TENNESSEE IMMIGRATION LAW UPDATE
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In order to discuss the new immigration law promulgated by the State of Tennessee, it is first necessary to get a brief overview of federal I-9 Employment Verification and E-Verify regulations.

I-9 COMPLIANCE

GENERAL OVERVIEW

All employers are required to verify that each employee it hires is authorized to work in the United States. Employers verify work authorization on a government issued I-9 Form by inspecting documentation of each new employee's valid work status. I-9 compliance necessitates strict adherence to proper procedure in order to avoid the multitude of potential liability that comes with failure to properly comply. The most recent I-9 Form and I-9 Employer Handbook can be accessed at www.USCIS.gov. The I-9 Employer Handbook provides useful information for guiding employers through the I-9 process. While an attorney can assist in developing I-9 policies and procedures, provide advice regarding issues that arise, and assist with auditing of I-9 files, it is of even more importance to have properly trained and conscientious individuals in your employ who are responsible for implementing and following I-9 procedures.

Proper compliance will only continue to become more important as the Department of Homeland Security ("DHS") devotes more of its time and resources to targeted audits of employers' I-9 files and less time to random employer raids. In April 2009, the Immigration and Customs Enforcement ("ICE") arm of DHS, implemented a new strategy to reduce illegal employment through audits and investigation of employers. Previously, the focus of DHS had been on employer raids, resulting in the arrest, detention and removal of undocumented workers. In July 2009, ICE launched its initiative by sending out over 600 audit notices to employers across the country. The employers were selected primarily based on leads provided to ICE by a variety of sources including disgruntled employees and consumer complaints about stolen identity. These audits continue today and affect many different types of employers.

Based on this new focus on employer compliance, it is more important than ever for employers to develop and follow a stringent I-9 procedure. Further, regular self-audits of I-9 files are highly recommended.

APPLICABLE STATUTES

I-9 compliance is sometimes made difficult because of the inherent tension between and among statutes applicable to this particular area of law. The Immigration and Naturalization Act ("INA") and the Immigration Reform and Control Act ("IRCA") prohibit employers from employing an individual who is not authorized to work in the United States. A Tennessee law that went into effect on January 1, 2008 subjects an employer to suspension of its business license for knowingly employing, recruiting or referring for a fee, an unauthorized worker. Tenn. Code Ann. 50-1-103.

At the same time, IRCA also prohibits employers from discriminating against applicants or employees on the basis of national origin or citizenship status in the hiring, recruiting, or discharging of individuals. Similarly, Title VII of the Civil Rights Act of 1964 ("Title VII"), prohibits discrimination by employers based on national origin. While Title VII only applies to employers employing fifteen or more individuals, IRCA applies to employers of four (4) or more employees.

Further, an employer could be liable even to an unauthorized worker for retaliatory discharge under IRCA and/or the National Labor Relations Act, and for minimum wage violations under the Fair Labor Standards Act. Add to these statutory provisions the increased raids and audits by DHS and you have an employer bombarded from every side with potential legal pitfalls.

The Immigration Act of 1990 imposes civil penalties for document fraud by the employer and employee. The Act makes it unlawful for a person to knowingly (1) forge, counterfeit, alter, or falsify any document for the purpose of satisfying the INA; (2) use or attempt to use, possess, obtain, accept, or receive any such document; (3) use or attempt to use any document lawfully issued to someone else; or (4) accept or receive a lawful document issued to someone other than the person possessing it. 'Knowledge" includes reckless conduct or constructive knowledge (that may be inferred by the circumstances).

The seemingly inherent conflict within these applicable laws may place an employer in the untenable position of deciding which risk to take: fines and possible imprisonment for hiring and I-9 violations or a lawsuit based on discrimination and wrongful termination.

PENALTIES

Potential Penalties for Unlawful Discriminations

There are multiple potential penalties faced by an employer found to be in violation of IRCA, the INA or the Immigration Act of 1990 provisions related to unlawful discrimination based on immigration or citizenship status. Such penalties may include an order to cease the unlawful practice, an order requiring the employer to hire or reinstate the individual, with or without back pay; a requirement that the employer post notices to its employees about their rights and the employer's obligations under the law; a requirement that the employer educate its human resources personnel; removal of incorrect information from an employee's personnel file; attorney fees if the employee prevails against the employer and the employer's argument is found to have no foundation; and civil monetary penalties.

Potential Civil Penalties for I-9/Hiring Violations

There is the potential for both civil and criminal penalties for I-9 violations including hiring or continuing to employ an unauthorized alien and/or improper completion of the I-9 Form. When IRCA was first enacted, government enforcement efforts focused primarily on education of employers regarding I-9 requirements and imposition of civil fines.

Failure to complete or improperly completing an I-9 Form constitutes a "paperwork violation." Employers committing a paperwork violation could face a civil fine of $110 to $1100 per violation. If the employer is found to have provided false statements on the I-9 Form, engaged in fraud related to the I-9 process or otherwise misused I-9 documents, there is a potential fine ranging from $275 to $5,500 and/or imprisonment.

Knowingly hiring an unauthorized alien, or continuing to employ an unauthorized alien once an employer knows or should have known that the worker lacks proper work authorization, may result in civil monetary penalties assessed against the employer ranging from $275 to $2,200 per individual for a first offense. For a second offense, that amount increases to $2,200 to $5,500 for each alien. For a third offense, the potential penalty ranges from $3,300 to $11,000 per individual.

These fines, while relatively small, can add up in the face of multiple violations. For example, after several years of investigating Wal-Mart's cleaning contractors, the government raided 61 Wal-Mart stores in 21 states and arrested 245 undocumented workers. Wal-Mart entered into an $11 Million settlement

agreement with the government in order to resolve the violations. In addition, Wal-Mart was required to implement an internal policy and procedures to ensure future compliance with immigration laws.

In setting the proposed fine, the government will weigh certain factors: (1) the size of the employer; (2) the good faith efforts of the employer to comply with I-9 requirements, discussed below; (3) the seriousness of the violation; (4) any history of previous violations; and (5) any actual involvement of unauthorized aliens. When analyzing the seriousness of a violation, the government considers whether the violation consisted simply of errors on the I-9 Form, whether important sections or attestations were incomplete, or whether the I-9 Form was retained at all.

Potential Criminal Penalties for I-9/Hiring Violations

Over time, many employers began viewing civil penalties for I-9 violations as a cost of doing business. In response, more recently the government's focus has shifted from educating businesses and imposition of civil penalties to punishment of employers through criminal prosecution for both knowingly employing workers without work authorization, and improper completion of the I-9 Form. In April 2006, ICE announced a new interior enforcement strategy as part of the Secure Border Initiative. Through criminal fines, restitutions, and civil judgments, it is estimated that ICE collected almost $30 million from employers in the first half of 2007 alone following the institution of this initiative.

If an employer is found to have engaged in a "pattern or practice" of knowingly hiring undocumented workers, misdemeanor penalties of up to six months imprisonment and fines up to $3,000 per alien could be assessed against the employer for the entire pattern or practice.

If during any 12 month period the employer knowingly hires at least ten individuals with actual knowledge that the individuals are unauthorized to work in the United States, the employer has committed a felony offense with potential criminal penalties including fines and/or imprisonment for up to five years.

There are also non-employment specific immigration violations that carry criminal sanctions. For example, it is a violation of the law for any person to bring or attempt to bring into the United States an "illegal alien"; transport an alien knowing or recklessly disregarding the fact that the person is an "illegal alien"; conceal or harbor an "illegal alien" knowing or recklessly disregarding the fact that the person is an "illegal alien"; encourage or induce a person to illegally enter the United States; or engage in a conspiracy to commit any of these acts. These violations may result in various penalties including fines and imprisonment depending on the type of, and aggravating circumstances surrounding, the violation. If the violation of this statute was done for commercial advantage or financial gain, the term of imprisonment could be as much as ten years. While infrequent, the government on occasion has charged an employer who has allegedly hired undocumented workers, with these additional, non-hiring offenses.

Personal Liability for Managers

IRCA imposes liability on a "person or entity" indicating that liability for I-9 violations is not necessarily limited to the company as a whole. Some courts have found that this language can impose joint liability for knowingly hiring undocumented workers on both the employer and the agent. This indicates that an agent in a company cannot escape personal liability for hiring undocumented workers simply because he or she is acting on behalf of the company rather than in an individual capacity. For example, in an audit of Yamoto Motors, which employed 28 employees, two managers were criminally prosecuted for knowingly allowing two unauthorized workers to return to work.

