Immigration News

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I-9/E-Verify Services:

- I-9/E-Verify consultations to determine how we can help you improve your compliance procedures

- I-9 and E-Verify Training

- I-9 Audits

- Assisting your company with E-Verify Registration

- Drafting I-9 and E-Verify Policies and Procedures or reviewing your company's written policies

OCAHO Pushes Back on I-9 Fines

Over the past several years, the Obama administration has stepped up enforcement of the law which requires employers to use the Form I-9 to verify the employment eligibility of its employees. These policies have resulted in more I-9 audits of businesses and in significantly increased fines for non-compliance. This increased enforcement has been met with nearly unanimous approval in Congress which will almost certainly make stronger employment verification rules a part of any Comprehensive Immigration Reform.

A number of recent decisions from the Office of the Chief Administrative Hearing Officer ("OCAHO"), which is the administrative law court that hears appeals of I-9 sanction determinations, shows a trend towards reducing these fines. OCAHO has issued decisions in several cases this year where it reduced the fines that had been imposed deeming the sanctions unfair or excessive under the circumstances. Two factors OCAHO re-

Judges show trend towards reducing I-9 fines.

peatedly scrutinized in these decisions was whether the penalty was "proportionate" to the size of the business and whether the employer acted in bad faith. OCAHO carefully evaluated each case to determine a "punishment that fit the crime".

While this helps in allowing some negotiating room with Immigration and Customs Enforcement when fines are levied after an I-9 audit, the lesson here is still that failing to have a solid I-9 compliance policy in place can be very expensive! Good faith was also a major factor in each of the OCAHO reductions. Thus, it is important to handle your I-9 compliance responsibilities seri-

Latest E-Verify Enhancement: Employee Notification

As of July 1, 2013, E-Verify can email employees directly if their information triggers a Tentative Non-confirmation ("TNC"). This new feature is enabled if the employee chooses to list their email address on the Form I-9.

It is important to note the following:

- Providing an email address on the Form I-9 is optional.

- If an email address is provided, E-Verify em-

ployers are required to enter it in the E-Verify email address field.

- This does not change the employer's responsibility to give a copy of the TNC notice to the employee.

Immigration Reform Stalled in House

Comprehensive Immigration Reform ("CIR") has stalled in the House of Representatives, having been passed by the Senate in June, 2013. Even though the House has several smaller immigration bills ready to go to the floor for a vote in November (dealing with border security, guest worker programs and high tech visas) it is not yet ready to tackle the Senate's CIR legislation.

House leaders have not been able to agree upon a plan for how to deal with the more than 11 million undocumented workers in the United States.

Serious disagreement among many House members exists over the so called "pathway to citizenship" for undocumented workers. This debate is going on internally and the leadership is not yet ready to bring

Comprehensive Immigration

the bill to the floor for debate.

In addition, Syria, health care and the debt limit are issues which have required the immediate attention of Congress, pushing discussion over immigration reform further down the list of matters to be considered. However, lobby groups anxious for immigration reform, including many business groups, are continuing to exert pressure behind the scenes in the hope that a bill can be passed before the end of the calendar year.

We will continue to monitor

Changes to New Form I-9 in the Making

> USCIS is holding studies with employers to test the enhancements which it is proposing to the Form I-9.

The United States Citizenship and Immigration Services ("USCIS") has been working on a new version of the Form I-9 that contains enhancements designed to assist employers in complying with the law and reducing errors employers and employees make when completing the Form I-9.

Prior to submitting the revised Form I-9 for public comment, USCIS held a series of studies in early September, 2013 where employers volunteered to complete the enhanced version of the Form I-9 in a mock hiring situation. USCIS is primarily interested in determining the amount of time that it takes to complete the

enhanced Form I-9.

Feedback from this study will be used to finalize the revised Form I-9. The revised Form I-9 will still need to be put out for public comment before it can be released by USCIS. Therefore, release is months away! We will keep employers advised of the status of the revised Form I-9.

Leadership Changes to Occur at DHS

Three of the major leadership positions in the Department of Homeland Security ("DHS") have seen changes in the past few months.

Homeland Security Secretary Janet Napolitano announced on July 12, 2013 that she would be leaving the department in September in light of her nomination to head the University of California sys-

tem. President Obama has nominated Jeb Johnson, a former top Pentagon lawyer, as Napolitano's replacement for Secretary of Homeland Security.

Immigration and Customs Enforcement Director John Morton announced in

DHS Secretary Nominee Jeb Johnson

June that he would be leaving at the end of July to work in the private sector. Two weeks later, President Obama announced that he was nominating U.S. Citizenship and Immigration Services Director, Alejandro Mayorkas to be Deputy Secretary of DHS.

