Immigration Enforcement Continues To Target Employers, Part 2

Insights
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In our last issue we provided an overview of the Immigration Reform and Control Act (IRCA), including I-9 requirements generally, along with a few special situations. In this article, we'll hone in on the E-Verify program, and government investigations.

E-Verify Generally
E-Verify is an Internet-based system operated by the Department of Homeland Security (DHS) in partnership with the Social Security Administration (SSA). E-Verify allows participating employers to electronically verify the employment eligibility of their newly-hired employees. To participate in E-Verify, the employer submits a query to E-Verify for any newly-hired employee after completion of the I-9 process and no later than the end of the third business day after the employee's actual start date (not counting the date the employee starts to work).

Enrollment and use of E-Verify is voluntary unless it is required by state or federal law. Some states, such as Arizona and Mississippi, require all employers to use E-Verify for new hires. Other states, such as Georgia and Missouri, require its use by employers with state contracts. Federal contractors and subcontractors may be required to use E-Verify for new hires and existing employees working on a covered federal contract.

Information about the E-Verify process may be obtained at the U.S. Citizenship and Immigration Services (USCIS) website. All employers who participate in E-Verify (whether voluntarily or because of state or federal requirements) must post notices in English and Spanish informing employees that the company uses E-Verify and of the employees' rights. E-Verify must be used: 1) only for new hires (unless you are required to use E-Verify as a federal contractor or subcontractor); 2) for all new hires regardless of national origin or citizenship status; and 3) only *after* hire and completion of Form I-9 and cannot be used to pre-screen applicants.

If the E-Verify system issues a tentative non-confirmation (TNC) in response to a query, the employer must provide the employee with a notice generated by E-Verify and information on how to contest the TNC. If the employee elects to challenge the TNC, the employer is required to provide the employee with a referral letter containing instructions and contact information for the agency that triggered the TNC (either the SSA or the DHS). Employers cannot terminate or take any other adverse action

against an employee who contests a TNC while the TNC is in process. The employee is allowed eight federal government work days to contact the appropriate federal agency. If you receive a final non-confirmation (FNC) or notice that the employee has decided not to contest the TNC, you must terminate the employee at that time.

Special Rules For Federal Contractors

The Federal Contractor E-Verify Rule became effective on September 8, 2009. The rule requires federal contractors, which have contracts for services and construction over $100,000 and a performance period over 120 days, to use E-Verify for all newly-hired employees and current employees working on the contract. The rule also includes a flow-down provision for subcontractors for services or construction over $3000. The E-Verify requirement will be triggered by the inclusion of an E-Verify clause in a new or renewed federal contract. Existing indefinite-delivery/indefinite-quantity federal contracts will be revised to include the E-Verify clause for future orders if the performance period extends at least six months after the effective date of the rule and the work or number of orders will be or is expected to be "substantial."

Contracts are not covered by this rule if: 1) the work will be performed only outside the U.S.; 2) the performance period is less than 120 days; 3) it includes only commercially available off-the-shelf (COTS) items (or but for minor modifications would be COTS items); or 4) is for a value of less than $100,000. Nor does the rule apply to prime contracts for food and agricultural products shipped as bulk cargo and which would otherwise be classified as COTS items.

Institutions of higher education, state and local governments, federally recognized Indian tribes, and sureties operating under a takeover agreement with a Federal agency pursuant to a performance bond are required only to verify employees assigned to the covered federal contract. Employees holding an active security clearance of confidential, secret or top secret or who have undergone background investigations under the Homeland Security Presidential Directive (HSPD-12) are exempt from verification requirements.

Contractors must continue to use E-Verify for all new hires during the validity of the covered federal contract. Pre-screening of employees is not allowed, although, the Form I-9 and E-Verify query may be completed prior to the start date as long as the employee has been offered and has accepted the position. The covered federal contractor and subcontractor may opt to E-Verify all employees, including existing employees not assigned to the federal contract.

ICE Audits

In June 2010, Immigration and Customs Enforcement (ICE) issued a strategic plan for worksite enforcement to be implemented through fiscal year 2014. One of the key initiatives of the plan is enforcement of immigration-related employment laws, including pursuing employers who knowingly violate those laws. ICE is utilizing education, I-9 audits and investigations, and criminal and civil sanctions to create a culture of compliance. Certain industries, such as agriculture, construction, hospitality, and food processing, are primary targets for these actions. I-9 audits may

be triggered by complaints, investigations already in progress, or when there are public health or national security concerns.

The (Notice of Inspection) NOI allows the targeted employers three days to prepare for a meeting with federal officials where the company's Form I-9 records will be reviewed. In addition to properly completed I-9 forms for all current and recently terminated employees, employers are required to turn over payroll documentation and other employee documentation, any documentation received from the Social Security Administration and E-Verify, and information about the business owners. ICE conducts an audit of the forms and other requested information and at the conclusion of the audit will notify the employer of the results. If no violations are found, ICE will issue a letter advising that there is no basis for further investigation. If violations are found, ICE may issue a "Notice of Technical or Procedural Failures" and allow the employer ten days to make identified corrections on the I-9 forms. If corrections are not made as requested within the allowed time, ICE may issue a "Notice of Intent to Fine" (NIF) and assess fines of $110 to $1,100 per form.

