

2009 Immigration Policies at a Glance

By Bruce Buchanan, Partner-in-Charge, Immigration Law Section

2009 brought about several changes in immigration policy that affect employers. Thus, I am summarizing these changes. As always, I welcome the opportunity to meet with you to discuss how immigration issues affect your business.

ICE I-9 Audits

In the past six months, Immigration and Customs Enforcement (ICE) has ramped up efforts to audit employers' I-9 records, moving away from the previous practice of workplace raids. The audit process begins with ICE issuing a "Notice of Inspection," upon which an employer has three days to comply; if an employer uses E-Verify, the employer has waived the three-day option. Following the audit, ICE provides the employer with a "Notice of Suspect Documents" wherein it identifies the employees whose I-9 documentation was invalid. Then, the employer gives these employees an opportunity to rectify the situation with valid I-9 documentation. If employees are unable to provide valid I-9 documentation or establish ICE made a mistake, employees should be terminated or the employer faces substantial fines for "knowingly" employing undocumented workers. In certain circumstances, even criminal prosecution may apply. Depending on your state's laws, additional penalties, such as a loss of business license, may apply if an employer "knowingly" employs or hires undocumented workers.

FAR E-Verify

On September 8, 2009, the Department of Homeland Security (DHS) implemented FAR (Federal Acquisition Regulation) E-Verify, requiring federal contractors and subcontractors to utilize E-Verify. (E-Verify is a free government web-based tool for employers to verify employees' I-9s with national databases). FAR E-Verify requires federal contractors and subcontractors to verify not only newly-hired employees, but also existing employees assigned to the federal contract. It applies to federal contracts \$100,000+ in value, and federal subcontracts \$3,000+ in value.

Expired Documents

DHS issued new rules in 2009 prohibiting an employer from accepting expired documents of any type from new employees in support of an I-9. However, in most circumstances, an employer does not need to request and receive new documentation from current employees, even if the document expires. The exception concerns Employment Authorization Documents. These cards are generally valid for only one to two years. Thus, employees must obtain a new Employment Authorization Document before its expiration or be unlawful to work. When an employee presents a new Employment Authorization Document to the employer for re-verification in Section 3 of the I-9, it should not have a different Alien Number (A#) than previously provided. If it

does have a different A#, it is fraudulent 99% of the time. (The A# is much like a Social Security number, it does not change.)

Employment-based Visas, such as H-1B

Employers can sponsor individuals on a temporary basis, and on a permanent basis in certain circumstances. This year, temporary employment-based work authorization applications, such as H-1Bs, were at an all-time low. Some argue this was a result of our tenuous economy. Regardless, if you have considered seeking an H-1B Visa in the past but have not because of concern it would not be granted, this is a great time to reconsider. I am available for questions regarding sponsorships of this type.