Liability for Successor Companies

In general, following a corporate reorganization, merger, or sale of stock or assets, completion of a new I-9 Form is unnecessary as long as the new employer maintains the I-9 Forms created and retained by the previous employer. However, if the new employer decides not to complete new I-9 Forms for the employees it retains from the previous employer, the new company is liable for any omissions and/or mistakes in the original I-9 Forms.

Responsibility of a Recruiter

When an employee is hired by a recruiter on behalf of a company, the recruiter must ensure that the I-9 Form is completed within three days of hire (not three days of the referral). However, the recruiter can designate the employer as the agent responsible for completion of the I-9 Form. In such cases, the recruiter must still keep a copy of the I-9 Form. In situations where a temp agency directly pays the employee, it qualifies as an employer responsible for I-9 Form completion, rather than a recruiter.

Good Faith Defense

Good faith compliance with I-9 procedures provides a "narrow but complete defense" against a finding that the employer has employed an undocumented worker. U.S. v. Walden Station, Inc., 8 OCAHO 1053, at 813, OCAHO Case No. 00A00040 (Apr. 21, 2000). In other words, if an employer has complied in good faith with the requirements of employment verification, it has established an affirmative defense against unlawful hiring. Properly completing the I-9 Form raises a rebuttable presumption that the employer has not knowingly hired an unauthorized alien. However, the government can rebut that presumption by offering proof that the documents did not appear genuine on their face, that the document verification was pretextual, or that the employer colluded with the employee in falsifying the documents.

Where the charge is for document errors, as opposed to unlawful hiring/employment, good faith compliance will reduce the size of the fine. The Good Faith Defense does not apply if an employer is given notice by the government of errors on an I-9 Form and fails to make the necessary corrections within 10 days. It also does not protect employers found to have engaged in a pattern or practice of hiring undocumented workers.

In addition to proper completion of the I-9 Form, the Good Faith Defense can be established and/or strengthened through other acts by an employer. Establishing written I-9 policies and procedures and providing regular training to employees who administer I-9 Forms help demonstrate an employer's good faith compliance with I-9 regulations. It is advisable that the employer have an explicit policy prohibiting the use of undocumented workers, and that such notice be prominently displayed on every job site. Conducting regular internal audits of I-9 files will further establish an employer's good faith. Finally, as discussed below, including in contracts with independent contractors a provision regarding I-9 compliance will demonstrate good faith compliance with the law.

APPLICATIONS & PRE-EMPLOYMENT INQUIRIES

In general, an employer must be cautious about what questions it asks an applicant prior to offering employment. This is of course true with regard to pre-employment questions about any subject related to a "protected category" under the law, not just national origin, citizenship or immigration status. There are three categories of individuals who are eligible to work in the United States: (1) United States Citizens, (2) Lawful Permanent Residents ("LPRs") of the United States, and (3) holders of a temporary and often otherwise limited work authorization.

Before hiring an individual, you may ask whether he/she is a U.S. Citizen or possesses employment verification documentation that authorizes him/her to work in the U.S. If the applicant responds to this question in the affirmative, you may ask no further questions. You may not demand documentation of his/her work authorization before offering employment. An employer may not limit its jobs to U.S. Citizens (unless such restriction is required by law, regulation, executive order or government contract). While it is permissible to prefer a U.S. Citizen over an equally or lesser qualified foreign national for a specific position, it is not advisable to have a blanket policy of such a preference.

If the applicant responds to the initial question about citizenship and work authorization in the negative, this means they will probably need an employer sponsor in order to work legally. At that point, the choice becomes yours (pursuant, of course, to any policies you have in place). If you have a policy of not sponsoring foreign nationals for employment, you can rely on that policy to reject the applicant. If you do sponsor foreign nationals, you can provide the person with general information about the process. But regardless of whether you do or do not have such a policy, it is important that you make no specific inquiry into the applicant's national origin.

COMPLETION OF THE I-9 FORM UPON HIRING

The current I-9 Form can be downloaded at www.uscis.gov. The current I-9 Form has an expiration date of August 31, 2012; however, employers should continue to use that form until a new I-9 Form has been released.

The employer must complete an I-9 Form every time it hires any person to perform labor or services with a few exceptions discussed at the end of this section. As discussed above, completion of the I-9 Form is mandatory. Further, failure to verify a worker's employment eligibility through completion of an I-9 Form will be considered by the government to be proof of the employer's "knowing" violation of the law against hiring undocumented workers.

The I-9 Form is completed jointly by the employer and the employee. It is the employer's responsibility to make sure the I-9 Form is filled out completely and correctly. Mistakes on an I-9 Form, even seemingly minor mistakes such as failing to provide the full business address or the employer representative's title, can result in fines if audited. Proper completion of the I-9 Form is discussed in detail below. In addition, a quick reference **I-9 "DO's" and "DON'Ts"** is attached as **Exhibit A**.

Information about the Employee (I-9 Form Section One)

Section One of the I-9 Form should be completed and signed by the employee on or before the first day of the new hire's employment. If the employee is physically unable to complete Section One, or requires a translator, the person preparing and/or translating must complete the "Preparer/Translator Certification" section of the I-9 Form.

In Section One of the I-9 Form, the employee attests to the fact that he/she is authorized to work in the United States and that he/she is either a U.S. Citizen ("USC"), a U.S. Lawful Permanent Resident ("LPR"), or otherwise authorized to work in the United States until a certain date. Providing a Social Security Number in Section One is voluntary unless the employer participates in the government's E-Verify program and then it must be provided.

You may not request any documentation to support the information provided for Section One of the I-9 Form. This includes documentation of any Social Security Number, Alien Registration Number (A#) or I-94 Number the employee provides. Keep in mind that certain documents such as the Social Security Card can be requested for purposes of completing the IRS Form W-2 (Wage and Tax Statement);

however, that request must be made separate from the I-9 process in order to avoid a violation by requesting specific documents. This applies too to the Social Security Number Verification Service ("SSNVS") through which an employer can verify by telephone Social Security Numbers of its new hires. Such verification should be done for the purpose of completing IRS Form W-2, not the I-9 Form. Similarly, an employer may request a driver's license based on job duties that involve driving a company vehicle; however, again it must not be requested as part of the I-9 process.

Documentation of Identification and Employment Authorization (I-9 Form Section Two)

Within three (3) business days of the employee's start date, the employer must complete Section Two of the I-9 Form verifying the employee's identity and employment eligibility. The I-9 Form contains three lists of documents that will sufficiently verify the identity and employment authorization of the employee. List A contains a list of documents that verify both the individual's identity and employment authorization. List B contains a list of documents that verify the individual's identity. List C contains a list of documents that verify the individual's employment authorization. Accordingly, an employee may present a document from List A or a document from both List B and List C.

It is the employee's choice regarding which documents to present to the employer for I-9 verification. The employer may not request a specific document from the list of acceptable documents. The employer may not request different or additional documentation than provided by the employee unless the documentation provided appears not to be genuine or are not documents contained in List A, B or C of the I-9 Form. To do so risks a potential basis for a discrimination lawsuit. An exception to this general rule is if an employee submits a restricted Social Security Card (i.e. stating "Not valid for employment," "Not valid if laminated," or "Valid for work only with DHS authorization"). In that case, the employer can ask to see immigration documentation authorizing employment.

If a document presented by the employee conflicts with information he/she provided in Section One, the employer is responsible for clarifying the conflicting information. For example, if the employee marks the box in Section One that he/she is a temporary worker authorized to work until a certain date, but then provides a Lawful Permanent Resident Card, the employer must point that out and ask if the information provided in Section One is incorrect. If it is (in this case the employee checked the wrong box), the employee must correct the information in Section One and initial/date next to the change.

The employee must submit the original document(s) for the employer's review, not a photocopy. The employer is not required to be an expert in identifying fraudulent documents. If the document reasonably appears to be genuine and relate to the employee, the employer may accept it as such. No overzealous scrutiny of the document is required; however, it is permissible for the employer to consult an attorney if unsure about a particular document.

The employer should note on the I-9 Form the type, issuing authority, document number and expiration date (if any) of the document. One relatively new requirement is that a driver's license or passport may not have expired (previously, employers could accept an expired driver's license or passport). The Certification Block on the form should be signed and dated by the individual who verified the documents.

