

BUSINESS IMMIGRATION ALERT

A complimentary service of the McCandlish Holton Immigration Practice Group

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1. New I-9 Form Expected Imminently

The Department of Homeland Security is expected to release a revised I-9 form in November. The new form will modify the list of acceptable documents for verifying the employment eligibility of employees. Although the list of acceptable documents on the current I-9 form has differed from the regulations for over a decade, DHS's position has been that it would not sanction employers who verified employment eligibility using the documents listed on the outdated I-9 form. The new I-9 form should eliminate this incongruity and will be the first substantive revision of the form since 1991. We will send an update as soon as the new I-9 form is issued. DHS also reportedly plans to issue new I-9 regulations and another revised I-9 form sometime in 2008.

2. Injunction Prevents Implementation of "No Match Letter" Regulations

On October 10, a Federal District Court issued a preliminary injunction preventing the federal government from imposing burdensome regulations on employers who receive a "No Match Letter" from the Social Security Administration. A "No Match Letter" informs an employer that the name and Social Security Number of an employee does not match SSA records. Although a "No Match Letter" can be the result of an employee using a false SSN, there are several possible explanations for the discrepancy, including a SSN database error or a typographical error by an employer when submitting its payroll reports. The government had given vague and inconsistent guidance to employers about how to respond to the "No Match Letter", creating widespread confusion. The new regulations were an attempt to provide more certainty by outlining a series of specific actions and timelines to be followed upon the receipt of a "No Match Letter." In granting the preliminary injunction, the court found that the new rule would result in the termination of lawfully employed workers and that the DHS rule "would result in irreparable harm to innocent workers and employers."

The preliminary injunction will remain in effect until the court makes a final decision on the merits of the case. If the lawsuit challenging the "No Match Letter" regulations ultimately fails, we will provide detailed guidance for complying with the new rules.

3. E-Verify Program Overview

E-Verify is a controversial internet-based system that enables employers to electronically verify the employment eligibility of newly hired employees. Employers who enroll in E-Verify must sign an agreement to abide by the program's conditions and procedures. In exchange for the

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administrative burden of verifying every new hire using the E-Verify system, participating employers benefit from a presumption that they did not knowingly employ an employee who is not authorized to work in the U.S. In addition, participation in E-Verify should effectively eliminate the receipt of "No Match Letters" for new hires. An overview of the procedure for verifying the employment eligibility of new hires using the E-Verify system is available at http://www.lawmh.com/practice_areas/pdfs/Overview%20of%20E-Verify%20Procedures.pdf

Employers should exercise caution when considering enrolling in the controversial E-Verify program. E-Verify is known to generate a significant percentage of errors (i.e., stating that an employee is not lawfully eligible to work, when in fact the employee is eligible). E-Verify also imposes a significant administrative burden on employers. Companies should also recognize that employers that properly perform the I-9 process already benefit from a favorable presumption. Accordingly, there are very few situations that justify enrolling in the E-Verify program.

Although E-Verify is currently a voluntary program in the vast majority of cases, companies with operations in Arizona, Colorado or Georgia may be required to participate in E-Verify by state law. Conversely, companies in Illinois are currently barred from participation in E-Verify until the government's database reaches 99 percent accuracy. Employers with operations in these states should contact a member of the McCandlish Holton Immigration Practice Group about the E-Verify program and the new state laws governing the employment eligibility process for new hires.