A Timely Analysis of Legal Developments

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In This Issue:

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The Immigration and Customs Enforcement (ICE) has announced that it will begin to investigate workplaces in all 50 states to identify employers who are hiring undocumented workers. Specifically on July 1, 2009, ICE launched a comprehensive audit initiative and issued Notices of Inspection (NOIs) to 652 businesses nationwide. States are also beginning to increase their enforcement efforts so employers should take steps to ensure compliance with both federal and state immigration requirements.

Latest Developments in Employment Verification Enforcement

By Jorge R. Lopez, Chadwick M. Graham and Melissa M. Randall

The Immigration and Customs Enforcement (ICE) has announced that it will begin to investigate workplaces in all 50 states to identify employers who are hiring undocumented workers. Specifically on July 1, 2009, ICE launched a comprehensive audit initiative and issued Notices of Inspection (NOIs) to 652 businesses nationwide. ICE did not issue that many NOIs in all of 2008 ICE reported that the 652 businesses that were presented with a NOI on July 1 for a Form I-9 audit were apparently selected as a result of leads and information obtained through other investigative means. The names and locations of the businesses have not yet been released.

ICE's actions are directly in line with President Barack Obama's pledge to fight illegal immigration by going after employers who hire undocumented workers.

States are also apparently beginning to enforce their state immigration compliance provisions, among them Colorado.

Enforcement in Colorado

Colorado's Employment Verification Law[1] became effective on January 1, 2007. The law essentially mirrors the federal I-9 requirements with a few minor exceptions to avoid federal preemption. For example, Colorado allows employers 20 days after hiring a new employee to complete the required affirmation, as well as only requiring the retention of I-9 documents for the term of employment.

The enactment of Colorado's Employment Verification Law in 2007 was disorganized and resulted in a lot of confusion, both within the state government and in the private sector. By default, the Colorado Department of Labor (CO-DOL) became ultimately responsible for the law's enforcement. While initial efforts focused on educating employers, many Colorado employers remain uninformed on the laws requirements.

Colorado has now shifted focus from educating employers to undertaking an enforcement initiative similar to the federal initiatives discussed above. The CO-DOL has begun conducting random and complaint-based audits. It does not appear that the

CO-DOL is targeting particular industries, regions of the state, or employers of any particular size. If the CO- DOL receives a complaint that an employer is not complying with the law, the CO-DOL will conduct a preliminary investigation into the person making the complaint to confirm that he or she is in a position to have a basis for believing that the employer is not in compliance. If it appears that the complainant has such a basis, then the CO-DOL will issue a complaint-based audit to the employer.

Both the random and complaint-based audits follow the same procedure. The CO-DOL first sends a Notice of Audit to an employer. The employer generally is given two weeks to respond and submit documents showing its compliance with the law. However, extensions are frequently granted. If the CO-DOL has any questions or concerns, it may send a second request letter to the employer detailing any additional information or concerns that it may have. Although the CO-DOL has the power to conduct on-site review of documents, it normally conducts this review based on paper submissions sent to the agency. Given the current financial crisis, the CO-DOL does not anticipate initiating on-site reviews anytime during the 2009-2010 fiscal year. After review of the documents, the CO-DOL will issue a final letter stating that the employer is either compliant or non-compliant. If non-compliant, the CO-DOL will include a determination of whether penalties are appropriate.

The CO-DOL applies a two-prong test to determine whether an employer is compliant with the law. The first prong is whether the employer has affirmation forms for each newly hired employee. The second prong is whether the employer has retained the file copies of the identification documents.

In general, the CO-DOL has wide discretion to determine whether a noncompliant employer should be subject to penalties. The law provides that an "employer who, with reckless disregard, fails to submit the documentation required by this section, or who, with reckless disregard, submits false or fraudulent documentation, shall be subject to a fine of not more than five thousand dollars for the first offense and not more than twenty-five thousand dollars for the second and any subsequent offense." It is the CO-DOL's position that each failure to have an affirmation and all necessary documentation for an employee may constitute a separate "offense." Therefore, if an employer with ten employees is audited and does not have the necessary affirmation and documentation for any of the ten employees, it may be found to have ten "offenses" by the CO-DOL.

When considering whether an employer has acted "with reckless disregard" and should be assessed penalties, a number of factors are considered including: (1) whether the employer has acted in good faith to try to comply with the law; (2) any past findings of non-compliance; (3) the percentage of non-compliance with respect to the number of employees; (4) the employer's level of cooperation and timeliness of the employer's document submissions; (5) evidence that the employees have filled out the forms rather than the employer; and (6) evidence that the documents were forged, or likely forged, in such a manner that it is not reasonable for an employer to accept them as valid documents.

The CO-DOL's audits have several important consequences. First, the audits are a snapshot in time and corrective measures required by the CO-DOL are prospective only. Therefore, if an employer is found to be noncompliant, the employer does not necessarily need to gather documentation and make affirmations for all its current employees. Similarly, if an employer is found to be compliant, that does not necessarily mean that it will be found to be compliant in future audits. Second, employers who are found to be noncompliant have a higher probability of receiving subsequent Notices of Audit. The CO-DOL maintains a "pool" of noncompliant employers that it will draw from to conduct re-audits, which may result in the imposition of penalties, or higher penalties, for the employer.

Conclusion

In an environment of increasing enforcement against employers, companies in other states should take notice of the initiatives undertaken not only by the federal government, but also by the State of Colorado. Employer enforcement seems to be coming from all angles, and burdensome enforcement measures could be coming to a state near you.

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[1] Colo. Rev. Stat. § 8-2-122.