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IMMIGRATION PRACTICE ALERT

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PRESIDENT BUSH EXTENDS E-VERIFY PROGRAM & PLEDGES $100 MILLION TOWARDS ITS CONTINUED USE

On September 30, 2008, President George W. Bush signed into law the appropriations legislation (H.R. 2638) for the U.S. Department of Homeland Security for fiscal year 2009. Section 143 of the "Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009" provides $100 million in funding for the E-Verify Program, the federal government's electronic employment verification system. The Act also extends the Program through March 6, 2009.

E-Verify is an online database jointly administered by the Department of Homeland Security (DHS) and the Social Security Administration (SSA) that enables participating employers to verify the work authorization of newly hired employees by checking the information employees provide on their Form I-9 against both DHS and SSA databases. The E-Verify Program, previously known as the "Basic Pilot Program," originally was scheduled to expire on November 30, 2008.

Although E-Verify remains a largely voluntary program, several states now require its use for certain employers,[1] and the Federal Government has also mandated its use for all federal contractors and certain sub-contractors (although final regulations are still required to effectuate the mandate).[2]

DEPARTMENT OF HOMELAND SECURITY ISSUES SUPPLEMENTAL FINAL RULE CONCERNING SOCIAL SECURITY "NO-MATCH" LETTERS

On October 23, 2008, the Department of Homeland Security (DHS) issued a (new) Supplemental Final Rule for the Department's "Safe-Harbor Procedures for Employers Who Receive a Mismatch Letter," known as the "Mismatch" or "No-Match" Rule. The Supplemental Final Rule is intended to provide additional background and analysis for the No-Match Rule, which was originally issued in August 2007, in response to concerns raised by the U.S. District Court for the Northern District of California. The concerns centered around the possibility that the new procedures could result in widespread terminations of lawfully employed workers in light of the known errors in the Social Security Administration's (SSA) records, and the threat of criminal and civil liability to employers who fail to follow the "safe harbor" procedures.

The original No-Match Rule created strict procedures, within required timeframes, for employers to follow upon receipt of a "no-match" letter from the SSA or DHS. These letters are sent to employers when employees' Social Security numbers do not match DHS

[1] Arizona, Arkansas, Colorado, Georgia, Idaho, Minnesota, Mississippi, Oklahoma, Rhode Island and South Carolina have mandated its use in some form.
[2] On June 6, President Bush signed an amendment to Executive Order 12989, requiring all federal contractors and certain sub-contractors to use the E-Verify system to verify the employment eligibility of all newly hired employees, as well as all existing employees assigned to work on federal contracts. The terms of the Executive Order will become effective when final regulations are issued, expected at the end of 2008.

records. The California District Court enjoined the original Rule on October 10, 2007, thereby preventing its implementation anywhere in the nation.

According to DHS, the new Supplemental Final Rule addresses the concerns the court identified in its preliminary injunction ruling. The first change relates to the scope of the Rule's safe harbor provision. In the August 2007 No-Match Final Rule, DHS stated that employers who follow safe harbor procedures uniformly will not be found to have engaged in discrimination in violation of the Immigration and Nationality Act (INA). The court, however, pointed out that the Department of Justice (DOJ), not DHS, has the authority for enforcement of the INA's anti-discrimination provisions. Accordingly, DHS removed statements from the Final Rule discussing the potential for anti-discrimination liability faced by employers that follow the safe harbor procedures, leaving that authority to DOJ. The second change is the addition of a rationale for what the court deemed a change in policy in the relevance of the no-match letters to immigration law compliance. Third, the Rule includes a Final Regulatory Flexibility Analysis that examines the Rule's potential costs. Aside from these three items, the Supplemental Final Rule remains essentially the same as the original No-Match Rule.

Although the Rule is effective upon publication in the Federal Register, which should occur within approximately two weeks, it cannot be implemented until the California district court lifts its injunction. DHS has indicated that in the coming days it will request the district court to lift the injunction in light of the Supplemental Final Rule so that the No-Match Rule can be implemented. On October 24, the SSA announced that it will wait for the outcome of the litigation before deciding whether it will send the no-match letters it has already prepared for fiscal year 2007 to approximately 140,000 employers.

In addition to the possible imminent implementation of the No-Match Rule, recent trends in enforcement continue to indicate that the federal government is aggressively pursuing its increasingly stringent worksite enforcement efforts. In fiscal year 2008, criminal worksite enforcement charges included 135 against employers or management-level employees, with fines raised by 25 percent. Fiscal year 2008 was also the first time that DHS debarred companies from federal contracting because they were found to have employed unauthorized workers. Accordingly, it is advisable for employers to perform an internal "check up" to examine compliance levels, particularly since identifying and correcting problems can currently be the basis of a "good faith" defense in an investigation. Fox Rothschild recommends a strategic, private, internal audit of I-9s, as well as an examination of hiring practices, policies and procedures prior to the implementation of new, possibly complex and strict procedures.

Alka Bahal is a partner and co-chair of Fox Rothschild's Corporate Immigration Practice. In the course of her career focused on corporate immigration law, Ms. Bahal has acquired extensive experience in corporate immigration and employer compliance issues, including IRCA, I-9s, Social Security mismatch issues and U.S. visas. Ms. Bahal is based in the firm's Roseland, NJ office representing clients throughout the United States and may be reached at immigration@foxrothschild.com or 973.994.7800. Visit Fox Rothschild's Immigration Practice on the Web at www.foxrothschild.com.

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