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Briefly
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IMMIGRATION Update

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Because immigration issues have been at the forefront of employment law news for the last several months, and because the Bureau of Immigration and Customs Enforcement (ICE) has now published two new regulations dealing with I-9 forms and Social Security mismatch letters, we are devoting the entire newsletter to that subject.

ICE Publishes Interim Rule Permitting Electronic Signing and Retention of Form I-9

Realizing that technology had progressed beyond the copy machine, the Bureau of Immigration and Customs Enforcement (ICE) entered the 21st century with publication of an interim rule permitting electronic signing and retention of Form I-9. 71 Fed. Reg. 34510 (June 15, 2006). This interim rule amends Department of Homeland Security regulations to provide that employers and recruiters or referrers for a fee, who are required to complete and retain Forms I-9, may sign and retain these forms electronically. The interim rule became effective June 15, 2006. Written comments may be submitted on or before August 14, 2006.

The interim rule permits employers to complete, sign, and store Forms I-9 electronically, as long as certain performance standards set forth in the interim rule for the electronic filing system are met. The interim rule also permits employers to electronically scan and store existing Forms I-9, as long as standards set forth in the interim rule for the electronic storage system are met. The interim rule adopts performance standards that have been proven by other federal agencies in the past and provides flexibility for employers to choose a method of retention that is the most economically feasible for their specific business. Utilizing the most widely applicable standards, those adopted by the Internal Revenue Service (IRS) for tax records, provides the widest possible cost savings within the business community because of existing compliance with those standards.

There is no single United States Government-wide electronic recordkeeping standard for recordkeeping by private individuals and entities. However, some United States Government agencies provide electronic recordkeeping standards for use in transactions with that agency. To the extent that these standards are applicable to the electronic storage of Form I-9, ICE attempts to use the requirements and language of existing standards. At the same time, ICE recognizes that systems for electronic recordkeeping develop rapidly with the creation of new storage mechanisms, mediums, and methods. Accordingly, the standards adopted in the interim rule are "product neutral" and will guide the application of new products to meet minimum performance standards, rather than establishing specific requirements. The regulation closely follows the widely accepted electronic storage standards and requirements set forth in the IRS Rulings previously published. The widespread application of these IRS standards by the business

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KNOW YOUR ATTORNEY

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community is the critical reason for adoption of these standards. This adoption of existing standards should reduce any potential burden on the portion of the business community that decides to utilize electronic retention.

There are a number of potential advantages that employers may gain through use of electronic Forms I-9. Many employers may experience cost savings by storing Forms I-9 electronically rather than using conventional filing and storage of paper copies or transferring the forms to microfilm or microfiche. Electronic forms may allow employers to better ensure that each Form I-9 is properly completed and retained. Some employers may find that electronic completion and storage renders the process less prone to error. Electronically retained Forms I-9 are more easily searchable, which is important for re-verification, quality assurance, and inspection purposes. This will be especially helpful and cost-effective for large employers that have job sites across the country or that have high employee turnover rates.

An employer that is currently complying with the recordkeeping and retention requirements of current 8 CFR 274.2 is not required to take any additional or different action to comply with the revised rules. The revised rules offer an additional option. Businesses will be permitted to adopt one or more of a number of different electronic recordkeeping, attestation, and retention systems that are compliant with the existing IRS standards. For example, a small business may wish to download and retain .pdf versions of the employment verification record. DHS made this system available on the USCIS web site. Employers who already utilize electronic data recordkeeping as part of their accounting and tax functions may expand those functions to include the employment verification process. As long as the electronic records system remains IRS-compliant, the system will be ICE-compliant.

ICE Publishes Proposed Rule on Social Security Administration (SSA) Mismatch Letters

Generally, employers who receive the name/number mismatch letters from the SSA have not worried about the penalties related to unauthorized employment for several reasons. For example, most employers do not engage in blatant criminal activities, such as document fraud and human smuggling. Also, the SSA has not been able to share information with ICE. Furthermore, ICE has focused on other enforcement issues. We are not aware of any situations in which employers have been penalized based solely on SSN mismatch information. In all cases in which employers have been penalized, there is other evidence that employers knew about the unauthorized status of the workers or disregarded the verification requirements.

Given historical enforcement practices, many employers have gone through the efforts described in the SSA letters and nothing more. Obviously, one letter from the SSA about an employee may not trigger

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the need to make further inquiry if the employee provides information demonstrating that the issue has been resolved. Yet, a second letter from the SSA about the same employee after the matter was supposedly resolved at an earlier time suggests that the worker may be lying about their identity and work authorization and may have provided false identity and work authorization documentation.

