Virginia Workplace Law

Even eBay Gets The Blues

By: Karen Elliott. ***This was posted Friday, October 22nd, 2010***

The news reports regarding California gubernatorial candidate Meg Whitman's undocumented housekeeper highlight critical issues for all employers.

When are you constructively on notice that your employee is not legally eligible to work in the U.S.? What do you do when you receive notice of a social security mismatch between your employee's name and their social security number? Knowing the answers to these questions in today's environment is important. According to Department of Homeland Security statistics released this month, DHS has audited more than 3,200 employers suspected of hiring illegal workers and imposed about $50 million in financial sanctions.

Employers violate the federal immigration laws if they have actual or constructive knowledge that they are employing unauthorized workers. Constructive knowledge means that you fail to complete or improperly complete the I-9 form. Or, you have information available that indicates that an employee is unauthorized (i.e. they tell you they need to go back to Mexico to get their social security card reissued). Or, it means that you act with reckless and wanton disregard for the legal consequences of allowing someone to introduce unauthorized workers into your workforce or to act as your agent (i.e. you hire a subcontractor to do what you cannot do).

In Whitman's case, she and her husband allegedly received a social security "no-match" letter in 2003 for their housekeeper. The procedures governing how to handle no-match letters have been the subject of controversy since the government attempted to issue rules for addressing no-match letters in 2007. The proposed safe-harbor rules were blocked by a federal court, and later rescinded. Currently, the social security administration states that it will only send a no-match letter to employers who reported more than 10 no-matches that represented more than 0.5% of the W-2s submitted by that employer. Because there are no safe harbor regulations to protect how you respond, the facts and circumstances of the situation should be discussed with your counsel to help you determine whether or not you could be deemed to have "constructive knowledge" of unauthorized workers in your workforce, while at the same time making sure that you address the issue without discriminating against the employee(s).

Employers who knowingly hire unauthorized aliens can be fined between $375 and $3,200 for each unauthorized worker for the first offense; and between $3,200 and $6,500 for each unauthorized worker for

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second offenses. The fines escalate for third offenses. These fines apply also for contract workers whom employers know are unauthorized to work in the U.S. There are also fines for Form I-9 violations (between $110 and $1,1000 for each I-9 not in compliance).

As Virginia employment attorneys, we advise our clients on the many procedures they need to have in place for their HR departments and hiring processes. What are your procedures for qualifying your workers and complying with the regulations governing Form I-9? What would you do if you were the recipient of a no-match letter?

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