MANAGING U.S. IMMIGRATION RISKS

Key Concepts for a Global Workforce

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The business press has been replete recently with stories of companies and employees that have potentially run afoul of U.S. immigration laws in one way or another. The rise in government investigations, prosecutions and the concomitant press coverage typically result in significant fines, penalties, damage to the company's reputation, and, in some cases, the complete failure of the business itself. Although the common complaint is that an employer's action or inaction has resulted in the employment of unauthorized workers, the circumstances and laws invoked do not always clearly indicate a violation. Not only is it critical for businesses with a global workforce to understand the current landscape of immigration law, but also it is imperative that they manage the related risks through issue identification, assessment, policy development, and education. This article provides a summary of current high focus areas for the U.S. government, of which those conducting business in the United States should be aware.

It's Just Business, Right?

The classifications of visitor for business (B-1) and visitor for pleasure (B-2) account for more visas and entries than all of the other nonimmigrant categories combined. Nonetheless, the rules and regulations that apply to business travelers are not always consistently interpreted by the U.S. Department of State (DOS) (charged with issuing visas) and the U.S. Department of Homeland Security (DHS) (charged with admitting foreign nationals into the country in the appropriate category). A company that intends to protect itself from the negative consequences of immigration violations should be aware of the U.S. government's increased focus on business travelers and to the interpretive subtleties that make the category difficult to use.

Generally, to qualify as a "visitor," applicants must meet three main elements. They must have a foreign residence they intend to maintain, an intended stay of temporary duration, and a primary business or pleasure purpose for the visit. "Business" is not defined in the DHS statute or the regulations, but it is addressed in DOS regulations, although not thoroughly enough to prevent tension in its application. "Business" in the B-1 context can mean a wide variety of valid commercial and professional activities, including negotiations, conferences, and consultations; in some situations, it may also apply to services and training for which H-1B or H-3 classification is ordinarily required. (*See sidebar, "Hiring Foreign Nationals on a H-1B Visa," p. 535.*)

GENERALLY, TO QUALIFY AS A "VISITOR," APPLICANTS MUST MEET THREE MAIN ELEMENTS. THEY MUST HAVE A FOREIGN RESIDENCE THEY INTEND TO MAINTAIN, AN INTENDED STAY OF TEMPORARY DURATION, AND A PRIMARY BUSINESS OR PLEASURE PURPOSE FOR THE VISIT.

Under DOS regulations, "business" excludes "local employment or labor for hire," i.e., the performance of skilled or unskilled labor in the United States. Although the DOS guidelines provide examples of B-1 activities deemed appropriate because they "relate to activities that are incidental to work that will principally be performed outside of the United States," it is sometimes difficult to understand how certain listed activities qualify, especially those that clearly involve employment or appear unrelated to international business. Among the delineated approvable activities are traveling to the United States to take orders for goods manufactured abroad, to pursue employment incidental to one's professional business activities (such as a member of a U.S. company's board of directors attending a board meeting; a domestic employee of certain non-immigrants and citizens; a worker planning to install, service, or repair commercial or industrial equipment or machinery purchased from a company outside the United States; or to train U.S. workers to perform such services, pursuant to a contract of sale), and to perform H-1B professional services or to participate in an H-3 training program, for which the applicant will receive no salary or other remuneration from a U.S. source other than an expense allowance. The disparate activities provided as illustrations of appropriate "business purposes" along with the lack of consistent guidelines from DHS invite the type of heated debate and government investigation prevalent today.

Among other companies, Boeing has recently been accused of misusing the B-1 category. In the Boeing case, the "B-1 in lieu of H-1B" sub-category was at issue. Eighteen Russian engineers from Boeing's Moscow design center were refused admission on B-1 status because of the U.S. immigration inspector's belief that they would be performing day-to-day engineering work rather than training or networking. A subsequent DHS investigation characterized the incident as a "communications error" between what the inspectors were hearing and what the engineers were saying. The miscommunication apparently centered on phrases such as "on-the-job-training" versus "hands-on engineering work." The incident underscores the significant potential for confusion inherent in qualifying for the B-1 category and the need to properly educate foreign national business travelers for business visits.