Employees not Subject to I-9 Requirements

An employer need not complete an I-9 Form for the following individuals:

- Hired before November 6, 1986.
- Not physically working in the U.S.
- Returning to work after paid/unpaid leave, temporary layoff, strike or labor dispute, wrongful discharge, or seasonal employment, for whom an I-9 Form was initially completed.

- Rehired within three years of the date their initial I-9 Form was completed (if their employment eligibility had no expiration or if the expiration date has not passed).
- Independent contractors and persons employed by a contractor such as a temporary agency.
- Casual workers who provide occasional services inside a private home (i.e. babysitters).

Independent Contractors

When determining whether a worker is an employee or an independent contractor, ICE considers the factors set forth in the Internal Revenue Service (IRS) regulations, such as whether the employer supplies the materials, is the sole employer for the worker, directs the time and method of employment, and has authority to hire and discharge the worker. The line between employee and independent contractor can get blurry, for instance when the employer directly supervises the employee. The cautious approach would be to complete an I-9 Form for such employees.

While an employer need not complete an I-9 Form for an independent contractor, it can still be subject to penalties for continuing to employ an independent contractor with knowledge that the worker is not authorized to work. This includes constructive knowledge, or knowledge that a reasonable and prudent employer should have.

It is wise to include in a contract with an independent contractor a provision for indemnification for any penalties resulting from lack of employment authorization of workers supplied under the contract.

Off Site or Remote Employees

For most employers, I-9 compliance through document review and completion of the I-9 Form is conducted at the company's primary place of business by a member of the Human Resources staff. However, many companies employ individuals at locations other than the primary place of business, sometimes a great distance away, making I-9 compliance challenging.

As a general rule, the company representative inspecting the documents submitted by the employee must also be the person completing and signing Section Two of the I-9 Form on behalf of the company. In other words, you cannot have someone at the remote site look at the documents and then send the I-9 Form back to the primary place of business for completion of Section Two by a Human Resources representative. In addition, the company representative completing the I-9 Form must view original documents; so you cannot have the remote employee send copies of the documents to an HR representative at the primary place of business, who then completes the I-9 Form.

If the remote job site is close enough for the employee to bring his or her documents to the primary place of business, the HR staff can review the documents and complete the I-9 Form. When dealing with a remote employee, keep in mind the timeline for completion - Section One by the employee on or before the first day of employment, and Section Two by the employer on or before the third day of employment.

If a company maintains a supervisor at the remote site (i.e. a site manager, project manager, or even a foreman), that supervisor can review documents and complete the I-9 Form. The supervisor must receive instruction and training on proper I-9 procedures. This should include keeping written I-9 procedures at the remote location for reference by the supervisor. Further, it is advisable to maintain proof of the supervisor's training in case of government audit.

If a company does not have a supervisor physically available at a remote site to inspect the original documents submitted by the employee and complete Section Two of the I-9 Form, it may designate an agent to perform these tasks. There are companies with which an employer can contract to handle I-9

compliance; or it can designate an individual (i.e. a notary, attorney, or accountant) as its agent. If designating an agent, the following basic steps are recommended:

1. Employer sends a packet to the remote employee (instructions for remote completion of the I-9 process, a blank I-9 Form, and Designated Agent Instructions and Form).
2. Employee completes Section 1 of the I-9 Form on or before the first day of employment, as directed by the instructions.
3. Employee contacts the Designated Agent and gives him/her the Designated Agent Instructions and Form. The Designated Agent inspects the employee's documents and then completes Section 2 of the I-9 Form by the employee's third day of employment.
4. At that time, the Designated Agent also completes and signs the Designated Agent Form.
5. By the end of that business day, employee faxes to the employer the following documents: completed and signed I-9 Form; copies (front and back if applicable) of the document(s) presented to the Designated Agent for I-9 employment eligibility verification; and the completed and signed Designated Agent Form. These documents should also be sent to the employer by mail.

The employer should retain these documents with its other I-9 records (if it retains I-9 documents for all employees). Perhaps the most important thing to keep in mind for remote location employees is that regardless of what type of "agent" an employer uses to complete the I-9 Form, the employer is ultimately liable for any document or hiring violations as if it had completed the I-9 Form itself.

RE-VERIFICATION (I-9 FORM SECTION THREE)

Re-verification upon Name Change

An employer is not required to update Form I-9 when an employee changes his/her name. However, because of the importance of maintaining correct employee information and because of the potential penalties associated with incorrect information on an I-9 Form, I recommend noting any name change in Section Three of the I-9 Form.

You do not have to request or view documentation from the employee demonstrating the name change. However, if you feel it is necessary, you may take certain steps (i.e. asking the employee for the basis of the name change) to be reasonably assured of the employee's identity and the veracity of the claimed name change. If provided by the employee, you may accept evidence of the name change to keep with the I-9 Form, so that your actions are well-documented if the government asks to inspect your I-9 Forms. But again, this is not required.

Re-verification upon Document Expiration

Several types of employment authorization documents, particularly for foreign nationals, have future expiration dates. The fact that an individual's employment authorization expires does not mean that he/she will not be granted an extension of that authorization. Therefore, such expiration should not be considered in determining whether the person is qualified for the position. Again, this will avoid the appearance of discrimination.

The employer is responsible for tracking the expiration date of the employee's I-9 documentation and will need to re-verify the individual's employment authorization upon expiration. This is done using Section Three of the I-9 Form. The re-verification must be done no later than the expiration date of the document. As an aside, List B documents, such as a driver's license, should not be re-verified when they expire. Lawful Permanent Resident ("green") cards also should not be re-verified upon expiration.

Re-verification upon Rehire of Employee

If the employer is rehiring a former employee, it must complete a new I-9 Form *unless* the rehire is within three years *of the initial hire date*. It is important to note that this is within three years of the initial hire date, not within three years of the employee's previous termination. This time period is consistent with the period of time an employer must maintain the I-9 Form (one year from the date of termination or three years from the date of hire, whichever is longer).

In the event an employer is rehiring a former employee within three years of the employee's initial hire date, the employer can choose to either complete a new Form I-9 or use Section Three of the existing Form I-9 to note the employee's rehire. The employer should inspect the old Form I-9 to see if it needs to be updated (i.e. the individual's work authorization has expired). If so, re-verification of documents may be necessary. If the employer decides to complete a new Form I-9, the old Form I-9 must be retained.

If the employee is being rehired more than three years after his/her initial hire date, a new I-9 Form must be completed, including verification of identity and work authorization through document review.

Re-verification upon Employment with Related, Successor or Reorganized Employer

Another situation that could result in an interruption in employment is when an employee continues his/her employment with a related, successor, or reorganized employer. Examples include:

- The same employer at another location.
- An employer who continues to employ some or all of a previous employer's workforce in cases involving a corporate reorganization, merger, or sale of stock or assets.
- An employer who continues to employ any employee of another employer's workforce where both employers belong to the same multi-employer association and the employee continues to work in the same bargaining unit under the same collective bargaining agreement. For these purposes, any agent designated to complete and maintain Forms I-9 must record the employee's date of hire and/or termination each time the employee is hired and/or terminated by an employer of the multi-employer association.

The "new" employer has the option of (1) obtaining and maintaining the Forms I-9 of each employee completed by the previous employer at the time of hire; or (2) completing a new Form I-9 for each employee.

Note that if the employer opts to obtain and maintain the existing Forms I-9, it takes on all responsibility for any errors and/or omissions contained in the Forms I-9, including the previous employer's failure to complete a Form I-9 for any employee.

Re-verification upon Transfer of Employee

If an employee is transferred from one distinct unit of an employer company to another distinct unit of the same employer in a different geographic location, completion of a new I-9 Form is not required. The

same rules apply if the employee transfers employment to a "related" company (i.e. where both companies belong to the same multi-employer association).

It would be advisable to note the date of transfer and prepare a memo explaining the situation that could be placed at the front of the company's I-9 Forms. Further, the employer may transfer the employee's I-9 Form to the new location. Having said that, there are significant advantages to maintaining all I-9 Forms for the company in a centralized location.

Other Interruptions in Employment not Requiring Re-verification

There are other situations in which an interruption in employment does not necessitate completion of a new Form I-9. Those include:

- Paid or unpaid leave that has been approved by the employer (FMLA, maternity or paternity leave, vacation, etc.);
- Temporary layoff for lack of work;
- Disciplinary suspension;
- Termination found to be unlawful by a court, arbitrator or administrative body, or pursuant to settlement where reinstatement is part of the resolution;
- Seasonal employment.

