IMMIGRATION-RELATED AUDITS: WHAT EMPLOYERS NEED TO KNOW.

By David H. Nachman, Esq.

There are three potential "hot spots" for audits and investigations for the government related to the immigration and nationality laws. The first has to do with the documentation that the employer is required to maintain in connection with the H-1B nonimmigrant professional and specialty and occupation worker visa. The second area of potential audit concerns the employer's obligations under the Immigration Reform and Control Act of 1986 ("IRCA") [Pub. L. No. 99-603, 100 Stat. 3359] (known to HR Professionals as the "I-9 Process"). The third, and one more recent, area of audit surrounds the new Labor Certification Application Program called "Permanent Electronic Review Management" ("PERM"). Each of the foregoing government programs anticipates compliance through "audit". Even a rudimentary understanding of the complex documentary requirements for each of these programs can help and employer to avoid potential liability.

First, the U.S. Department of Labor ("DOL") regulations that govern the maintenance of professional and specialty foreign national worker require an organization to develop and produce certain documents concerning the wages and the working conditions of an H-1B nonimmigrant. These documents are referred to as the Public Access File ("PAF"). The PAF documents are required to be maintained at the H-1B worksite immediately after the employer files the Labor Condition Application ("LCA") with the DOL. The employer is well-situated to ensure they maintain PAF documents and be sure that they continue to pay the H-1B nonimmigrant the specified wage on the LCA. Under the American Competitiveness and Workplace Improvement Act ("ACWIA"), an H-1B nonimmigrant must be offered the same company benefits as those offered to "similarly situated" non-H-1B employees in the organization.

DOL audits can arise as a result of a complaint by a disgruntled employee or as a result of a randomly conducted investigation. Upon a DOL audit (normally undertaken by the Wage and Hour Division) an employer may be found not to be in compliance with (1) paying the H-1B nonimmigrant the specified wage (which pursuant to the H-1B Reform Act of 2004 became effective on March 8, 2005 must be 100% of the federally mandated prevailing wage); and/or (2) maintaining PAF documents; and/or (3) providing the H-1B nonimmigrant with the same benefits as those provided to all other "similarly situated" non-H-1B employees. Any failure to comply with DOL requirements can result in an employer being liable to pay back wages to an H-1B employee, debarment from the use of the H-1B program and/or other potential civil and/or criminal liabilities. Also, if the employer is a government contractor, the failure to comply may result in the debarment from the government contacts.

A second potential audit area for audit and investigation of an employer concerns employment verification and employer sanction law (referred to as the "Immigration Reform and Control Act of 1986" or "IRCA"). As every HR Professional knows, IRCA

is an integral aspect of every hire. Under IRCA, every employer is required to properly verify the eligibility of an employee to work in the U.S. on the Form I-9. The I-9 Form is a deceptively simple document. The I-9 Form is only one page in length but it continues to raise issues about proper preparation and retention.

Since the U.S. Department of Homeland Security's ("DHS") absorption of the Legacy-INS, the Immigration and Customs Enforcement Division ("ICE") has been charged with worksite inspections and audits of I-9 documents. The "good news" for employers is that the number of I-9 inspections has been on the decline. The "bad news" for employers is that ICE Officers are not inclined to be lenient and educate employers about their responsibilities but are more likely to impose sanctions.

Given the present focus on "security" and "identity" in the workplace, it is likely that ICE Officials will be more active in their investigations in the future. ICE is not required to wait for a specific lead. The investigative authorities of the DHS have implemented a "General Administrative Plan" (the "Plan"). The Plan identifies employers from a national database and it targets specific industries that have developed a reputation for hiring unauthorized workers (e.g., restaurant, meat-packing, commercial cleaning, textile and garment). The Plan also provides for "random" audits. For example, due to national security concerns, great efforts continue to be placed on identifying those individuals who have access to the nation's "critical infrastructures" such as airports, wastewater facilities, and highways.

Finally, the third area of interest for employers from an audit perspective is the new PERM process for Labor Certifications Applications (the "Green Card"). After pending for over two (2) years, in December 2004, the PERM regulations became "Final" and on March 28th, 2005, the old Labor Certification Application process was replaced by PERM. While PERM promises faster green card processing, the application process is much more complex. The DOL seems to be sending a message that it is easier to audit the employer as opposed to processing an Application.

The new PERM process requires an employer to obtain a Prevailing Wage Determination (the "PWD") from the State Workforce Agency (the "SWA") (e.g. The NJDOL, Alien Labor Certification Unit) in the State where the position has been offered. The PWD area of the law is constantly evolving. Once the PWD is obtained, an employer must undertake a rigid "recruitment process". Recruitment consists of placing a job order with the SWA and placing two (2) Sunday advertisements in an appropriate newspaper. The recruitment process needs to be completed within six (6) months of the filing of the PERM Application.

PERM requires meticulous preparation and a thorough understanding of the Regulations. The PERM process is analogous to the administrative process that surrounds the filing of a U.S. tax return. When the return is filed, the filer makes representations, declarations, and attestations about annual income and expenses. The filer does not submit evidence about annual income and expenses. Such information is only provided if the Internal Revenue Service ("IRS") sends the filer a notice for an audit. The PERM program is

similar. A PERM Application is filed by making attestations on the new DOL Form 9089. The Form 9089 is submitted to the DOL. DOL can either certify the Form without receiving documentation, or DOL can send out an audit letter.

The new PERM Regulations state that the DOL can request an audit of any pending Labor Certification Application for cause or in the DOL's discretion. In the event that a prospective employer is noticed for an audit, the employer will receive an audit letter that lists the documents that will have to be submitted. The audit letter shall set a date that is thirty (30) days from the date of the letter for submission of the additional documents and shall advise the employer that the Labor Certification Application will be denied if the information is not received in a timely manner. If the employer does not respond, the PERM Labor Certification Application will be denied.

It appears clearly to be the case that immigration-related programs that are undertaken by employers may be subject to either directed and/or random government audits from the DHS and/or the DOL. Failure to adequately comply with government regulations can result in penalties. The employer's familiarity with the intricacies of the auditing and compliance are likely to save a considerable amount of both time and money.

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