Given the potential for differing interpretations between the U.S. Consulate and the U.S. immigration inspectors, employers should maintain internal guidelines for B-1 business travel. Such guidelines should address policies for common types of business travel and the potential issues associated with such trips. For example, foreign national employees may want to travel to the United States to gain information on schools and neighborhoods in a proposed transfer location before they are transferred. While it is natural to visit the office in the new location, spending prolonged hours there on multiple pre-transfer trips might be deemed inconsistent with visitor status. Although business conferences are explicitly permitted, some conference activities can be viewed as local employment. Immigration inspectors might deem meetings where the B-1 visitor is managing direct U.S. reports as crossing the line between a visit and employment. Further, training activities should be carefully outlined and assessed prior to sending an employee to the United States to engage in them, as some clearly qualify for B-1 (observation of professional activity with no hands-on involvement) while others are less likely to qualify (leading seminar training session for paying audience.)

EMPLOYMENT ELIGIBILITY VERIFICATION COMPLIANCE

The Immigration Reform and Control Act of 1986 (IRCA) made the knowing employment of unauthorized immigrants unlawful and introduced a system requiring that the employment eligibility of every new employee hired after Nov. 6, 1986, be verified through the use of the Form I-9. The primary prohibition is against employing foreign nationals knowing that they are unauthorized to work under the immigration law. This prohibition triggers civil fines, potentially resulting in large sums, and criminal penalties and injunctions for pattern or practice violations. The first tier penalty range for hiring or continuing to employ an unauthorized worker is $375 to $3,200 per unauthorized worker.

While I-9 investigations may result in substantial liability in terms of knowingly hiring or continuing to employ unauthorized workers, liability also can arise from the failure to complete and retain I-9 forms properly (referred to as "paperwork violations"). The standard first tier paperwork violation penalty range is $110 to $1,100 per employee. Unlike penalties arising from the employment of unauthorized workers, I-9 compliance liability can arise even for employers with a 100 percent employment-authorized workforce. In fact, a company that employs exclusively U.S. citizens is nonetheless subject to I-9 audits and may be fined for paperwork violations even though the violations occur only on the I-9s of U.S. citizen employees.

Paperwork violations include errors and omissions in completion of the I-9, failure to complete the I-9 within the required deadlines, and failure to complete the I-9 form altogether. Some paperwork violations are considered to be "technical or procedural," and DHS is required to offer the employer a 10-day grace period to correct such violations. Substantive paperwork violations, on the other hand, are failures that DHS deems likely to increase the risk of hiring illegal workers. In the context of substantive violations, DHS will not provide such a grace period. Any technical violation that remains uncorrected after the 10-day grace period and any substantive violation would expose the employer to civil fines. Employers can enter into settlement negotiations with DHS to obtain a lower fine level, however, negotiations are handled by the Office of Chief Counsel and not the special agent responsible for the investigation. If negotiations are unsuccessful, the employer may appeal the fines in a hearing before an administrative law judge.

Some employers mistakenly assume that because the company is in an industry not typically known for having a foreign workforce, it is immune to immigration enforcement activity — such an erroneous assessment and the associated inattention to I-9 compliance procedures could result in substantial fines and sanctions. In recent years, a large amusement park was the subject of an I-9 investigation. DHS concluded that the amusement park did not employ illegal workers. Nonetheless, because the amusement park had a significant number of paperwork violations, it faced fines in excess of $300,000, considered at the time to be a record.