The key to making the determination as to whether an employee has been terminated and then rehired, or whether the employee maintained continuous employment despite the interruption in employment, is whether the employee had a reasonable expectation of employment at all times. There are several factors in making this determination:

- The individual was employed on a regular and substantial basis, generally established by a comparison with other, similarly employed workers;
- The individual complied with the employer's established policies regarding his/her absence;
- The employer's past history of recalling absent employees for employment indicates a likelihood that the individual will resume employment within a reasonable period;
- The individual's former position has not been taken permanently by another worker;
- The individual has not sought or obtained benefits during his/her absence from employment that are inconsistent with an expectation of resuming employment within a reasonable period;
- The financial condition of the employer indicates the ability of the employer to permit the individual in question to resume employment within a reasonable period;
- The oral and/or written communication between the employer and the individual indicates that it is reasonably likely the individual will resume employment within a reasonable period.

If the employee is considered to have been continuously employed, the employer should simply continue to maintain the previously completed Form I-9. At the time of the interruption in employment, the employer should inspect the Form I-9 to ensure that it does not need updating

(i.e. re-verification of employment). It would be advisable to note the interruption on the I-9 Form or, if applicable to several employees, a memo to be kept in the front of the I-9 Forms.

There may be other circumstances in which an employer determines the need to correct or complete a new I-9 Form (i.e. the discovery that an I-9 Form was incorrectly completed or incomplete, or the expiration of prior work authorization). It is imperative that any change be noted with the current date and signature of the person making the change. This will avoid the appearance of any wrongdoing by the employer such as backdating. If you are unsure regarding whether an updated or newly completed I-9 is necessary, consult your attorney.

RETENTION OF I-9 RECORDS

An employer is not required to keep photocopies of document(s) submitted by an employee for I-9 Form completion. Retaining documents could reveal errors in recording the document information on the I-9 Form if later inspected. On the other hand, retaining documents would make an internal audit easier when determining whether the document was properly recorded and/or when the I-9 Form needed re-verification. Further, in case of audit by DHS, there may be some errors that an employer will be permitted to correct only if it maintains its I-9 documentation. As an aside, if you are enrolled in E-Verify, there are certain documents that you are required to keep.

Regardless of whether an employer chooses to retain I-9 documents, it must be consistent in its document retention practices – keep photocopies of documents for **all** or **none** of your employees. Doing so will avoid potential discrimination claims. If an employer has been retaining I-9 documents and decides to end that practice, it should send a company-wide memo to ensure uniform compliance with the new practice.

Location of I-9 Files

If you do retain photocopies of I-9 documentation, they should be kept with the completed I-9 Forms. I-9 records should be kept separate from personnel records, because they contain private information about the employee's national origin. In addition, in case of audit, they will be easily accessible. If your company consists of several departments and/or locations, I-9 records should be kept in a centralized location. This is again for ease of maintenance and auditing.

Electronic Retention

In 2004, new legislation made it possible to complete the I-9 Forms electronically. Electronic retention of I-9 records is permissible but subject to strict guidelines. It is advisable to consult the I-9 employer handbook and/or an attorney before instituting this procedure. For example, any electronic system must include an audit trail tracking the date on which any I-9 Form is accessed or altered. It must also have a backup system to protect against information loss, and the capability to attach an electronic signature to the completed I-9 Form and produce a printed copy.

An employer should keep in mind that deficiencies in its electronic I-9 procedures can result in penalties, in the same way human errors in completion of the I-9 Form can. For example, Abercrombie & Fitch was recently fined after an audit revealed numerous technology-related deficiencies in the company's electronic I-9 verification system. The company entered into a fine settlement of just over $1 Million. It is important to note that in discussing the settlement, ICE commented on the fact that Abercrombie & Fitch was fully cooperative during the audit and had worked diligently to implement proper procedures to assist in future compliance. ICE pointed to the large settlement as a warning to other companies that the I-9 employment verification process should be taken seriously.

Retention Period

I-9 documentation must be retained for three (3) years following the employee's hire date or one (1) year following the employee's termination date – whichever is longer. In other words, I-9 documentation must be kept for the duration of the employee's employment and for one year following termination of employment, unless that time period would be less than three (3) years from the employee's hire date.

SELECTION AND TERMINATION OF EMPLOYEES

As discussed above, selection of an equally or better qualified United States Citizen over a foreign national does not constitute an unlawful employment practice. In addition, some employers are subject to contracts requiring that all employees be U.S. Citizens.

An employer may terminate an employee for failing to provide the required documents or receipts within 3 business days of hiring. As with most policies and employment actions, you must make sure to apply this standard uniformly as failure to do so could constitute the basis of a discrimination claim.

A false statement made on an I-9 Form by an employee is a felony, even if the employee is subsequently granted work authorization. Therefore, if the employer determines that an employee has fraudulently executed his or her initial I-9 Form, the employer may terminate the employee pursuant to a consistently applied policy of termination for criminal conduct or knowing misrepresentations in the workplace. It is advisable to consult with your attorney prior to taking such action. In the alternative, if the employer wishes to continue employing the individual, it must complete a new I-9 Form based on a review of the new, legitimate documents.

INTERNAL SELF-AUDITS

Conducting a Self-Audit

It is advisable for employers to conduct annual, internal audits in order to determine that an I-9 Form has been completed for all current and recent employees, that all existing I-9 Forms are completed correctly, and that any I-9 Forms based on proof of temporary work authorization are re-verified. As mentioned above, performance of internal audits of I-9 records, either by a company employee properly trained in I-9 compliance or by the company's attorney, will help demonstrate an employer's good faith compliance with I-9 regulations, potentially forming the company's primary defense in a government prosecution.

Correcting Errors on the I-9 Form

If during an internal audit, or at any time, an employer becomes aware of a mistake on an I-9 Form, it must take steps to correct the error. It is important to correct these errors properly because making an improper correction can constitute a finable error in and of itself. It is most important to be transparent with corrections. For example, never erase, white out or back date an I-9 Form. Further, only the employee should correct Section One of the I-9 Form and only the employer should correct Section Two. All corrections should be initialed and dated. It is also advisable in certain situations to attach an "Explanation of Correction" to the corrected I-9 Form.

GOVERNMENT I-9 AUDITS

An employer's I-9 files are subject to inspection by DHS, the Department of Labor ("DOL") or the Department of Justice's Office of Special Counsel ("DOJ OSC"). As discussed previously, in 2009, ICE

implemented a new, comprehensive strategy to reduce the demand for illegal employment with the goal of protecting employment opportunities for the legal workforce in the U.S. The focus of this initiative is on audit and investigation of employers suspected of employing illegal workers. These audits and investigations necessarily involve inspection of the employer's I-9 verification procedures and records. In the last couple of years, ICE has assessed a record number of civil and criminal penalties against employers who violate immigration laws.

While government audits are beyond the scope of this presentation, it is important to emphasize a few points. Employers can prepare for audits by (1) implementing a standard I-9 procedure; (2) regularly training those responsible for compliance; (3) taking time and care during the initial completion of the I-9 Form; (4) creating a system for tracking employee documents that must be re-verified upon expiration; (5) conducting regular self-audits to ensure correct completion and re-verification when appropriate; and (6) taking time and care in correcting I-9 Forms when necessary.

Such preparation is critical because once notified of an audit, the employer will have only three (3) days to submit the requested documentation. Documentation will include not only I-9 documents, but also general documents about the company and its employees.

Depending on the size of the employer, the DHS officer will either inspect the documents at the employer's place of business, or take them to a DHS office to review. The office may also conduct interviews of all employers responsible for completing I-9 Forms.

The DHS officer will notify the employer of any unauthorized workers to be terminated, and/or technical/procedural document errors to be corrected. Both must be done within ten (10) days or will otherwise become substantive violations. The DHS officer will then issue a Notice of Intent to Fine based on the substantive errors contained in the I-9 Forms. The Notice will set forth the fine to be assessed.

WORK SITE RAIDS

A government raid on an employer's work site is also beyond the scope of this discussion. However, it is important to note that these raids can result in numerous issues including violation of the privacy rights of employees, lengthy investigations causing major disruption of the employer's business for a long period of time, negative publicity for the employer, etc. You should contact your attorney immediately in the event your worksite becomes the subject of an investigation and/or raid.