Several problems exist with further investigation of the identification and work authorization of workers. For example, employers have limited resources and limited sources for verifying the identity and work authorization of current employees. The Basic Pilot Program cannot be used to verify the employment authorization of existing employees. Furthermore, the immigration laws prohibit employers from requiring workers to produce specific identification and work authorization documents. Instead, the workers decide what documents they will produce to satisfy the verification requirements. Also, the immigration laws forbid further inquiry if the workers produce documents that on their face comply with the verification requirements. The fines for prohibited inquiries can range from $100 to $1,000 per violation. In addition, employers who decide to terminate workers for providing false identity or work authorization documentation could face discrimination claims for violation of the various state and federal discrimination laws, even if the workers are not authorized to work.

In an effort to address some of these issues, ICE has proposed regulations that provide safe harbor procedures for employers to follow upon receiving notice from the SSA of a name/number mismatch. 71 Fed. Reg. 34281 (June 14, 2006). First, the employer must take reasonable steps, within 14 days, to attempt to resolve the discrepancy. Such steps may include:

(1) Checking the employer's records promptly after receiving the notice to determine whether the discrepancy results from a typographical, transcribing, or similar clerical error, and if so, correcting the error(s), informing the SSA of the correct information (in accordance with the letter's instructions, if any; otherwise in any reasonable way), verifying with the SSA that the employee's name and SSN, as corrected, match in SSA records, and making a record of the manner, date, and time of such verification; and

(2) If no such error is found, promptly requesting the employee to confirm that the name and SSN in the employer's records are correct - and, if they are correct according to the employee, requesting the employee to resolve the discrepancy with the SSA, such as by visiting an SSA office, bringing original documents or certified copies required by SSA, which might include documents that prove age, identity, and citizenship or alien status, and other documents that may be relevant, such as those that prove a name change, or, if the employee states that the employer's records are in error, taking the actions to correct, inform, verify, and make a record described in the preceding paragraph.

An employer must, within sixty (60) days of receiving the notice, verify certain information with the SSA. First, the employer must verify that the employee's name matches in the SSA's records. Second, the employer must verify a number assigned with that name. Third, the number must be valid for work, or must be valid for work with United States Citizenship and Immigration Service (USCIS) authorization (and, with respect to the latter, verify the authorization with USCIS). The employer must take reasonable steps, within an additional 3 days, to verify the employee's employment authorization and identity. The reasonable steps should include:

(A) The employer completes a new Form I-9 for the employee, using the same procedures as if the employee were newly hired, except that

(1) Both Section 1 - "Employee Information and Verification" - and Section 2 - "Employer Review and Verification" - of the new Form I-9 should be completed within 63 days of receiving the notice from the SSA.

(2) No document containing the SSN that is the subject of the SSA notice, and no receipt for an application for a replacement of such document, may be used to establish employment authorization or identity or both; and

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(3) No document without a photograph may be used to establish identity or both identity and employment authorization; and

(B) The employer retains the new Form I-9 with the prior Form(s) I-9 for the same period and in the same manner as if the employee were newly hired at the time the new Form I-9 is completed.

Like the interim regulations for electronic retention of Forms I-9, written comments on the proposed regulation must be submitted on or before August 14, 2006.

What should employers be doing? Employers who continue the past practice of doing nothing appear to face a higher risk of criminal sanctions. Employers who continue the past practice of terminating employees without any investigation may be overreacting. The best approach may be to follow the proposed regulation at least on an interim basis.

Senate Passes Comprehensive Immigration Reform Bill

In May, the Senate voted 62 to 36 to approve compromise immigration reform legislation (S. 2611, the Comprehensive Immigration Reform Act of 2006), thereby setting the stage for what will likely be a contentious House/Senate conference, in which the Senate-passed bill will now have to be harmonized with the enforcement-only bill (H.R. 4437) passed by the House in December.

The Senate bill includes a path to permanent legal status for most of the 12 million undocumented immigrants in the country, a new temporary worker program, significant increases in family- and employment-based permanent visas, important reforms to the agricultural worker program, significant reforms to the high-skilled immigration programs, and an electronic employment verification system to replace Form I-9. The bill also includes some tougher enforcement provisions. Under the Senate bill employers must commence participation in the electronic employment verification system within 18 months after Congress funds the $400 million needed for the system.

The House bill contains many provisions dealing with border security and the removal and detention of aliens who are legally present, but who commit crimes, and of aliens who are not lawfully present. In addition, the House bill would impose an electronic employment verification system in addition to the existing Form I-9 requirements. The House bill would immunize an employer from liability for terminating an employee pursuant to a final non-verification from the system. Most significantly, ICE and the SSA would be able to communicate about name/number mismatches, and ICE is required to investigate such mismatches. The House bill includes substantially higher civil fines than the Senate bill for unlawful employment and recordkeeping violations. The House bill also increases the fines and minimum jail time for criminal violations. The effective date for the changes in the House bill is the date of enactment, except the changes relating to the employment eligibility verification process would become effective two years after the date of enactment.