FOSTER QUAN, LLP
THE COMPREHENSIVE IMMIGRATION LAW FIRM

IMMIGRATION UPDATE©

Thursday, September 3, 2009

1. E-VERIFY REQUIREMENT GOES INTO EFFECT FOR FEDERAL CONTRACTORS ON SEPTEMBER 8, 2009

As reported in previous Immigration Update© bulletins, the Federal Acquisitions Rule requiring federal contractors and subcontractors to utilize E-Verify for the electronic verification of employment eligibility will go into effect on September 8, 2009. Federal contract awards and solicitations on or after September 8, 2009, must include a clause requiring the enrollment and use of E-Verify by federal contractors and subcontractors, unless the contracts are exempt based on contract value or product type. Participating employers must enter into a Memorandum of Understanding, or binding agreement, with the government.

E-Verify participation does not substitute for an employer's Form I-9 Employment Eligibility Verification obligations. Employers must continue to verify employment eligibility on Form I-9, and will continue to be exposed to liability for both technical "paperwork violations" as well as patterns and practices of substantive compliance failures. Employers seeking to mitigate liability and digitize the Form I-9 process may do so using software that will interface with the E-Verify system. For more information on the options to fully digitize the employment eligibility verification process, contact your Foster Quan immigration attorney.

The Chamber of Commerce of the United States of America previously filed suit challenging the Government's authority to mandate the use of E-Verify, a program originally authorized by Congress as a voluntary program. Recently the Chamber of Commerce lost this lawsuit, and has filed an Emergency Motion for an Injunction Pending Appeal. The Motion requests that the regulation be enjoined pending the Plaintiff's Appeal from the decision in the lawsuit, and requests action by the Court prior to September 8, 2009. Most analysts appear to believe the injunction will not issue, though no one rules out the possibility.

Assuming the rule is not enjoined, beginning September 8th, employers that are awarded certain federal contracts will be required to enroll in E-Verify within 30 days, and will be required to implement usage of the program within 90 days. As employers prepare for eventual enrollment in E-Verify, and the use of the program to verify employment eligibility for existing employees working on fulfillment of contracts covered by the new rule, employers should

evaluate current compliance policies and their efficacy. Because the Government freely acknowledges that employers' E-Verify data will be data-mined, and that E-Verify participants will thus be more likely to be audited, it is highly recommended that employers undergo an independent audit by qualified immigration counsel in order to identify compliance failures, mitigate existing liability, and minimize the risk of future noncompliance. Employers should clean house before government inspectors arrive. Failure to focus on correct compliance policies and consistent implementation at this stage will, in the future of increased government audits, be seen as a regrettable and avoidable mistake when viewed with the 20-20 vision that hindsight affords.

More on Government Data-Mining of E-Verify Database

As previously reported in Foster Quan Immigration Updates©, the U.S. Department of Homeland Security plans to mine the E-Verify database for indicators of compliance failures and fraud.

In a 22-page Privacy Impact Assessment released earlier this summer related to the new Compliance Tracking and Management System (CTMS), the DHS disclosed that the E-Verify database will be data-mined. The Assessment described how the system will be used to identify employers that misuse the system, fail to consistently utilize the system for verification of all new hires, or develop patterns of compliance failures.

Pursuant to a Memorandum of Agreement between U.S. Citizenship & Immigration Services (CIS) and U.S. Immigration & Customs Enforcement (ICE), evidence of compliance failures obtained through the new data-mining program are to be referred to ICE for purposes of initiating worksite enforcement investigations.

Specifically, government officials will be looking for evidence of the following types of discrepancies and compliance failures:

- Misuse, abuse, and/or fraudulent use of E-Verify occurring at critical infrastructure sites
- Violations regarding employment of unauthorized workers
- Criminal activity (harboring offenses)
- Failure to use E-Verify for all new hires
- Retaining employees after an E-Verify Final Non-confirmation

Upon notification of compliance failures, ICE is charged with initiating worksite investigations in appropriate cases. This means that a pattern of compliance failures, or the appearance of a pattern of compliance failures, could result in the opening of worksite enforcement investigations to enforce an employer's Form I-9 Employment Eligibility Verification obligations, as well as other immigration-related laws.

