Proposed Immigration Lesiglation On E-Verify and "No-Match" Rule

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Congress and the Obama administration have shifted recent immigration enforcement efforts onto employers. This shift may impact how employers verify the employment eligibility of employees.

E-Verify

Earlier this month, the Senate approved a significant amendment to a homeland security appropriations bill (H.R. 2892) that would (1) make E-Verify permanent, (2) mandate its use by federal contractors, and (3) allow employers to use E-Verify for all employees. The House approved a similar, but different version of the bill. At the same time, the Department of Homeland Security (DHS) announced the Obama administration's plan to implement a rule requiring federal contractors to use E-Verify beginning September 8, 2009.

E-Verify is an Internet-based system operated by DHS in partnership with the Social Security Administration (SSA) that enables employers to verify the employment eligibility of newly hired employees. Currently, the use of E-Verify is voluntary though certain states require employers to use it. Washington and Oregon are not among those states. Only verification of new hires is permitted. That may change with the new bill and/or implementation of the DHS rule.

In November 2008, the Bush administration issued a final rule that had mandated federal contractor use of E-Verify. However, a lawsuit challenging that rule delayed its implementation. If that rule had been implemented, federal contractors would be required to use E-Verify to confirm the employment eligibility of (1) newly hired employees hired during the contract term and (2) all current employees assigned to work on a federal job within the U.S. The current administration seeks to implement that rule.

There are some limitations. E-Verify will apply only to employers with direct contracts with the federal government and their subcontractors. A covered contract must have a period of performance of more than 120 days and a value greater than $100,000. Subcontractors providing services or construction with a value of $3,000 or more will likewise be required to participate in E-Verify. However, employers working only on federally funded projects or on other projects not under contract with a federal agency will be excluded.

Based on DHS's recent announcement, it is likely that the rule will be implemented even with the pending lawsuit. The court may, however, enjoin the government's action. Additionally, the Senate and House must still reconcile the different versions of the bill. If it is passed, covered employers should follow U.S. Department of Justice guidelines. See E-Verify guidelines.

No-Match

In a related issue, on July 8, 2009, DHS announced its plan to rescind the "no-match" rule. The purpose of the rule was to provide employers with "safe harbor" instructions and guidelines on the steps to take after receiving a "no-match" letter—SSA issued nomatch letters

when an employee's Social Security Number did not match government records. Under the rule, an employer could avoid a finding that its receipt of a no-match letter gave an employer constructive knowledge of the employee's undocumented status if it met the requirements of the "safe harbor."

Before the rule was implemented, the U.S. Chamber of Commerce, the AFL-CIO, and other groups filed a lawsuit challenged the rule. As a result, the court enjoined enforcement of the rule. The litigation is pending, even though DHS plans to rescind the rule.

DHS's efforts to rescind the nomatch rule may, however, be thwarted by Congress. In its appropriations bill, the Senate added an amendment prohibiting funds from being used to rescind the no-match rule. If Congress passes a final bill with this amendment, DHS would be prohibited from rescinding the rule.

Until this issue is resolved, employers who receive a no-match letter should follow the instructions in the letter, consider following the safe-harbor process as evidence of good-faith compliance, and seek legal advice from counsel. Employers should also ensure that their employment authorization verification policies and procedures comply with current regulations.

Williams Kastner will continue to monitor the proposed government action and legislation and provide any updates.