

E-VERIFY AND SSA "NO-MATCH" LETTER UPDATE

Our July News Flash provided information with respect to state-specific E-Verify requirements. In light of very recent federal developments related to this same matter, we decided it was appropriate to provide an update to the July News Flash. Following the election of President Barack Obama, many were anxious to see how the new Administration would handle the much-criticized E-Verify program (as well as its proposed mandatory use by federal contractors). E-Verify is a free electronic system cooperatively administered by the Department of Homeland Security (DHS) and the Social Security Administration (SSA) that provides employers the opportunity to verify the identity and work eligibility of all new hires with federal databases. Similar anxiety has surrounded the status of the highly contested DHS regulations regarding appropriate responsive action for employers upon receipt of "No-Match" letters from SSA. In the past, SSA has sent letters to employers notifying them when certain workers' social security numbers did not match with the corresponding name in SSA's database. After several months of relative uncertainty, it appears we are starting to get a glimpse of the new Administration's approach to these issues.

In a recent statement, DHS Secretary Janet Napolitano indicated that the new Administration fully supports the federal regulation that would award federal contracts only to employers who use E-Verify to confirm employee work authorization. This new regulation extends mandatory use of E-Verify to covered federal contractors and subcontractors, including those who receive American Recovery and Reinvestment Act funds. The regulation is scheduled to be fully implemented and applied to all federal solicitations and contract awards government-wide beginning on September 8, 2009. In addition to the endorsement of E-Verify by the new Administration, the United States Senate recently passed legislation approving the indefinite continuation of E-Verify, signaling its commitment to work through needed improvements.

While E-Verify participation is not yet mandated for private sector employers on a general basis, voluntary participation may present some benefits. It has been our experience that when conducting I-9 audits, Immigration and Customs Enforcement (ICE), the enforcement branch of DHS, inquires of employers whether they are using E-Verify. While it is unclear at this point whether such voluntary participation will ultimately improve the employer's chances of a favorable audit, it is likely a positive factor that ICE will consider.

Secretary Napolitano also announced that DHS will be proposing a new regulation that rescinds the proposed regulations regarding SSA No-Match letters. These regulations, published by DHS in 2007, were blocked by a court order shortly after issuance and have yet to take effect. Essentially, the regulations established procedures for employers to follow upon receipt of SSA No-Match letters. According to Secretary Napolitano, it is the position of the new Administration that E-Verify addresses data inaccuracies that can result in No-Match letters in a more timely manner and provides a more robust tool for identifying unauthorized individuals in combating illegal employment.

If you have any questions regarding your E-Verify obligations or regarding appropriate responses to SSA No-Match letters, please contact a member of Koley Jessen's Employment, Labor and Benefits Group.

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