



Portfolio Media, Inc. | 648 Broadway, Suite 200 | New York, NY 10012 | www.law360.com
Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

Immigration Issues Employers Should Watch

By **Ben James**

Law360, New York (January 29, 2009) -- Employers are bracing for changes to labor law under the Obama administration, but they should also keep an eye on immigration issues, attorneys say, as federal work site enforcement efforts target companies over undocumented workers and states look to regulate immigration.

So far, immigration lawyers haven't gotten a great deal of information about exactly where immigration issues rank on the new administration's list of priorities, but it seems that Homeland Security Secretary Janet Napolitano doesn't intend to back away from the work site enforcement actions that have plagued employers across the country, according to Irene Recio, a Washington, D.C.-based immigration lawyer with Reed Smith LLP.

"We do not anticipate any reduction in those actions," Recio said. "As we see the unemployment rate continue to rise, we're going to see increased pressure on the administration to make sure the workers that are employed are legally entitled to work."

"We are advising clients to make sure that they undertake whatever internal audits they need to make sure they are in compliance with the I-9 regulations," Recio added.

Based on what Napolitano has said thus far, it appears likely the enforcement efforts — including on-site raids and employer audits — will focus on going after businesses that employ undocumented workers, rather than after the workers themselves, said Lynda Zengerle, head of the immigration practice at Steptoe & Johnson LLP.

"Judging from what the new administration has said and is doing, I would counsel my clients to be more aware of the issue of having illegal aliens working for them," Zengerle said.

That means not only making sure that workers have legal status at the time of hiring, but making sure their eligibility to work doesn't expire while they're still on the job, Zengerle

pointed out.

Employers should take notice that an employee's eligibility will end well in advance of its expiration date, in time to apply for an appropriate extension if the employer wants to keep that employee in the work force, Zengerle said.

Crafting a response to the fact that there are millions of undocumented workers in the U.S. is something President Obama has indicated he intends to do, but reform addressing that issue will involve a delicate balancing act, Recio noted.

A deteriorating economy means fewer jobs overall, which magnifies the chorus of voices opposing any type of amnesty.

On the other hand, some argue that allowing undocumented workers to become legally integrated into the workforce would be a positive change, at least in part because it would boost tax revenues.

U.S. Citizenship and Immigration Services recently published an interim final rule paring down the list of documents employers can accept to verify employment authorization on the I-9 form, and the revised form will become effective Feb. 2, said Joycelyn Fleming, a partner with Ford & Harrison LLP who manages the business immigration department for the firm's labor and employment practice.

"Notwithstanding the change in administration, government enforcement is going to continue to be just as vigorous as it has been. Employing only documented workers and keeping the right paperwork is key," Fleming said.

The fact that employees will no longer be able to use expired employment verification documents to satisfy the requirements of the new I-9 is a major change, and recent amendments to the I-9, which was introduced in the Immigration Reform and Control Act of 1986, shows that the government is realizing the form's significance as an enforcement tool, Zengerle said.

Multinational companies and U.S. companies who get foreign visitors should be aware that as of Jan. 12, travelers coming to the U.S. from Visa Waiver Program countries — which include Germany, the U.K. and Japan — need to get approval through the online Electronic System for Travel Authorization, Fleming said.

Employers, and not just those with or looking for government contracts, should also be watching developments related to the E-Verify program.

While the implementation of a rule that would require many government contractors to use the E-Verify system to verify employees' eligibility to work in the U.S. has been postponed twice after drawing a legal challenge from the U.S. Chamber of Commerce and other trade groups, the E-Verify system, in some form, is here to stay, said Eric Bord, a Washington-based immigration partner with Morgan Lewis & Bockius LLP.

Use of the E-Verify system is currently voluntary, and some attorneys advise clients not to use it. The system, which is operated by USCIS in conjunction with the Social Security Administration, has drawn criticism for being inaccurate.

Employers don't want to shun the law and employ illegal workers, said Recio, who counsels clients against using E-Verify. But a company who uses E-Verify could find itself caught in a catch-22 if the system says an employee who is actually eligible to work isn't.

The company could face problems with immigration authorities if it keeps the worker on the payroll or the prospect of a wrongful termination suit if the employee is let go, Recio noted.

Much of opposition to the program would dwindle if companies had assurance that the information in the system was actually accurate, Recio said.

Bord said that though he had some concerns about the system's integrity, E-Verify wasn't going anywhere. Electronic verification of employment eligibility will become an issue for many employers that aren't federal contractors, either because of the current patchwork of state laws or through some eventual federal mandate, he added.

"It doesn't make sense to continue to rely on a paper process that has proven to be largely ineffective when there is an electronic platform that would supplement and could replace the I-9," Bord said.

"All employers should be exploring ways to get true control of their I-9 compliance programs, including exploring electronic I-9 options," Bord added.

Three states — Mississippi, Arizona and South Carolina — already mandate that employers use E-Verify for all new hires, regardless of whether employers do business with the state.

South Carolina's law says large employers have to comply by January 2009, and all others

by 2010, with an exception for companies with South Carolina-based employees who all hold valid driver's licenses from that state or from a state with similarly strict standards for issuing licenses.

"Every indication is that E-Verify is here to stay in some format," Bord said, adding that Arizona's E-Verify law was signed by then-Gov. and current DHS Secretary Janet Napolitano. On the other hand, President Obama's home state of Illinois passed a law prohibiting employers from enrolling in the E-Verify system in 2007.

DHS sued Illinois over the law, which Illinois agreed not to enforce until the suit was resolved. The suit is still pending, a DHS spokesman said Thursday.

On the legislative front, the states, rather than Congress, are more of a concern right now, according to Fleming.

Zengerle said that more states mandating the use of E-Verify was conceivable, but added that she doubted that those laws would stand up in court. And while she said that the database needed to be improved, she noted that E-Verify could serve as a shield against liability for employers who could point to their enrollment in the program as evidence of their diligence in complying with immigration laws.

In addition, if an economic stimulus package gets passed, it could increase the number of employers subject to E-verify rules, Zengerle said.

If and when the Obama administration and Congress will tackle comprehensive immigration reform remains to be seen, but a case could be made that since the issue is too volatile to take on early in President Obama's tenure, but too important to completely ignore, he might address it later in his term — perhaps in the third year, Bord said.

However, a case can also be made that immigration reform should be a part of the strategy to overhaul the country's economic health, and Sen. Harry Reid, D-Nev., has said he wants to make immigration an issue in the 111th Congress, Bord added.

But while the floundering economy may have a lot of people worried, it hasn't stemmed the tide of people looking to come to the U.S. in search of a better life.

"I've been doing this 30 years," Fleming said. "Everyone still sees this as a land of opportunity, and the inauguration made this all the more visible."

All Content © 2003-2009, Portfolio Media, Inc.