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Labor and Employment Update - U.S. House Passes New Immigration Act Considerations for an Emergency Preparedness Plan

U.S. House Votes to Require Electronic Employment Authorization Verification

By Nancy-Jo Merritt

The U.S. House of Representatives recently passed HR 4437, The Border Protection, Anti-Terrorism, and Illegal Immigration Control Act of 2005. Sponsored by Rep. James Sensenbrenner (R-Wisconsin), the Bill focuses on border and national security issues and employment eligibility verification, but does not include a guest-worker program. The Bill has been sent to the Senate for debate on immigration reform in February. Senate Majority Leader Bill Frist has indicated that the final version of an immigration reform bill will include a guest or temporary worker program. Title VII of the Bill is of special interest to employers. It establishes an employment eligibility verification system similar to the legacy Immigration and Naturalization Service (INS) "Basic Pilot Program."

The Basic Pilot Program was established in 1997, initially available only in five states (California, Florida, Illinois, Nebraska, New York, and Texas), but now available in all states. The program is web-based and free. Participants must register on the internet and sign a Memorandum of Understanding (MOU) with the U.S. Citizenship and Immigration Services (USCIS) and Social Security Administration (SSA). According to USCIS, the system is "extremely user-friendly." Involved employers must post notice of participation in the program and agree not to discriminate in the hiring process. Once a new employee completes the I-9, the company enters an online automated employment verification query with information taken from the completed I-9. The employment verification queries are sent to the Department of Homeland Security (DHS) and SSA databases for verification of the employee's social security number and authorization to work in the United States.

Although the employment eligibility verification system described in HR 4437 is similar to the Basic Pilot Program, § 701 of the Bill would make major revisions to the current employment verification system in § 274(A) of the Immigration and Nationality Act. The Bill requires the Secretary of Homeland Security to create a system for telephonic or electronic verification of an individual's employment authorization. The verification system would provide verification, or tentative non-verification, of an individual's identity and employment eligibility within three days of the inquiry, or ten days for instances of tentative non-verification. The Commissioner of SSA and the Secretary of Homeland Security would be responsible to develop a process using the respective databases to ensure timely and accurate responses to employer inquiries. While the Bill requires that information contained in the databases cannot be used by the government for any purpose other than as provided for in the Bill, it also prohibits class-actions challenging problems with the verification mechanism and limits claims for relief to the processes established in the Federal Tort Claims Act. Employers who take action in good faith reliance on information provided via the new employment eligibility verification system would be immunized from liability for any negative consequences.

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Another major change in the Bill's new employment eligibility verification system would be its application to current workers. Employers would be authorized to use the system on a voluntary, nondiscriminatory basis to verify previous hires for the first two years after enactment of the legislation, but within six years after enactment they would be required to verify the identity and employment eligibility of all employees not previously verified. Federal, state, and local government entities and private employers in specified fields (relating to critical infrastructure), however, would be required to verify *all* previous hires within three years of enactment. This is a substantial change from the current legislative standards in which new changes are applicable only to individuals hired after the date of enactment.

Finally, HR 4437 would significantly increase the civil penalties for hiring, recruiting, and referral violations. The minimum penalty for a first violation would be \$5,000 for each unauthorized alien with respect to whom a violation occurred. Employers previously subject to cease and desist orders would be subject to a minimum penalty of \$5,000 and a maximum penalty of \$10,000 for each offense. Employers previously subject to more than one such order would be subject to a minimum penalty of \$25,000. In addition, the civil penalty levels for paperwork violations, including failure to use the new verification system, would be increased to a minimum \$1,000 penalty and maximum \$25,000 penalty; however, the Act would establish a scheme for mitigating the penalty structure by reducing the amounts due based on the size of the employer. Criminal penalties for entities engaged in a "pattern or practice" of hiring and employing unauthorized workers would be increased from a maximum fine of \$3,000 to \$50,000 for each unauthorized worker, and a minimum period of imprisonment of one year (as opposed to the current maximum period of six months).

