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A Concise Guide to Form I-9 Compliance

Every employer must comply with the Department of Homeland Security, U.S. Citizenship and Immigration Services "Form I-9" rules. These laws require that every employer verify the identity and employment authorization of each person hired. Form I-9s are used to identify individuals who are authorized to work in the United States. A Form I-9 must be completed each time a person is hired to perform labor or services (other than independent contractors) in the United States in return for wages or other remuneration.

The Form I-9 must be filled out completely and accurately — and the employer must attest to the completeness and accuracy of the information on the form. Form I-9s can be subject to inspection by an Immigration and Customs Enforcement (ICE) agent. While a technical or procedural violation in the completion of a Form I-9 may be corrected within ten days of the discovery of the error, if an employer does not correct a technical or procedural violation, the employer may be fined and, in certain situations, may be prosecuted criminally. Additionally, an employer found to have knowingly hired or continued to employ unauthorized workers may be subject to debarment — in other words, prevented from participating in future public contract work and from receiving other government benefits. Monetary penalties for knowingly hiring and continuing to employ unauthorized workers range from $375 to $16,000 per violation, with repeat offenders receiving penalties at the higher end. Penalties for substantive violations of the law — which include failing to produce a Form I-9 — range from $110 to $1,100 per violation. In determining penalty amounts, ICE agents consider five factors: the size of the business, good faith efforts to comply, the seriousness of the violation, whether the violation involved unauthorized workers, and history of previous violations. Obviously, since the Form I-9 is a simple document to complete and maintain, it behooves all employers to avoid the risk of penalties by simply complying with the laws.

To complete the Form I-9, the employee, at the time of hire, completes Section 1. If the employee is an alien authorized to work in this country, the employee must provide his/her alien or admission number and the expiration date for the work authorization period. The employee must sign and date the Form I-9, and the employer is responsible for reviewing and ensuring that the employee fully and properly completes Section 1.

After Section 1 is completed, the employer completes Section 2. This section is intended to verify both employment authorization and the employee's identity. The employee may provide a single document to confirm both employment authorization and identity as listed on the List of Acceptable Documents (the List is attached to the Form I-9). That document would be listed under List A in Section 2. A U.S. passport or permanent resident card or alien registration receipt card are the primary acceptable documents under List A. If an employee does not have a U.S. passport or a permanent resident card or alien registration receipt card, then two documents are needed and both List B and List C columns must be filled out. Examples of acceptable documents for these columns are a driver's license and a U.S. Social Security card or a voter's registration card and a birth certificate — or any of the other acceptable combinations of documents listed in the Lists of Acceptable Documents attached to the Form I-9. There are certain exceptions to these rules for minors and employees with disabilities.

After the employer confirms the employee's identification and employment authorization, the employer must certify under pains of perjury that the information is accurate. For employers with numerous employees, there is an electronic, "E-Verify" program to make it easier for employers to comply with the Form I-9 eligibility verification requirements.

For more information, please contact Joshua A. Hawks-Ladds at 860.541.3306 or by email at jhawks-ladds@pullcom.com.

Does a Bonus Constitute a Wage?

A "bonus" as defined by the Merriam-Webster dictionary is "something in addition to what is expected or strictly due." This definition buttresses the traditional understanding that an employer, at his or her discretion, awards a bonus for excellence to select employees. However, the fundamental notion of a bonus is being closely examined — or some may contend, overturned — by Connecticut courts that are addressing the issue of whether a bonus constitutes a wage pursuant to Connecticut General Statutes § 31-71a(3).

In 2008, the Connecticut Supreme Court addressed the issue based on the statutory language of C.G.S. § 31-71a(3). *Weems v. Citigroup, Inc.*, 289 Conn. 769 (2008). In that case, the bonus was not contractually guaranteed and the decision to award the bonus was dependent on subjective factors such as the profitability of the entire group rather than a particular employee. The Connecticut Supreme Court ultimately found the bonus was not a wage in accordance with the statute and held that "bonuses that are awarded solely on a discretionary basis, and are not linked solely to the ascertainable efforts of the particular employee are not wages under § 31-71a(3)."

Shortly thereafter, the Connecticut Appellate Court was faced with the same issue, but slightly different facts. *Ziotas v. Reardon Law Firm*, 111 Conn. App. 287 (2008). In Ziotas, the bonus was contractually guaranteed, but the amount of the bonus was discretionary. The Appellate Court opined that in this case the bonus could be considered a wage. The Court held that as long as the employment agreement provided for a bonus in exchange for services, then it did not matter if the amount of the bonus was discretionary. However, the Connecticut Supreme Court did not share this opinion. *Ziotas v. Reardon Law Firm*, 296 Conn. 579 (2010). The Supreme Court, overturning the Appellate Court on this issue, found that the wage statute contemplates "a more direct relationship between an employee's own performance and the compensation to which the employee is entitled. Discretionary additional remuneration, as a share in a reward to all employees for the success of the employer's entrepreneurship, falls outside the protection of the statute." Thus, the plaintiff received no relief pursuant to C.G.S. § 31-71a(3).

