Employment Edge 101st Edition (Immigration Issue)- How Employers Should Respond to Recent Immigration Law Enforcement Changes Targeting Employers

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On April 30, 2009, the Department of Homeland Security (DHS) issued a press release stating that the agency intends to shift the focus of its worksite enforcement strategy away from illegal workers and towards the criminal prosecution of employers who knowingly hire them. In its press release, DHS emphasized the fact that, in 2008, employers comprised only 135 of the nearly 6,000 arrests that were made in worksite enforcement operations. The press release and recent news regarding the Obama Administration's immigration policy suggest a change of direction regarding worksite enforcement. According to the press release, criminal prosecution of employers will be a prerequisite for arresting unauthorized workers for immigration violations. The press release also makes clear that DHS is committed to continuing the E-Verify system.

In light of DHS's shift in priorities regarding worksite enforcement of immigration laws, it is now especially important for employers to ensure that they are in compliance with applicable laws. Employers are prohibited from knowingly employing workers who are unauthorized to work in the United States, and are well-advised to take reasonable responsive action if they have reason to believe that an employee lacks work authorization. An employer is considered to have "constructive knowledge" where facts and circumstances that are known to the employer indicate that the employer should have known the worker was not authorized.

As a result of this shift in DHS's priorities regarding worksite enforcement, employers should ensure that they have appropriate documentation for current employees and that employers lawfully prepare and maintain the Form I-9, Employment Eligibility Verification, for all newly hired employees. We recommend that employers review their immigration compliance procedures, which should include:

- Regularly scheduled in-house audits of I-9 records to ensure proper completion and retention and to correct any discrepancies
- Ongoing training of human resources professionals involved in the I-9 process

- A procedure for appropriately responding to a Social Security No Match letter, a DHS Notice of Suspect Documents, or other evidence indicating that they might have "constructive knowledge" that a certain worker does not have work authorization.

As they take efforts to ensure that they are not employing unauthorized workers, employers should keep in mind that it is illegal to discriminate against any person based on national origin. In particular, employers must treat all employees the same when completing the Form I-9 and must not request that an employee provide more or different documents than are required by the Form I-9. Employers cannot refuse documents that appear genuine on their face or refuse to hire someone who presents a document that has a future expiration date. Employers should not make any assumptions about an employee's authorization to work in the United States based solely on the employee's national origin.

As we have written about in previous Employment Edge articles, the DHS's rule, "Safe Harbor Procedures For Employers Who Receive A No-Match Letter" is currently on hold indefinitely pending the conclusion of a court proceeding regarding its legality. The rule provides recommended procedures for employers to follow after receiving a No-Match letter from the Social Security Administration (SSA) or a Notice of Suspect Documents from DHS. The government is not expected to send out any No-Match letters until there is further resolution on the future of the rule. However, an employer can still follow the procedures set out in the rule in response to a No-Match letter. Notwithstanding the fact that the DHS no-match rule is not in effect, employers should still respond carefully to a No-Match letter if they do receive one. A reasonable response would include notifying an employee of the no-match finding and following up in a timely manner to resolve the mismatch, while keeping records of the steps taken. If it cannot be resolved, an employer should take a look at the big picture in weighing whether it appears that it has constructive knowledge of an employee's unauthorized status.

If you have any questions about immigration law enforcement against employers or other employment law issues, please contact Casey Nolan, Mark Mathison, or another member of Gray Plant Mooty's Employment, Labor, & Higher Education practice group.

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