CONCLUSION

The I-9 Form is deceptively simple; however, proper completion of the I-9 Form has time and again proved to be a laborious task for employers. That difficulty is only compounded when correcting mistakes made at the time of the initial completion. Further, I-9 compliance can be complicated and result in a multitude of violations caused not merely by the employer's wrongdoing, but also by "innocent" mistakes such as a lack of proper attention to detail, failure to be consistent, overzealous attention to documents, etc. I-9 violations can result in significant fines, as well as jail time for violators. Therefore, good faith compliance through consistency, a well-trained human resources department, strict adherence to a carefully crafted policy and procedure, and regular self-auditing is essential.

E-VERIFY

BASIC OVERVIEW

E-Verify is a free, internet-based program that helps employers verify the work authorization of new hires by comparing information from the Employment Eligibility Verification I-9 Form against federal government databases to verify the worker's employment eligibility. The program is jointly operated by the Citizenship and Immigration Service ("USCIS"), an agency within the Department of Homeland Security ("DHS"), and the Social Security Administration ("SSA").

According to the U.S. government, E-Verify is advantageous for employers because it improves the accuracy of wage and tax reporting; protects jobs for authorized workers; and assists employers in maintaining a legal workforce. Despite this, Employers have been somewhat reluctant to get on board with E-Verify. Insufficient accuracy is a commonly stated reason for failure to participate in E-Verify. For example, the SSA has reported that just over 4% of its records contain discrepancies. However, the USCIS recently stated that the accuracy of the E-Verify system has greatly improved and more than 96% of verification inquiries are instantly verified as employment authorized.

The steps for proper compliance with E-Verify are discussed below. In addition, a quick reference **E-VERIFY "DO's" and "DON'Ts"** is attached as **Exhibit B**.

"SAFE HARBOR" FOR EMPLOYERS

Approximately seventeen states require use of E-Verify by some or all employers either through legislation or executive order (including Arizona, North Carolina, South Carolina, Georgia). Tennessee does not require the use of E-Verify. However, as discussed in more detail below, it has enacted a law requiring verification of employment eligibility, with E-Verify being one acceptable method of doing so. The law encourages use of E-Verify by providing to participating employers a defense, or "safe harbor," from an unlawful hiring/employment violation.

E-Verify creates a rebuttable presumption that the employer has not knowingly hired an unauthorized worker. There is a strict procedure to be followed under the E-Verify program, and it is therefore critical to become familiar with the system and follow its prescribed steps carefully. You can download a copy of the E-Verify User Manual for Employers at www.uscis.gov. This manual contains very helpful information about E-Verify and how to follow its procedures. Misuse of the E-Verify system could lead to legal action against the employer, as well as termination of access to the system.

APPLICABLE LAWS

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), requiring the SSA and the Immigration and Naturalization Service or INS (now the USCIS) to initiate an employment verification program. Initially, the program was a pilot program set to expire in September 2009; however, in July 2009, the Senate passed the FY 2010 Homeland Security Appropriations bill which permanently reauthorized the E-Verify program.

As discussed above, there are also numerous laws applicable to general I-9 Employment Verification compliance. Penalties imposed by those regulations are also discussed above. E-Verify violations can result in penalties between $550 and $1,100 for continuing to employ a worker whose employment authorization was not verified, and $5,500 for failure to promptly notify the employee of a tentative non-confirmation notice.

MANDATORY E-VERIFY FOR GOVERNMENT CONTRACTS

While participation in the E-Verify program is generally voluntary, unless you are operating in a state that mandates participation, beginning on September 8, 2009, all covered federal contractors (including prime- and sub-contractors) were required to enroll in E-Verify. In July 2008, President Bush amended Executive Order 12989 to require all federal government departments and agencies to use an electronic verification system to verify employment eligibility. DHS designated E-Verify as the system all federal contractors must use pursuant to this Executive Order. In November 2008, the Federal Acquisition Regulation ("FAR") final rule was published implementing Executive Order 12989.

Several business groups, including the United States Chamber of Commerce and Associated Builders and Contractors, Inc., filed a lawsuit challenging the rule requiring mandatory E-Verify participation for government contractors. On August 25, 2009, a federal district court upheld the mandatory E-Verify rule for federal contractors, granting the government's motion for summary judgment. The plaintiffs appealed the district court decision and filed for an emergency injunction to stay implementation of the rule pending the outcome of the appeal. The court denied the request for injunction and the mandatory E-Verify participation for federal contractors went into effect on September 8, 2009 as scheduled.

Covered Federal Contracts

Only federal contractors entering into a covered federal contract are required to participate in E-Verify. A "covered" federal contractor or subcontractor is one with a federal contract:

- awarded on or after September 8, 2009
- of more than $100,000 ($3000 if a subcontract stemming from the prime contract);
- with a performance period of longer than 120 days;
- where the work will be performed inside the United States.

Whether your federal contract requires you to enroll in E-Verify is not a determination you as a federal contract holder will have to make. The government contracting official for your contract will determine whether the contract will include the FAR E-Verify Clause (73 FR 67704). If your federal contract does not include this clause, you are not required to enroll in E-Verify. Therefore, review your contract carefully and contact your government contracting official if you are unsure if it contains the provision.

Existing Contracts

While the E-Verify mandate applies to all contracts issued after September 8, 2009, there are certain contracts, existing prior to that date, that might also trigger mandatory participation in E-Verify. If on September 8, 2009, an existing federal contract had a remaining period of performance of six months or more and a substantial amount of work to be done, the contract may be modified to include the E-Verify clause. This would apply, for example, to Indefinite Delivery / Indefinite Quantity (IDIQ) contracts.

Exempt Contracts

Certain federal contracts are exempt from the E-Verify requirement. These are contracts for commercially available "off the shelf" ("COTS") items and related services, such as contracts for supplies, food, etc. And of course contracts under $100,000, or with a performance period of less than 120 days, or for work performed outside the U.S., are also exempt.

The current understanding is that a federal contract awarding a federal grant (i.e. to an educational or healthcare institution) does not constitute a "federal contract" for purposes of the E-Verify rule. Keep in mind, of course, that such institution may still be required to participate in E-Verify if it enters into a separate "covered" federal contract.

Subcontractors

A subcontractor awarded a "covered" federal contract must verify its own employees through the E-Verify system. While the prime contractor is not responsible for verifying the employees of its subcontractors, it should ensure that its subcontracts contain the E-Verify provision and that its subcontractors comply with the provision by requesting proof of enrollment. Knowingly continuing to work with a subcontractor who is in violation of the mandatory E-Verify rule, could subject a prime contractor to penalty.

Subsidiaries and Affiliates

Only the legal entity that signs the federal contract is considered to be the contractor for purposes of mandatory enrollment in the E-Verify program. Subsidiaries or affiliates of that legal entity may or may not also be considered the contracting entity and therefore required to enroll in E-Verify. This will depend on the facts of each individual case; and it is therefore advisable to contact an attorney if you have questions with regard to this matter.

Verification Requirements

A federal contractor or subcontractor is required to verify the employment of all individuals hired during the contract term, whether or not they will be working on the federal contract. There is an exception for certain federal contractors (i.e., certain institutions of higher education, state and local governments) who are permitted to verify only new hires who will be working on the contract, as opposed to all new employees hired during the term of the contract. The employer is also required to verify all current employees performing work on the federal contract (note that this is different than a non-federal contractor employer participating in E-Verify who is prohibited from verifying current employees).

If a current employee is performing only an administrative, indirect or overhead role on the federal contract, with no substantial duties applicable to the contract, that employee need not be verified. If an employee spends only a small amount of time on the federal contract, but when he or she does work on the project it is a direct role, that employee must be verified. In addition, employees with certain security clearances need not be verified.

Even if the employee is not required to be verified under these exceptions, the employer must still complete an I-9 Form for all employees it hires. An employer with a federal contract can decide to generally participate in E-Verify and verify all workers, rather than just new hires and those working on the federal project. This might be an easier option for companies in which employees are moved from project to project and so very well may end up working on the federal contract at some point and with little prior notice. In addition to the E-Verify User Manual mentioned above, the USCIS has also issued a Supplemental Guide for Federal Contractors, that can be downloaded at www.USCIS.gov.

Verification Time Line

For employers not enrolled in E-Verify as a federal contractor at the time of the contract award:

- Enroll in E-Verify within 30 days of the contract award. If the employer is enrolled in E-Verify, but not as a federal contractor, it simply needs to update its profile.
- Begin verifying new hires within 90 days of enrollment in E-Verify. After the 90 day period, new hires should be verified within 3 business days of their start date.
- Begin verifying existing employees assigned to the contract within 90 days of enrollment in E-Verify or within 30 days of assignment to the contract, whichever is later.
- If an employer opts to verify all employees at its worksite, it must begin verification within 180 days of notifying the E-Verify program of that intention.

