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## Recent Trends in Immigration Law

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Employers in the construction industry must be mindful of the need to verify the employment eligibility of each new employee they hire, as the U.S. Immigration and Customs Enforcement Agency (ICE) has begun to crack down on employment of unauthorized aliens. According to the ICE FY 2007 Annual Report, "ICE dramatically increased penalties against employers whose hiring processes violated the law, securing fines and judgments of more than \$30 million while making 863 criminal arrests and 4,077 administrative arrests" in FY 2007. Many of these arrests were the result of targeted worksite raids, and the number of arrests and civil penalties imposed against employers was dramatically higher than those from previous years. Because ICE has chosen construction businesses, among others, as targets for its worksite enforcement inspections, this article will briefly discuss some of the changes in immigration law as it pertains to the construction industry.

The Immigration and Nationality Act (INA), which governs the employment of aliens by U.S. employers, was amended to add sanctions for employers who employ aliens not authorized to work in the U.S. More specifically, the sanctions provisions permit the government to levy civil

penalties against employers who knowingly violate the INA by employing an unauthorized foreign national, or who fail to verify an employee's eligibility to work in the U.S. (through use of the Form I-9). Criminal penalties may also be available where the government is able to show a pattern or practice of employing unauthorized foreign nationals. Therefore, employers must be careful to avoid habitually employing unauthorized foreign nationals, as criminal penalties are steep. Fines can be as much as \$3,000 for each unauthorized alien working for the employer, and penalties may include imprisonment for up to six months for the violation of the statute, or both. Employers must also be careful to comply with verification requirements for each new employee hired. This includes requiring each new hire to fully complete Form I-9 and provide the supporting documentation. Employers must insure that they carefully verify the information provided by employees on Form I-9 and review the newly hired employee's documentation to verify the employee's eligibility to work in the U.S. Employers who fail to fully comply with these requirements, could find themselves facing stiff civil penalties (civil penalties for a first offense range from \$375 to \$3,200 for each unauthorized alien employed after March 27, 2008, for a second offense \$3,200 to \$6,500 for

each unauthorized alien employed after March 27, 2008 and for two or more offenses \$4,300 to \$16,000 for each unauthorized alien employed after March 27, 2008). The most effective way for employers to avoid the civil and criminal penalties associated with employing unauthorized aliens, is to ensure compliance with employment verification. This is most effectively achieved by ensuring that the company is complying with Form I-9 requirements for each newly hired employee.

The importance of complying with the verification process and insuring that the employee accurately completes Section 1 of Form I-9 cannot be overstated. This is because only employers who properly comply with the employment verification process will be able to employ an affirmative defense to any suit brought by the government for imposition of criminal or civil penalties. In other words, employers who have, in good faith, complied with the employment verification procedures, and adequately completed Form I-9, will often avoid the imposition of criminal and civil penalties for employment of unauthorized aliens. While careful compliance with Form I-9 requirements is a necessity for employers, those same employers must be careful not to selectively employ the requirements, seek additional documentation or attempt to

# Recent Trends in Immigration Law, Continued

ferret out fraudulent documents. Employers who do impose these additional requirements may open themselves up to potential liability for discrimination. It is important to remember, an employer has “complied with the requirement [relating] to examination of a document if the document reasonably appears on its face to be genuine.” 11 U.S.C. 1324a.

One tool that will help employers identify employees authorized to work in the U.S. is E-Verify. E-Verify, which has been around in different forms for almost a decade, is a database jointly operated by the Department of Homeland Security (DHS) and the Social Security Administration (SSA). The database allows employers to utilize the information given to them by employees on the Form I-9 to verify the eligibility of those employees to work in the United States. E-Verify works by comparing information provided by the employer with information contained in databases maintained by DHS and SSA. More importantly, use of E-Verify is now mandatory for most government contractors and subcontractors.

On June 9, 2008, President George H.W. Bush amended Executive Order 12989 to require that all contractors and subcontractors entering into contracts with the federal government verify their employees' eligibility to work by utilizing E-Verify. That order has now been codified in the Code of Federal Regulations by way of amendments to 48 C.F.R. Parts 2, 22 and 52, making use of E-Verify mandatory for all contractors and subcontractors

who have contracts with the federal government worth over \$100,000. Thus, construction employers who enter into contracts with the federal government for projects over \$100,000 will have to use E-Verify to confirm their employees eligibility to work in the U.S. Although employers utilizing E-Verify must still have newly hired employees complete and sign a Form I-9, E-Verify allows employers to verify the information and avoid the costly civil and criminal penalties that may arise from employing unauthorized aliens. Moreover, use of E-Verify will be mandatory after January 15, 2009, for employers who have contracts with the federal government worth over \$100,000.

While E-Verify works in conjunction with Form I-9, and even employers using E-Verify must insure that Form I-9 is accurately completed before an E-Verify query is started, it is important to note that use of E-Verify modifies some of the Form I-9 compliance requirements. For example, the types of identification documents that an employer may accept for E-Verify is more limited than the types allowed under the Form I-9. In addition, employees hired by employers participating in E-Verify must provide their employer with a social security number, or where that employee is an alien, their alien number or I-94 number. Participation in the E-Verify program also requires employers to notify potential employees of their participation in the E-Verify program. Finally, due to the private nature of the information provided by potential employees, employers must be careful to protect the privacy of the individual's information to avoid potential criminal penalties from a violation of the Privacy Act.

The record number of civil and criminal

penalties obtained by ICE against employers in 2007 demonstrates its determination to reduce employment of unauthorized aliens. Employers must be careful to verify the eligibility of their employees, or risk significant civil and criminal penalties. However, prudent employers will easily be able to avoid penalties associated with employment of unauthorized aliens by carefully complying with Form I-9 requirements and by using the E-Verify system, which employers contracting with the government will be required to utilize after January 15, 2009. By being conscious of these laws, instituting appropriate procedures, and carefully complying with the ICE verification procedures, employers will be able to avoid potentially damaging and costly penalties.

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