Corporate executives should also remain attentive to the connection between workplace compliance liability and corporate disclosure obligations related to the Form I-9. Increasingly, companies are compelled to put shareholders and potential investors on notice of I-9 compliance shortcomings in their U.S. Securities and Exchange Commission filings. In its 2007 10-K report, American Apparel reported its participation in an ongoing DHS I-9 audit. The company informed investors that the investigation could result in a very substantial turnover of employees on short or no notice, which could result in manufacturing and other delays, difficulty attracting or hiring new employees in a timely manner, and a materially adversely impact on revenues and ability to compete. Likewise, in its recent SEC filing, Infosys apprised shareholders that DHS had discovered errors in a significant percentage of its I-9 forms. While Infosys declined to estimate the amount or range of loss that it could incur, it would be reasonable to expect potential results similar to those listed in the American Apparel 10-K.

Form I-9 compliance measures are frequently extended beyond the immediate business entity. Companies considering mergers and acquisitions are increasingly including I-9 compliance in their due diligence checklists. Moreover, some U.S. employers, hoping to avoid I-9 liability by virtue of a constructive knowledge theory, have taken a hard line approach to monitoring the hiring practices of their vendors, contractors, and subcontractors. Such companies often require one or all of the following: a contractual guarantee of immigration compliance, a third-party audit of the vendors' immigration practices, and termination of service contracts with noncompliant providers.

AVOIDING ACTS OF DISCRIMINATION

During the IRCA legislative process, certain groups were concerned that under the pretext of the employment eligibility verification law or by genuine misunderstanding, employers would turn away job applicants or even fire employees based on a perception that they looked or sounded foreign, even though the individuals might be American or otherwise eligible to work. To address these concerns, IRCA applies the I-9 verification procedure to everyone after they have been hired and incorporates an elaborate provision against discrimination based on citizenship status or national origin.

Consequently, employers must walk a fine line in the realm of I-9 compliance. If they fall short in their I-9 compliance efforts, DHS could pursue civil and criminal sanctions against them. At the other extreme, if they go too far to ensure work authorization, the U.S. Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) could pursue significant civil sanctions against them. The OSC enforces the anti-discrimination provision (Section 274B) of the Immigration and Nationality Act (INA), 8 U.S.C. §1324b. This federal law prohibits: 1) citizenship sta-

tus discrimination in hiring, firing, or recruitment or referral for a fee; 2) national origin discrimination in hiring, firing, or recruitment or referral for a fee; 3) document abuse (unfair documentary practices during the employment eligibility verification, Form I-9, process; or 4) retaliation or intimidation. U.S. citizens, recent permanent residents, temporary residents, asylees, and refugees are protected from citizenship status discrimination. The national origin provisions prohibit employers from treating individuals differently because of their place of birth, country of origin, ancestry, native language, accent, or because they are perceived as looking or sounding foreign. The unfair documentary practices provision relates to verifying the employment eligibility of employees. Under this provision, employers may not request more or different documents than are required to verify employment eligibility, reject reasonably genuine-looking documents, or specify certain documents over others with the purpose or intent of discriminating on the basis of citizenship status or national origin.

With DHS enforcing record fines in cases of I-9 noncompliance, the OSC has seen an increase in "document abuse" prosecution. In December 2011, BAE Systems Ship Repair Inc., a leading provider of ship repair services, paid $53,900 to settle allegations that its subsidiary engaged in a pattern or practice of discrimination by imposing unnecessary and additional documentary requirements on work-authorized non-U.S. citizens when establishing their eligibility to work in the United States. In March 2012, Ross Stores agreed to reinstate the charging party and pay $6,384 in back pay plus interest to the charging party and $10,825 in civil penalties to the United States amidst allegations that the company discriminated against a work-authorized individual when it refused to honor a genuine work authorization document and requested that the employee produce a green card, despite the fact that the company did not require U.S. citizens to show specific work authorization documents. Regular training of company personnel on these specialized anti-discrimination provisions is a useful supplement to a company's I-9 compliance policy.

Identify Yourself!

The U.S. government's requirements for complying with its employment eligibility verification laws can be difficult to apply, but now multi-state employers must be especially careful traversing the various requirements in many states. In Louisiana, employers must either use E-Verify or retain copies of a limited set of identity and work authorization documents. In South Carolina, employers may no longer confirm new

workers' employment authorization with a driver's license or state identification card. In Tennessee, employers must use E-Verify or request a valid Tennessee driver's license or photo identification card or a driver's license from another state where the license requirements are at least as strict as those in Tennessee.