If ICE determines that the information provided on the I-9 form for certain employees is incorrect or invalid (e.g., the information related to an individual other than the employee or the numbers provided had never been issued by the government), it will issue a "Notice of Suspect Documents" and require you to obtain new documentation from those identified employees to prove their identity and employment eligibility. If the employees cannot produce the required documentation, you would not be allowed to continue to employ them. Continuing to employ the identified employees without valid documentation could result in fines ranging from $375 to $3,200 per unauthorized employee for the first violation.

If fines are assessed, ICE will issue an NIF. The NIF will list the violations, include details about how the fine was calculated and specify the total amount of the fine to be paid. You have the right to contest the fine by requesting a hearing before an administrative law judge within 30 days from the service of the NIF.

DOL Wage and Hour H-1B Investigations

Foreign nationals may be granted permission to work temporarily in the U.S. in professional or specialty jobs under the H-1B visa program. The H-1B regulations require employers to certify on a Labor Condition Application (LCA) submitted to the U.S. Department of Labor that they, in addition to other requirements, will pay the H-1B employee at least the prevailing wage determined by the DOL for the same job in the same geographic area and offer the same benefits as those offered to other workers in the same classification. The DOL Wage and Hour Division is responsible for investigating the H-1B employer's compliance with the LCA attestations. These investigations are generally triggered by a complaint from an employee.

The DOL Wage and Hour Division notifies the H-1B employer of an investigation by letter, including the date and time that the investigation will be initiated. The letter also lists what records must be made available for inspection, including:

- all public access documentation required under the LCA regulations (Form ETA 9035 and/or ETA 9035E);
- documentation of the wage rate paid to the H-1B worker;
- an explanation of how the wage rate was set;
- documentation showing how the prevailing wage was established; and
- a summary of the benefits offered to U.S. workers in the same occupation as the H-1B worker.

The Wage and Hour Division investigator will also request payroll records for the H-1B employee, the date the H-1B employee entered the U.S., the date of hire and termination, copies of any termination notices provided to the USCIS and the agency's response, a copy of the H-1B petition submitted to the USCIS, and the current or last known address and contact information for all H-1B employees.

The primary goal of the investigation is to determine if the employer has complied with the terms of the LCA, including paying the H-1B employee the wage listed for all times that the H-1B authorization remained in effect and that the H-1B employee's wages were not docked as a result of benching or furlough at any time. At the conclusion of the investigation, which generally includes interviews of the employer and the H-1B employees, DOL will determine if back wages are due to the H-1B employee (e.g., if you were not paying the H-1B employee the wage as stated in the LCA), and whether civil money penalties are appropriate for failing to comply with the terms of the LCA or the related requirements. The DOL may debar employers from applying for H-1B workers for a period of time.

State Laws

Since 2006, many states have enacted laws which provide for employer sanctions related to hiring unauthorized workers – independent of any monetary and/or criminal sanctions available for federal immigration violations. The focus of many of the state immigration laws is the DHS E-Verify system.

Many states have enacted laws requiring employers doing business with the state to verify the legal status of each employee to work in the U.S. (Arkansas, Georgia, Idaho, Pennsylvania) or to certify compliance with IRCA (Delaware, Massachusetts). Iowa requires any business that receives economic development assistance from the state or that receives public monies must ensure that jobs are filled solely by individuals authorized to work in the U.S.

Kansas limits unemployment benefits and employment protection status to citizens and those with legal immigration status and provides employment security measures and unemployment benefits to legal residents of the state. Montana and New Mexico unemployment insurance laws exclude from the definition of "employment," any services performed by an alien having a residence in a foreign country coming temporarily to the U.S. to perform agricultural services.

Several states have enacted laws that require employers to register for and use E-Verify for all newly hired employees (e.g., Arizona, Mississippi), to attest that their employees are authorized to work in the U.S. (e.g., Colorado), to use E-Verify or the Social Security Number Verification System (e.g., Utah), or to use E-Verify or view a driver's license issued by a state that verifies legal status as part of the driver's license process (e.g., South Carolina).

Summing It All Up

Now is the time to put immigration compliance on your "To Do" list. Review your company's compliance with federal and state immigration laws. Make sure that the employees who complete the I-9 process on behalf of the company are properly trained. Conduct periodic I-9 audits and correct errors on the forms that you are allowed to correct.

Consider moving to an electronic I-9 system. Check to see whether you are required to comply with additional federal and/or state immigration laws. Ensure that your H-1B employees are being paid properly. You may be at the top of ICE's or the USDOL's "To Do" List, so be ready to show them that you take your obligations seriously and are in compliance.

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