For employers already enrolled in E-Verify as a federal contractor, but for less than 90 days, at the time of the federal contract award:

- Begin verifying new hires within 90 days of enrollment in E-Verify (the employer may already be verifying new hires if already enrolled). After the 90 day period, new hires should be verified within 3 business days of their start date.
- Begin verifying existing employees assigned to the contract within 90 days of the contract award date or within 30 days of assignment to the contract, whichever is later.
- If an employer opts to verify all employees at its worksite, it must begin verification within 180 days of notifying the E-Verify program of that intention.

For employers already enrolled in E-Verify as a federal contractor for 90 days or more at the time of the federal contract award:

- Verify new hires within 3 business days of their start date.
- Begin verifying existing employees assigned to the contract within 90 days of the contract award date or within 30 days of assignment to the contract, whichever is later.
- If an employer opts to verify all employees at its worksite, it must begin verification within 180 days of notifying the E-Verify program of that intention.

ENROLLMENT IN E-VERIFY

In order to participate in E-Verify, an employer must enroll in the program online, execute a Memorandum of Understanding ("MOU"), and post the required notices at the hiring site. Employers enrolling as a government contractor must enroll in E-Verify within 30 days of being awarded the federal contract. The E-Verify Manual takes the employer through the enrollment process step by step. The participating employer has the responsibility to secure the privacy of its employees' employment verification information.

VERIFICATION OF EMPLOYEES

The general principals of E-Verify are very similar to those used in compliance with I-9 procedures. For example, the employer must use the program to verify all new hires. An employer does not have to verify its independent contractors (except, as discussed above, if the independent contractor is a "covered" federal subcontractor, it must sign its own MOU and perform its own verification of its employees). The E-Verify system is not for use to verify current employees (except for government contractor employers as discussed above).

As with I-9 regulations, the E-Verify program applies to both U.S. Citizens and non-citizens, meaning all employees must be entered into the program for comparison with SSA and DHS records. An employer should not use the E-Verify program selectively when they suspect a new hire is not authorized to work.

Similarly, unless you are a State Workforce Agency, an employer may not use the E-Verify system to pre-screen employment applicants. An employer should not re-verify employees it has already verified. On the other hand, verification by a previous employer does not satisfy the current employer's obligation to verify the employee.

Completing the I-9 Form

Before verifying an employee in E-Verify, the employer must complete the I-9 Form for every new hire pursuant to the I-9 procedures set forth in the previous section. While I-9 regulations state that an employer cannot request specific documents from the I-9 Form, an employer enrolled in E-Verify must require that any identification document from List B on the I-9 Form contain a picture ID. Further, while generally, provision of a social security number is voluntary, it is mandatory for employees of an employer enrolled in E-Verify.

Also, if the employee is not a U.S. Citizen or Permanent Resident, he or she must provide an alien number (A#) or I-94 number. The I-94 card is an entry card that a foreign national receives whenever he or she enters the United States. The card indicates the status in which the individual is entering and the period during which the individual is authorized to remain in the United States. The employer cannot ask to see documentation of either the alien number or I-94 number.

As a general rule, the employer need not make and/or keep a copy of the I-9 documents submitted by an employee; of course if an employer does keep such documents, it must keep them for all employees. An exception for employers participating in E-Verify is if the employee submits an I-551 (permanent resident card or "green card") or an I-766 Employment Authorization Card (also called an Employment Authorization Document or EAD), the employer must make a copy of the document for use with the photo screening tool in E-Verify.

Because of these additional requirements for E-Verify participants, and because a federal contractor must verify the employment authorization of existing employees assigned to the federal contract, the I-9 Forms of existing employees of federal contractors will need to be updated or re-verified. Some existing employees must have a new I-9 Form completed, while for others, the I-9 Form may simply be updated. The simplest option may be to complete a new I-9 Form for all existing employees required to be verified. Treating all of these employees the same, as opposed to updating existing forms when allowable and completing new forms when necessary, will help avoid a potential claim of discrimination.

Entering Information in the E-Verify System

Once the I-9 Form is completed, the employer enters the information from the I-9 Form into the E-Verify system. This must be done within three business days after the employee begins working (except that a federal contractor has 90 days after enrolling in E-Verify to begin verifying existing employees). An employer can verify the employee before the start date as long as an offer of employment has been made and accepted. If the employer does not verify the employee within this time period, it must draft a statement regarding the reason for failure to do so, attach it to the I-9 Form, and begin the verification as soon as possible. One allowable reason for delay is when the employee has applied for, but not yet been issued a social security number. In that case, the employer should delay running an E-Verify inquiry until the number has been issued AND the employer should continue to employ the employee while the application is pending.

The information submitted by the employer is compared to all records in the SSA and DHS databases. Generally, the E-Verify system will respond "Employment Authorized" meaning that the employment eligibility of the individual is verified and the case may be closed or "resolved." Make a note of the Case

Verification Number because if any problem arises, you will need that number to resolve it. If the name or photo displayed by the E-Verify system for the employee differs from the one you submitted, you should request additional verification.

RESPONDING TO A TENTATIVE NON-CONFIRMATION NOTICE

Occasionally, the employee's information cannot be immediately confirmed and the employer receives a response of "Tentative Non-Confirmation" ("TNC"). This could occur for any number of reasons such as a name change because of marriage or divorce, typographical errors or changes in citizenship status; and does not necessarily indicate employment ineligibility. The TNC could come from either the SSA or DHS, depending on which records did not match the information submitted.

If the employer receives a TNC notice, the employer must immediately provide it to the employee. I suggest reviewing it with the employee as well, along with the I-9 Form, to ensure that the information was entered correctly. The employee must indicate in the E-Verify system whether or not he or she will contest the TNC. There is a form for both the employer and employee to sign, as well as a referral letter (failure to provide the letter to the employee may constitute discrimination). A signed copy of each of these should be provided to the employee, with another copy filed with the I-9 Form. The E-Verify Manual takes you step by step through the procedure to follow upon receipt of a TNC.

If the employee decides not to contest the TNC, E-Verify will issue a "Final Non-Confirmation" ("FNC"). At this point, the employer can terminate the employee. If the employee does intend to contest the TNC, he or she must begin attempting to resolve the error within 8 federal work days and can do so by visiting an SSA Office or calling DHS (depending on which agency issued the TNC). The letter provided to the employee from the E-Verify website contains detailed instructions for the employee to follow. An employer should not ask an employee to obtain a printout or other written verification from the SSA or DHS when referring that employee to either agency. If the employee fails to begin resolving the error within the specified timeframe, an FNC will be issued and the employer may terminate the employee. As a side note, if an employer intends to continue to employ an individual on whom an FNC has been issued, the employer must notify the E-Verify system.

The employer should avoid any appearance of influencing or coercing an employee's decision about whether to contest a TNC notice. An employer must continue to employ the employee while he/she is in the process of contesting a TNC notice. Avoid taking any adverse action against the employee who is contesting a TNC notice. This might include denial or reduction of scheduled work hours, delay or prevention of training, mistreatment of the employee, requiring the employee to work longer hours or in poorer conditions, requiring the employee to provide any additional documentation of his/her employment eligibility, or subjecting the employee to any assumption that he/she is unauthorized to work. It is also advisable for the employer to check the E-Verify system daily for updates regarding the TNC notice being contested. Generally, a response will be issued between 24 hours and three days. The actions described in this paragraph should be continued until an FNC or no show response is received.

CLOSING A CASE AND/OR TERMINATING AN EMPLOYEE

If the E-Verify system responds with "Employment Authorized," the employment eligibility of the individual is verified and the case may be closed or "resolved." If a TNC is contested and successfully resolved, the system will issue an "Employment Authorized" response. If the TNC is not contested or not successfully resolved, the system will issue an FNC or an "Employment Unauthorized" or a "No Show." In order to close a case, the employer must follow the steps in the E-Verify system. Print the final Case Details Report and file it with the I-9 Form.

An employer may not terminate an employee while a verification or TNC resolution is pending, unless the termination is for reasons completely unrelated to immigration status (even this would be risky and I would strongly advise discussing it with an attorney beforehand). If the E-Verify system responds with an FNC, "Employment Unauthorized" or "No Show," the employer may safely terminate the employee.

CONCLUSION

As with any government program, time and a certain amount of "tweaking" will improve both the reliability and ease of use of the E-Verify program for employers. As noted previously, the system is already statistically far more reliable than it was at its initial launch. Whether participation in the E-Verify program is something worth considering for your company will depend on many factors (the most obvious, of course, being whether you intend to bid for federal contracts).

