Immigration 2009 – What Every Employer Needs to Know

Insights
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This year is shaping up to be one of dramatic changes in employment law. The stage is set for significant developments in immigration law once the new administration gets settled into office. What follows is some important information to keep in mind for the new year, and also a brief overview of what we expect to see on the immigration horizon.

New Form I-9 Regulation
Beginning February 2, 2009, employers are required to use a revised Form I-9 to verify the employment authorization and identity of employees. The new Form I-9 carries with it some new requirements, including a prohibition against accepting expired documents (for example, an expired U.S. Passport will no longer be acceptable as a List A document) and changes to the list of documents that are acceptable for the I-9 verification process.

The current edition of the I-9 form (dated 06/05/2007) will only be valid for use until the U.S. Citizenship and Immigration Services (USCIS) issues the revised form. Once the USCIS issues the revised I-9 form (which we expect to happen by the time this article goes to press), employers should use only the new form for new hires or reverifications. Please check our website for developments and a copy of the new Form I-9 and handbook as soon as it is available.

H-1B Deadline for New Petitions
On April 1, 2009, the USCIS will open the one-week filing window for new H-1B visa petitions with anticipated start dates of October 1, 2009.

The H-1B visa category is the most common temporary work visa option for companies wishing to hire a foreign worker to fill a "professional" or "specialty occupation" position (defined as requiring at least a bachelor's degree or equivalent for entry into the position). Each fiscal year, there is a "cap" on the number of new H-1B visas available – 65,000 visas for individuals holding bachelor's degrees or the equivalent experience and an additional 20,000 visas for foreign nationals with a master's or higher degree awarded by a U.S. college or university.

In 2008, USCIS received nearly 163,000 H-1B petitions during the filing period of April 1-7, 2008 and at the close of the filing period, conducted a computer-generated random selection process to determine which petitions would be processed under the H-1B cap. We anticipate that the procedure for selection with be the same as last year, that the number of H-1B petitions will again far exceed

the cap, and that approximately one third of the submitted petitions will actually result in an approval.

Part of the H-1B petition process involves the certification of the Labor Condition Applications (LCA) by the U.S. Labor Department (DOL). The DOL announced that it plans to increase its scrutiny of the LCA process and this will result in a longer processing time for certification. Given the expected increase in processing times for the LCA and the tight H-1B filing window, we recommend that you start evaluating your company's need for H-1B workers now and be ready to finalize the H-1B petition paperwork in early March. Possible candidates for H-1B visas are current employees or potential new hires now working in F-1/OPT, J-1, L-1 and TN categories whose employment authorization will expire before October 2008.

No-Match Letter Rule Litigation

In August, 2007, the Department of Homeland Security (DHS), in response to what it believed was confusion on the part of employers on how to proceed when faced with a mis-match letter from the Social Security Administration (SSA), issued a rule entitled *Safe-Harbor Procedures for Employers Who Receive a No-Match Letter (*"No-Match Rule"). A judge in the Northern District of California blocked implementation of the rule after a group of businesses filed a lawsuit challenging it.

Since the injunction, the DHS has issued two rounds of supplements to the rule and seeks to have the injunction lifted. If and when the injunction is lifted, the SSA will resume sending out No-Match letters and employers will be required to follow the No-Match Rule procedures or risk being fined for continuing to employ an individual without authorization to work in the U.S. A decision on the injunction will most likely not occur until March, 2009. In the meantime, we recommend that you become familiar with the safe harbor procedures and requirements of the rule and be ready to implement a policy for resolving no-match letter discrepancies.

Federal Contractors Required to Use E-Verify

In 2008, Former President Bush signed an Executive Order requiring federal contractors and subcontractors to enroll in E-Verify when they are awarded a federal contract or subcontract that includes the E-Verify requirement, or when an existing contract is amended to include the require E-Verify. Employers covered by this new rule will be required to verify the work authorization of all new hires and existing employees assigned to work on the federal contract. Originally, this rule was due to take effect on January 15, 2009 but the U.S. Chamber of Commerce, along with other business groups, filed a lawsuit on December 23, 2008, challenging the legality of this law. An agreement was reached, in light of the pending litigation, to suspend applicability of the rule until February 20, 2009.