The Supreme Court had not concluded its review of this issue, as later in the year it decided another opinion on the same matter. *Association Resources, Inc. v. Wall*, 298 Conn. 145 (2010). In Wall, the bonus was both contractually guaranteed and a specific formula for calculating the amount of the bonus was included as a part of the contract. The Supreme Court easily decided this bonus constituted a wage since no part of it was discretionary. Yet, the new twist was that the Supreme Court further held that an employee's seniority can play a role in determining whether a bonus can be classified as a wage. Here, the Supreme Court noted that even if a bonus is contingent on the performance of a collective group, if the plaintiff is the one managing the group, then the bonus is not discretionary. Thus, the bonus constituted a wage.

Overall, an employer needs to be aware of two areas, whether (1) the bonus is contractually guaranteed and (2) the amount of the bonus is discretionary. For now, these two factors are the primary lynchpins that will determine whether a bonus is a wage pursuant to C.G.S. § 31-71a(3).

For more information, please contact Jonathan B. Orleans at 203.330.2129 or by email at jborleans@pullcom.com orTiffany G. Kouri at 860.424.4360 or by e-mail at tkouri@pullcom.com.

NLRB Files Complaint Against Employer for "Facebook" Firing

Is calling your boss "a scumbag as usual" on Facebook protected by the National Labor Relations Act? The National Labor Relations Board (NLRB) thinks so and has brought a complaint against a Connecticut employer that allegedly fired an employee after her Facebook postings about work. The case is scheduled for a hearing in January 2011.

The case is an important one to track because it signals a renewed enthusiasm by the NLRB to apply 20th century laws to 21st century behavior. The NLRB, in filing its complaint, is trying to set the parameters in this age of technology.

"Protected concerted activity" has typically been interpreted to protect employees who may talk with other employees about their working conditions, including their supervisors. Importantly, the NLRB has said that this applies to both union and non-union work environments. The NLRB argues now that criticizing a supervisor (or complaining about work) to other co-workers on Facebook should be treated no differently.

Employers should consider creating (or updating) their social media policies and guidelines to be clear about the expectations of the employer and consider adding language that specifically allows conduct or speech protected by any state or federal law.

For more information, please contact Daniel A. Schwartz at 860.424.4359 or by email at dschwartz@pullcom.com.

Genetic Information Nondiscrimination Regulations Take Effect in January 2011

On November 9, 2010, the EEOC released its final regulations for the Genetic Information Nondiscrimination Act (GINA); they become effective on January 9, 2011. Employers in Connecticut have long had to abide by state laws that prohibit the use of genetic information in making employment law decisions. But GINA and the new regulations take those provisions one step further. Any employer who collects or receives medical information should become aware of these regulations and update their policies to reflect these new changes.

Among the most important provisions of the new regulations is a "safe harbor" provision that, in some cases, requires employers to notify their employees to not provide genetic information in response to a request for medical information. This will have a direct impact on FMLA certifications, pre-employment medical exams and other similar issues in the workplace. The regulations also prohibit employers from conducting "Internet searches" for the purpose of seeking genetic information. Thus, even a Google request on an applicant's name could be interpreted in some instances as a violation of GINA.

Employers should use this 60-day implementation period to acquaint themselves with these new regulations and seek counsel where appropriate.

For more information, please contact Daniel A. Schwartz at 860.424.4359 or by email at dschwartz@pullcom.com.

Attorney Notes

As part of Pullman & Comley's ongoing Labor & Employment Webinar series, Attorneys Richard C. Robinson and Megan Youngling Carannante hosted "English-Only Rules in the Workplace – The Relevant Law and Successful Litigation Strategies for Employers," on Wednesday, December 8. Jonathan B. Orleans and Tiffany G. Kouri addressed two hot topics for Connecticut businesses in "Classification and Compensation Issues for Connecticut Employers," on Wednesday, November 3.

Daniel A. Schwartz's blog, the Connecticut Employment Law Blog, was recently named one of the 100 best legal blogs in 2010 by the American Bar Association's *ABA Journal*. Dan also spoke about the emergence of cloud computing, the effect of social media on the legal workforce and the future of the practice of law at the New England Bar Association's annual meeting on October 23.

Michael N. LaVelle published "Agency Tries to Dodge Restrictions on Awards: CHRO Wants to Offer Emotional Distress Compensation in Discrimination Cases" in the *Connecticut Law Tribune* on October 25. Also in that issue, Adam S. Mocciolo and Edward Lefebvre published "Minimize Taxes in Business Litigation Settlements."

Jonathan B. Orleans authored chapters in two books published in 2010: "Current Regulatory Compliance Issues Affecting Employers," in *Complying with Employment Regulations 2010* and "Key Terms in Today's Employment Agreements" in *Negotiating and Drafting Employment Agreements 2010*, both published by Aspatore Books, a Thomson Reuters Company.

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Workplace Notes

850 Main Street
Bridgeport, CT 06604
Phone: 203.330.2000
Fax: 203.576.8888

90 State House Square
Hartford, CT 06103
Phone: 860.424.4300
Fax: 860.424.4370

107 Elm Street, 4th Floor
Stamford, CT 06902
Phone: 203.324.5000
Fax: 203.363.8659

50 Main Street
White Plains, NY 10606
Phone: 914.682.6895
Fax: 914.682.6894

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PULLMAN & COMLEY, LLC ATTORNEYS AT LAW 850 MAIN STREET P.O. BOX 7006 BRIDGEPORT, CT 06601-7006