As part of the new employment authorization verification scheme, the Commissioner of Social Security would be required to submit a report to Congress evaluating a list of proposed requirements and changes including: making social security cards with encrypted, machine-readable electronic identification strips and a digital photograph, creating a unified database to be maintained by DHS including data from SSA and DHS specifying work authorization of all individuals, and requiring all employers to verify employment eligibility using the new social security cards through a phone, electronic card-reading, or other mechanism.

Obviously, HR 4437 would create a substantial shift in the employment verification process and an increase in penalty levels. Whether the specific employment verification provisions of HR 4437 survive the legislative process in the Senate or not, it is clear that verification of work authorization will be a central aspect of any immigration reform bill. Of particular note in HR 4437 is its requirement that employers verify, over a three- or six-year period, the work authorization of *current* employees. It is thus important that all employers consider the effect such changes will have on current hiring programs, and on the stability of their current work force.

The action of Congress on immigration reform in the coming months will be of continuing interest.

Emergency Preparedness for Employers: Even Chicken Little is Right Sometimes

By Janice Procter-Murphy

As Hurricane Katrina, the recent mining accident in West Virginia, and the events of 9/11 vividly remind employers, companies cannot predict when emergencies will occur and their business operations will be disrupted. Emergency preparedness/disaster recovery plans outline a course of action for companies to follow during times of crisis to protect their employees, limit economic loss and minimize legal liability. While developing an emergency preparedness plan may strike some employers as an unnecessary diversion of critical resources, "[t]hose who do not remember the past are condemned to repeat it."¹ Accordingly, when putting together a plan, companies should consider, at a minimum, the following:

- Does the company maintain and could it access current contact information for its employees, customers and vendors? The transmittal and receipt of accurate information is key in emergency situations. Any plan should address who will be responsible for communicating with various individuals and consider the use of logs to record

¹ George Santayana.

the information received or provided. During such a chaotic time, crucial pieces of information could be forgotten or lost if not documented. Interactive websites and toll free numbers also could be used to maintain communications. Similarly, if circumstances require that a temporary work facility be established, contacts with vendors will be important to ensure that the company has the equipment and supplies necessary to perform vital business operations.

- Does the company have off-site backup for its computer systems and where is the backup system located? Having a backup in the same city may not be adequate if, for example, power is disrupted in that jurisdiction.
- Are critical documents imaged if the workplace becomes inaccessible? Federal and Arizona laws permit employers to maintain certain records electronically. The ability to reproduce certain records quickly could aid the company and its employees in applying for assistance with agencies or filing insurance claims.
- Do the company's insurance policies cover business disruption and do its own business contracts address "Acts of God" or other circumstances beyond the company's control?
- Who will be on the company's communications team to address media and other inquiries? The importance of communications in minimizing legal exposure should not be underestimated. In fact, several studies of physicians have found that a physician's communications with a patient are a key factor in whether a patient will pursue a malpractice lawsuit.
- Has the company developed an evacuation plan for its employees/clients with rendezvous points as well as a procedure for securing the worksite?
- Does the company have policies in place to help prevent workplace violence? Many times, emergencies in the workplace are caused by incidents of workplace violence by current or former employees. To address potential workplace violence issues and hopefully prevent them from ever occurring, employers should consider adopting, at a minimum, policies on the following issues: drug/alcohol impairment testing; workplace monitoring; reference checks; harassment; falsification of company records; prohibition of weapons, drugs and/or alcohol in the workplace; reporting injuries and accidents; and zero-tolerance for threats or acts of violence.

So, consider developing an emergency preparedness/disaster recovery plan for your company... because, unfortunately, even Chicken Little is right sometimes.

Nancy-Jo Merritt focuses her practice in immigration law and has over two 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 J.D. (1978), from Arizona State University.

Janice Procter-Murphy practices primarily in the areas of labor and employment law and civil appeals. She counsels employers on a variety of employment and labor matters. She also defends employers in litigation and administrative proceedings alleging employment discrimination, breach of contract, wrongful discharge and other employment-related torts, wage claims, violations of restrictive covenants and unfair labor practices. She earned her B.A. (1985) cum laude, and J.D. (1988) cum laude, from the University of Michigan.



Nancy-Jo Merritt
Director
602.916.5411
nmerritt@fclaw.com



Janice Procter-Murphy
Director
602.916.5331
jpmurphy@fclaw.com