or her employment and has a reasonable expectation of employment at all times”.

This concept of “continuing in his or her employment” includes situations in which:

- (1) An individual takes approved paid or unpaid leave on account of study, illness or disability of a family member, illness or pregnancy, maternity or paternity leave, vacation, union business, or other temporary leave approved by the employer;
- (2) An individual is promoted, demoted, or gets a pay raise;
- (3) An individual is temporarily laid off for lack of work;
- (4) An individual is on strike or in a labor dispute;

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- (5) An individual is reinstated after disciplinary suspension for wrongful termination later found unjustified by a court, arbitrator, or administrative body;
- (6) An individual is transferred from one distinct unit of an employer to another distinct unit of the same employer, and the individual's Form I-9 is transferred to the receiving unit;
- (7) An individual continues his or her employment with a related, successor, or reorganized employer, provided that the new employer obtains and maintains records and Forms I-9 from the previous employer; or
- (8) An individual is engaged in seasonal employment.

Nancy-Jo Merritt focuses her practice in immigration law and has nearly three decades of experience representing domestic and international companies with issues concerning foreign national employees and business immigration matters. She provides strategic counseling to clients and assists employers in developing compliance programs. She earned her B.A., (1964) M.A., (1974) and her J.D., (1978) from Arizona State University.

Matthew J. Martinez focuses his practice in the area of immigration and nationality law, with an emphasis on corporate transfers, professionals, entrepreneurs, investors, entertainers and athletes. Mr. Martinez has extensive experience representing employers and athletes in the equine industry, and in obtaining visas for temporary and seasonal workers. He earned his B.S., (1995) and his J.D., (1999) from Brigham Young University.



Nancy-Jo Merritt
Director
602.916.5411
nmerritt@fclaw.com



Matthew J. Martinez
Associate
602.916.5446
mmartinez@fclaw.com