Companies who participate in E-Verify should strongly consider the need for a proactive, independent audit of Form I-9 and E-Verify compliance policies and records. Such an audit can assist employers in mitigating potential liability and proactively reduce exposure in advance of a government audit or worksite investigation. For more information regarding an independent audit of Form I-9 Employment Eligibility Verification documents and/or H-1B Labor Condition Application compliance, contact your Foster Quan immigration attorney. Experienced attorneys in Foster Quan's Workforce Compliance Practice Group can assist your company in preparing for the additional government scrutiny that comes with E-Verify participation.

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2. U.S. CIS CONTRACT INVESTIGATORS CONTINUE H-1B SITE VISITS—EMPLOYERS SHOULD REVIEW H-1B BASICS AND PREPARE FOR SITE VISITS

As reported in previous Foster Quan Immigration Updates©, the CIS continues to utilize contract investigators to conduct thousands of site visits to H-1B employers. A recent Foster Quan article provides additional information on the site visits and the recommended action points for H-1B employers seeking to prepare for such visits.

Prepare for Site Visits

Foster Quan recommends that H-1B employers schedule a consultation with qualified immigration counsel immediately in order to develop an action plan for implementation. That action plan should be distributed to first responders and company personnel who will be charged with handling the investigators' inquiries. Providing information in advance to employees likely to encounter outside visitors will help ensure that the company's response is efficient, effective, compliant, and without undue disruption in the workforce. To schedule a consultation and develop an action plan for distribution to receptionists, human resources personnel, managers, and H-1B employees, please contact your Foster Quan immigration attorney.

Reviewing the Basics of H-1B Compliance

When preparing for site visits, employers should generally take an inventory of H-1B employees and review their worksites and job duties. Worksites and job duties should generally match the statements made on the H-1B petitions, with very few exceptions.

Basic Limitations on H-1B Employment

Please recall that in most cases, H-1B employees are authorized to work only for the petitioning employer, only in the specific position for which a petition has been filed, and only in the location(s) specified on the Labor Condition Application (LCA) and H-1B petition filed with U.S. DOL and U.S. CIS. Additionally, employees must be paid the required wage rate in accordance with the wage attestations made on the LCA.

Document Requirements

H-1B employers must maintain certain documentation pertaining to each H-1B employee in a Public Access File. Foster Quan provides H-1B employers with specific, detailed information regarding the documents which must be retained in the Public Access File. Please review the list of required Public Access File documents, and notify your Foster Quan attorney if you have any questions regarding document retention.

Short-term Placement of H-1B Workers at Other Worksites

Under limited circumstances and in accordance with specific regulatory requirements, H-1B employees may perform services for a limited period of time at one or more worksites not listed on the LCA and H-1B petition. If your company has H-1B employees who are performing services at a site not listed on the LCA and H-1B petition, additional steps may be required to ensure regulatory compliance. Further, if short-term placement at another worksite does not meet specific regulatory requirements, an amended H-1B petition may be required. Please notify your Foster Quan attorney if your company has placed H-1B workers temporarily at other worksites, at client sites, or with other employers.

Salary Reductions, Reductions in Work Hours, Reductions in Force

Generally speaking, an employer may reduce an H-1B worker's salary or wages only if the new rate is not below the required wage rate, to which the employer attested on the LCA. Generally, a reduction in work hours below full-time would require an amended H-1B petition. If your company implements an across-the-board paycut, a reduction in hours, a reduction in force, or similar cost-cutting measures, please notify your Foster Quan immigration attorney. Your attorney will be able to provide you with further information and instructions relevant for ensuring full compliance with regulatory requirements.

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3. U.S. DEPARTMENT OF HOMELAND SECURITY (DHS) PUBLISHES NEW FORM I-9; Previous Form I-9 Version Dated February 2, 2009, Remains Valid

Last week the U.S. Department of Homeland Security published a new version of the Form I-9 for Employment Eligibility Verification. U.S. Citizenship & Immigration Services has announced the continued validity of the previous version of Form I-9 Employment Eligibility Verification dated February 2, 2009, with an expiration date of June 30, 2009. This prior version will remain valid for purposes of initial employment eligibility verification, and subsequent updates. The new Form I-9 version dated August 8, 2009, and scheduled to expire August 31, 2012, is identical to the February 2, 2009 version of the form.

The Form I-9, and the M-274 Employer Handbook are available on the Foster Quan website. For more information contact your Foster Quan immigration attorney.