The new rule covers prime federal contracts with a value of at least $100,000 and a period of performance of 120 days or longer. A contract is not covered by this rule if the work will be performed only outside the U.S., includes only commercially available off-the-shelf (COTS) items (or but for minor modifications would be COTS items), or is for food and agricultural products shipped as bulk cargo and which would otherwise be classified as COTS items. Subcontractors are covered

only if the prime contract includes a clause covering the subcontract and only for services or construction with a value of $3,000 or more.

Covered employers who are not currently enrolled in E-Verify must enroll within 30 calendar days of the award of the contract that requires E-Verify participation and must begin using the system to verify new employees within 90 days of enrollment. Covered employers who have been enrolled in E-Verify for more than 90 days are required to continue to submit verification queries to E-Verify within the required three business days of the newly-hired employee's start date but must start using E-Verify for existing employees assigned to perform work on the contract 90 days from the contract award date. Those enrolled in E-Verify for less than 90 calendar days are allowed 90 calendar days from the date of enrollment in the system to initiate verification of newly-hired employees.

We recommend that you review any current federal contracts, any bids or solicitations for future federal contracts, and the scope of any applicable contracts (in particular which current employees are working or will be assigned to work on those contracts) to determine whether the requirements of this rule will need to be implemented. Once you determine which current employees will need to be processed through E-Verify, audit the I-9 forms for those employees to ensure that they meet the requirements for E-Verify.

State Immigration-Related Laws

Across the country, states continue to enact their own employment-related immigration legislation, including legislation requiring certain employers to use E-Verify to electronically verify the employment eligibility of their newly hired employees. The National Conference for State Legislatures reported that in 2008 states have enacted a total of 19 immigration laws relating solely to workplace issues and another three laws including employment-related provisions.

In Missouri, for example, effective January 1, 2009, employers of unauthorized workers face potential loss of state contracts or tax breaks, suspension or even revocation of their right to do business in the state, and possibly a civil trial in Missouri state court. The law requires any Missouri employer to enroll in E-Verify if it: has any state contract or grant worth more than $5,000; or receives any state-administered or subsidized tax credit, tax abatement, or loan.

Immigration Expectations and the Obama Administration

As the Obama Administration takes office, Americans are anxious to see what change the new administration will bring. Although comprehensive immigration reform is not expected within the next two years, there are some areas in which we may see immediate change.

Within President Obama's first year, we anticipate that the administration will raise the current cap on H-1B visas for highly skilled workers in the science, technology, engineering, and mathematics (STEM) fields. In recent years, the demand for H-1B visas has severely exceeded the numerical cap allowed and has prevented many companies from adding needed highly-skilled professional workers to its workforce. The crunch in the availability of H-1B visas has especially affected the

high-tech industry and this industry is leading the push to increase the H-1B cap for holders of STEM degrees.

We also expect to see the government recapture unused immigrant (permanent residence) visa numbers. The law imposes annual numerical limits on the number of foreign nationals who may receive immigrant visas each year per country. At the end of each fiscal year, unused visa numbers are "lost" if not used. Recapturing these unused immigrant visa numbers would reduce the current visa backlog for foreign nationals seeking to become permanent residence.

By the end of Obama's first term in 2013, we may also see comprehensive immigration reform, with a focus on securing the borders, family unification, and perhaps even an amnesty. Although, we do not expect to see a continuation of the level of work-site enforcement raids under the Obama administration as with the Bush administration, Obama has emphasized the importance of a legal workforce. Even if a reduction in worksite raids occurs, it is likely that we will see an increase in the applicability of E-Verify and possibly the requirement that it be used universally just as the Form I-9 is required now.

Keeping up-to-date on changes in immigration law will continue to be an important component in protecting your business and employees. Contact one of the attorneys in the Fisher Phillips Global Immigration Practice Group with any questions you may have.

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