E-Verify is an Internet-based system, operated by DHS in partnership with the Social Security Administration (SSA), that allows participating employers to electronically verify the employment eligibility of newly hired employees. Participation in E-Verify is free and voluntary for most employers, except where mandated by state law or the federal contractor rule. To participate, an employer must sign a Memorandum of Understanding (MOU) with DHS and SSA, which requires the employer to provide access to its employment records to DHS and SSA for the purpose of program evaluation.

Verifying the employment authorization of a new hire using E-Verify creates a rebuttable presumption that the employer has not knowingly hired an unauthorized alien. An employer may *not* use E-Verify to pre-screen applicants or to check employees hired before the MOU has been executed. In a departure from the typical Form I-9 rules, an employer may *not* use E-Verify to re-verify employment authorization. Once an employer has taken the necessary steps to enroll in and activate E-Verify, it must use E-Verify for all new hires. In other words, an employer may not verify employees selectively.

The employer must display notices to inform employees and prospective employees that the employer participates in E-Verify and prohibits I-9 related discrimination. In response to public criticism of the system, DHS is working to enhance the functionality and use of E-Verify, including improvements to the employer registration process, expansion of the E-Verify photo tool, enhanced monitoring for misuse, increased nationwide outreach to inform employees of their rights, coordination with state departments of motor vehicles to share driver's license data, measures to detect identity theft, and deployment of a self-check function to allow prospective workers to check their E-Verify response prior to being hired. Given the investment of time, funding, and political capital that have been put into the program, it is safe to assume that E-Verify is here to stay. Efforts to make E-Verify mandatory for all employers nationwide have not yet succeeded; however, recent federal and state legislation has significantly broadened the scope of employers who are required to use E-Verify. For example, the Bush Administration amended the Federal Acquisition Regulation (FAR) to require certain federal contractors to use E-Verify.

Many employers send employees on interstate business trips not realizing that temporary travel to or through certain states can potentially affect employees, particularly work-authorized non-U.S. citizens. Shortly after the enactment of Alabama's immigration law requiring police officers to arrest individuals without proper residency identification, a Mercedes executive was detained. Pulled over for driving a rental car without adequate license plates, the executive could only produce German identification documents, an unacceptable form of identification under the state law. The executive had to appear in court to present his immigration documents and have the charges dropped. A Japanese employee temporarily assigned to work at a Honda assembly plant in Alabama was also penalized for not having acceptable documents. Arizona's immigration law has caused similar business travel disruption. Employers should stay apprised of differing state employment verification requirements and make all employees aware of the potential for having to present documents to law enforcement officials even during routine traffic stops.

E-Verify Required for Federal Contractors

Federal contracts and solicitations issued on or after Sept. 8, 2009, include a clause requiring federal contractors to use E-Verify. Prime contractors must include a clause requiring subcontractors to use E-Verify for any subcontract with a value of more than $3,000 for services or construction. Exemptions from the E-Verify requirement include prime contracts for less than $100,000; contracts for commercially available off-the-shelf (COTS) items (which include nearly all food and agricultural products); contracts for less than 120 days duration; and contracts where all work is performed outside the United States. The rule applies only to employees working in the United States, which includes the 50 states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands.

Conclusion

The Second Circuit Court of Appeals once remarked that, "The Tax Laws and the Immigration and Nationality Acts are examples … of Congress' ingenuity in passing statutes certain to accelerate the aging process of judges." When one combines the immigration laws with increased globalized trade in goods and services, and international business travel, the result is sure to accelerate the aging of business leaders as well. Minimizing immigration compliance risk can be accomplished with careful planning. Most businesses have built some type of risk management processes into their organizations. Adding an immigration compliance component to the existing risk management process is a meaningful way to improve institutional adherence to immigration laws. Understanding the issues, such as those summarized in this article, is the key starting point for developing robust immigration compliance policies.

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