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Online Feature

October 17, 2007

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Homeland Security Takes Strong Measures to Fight Illegal Hiring

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SPECIAL TO LAW.COM
OCTOBER 17, 2007

Absent enactment of comprehensive immigration reform by Congress, the Department of Homeland Security has sought to strengthen worksite enforcement of laws to prevent employers from *knowingly* hiring illegal aliens. Recent DHS actions have spurred controversy -- and lawsuits -- and have created uncertainty about employers' legal obligations.

DHS's NO-MATCH LETTER RULE

DHS recently issued a regulation bolstering the effect of "no-match" letters sent by the Social Security Administration. Until recently, when employers reported wages to the SSA and the employee's name and Social Security Number did not match SSA records, the SSA sent a no-match letter to inform the employer of the discrepancy. No employer response was required.

Under the new DHS regulation, an employer receiving a no-match letter faces liability for having "constructive knowledge" of an employee's illegal status, unless the employer satisfactorily resolves the discrepancy.

Under the rule's "safe harbor" procedures, an employer has 30 days to ensure the discrepancy was not caused by its own clerical error. If not, the employer must promptly notify the employee, who has 60 days to resolve the discrepancy with the SSA. If the issue is not resolved within 90 days after the employer's receipt of the no-match letter, the employer must obtain from the employee and submit to DHS a new Form I-9 as if the employee were newly hired, without use of any document containing the no-match SSN. If the employee cannot verify identity or work authorization, the employer is required to terminate the employee or risk liability for "knowingly" employing an unauthorized employee.

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FEDERAL COURT TEMPORARILY BARS DHS FROM IMPLEMENTING NO-MATCH RULE

The no-match rule has been criticized, primarily over the accuracy of the SSA's database. Studies have shown significant error rates, and the database does not account for mismatches due to clerical errors by the SSA, workers who have changed names or workers with multiple last names (common in Latino and Asian communities). Many predict enforcement of DHS's no-match rule will result in massive terminations, and immigrant rights groups predict discrimination against Hispanic workers.

The new regulation was to take effect on Sept. 14, but the AFL-CIO, the ACLU and several California labor groups sued to prevent its implementation. On Aug. 31, the U.S. District Court for the Northern District of California temporarily barred DHS from implementing the rule. After a hearing on Oct. 1, Judge Charles Breyer extended the temporary restraining order and, on Oct. 10, granted a preliminary injunction, barring the government from sending the DHS no-match letters.

Breyer stated that there are serious questions about the DHS rule, that the plaintiffs demonstrated a high probability of succeeding on their claims and that the the "balance of hardships tips sharply in plaintiff's favor." He also noted

that "the magnitude of DHS's safe harbor rule is staggering," and that "there can be no doubt the effects of the rule's implementation will be severe."

The DHS may appeal the court's decision.

The SSA has prepared approximately 140,000 no-match letters this year, covering more than 8 million workers, but has held the letters pending the final DHS rule. DHS does not currently have direct access to a list of employers who receive no-match letters and plans to include its own letter with the SSA letter, explaining the no-match regulation.

DHS' E-VERIFY PROGRAM

DHS also recently sought to expand its voluntary E-Verify program, which allows an employer to verify online whether an applicant is eligible to work by comparing the information provided by the applicant to the SSA and DHS databases. The program began in 1996 as the Basic Pilot Program and was originally done by telephone. Proposals for comprehensive immigration reform have sought to mandate this program for all employers, but those measures have failed.

Under the program, employers must submit an employee's Form I-9 information to the E-Verify system within three days of a new hire. The employer is notified whether the new employee is authorized to work, and the system issues a "tentative nonconfirmation" notice if it cannot confirm eligibility. An employee can contest such a finding but must do so within eight days. If an employee receives a final nonconfirmation of employment eligibility, the employer must either terminate the employee or be subject to a rebuttable presumption that the employer knowingly hired an unauthorized employee.

According to DHS, over 2.9 million E-Verify queries were made last year by 22,205 employers, with approximately 800 new employers joining monthly. DHS recently issued a rule requiring all federal contractors to participate in the E-Verify program, adding approximately 200,000 companies and dramatically increasing the number of queries. DHS also announced that E-Verify will provide photographs from federal databases for an employer to compare to the employee's documents.

DHS SUES ILLINOIS, SEEKING TO INVALIDATE STATE LAW PROHIBITING EMPLOYERS FROM USING E-VERIFY PROGRAM

DHS's E-Verify program has also been criticized, again, mainly due to concerns about the accuracy of the SSA and DHS databases.

On Aug. 13, Illinois legislators passed a law, signed by Gov. Rod Blagojevich, effective Jan. 1, 2008, prohibiting employers from using the E-Verify system until the SSA and DHS databases are able to settle 99 percent of problematic records within three days. This requirement effectively bars an Illinois employer from using the program, because the DHS rule allows 10 days for E-Verify to respond to employers, and it is not 99 percent effective. DHS Secretary Michael Chertoff said that the three-day Illinois standard was impossible to meet.

The Illinois law passed with veto-proof majorities in both chambers. Illinois claims the DHS exceeded its regulatory authority.

On Sept. 24, the U.S. Department of Justice sued Illinois, claiming that the law is unconstitutional and seeking to permanently prohibit its enforcement. The complaint states that the law prohibits employers from using E-Verify, and the increased standards impermissibly impose upon the federal government's authority.

Until the litigation is resolved, employers in Illinois risk violating Illinois law by using DHS's E-Verify, while Illinois federal contractor employers are faced with conflicting federal and state requirements.

CONCLUSION

DHS appears serious about cracking down on work-site enforcement of immigration laws. The outcome of both lawsuits is uncertain, but employers should be aware of the requirements imposed by these measures and prepare for other possible similar DHS actions.

According to Chertoff, "[u]ntil Congress chooses to act, we're going to be taking some energetic steps of our own."

It remains to be seen whether they have energetically overstepped their regulatory authority.

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