

IN PRACTICE

IMMIGRATION LAW

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Increasing the Liability for Hiring Undocumented Workers

Pressure for employers to comply with regulations increases

As the immigration debate continues to swirl, the pressure on employers to strictly comply with regulations increases. The rhetoric on illegal immigration frequently focuses on the employer's duty to ensure employees are legally present and authorized to work. Both the state of New Jersey and the federal government continue to squeeze business owners with additional obligations and increased penalties, creating economic hardships to businesses and disincentives to operate in New Jersey.

Since 1986, every employee must complete a I-9 form upon commencing employment. This document evidences the employee's eligibility to work in the United States. For many years employers had little fear of penalties for failing to comply with the letter or spirit of the law. Enforcement was lax and penalties rare. However that changed on September 11, 2001. Since then, enforcing immigration laws has become a priority at the borders and at the workplace.

Recently, New Jersey Senate Major-

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ity Leader Stephen Sweeny introduced legislation to punish small business owners for hiring undocumented workers by revoking the business license of the company.

Sen. Sweeny's bill faces many obstacles, not the least of which is the Supremacy Clause of the Constitution. Immigration law is a purely federal area which states are constitutionally prohibited from regulating. In addition to the legal barriers to Sen. Sweeney's proposal, requiring employers to enforce immigration laws is difficult. There is literally an alphabet soup of visa types, from, A-visas for diplomats to B-2 visas for tourists, H visas for workers, K visas for finances, P visas for athletes, all the way to V visas for family members of permanent residents, to name a few. Even a diligent business owner would have a hard time learning all the visa types available as well as pinpointing legitimate forms of identification for each type.

In addition to confirming eligibility to work, employers must collect valid Social Security numbers from each employee. Each year, Social Security discovers about 10 percent of the Social Security numbers submitted do not

match the names listed. In response, the agency sends out about 9 million "no match" letters to individuals and about 150,000 "no match" letters to employers alerting them to discrepancies between the names and numbers.

Employers who receive "no match" letters must conduct a diligent inquiry into the discrepancy and terminate employees who cannot produce a valid number. Knowingly hiring employees not eligible to work is a crime which can result in heavy fines and jail time. Receipt of a "no match" letter may, in some circumstances, give rise to liability. On the other hand, antidiscrimination laws can punish employers who jump to conclusions about an employee's nationality.

The Department of Homeland Security (DHS) has been attempting to draft "safe harbor" regulations for employers receiving "no match" letters; however the adoption of final regulations were halted by a preliminary injunction issued by the U.S. District Court for the Northern District of California in October 2007. In response to the injunction, on March 26, DHS released a supplemental proposed rule addressing whether the original proposed regulations exceeded DHS's authority. The comment period for this supplement regulations ends on April 25.

While the specifics of the "safe harbor" regulations remains uncertain, the basic concept is to give employers a set of steps to work through upon

receipt of a “no match” letter which, if strictly followed, would reduce employer liability both for hiring undocumented workers as well as charges of discrimination by employees.

Finally, adding to this minefield facing employers, the federal government announced higher civil fines to be levied against employers. The new fines took effect March 27, and increase by over 25 percent the liability

for employing undocumented workers. The minimum penalty for hiring an undocumented worker is now \$375 per incident. Each undocumented employee is a separate incident under the law. For example, hiring three undocumented workers would result in three separate fines.

Many of these developments have not been widely reported but would have profound implications for com-

panies nationwide. Rules placing greater burdens on employers for verifying immigration status result in higher costs for compliance and lead to increased liability for mistakes. Being prepared and in full compliance now can save time and money later on. Conducting a self-audit on I-9 compliance and training human resources staff to properly maintain the forms is the best strategy. ■