



LEGAL ALERT

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Update on Immigration Matters: State and Federal

State Immigration Update

The "Legal Arizona Workers Act" ("LAWA") took effect January 1, 2008. LAWA prohibits the knowing or intentional hiring of unauthorized workers. Employers found to knowingly hire unauthorized workers will be subject to a three-year probationary period and possible suspension of the employer's business license not to exceed ten days, among other penalties. Intentional violations carry virtually the same penalties as a knowing violation with the exception of a five-year probationary period and mandatory suspension of the employer's business license for at least ten days. Repeat offenders risk losing their business license. When it took effect, LAWA was one of the most stringent employer-sanction laws in effect anywhere in the country. Unfortunately, there were many unanswered questions about the scope of the law.

To address some of the ambiguities of LAWA, Arizona Governor Janet Napolitano signed legislation (H.B. 2745) on May 1, 2008, which took effect immediately. The new law makes clear that LAWA applies only to employees hired after January 1, 2008. The new law also clarifies that the penalties will be applied on a site specific basis, thereby alleviating fears that businesses with multiple locations might have to shut down all locations instead of just the one where the violation occurred. Employers who attempt to avoid the requirements of LAWA by paying employees in cash will be subject to fines of up to \$5,000. Under the new law, a prosecutor cannot investigate complaints on the basis of an employee's race, color, or national origin; however, anonymous complaints are still permitted.



The requirement that employers use E-Verify also remains in effect. While LAWA does not contain any penalties for failing to use E-Verify, the amendments clarify that employers who do not enroll in E-Verify by September 30, 2008 will be precluded from receiving a state, city, county, school, or other government contract.

The amendments to the new law establish a voluntary program that assists participants in demonstrating “good faith” in trying to comply with LAWA. This Voluntary Employer Enhanced Program has not yet been completely established. However, one central component of the program is that employers will have to agree not only to use E-Verify, but also agree to verify the social security numbers of all of the employees who were not already verified through the E-Verify system. For those who signed up for E-Verify on January 1, 2008, that means checking the social security number for all current employees hired prior to January 1, 2008. The goal of the program is to minimize potential exposure under the state law while quelling many of business owners’ concerns that their efforts to comply will go unnoticed.

Finally, the law is now clear that it does not apply to independent contractors. “Independent contractor” is defined as “any individual or entity that carries on an independent business, that contracts to do a piece of work according to the individual’s or entity’s own means and methods and that is subject to control only as to results.” Because the final determination of whether an individual or entity is an independent contractor is fact specific, you should consult with your attorney before making this determination.

Federal Immigration Update

Some foreign students can extend their Optional Practical Training period

Following graduation, many foreign students in F-1 status use their Optional Practical Training “(OPT)” to obtain employment with U.S. companies. Typically, the maximum length for OPT is 12 months and then the foreign student is expected to either leave the country or obtain another work visa. The Department of Homeland Security “(DHS)” recently issued a federal regulation that allows some of these F-1 visa holders to extend their OPT by 17 months.

If you are currently employing foreign nationals in F-1 status who are working for you as part of their OPT period (typically just 12 months), these workers may be able to extend their stay by 17 months if 1) they have completed a degree in science, technology, engineering or mathematics and 2) your company has enrolled in the U.S. government program known as E-verify. Many Arizona employers have already enrolled in E-Verify due to the new state immigration law discussed above. Contact your immigration attorney for the qualifying list of degrees and more specifics on this new rule if you have questions.

New Proposed Social Security No-Match Rule

In August, 2007 the Department of Homeland Security “(DHS)” issued a final “no-match” rule outlining steps an employer should take if it received a no-match notification from the Social Security Administration. Following the steps in the final rule promised a “safe



harbor” from a finding of intentionally hiring an undocumented worker based on receipt of the no-match notification. However, due to legal challenges to the rule, the Social Security Administration suspended sending out no-match letters until the matter was resolved.

DHS agreed to address the challenges to the original rule and just recently issued a new proposed rule. Although the expectation was that DHS would significantly revise the earlier rule, in fact the new proposed rule is essentially the same as the one that was challenged last year. The comment period for the supplemental proposed rule ended April 25th, with over 250 comments submitted

from immigrant groups, labor and business groups. One of the major criticisms is the alleged flaws in the Social Security database which can result in US citizens being the unintended victims of the “no-match” rule.

DHS has not set any time table for issuing a final no-match rule. In the meantime, employers who sign up for E-Verify can take some comfort in knowing that the new employees who clear the E-Verify system at least have social security numbers that match their names. In Arizona, the state law also provides some level of protection against a claim of “knowingly hiring” undocumented workers if the company participates in E-Verify.

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