If you do decide to participate, strict adherence to the procedures is critical, given the potential liability for failure to properly comply. While an attorney can guide you in developing policies and procedures for participation in E-Verify, advise you in addressing issues that arise and assist with regular audits of I-9 and/or E-Verify files, of even more importance is proper training of the individuals who will be responsible for implementing and following the I-9 and E-Verify procedures. Consistency is the key to successful participation in the program.

TENNESSEE LAWFUL EMPLOYMENT ACT

Over the past few years, several states have addressed a perceived shortcoming in existing federal immigration laws by passing state laws requiring the use of E-Verify in certain circumstances, as well as other laws to address and/or curb the "problem" of illegal immigration.

Existing Tennessee law prohibits the knowing hiring and/or employment of "illegal aliens". Tenn. Code Ann. §50-1-103. In 2011, the Tennessee Legislature passed the Tennessee Lawful Employment Act ("TLEA"), modifying existing Tennessee immigration law and purporting to extend its and the existing federal law's restriction on employment of undocumented workers. Tenn. Code Ann. §50-1-701 *et seq*. In a nutshell, the TLEA imposes employment eligibility verification requirements on Tennessee employers and becomes effective on staggered dates during 2012 and 2013 depending on the type and size of employer.

It is important to keep in mind that the Tennessee law provides for *additional* requirements; all U.S. employers must also continue to verify the employment eligibility of employees through document verification and completion of the I-9 Form pursuant to federal law, specifically the Immigration Reform and Control Act of 1986 ("IRCA"). See, Tenn. Code Ann. §50-1-711. In addition, employers continue to be prohibited from hiring/employing "illegal aliens" under IRCA and TCA §50-1-103, and subject to all penalties set forth in those regulations.

REQUIREMENTS

The TLEA requires employers to verify the employment eligibility of all new hires. For employees, the employer may do this using one of two methods: (1) verify each new employee in the federal E-Verify system; ***or*** (2) obtain and maintain a copy of an identification document for each new employee.

Note that an employer must select the same method of compliance with the TLEA for all new employees. In other words, it cannot E-Verify a portion of its employees and obtain an identification document for others. Employers are under the same obligation of consistent treatment of employees under federal employment verification laws.

For employers wishing to enroll in E-Verify who do not have internet access, the Tennessee Department of Labor and Workforce Development ("TDOLWD") can provide assistance. Essentially, the employer will enter into an agreement with the TDOLWD and the Department of Homeland Security ("DHS") permitting the TDOLWD to enroll the employer in E-Verify and conduct the employment verification of the employer's new employee. Additional information can be obtained on the TDOLWD's website at www.tn.gov/labor-wfd.

NON-EMPLOYEES

The TLEA requires that employers also verify the employment eligibility for a "non-employee providing labor or services," such as an independent contractor. Such individuals cannot be confirmed using E-Verify; therefore, the employer must obtain and maintain an identification document for these workers. Federal I-9 regulations, in contrast, contain an exception to the employment verification requirement for independent contractors.

Under the TLEA, a "non-employee" is an individual who is paid directly by the employer in exchange for the individual's labor or services. Tenn. Code Ann. 50-1-702. If an employer contracts services from an outside entity (i.e. Limited Liability Company or Corporation), as opposed to an individual, then no action is required to verify that company's employees.

ACCEPTABLE DOCUMENTS

Acceptable identification documents for purposes of compliance with the TLEA include the following:

- A valid (unexpired) Tennessee driver's license or photo identification;
- A valid (unexpired) driver's license or photo identification from another state as long as the license requirements are at least as strict as those in Tennessee (as determined by the Department of Labor and posted on its website);
- A valid (unexpired) U.S. passport;
- A birth certificate issued by a U.S. state, jurisdiction or territory;
- A certified birth certificate issued by the U.S. government;
- A certificate of birth abroad;
- A U.S. certificate of citizenship;
- A U.S. certificate of naturalization;
- A U.S. citizen identification card;
- A U.S. lawful permanent resident card; or
- Valid alien registration documentation or other proof of current immigration registration recognized by the U.S. Department of Homeland Security that contains the individual's complete legal name and current alien admission number or alien file number (or numbers if the individual has more than one number).

Tenn. Code Ann. §50-1-703(a)(1).

Many, but not all, of these documents are also acceptable for compliance with I-9 requirements. An employer should not assume a document collected for compliance with the TLEA will also satisfy I-9 requirements.

While the TLEA does not specifically prohibit an employer from requesting a specific document, keep in mind that I-9 regulations require that an employee be permitted to select the document(s) he/she wishes to present from the list of acceptable documents on the I-9 Form.

TIMELINE FOR OBTAINING DOCUMENTS

While the TLEA does require the employer to enroll in E-Verify (assuming it chooses this method of compliance) prior to the hiring of new employees on or after the applicable phase in period, it does not state that the employee's information must be entered into the E-Verify system prior to the employee's first day of work. Tenn. Code Ann. §50-1-703(a)(1)(B)(ii). Therefore, presumably the employer continues to have the three (3) days within which to enter the employee's I-9 information into the E-Verify system as it does under the federal E-Verify regulations.

Employers electing instead to obtain an identification document, must do so *prior* to the employee beginning work (or the non-employee providing any services). Tenn. Code Ann. §50-1-703(a)(1)(B)(i). In contrast, the federal I-9 law gives employers three days from the employee's start date (the first date upon which the employee performs services for which he/she is paid) within which to review documents and complete Section Two of the I-9 Form. Keep in mind that Section One of the I-9 Form is to be completed by the employee on or before his/her start date.

MAINTAINING DOCUMENTATION

The TLEA requires employers to maintain a copy of the identification document or the case verification report generated by the E-Verify system. Tenn. Code Ann. §50-1-703(a). In contrast, I-9 regulations do not impose a requirement that the document(s) be maintained, only that it be examined and recorded on the I-9 Form.

Similar to the federal law (when an employer does choose to maintain its I-9 documentation), the Tennessee Lawful Employment Act requires an employer to maintain the identification documentation for *the later of* three years after the employee's hire date or one year after his or her termination date. Tenn. Code Ann. §50-1-703(a)(3).

PHASED APPLICATION

The TLEA becomes applicable to employers in phases, beginning on January 1, 2012, and depending on the size of the employer. Employers with five (5) or fewer employees are exempt from the TLEA. Government (state and local) employers, and employers with 500 or more employees, must comply by January 1, 2012. Employers with 200 to 499 employees must comply by July 1, 2012. Employers with six (6) to 199 employees must comply by January 1, 2013. §Tenn. Code Ann. 50-1-703(b)

While not made clear in the TLEA, TDOLWD's website states that the employer's total number of employees for purposes of determining the effective date includes not only those employees working in Tennessee, but also employees at the employer's operations in other states, if any.

INQUIRY BY THE TN DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT

The TLEA mandates that the TDOLWD oversee compliance with the TLEA through inquiry, investigation and inspection. Tenn. Code Ann. 50-1-703(a)(6). Such oversight may be based on a "routine" inquiry by the TDOLWD, or one initiated based on a complaint received by the TDOLWD. Any Tennessee resident or federal employee can lodge a complaint of non-compliance with the TDOLWD. As long as the complaint is supported by satisfactory evidence, the TDOLWD will conduct an investigation. Tenn. Code Ann. §50-1-703(c).

When requested by the TDOLWD pursuant to an inquiry, employers are required to submit documented proof of compliance with the TLEA. Such proof must consist of either a copy of one of the eleven acceptable identification documents for each newly hired employee and non-employee; or a copy of a case verification report from the E-Verify system showing that each newly hired employee is authorized to work and a copy of one of the eleven acceptable identification documents for each newly hired non-employee.

Failure to respond to an inquiry by the TDOLWD within 30 days automatically results in the issuance of an initial order of non-compliance against the employer. Tenn. Code Ann. 50-1-703(a)(6).

PENALTIES

The penalties upon TDOLWD issuance of an order of non-compliance of the Tennessee Lawful Employment Act are as follows:

- First Offense = $500 penalty + $500 per employee or non-employee not verified or for whom a copy of identification documentation is not maintained. The Commissioner of the TDOLWD

shall waive the fine for a first offense if he or she finds that the employer complies with all remedial measures within 60 days and that the violation was not "knowing."