Start Planning For Your FY2015 H-1Bs

The expectation, once again, is that the H-1B quota will be filled on the first five days that filings are permitted (April 1 through 7, 2014). Thus, employers who have a candidate for a FY2015 H-1B should begin the process by the end of this year so that the petition can be timely filed. Employers should evaluate **now** whether they have any employees who would need an H-1B for the fiscal year beginning October 1, 2014.

There is an annual quota of 65,000 visas per year with an additional 20,000 H-1B visas available for beneficiaries who have obtained a Masters Degree or higher from a United States educational institution. Federal regulations require that if sufficient petitions are received on the first filing day then all petitions received on the first five filing days are

FY2015 H-1B filings expected to exceed the quota

placed in a random lottery and a sufficient number are chosen to fill the quota.

An H-1B petition is a three step process and requires substantial documentation. It is important to evaluate your needs now. In order to allow sufficient time to prepare the petition for filing, you should begin the process in December of this year so that the petition can be ready for filing on April 1, 2014.

If you are interested in filing a petition or have any questions please call our office.

Form I-9 Q & A

Question: Can the newly hired employee choose which documents from the List of Acceptable Documents they will submit to the employer when filling out the Form I-9?

Answer: Yes. Employers *cannot* ask for specific documents, or for more documents than are required for the Form I-9. The newly hired employee has the right to choose which documents he/she will present to the employer from the List of Acceptable Documents. As long as the newly hired employee presents either a List "A" or a List "B" and a List "C" document from the List of Acceptable Documents, and, the documents appear to be genuine and relate to the person presenting them, then the employer must accept them.

In addition to fines for Form I-9 violations, an employer who "requires" certain documents for the Form I-9 could be liable for unlawful discrimination under the Immigration and Nationality Act.

> "The newly hired employee has the right to choose which documents he/she will present to the employer from the List of Acceptable Documents."

Idaho and Iowa Join RIDE Program

On July 14, 2013, the United States Citizenship and Immigration Services ("USCIS") announced that Idaho has become the third state to join the USCIS's Records and Information from DMVs for E-Verify (RIDE) program. On September 8, 2013, USCIS announced that Iowa had become the fourth state to join the RIDE program.

The program, launched in June, 2011 allows the E-Verify electronic employment eligibility verification system to validate employees' driver's licenses by checking state department of motor vehicle records.

Before the launch of the program, E-

Iowa is one State that has joined RIDE.

Verify was only able to verify the authenticity of an employee's Social Security card. According to USCIS, the additional validation capability increases E-Verify's ability to combat identity and document fraud.

Mississippi and Florida also participate in the RIDE program.

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Just a Note...

This past week I attended a seminar on Workplace Enforcement which focused on sophisticated issues involved in I-9 and E-Verify compliance and enforcement. Government and private practitioners agree that all medium and large businesses can expect to have an I-9 audit in the next 10 years. Therefore, if you expect to be in business over the next decade, you need to make sure that your Employment Eligibility Verification procedures are in place and compliant with all federal regulations because audits and fines are increasing exponentially. Even with the trend of OCAHO reductions, the average cost to the business of each I-9 that has an error is $1,300.

Many employers have told me that they wished they had used my I-9 services BEFORE ICE served its I-9 Notice of Inspection instead of after. Don't let this happen to your business. Take the time now to get your I-9s in order. Be proactive and put yourself in the best position to defend your business in an I-9 audit.

Patricia

Is E-Verify in Your Future?

Any Comprehensive Immigration Reform ("CIR") bill will almost certainly contain a requirement that all employers use the E-Verify employment eligibility verification system. Deadlines for enrollment will vary depending on the size of the employer.

Businesses which are not enrolled in E-Verify should evaluate their I-9 policies and procedures now so that they are in the best position to transition into joining E-Verify. E-Verify is a free internet system that employers use to confirm the legal status of newly hired employees. It is important to be aware that all the information that the employer inputs into E-Verify is taken off of the newly hired employee's Form I-9.

Thus, an employer needs to first evaluate his Form I-9 procedures to make certain that the business is fully compliant before signing the Memorandum of Understanding to join E-Verify. The safeguards which an employer

Is your business ready to join E-Verify?

receives under the law upon getting a confirmation on a new hire only exist if the Form I-9 has been properly completed.

Employers should begin now by having an audit done of its Form I-9s and establishing written policies and procedures for I-9 and E-Verify compliance. Our firm can assist you with both the I-9 audit and drafting policies and procedures. We can also provide I-9 training to your staff to ensure that they are fully aware of all of the I-9 requirements. In addition, when you are ready to join E-Verify we can assist you with the registration process and E-Verify training for your staff.