- Second offense = $1,000 penalty + $1,000 per employee or non-employee not verified or for whom a copy of identification documentation is not maintained.
- Third offense = $2,500 penalty + $2,500 per employee or non-employee not verified or for whom a copy of identification documentation is not maintained.

Tenn. Code Ann. §50-1-703(f). The employer has the right to appeal a finding by the TDOLWD. Tenn. Code Ann. §50-1-703(d)(2).

Failure to submit evidence of compliance to the TDOLWD within 60 days of the final order of non-compliance may result in suspension of the employer's business license until it remedies the violation. Tenn. Code Ann. §50-1-703(f)(3).

Further, the TDOLWD will post on its website a list of employers against whom a final order has been issued, to include the employer's name, place of business, a brief description of the violation, designation as a first or subsequent offense, and any penalties assessed. Tenn. Code Ann. §50-1-705.

For employers that choose to E-Verify new hires, failure to terminate the employment of any individual for whom a final non-confirmation is issued by the E-Verify system, may be considered by the TDOLWD when making a determination pursuant to the prohibition against unlawful hiring/employment of an "illegal alien" under T.C.A. §50-1-103.

And, as discussed previously, employers are also liable under federal law for hiring/employment and document violations.

SAFE HARBOR

Like federal immigration law, the TLEA provides the employer with an absolute defense, or "safe harbor," to a charge of unlawful hiring/employment of an undocumented worker if it enrolls in and uses E-Verify to verify the employment eligibility of its new employees. Tenn. Code Ann. §50-1-703(a)(1)(C)(i). The safe harbor also applies in situations where the employer receives a tentative non-confirmation of the employee's eligibility to work, but the employee disputed the non-confirmation and the case is pending, or the employee has not yet disputed the non-confirmation but the time for him or her to be able to do so has not yet expired.

This defense *is not available* if the employer uses the alternative method of obtaining one of the listed identification documents. The TLEA specifically states that "No employer shall prevail in any proceeding where a violation of Section 50-1-103 is alleged if the sole evidence presented by the employer is evidence of compliance with subdivisions (a)(1)(A) or (a)(1)(B)(i)." Tenn. Code Ann. §50-1-703(a)(1)(C)(ii).

UNANSWERED QUESTIONS

Several important issues remain unclear from the language of the TLEA. First, it does not appear to distinguish between in-state and out-of-state employers. For example, would an employer operating in several states be required to take these additional steps to verify the employment eligibility only for employees in Tennessee? If so, this could have the potentially damaging effect of employers relocating their operations to other states. The TLEA defines an "employee" as "any individual for whom an employer must complete a Form I-9 pursuant to federal law…" Tenn. Code Ann. §50-1-702. This could

be interpreted to include all the employer's employees, even if employed outside the state of Tennessee. But again, it is unclear.

Another example of the lack of clarity under the TLEA is whether an employer may select the identification document to be presented. Under I-9 regulations, employers are specifically prohibited from requesting a particular document and must accept whatever document the employee provides as long as it is listed on the I-9 Form, and appears to be genuine and relate to the individual. Failure to comply with this provision of the federal law could result in evidence of national origin discrimination on the part of the employer. The TLEA, on the other hand, does not appear to prohibit employers from requesting a particular identification document from the list. Regardless, in complying with the TLEA, it would be wise either to provide a list of acceptable documents to the employee and request that he or she chose one of them to submit; or be sure to keep your I-9 procedure and your TLEA procedure entirely separate so that when you request a particular document to satisfy the TLEA, you are not using that same document to satisfy I-9 requirements (unless the employee subsequently chooses to provide the same document for I-9 purposes).

Finally, it is unclear whether an employer will be given the benefit of the "good faith compliance" defense offered under federal I-9 regulations. Again, Tennessee employers who opt to retain one of the listed documents as verification of employment eligibility, may not avail themselves of the "safe harbor" provided to employers who enroll in E-Verify. This is equally true under federal law. However, under federal law an employer's good faith attempt to comply with the law by reviewing the required documents can constitute an affirmative defense against unlawful hiring.

The TDOLWD has been authorized to promulgate rules and regulations to effect and enforce the TLEA. However, as yet, the TLEA is too new to have resulted in additional regulations interpreting its provisions and/or clarifying some of these issues.

CONCLUSION

It is clear that Tennessee employers are facing the ever more complicated task of complying with a mishmash of sometimes conflicting federal and state laws and regulations designed at confronting illegal immigration. However, despite the many unresolved issues regarding compliance with and enforcement of the TLEA, the bottom line is that it does not at this point appear to impose significantly greater obligations than employers already have under existing federal law.

EXHIBIT A

I-9 "DO's" and "DONT's"

- DO implement a written policy/procedure for I-9 compliance.
- DO implement a written policy prohibiting the use of undocumented workers and display the policy at every job site.
- DO hold regular training sessions for managers, supervisors and any other employee responsible for I-9 compliance.
- DO NOT limit jobs to US Citizens (unless required by law or government contract).
- DO NOT institute a blanket policy of preferring a U.S. Citizen over a foreign national.
- DO NOT use a work authorization expiration date as a basis for judging whether the individual is qualified for the position.
- DO NOT request to see employment verification documents prior to hire simply because you believe the person is "foreign."
- DO have the employee complete Section One of the I-9 Form on or before the first day of employment.
- DO review Section One to ensure that there are no omissions and that the employee signed and dated the Form.
- DO NOT request documents to support any information provided by the employee in Section One.
- DO keep separate from the I-9 process any request for a Social Security Card or check of a Social Security Number for purposes of completing the employee's Form W-2.
- DO complete Section Two of the I-9 Form on or before the third day of employment.
- DO be sure to provide all information requested in Section Two.
- DO NOT request specific documents from the employee for purposes of completing Section Two.
- DO show the employee the list of acceptable I-9 documents and allow him/her to select what document(s) to present.
- DO NOT require different or additional documents than required by the I-9 Form.
- DO NOT reject a document that reasonably appears to be genuine and relate to the employee.
- DO NOT make and keep copies of I-9 documents for some, but not all, employees.
- DO track work authorization documents that expire and re-verify the employee's work authorization by the date of expiration.
- DO NOT re-verify List B documents upon expiration (i.e. driver's license).
- DO complete Section Three of the I-9 Form when re-verifying documents.
- DO NOT discard I-9 documents unless it has been one year since the employee was terminated (or three years after the employee was initially hired if that period would be longer).
- DO NOT treat non US Citizens (or those who are perceived to be "foreign") differently with regard to employment decisions.

EXHIBIT B

E-VERIFY "DO's" and "DON'Ts"

E-VERIFY "DO'S"

- Update your employer profile in E-Verify when any changes occur such as termination of a federal contract, termination of participation in E-Verify, etc.
- Post the required E-Verify notices in plain view at the hiring site.
- Complete an I-9 for an employee within 3 business days of his/her first day of employment.
- Request documentation of work authorization if employee presents a Social Security Card noting "valid for work only with DHS authorization."
- Require submitted List B documents to contain a photo ID.
- Require an employee to provide a Social Security Number (not required under I-9 regulations, only if also enrolled in E-Verify).
- Require an employee to provide an Alien Registration Number or I-94 number if the employee is not a U.S. Citizen or Permanent Resident (also required under I-9 regulations).
- Keep copies of I-9 documents (containing information entered in E-Verify) for all or none of your employees.
- Make and keep a copy of an I-551 U.S. Permanent Resident ("Green") Card or I-766 Employment Authorization Document (EAD) if submitted by the employee.
- Verify the employee in E-Verify within 3 business days of the employee's first day of employment.
- Note the reason if unable to begin verification within the required timeframe and attach it to the Form I-9.
- Verify all new hires, whether U.S. Citizens or not.
- Verify employees even if they have already been verified by a previous employer.
- Secure the privacy of employment verification information by protecting passwords and limiting access to the information.
- Notify an employee immediately upon receipt of a TNC and follow steps set forth in the E-Verify system for contesting the TNC.
- Provide the employee with a DHS or SSA referral letter if the employee decides to contest the TNC.
- Place a copy of the signed TNC form and referral letter in the I-9 file.
- Allow an employee to continue working while the verification process or TNC resolution is pending.
- Check E-Verify daily for updates regarding a pending case.
- Print a final Case Details Report for closed ("resolved") cases and file it with the I-9.
- Notify the E-Verify system if you intend to continue to employee an individual who received an FNC.

Additional "Do's" For Federal Contractors

- Enroll in E-Verify within 30 days of being awarded a federal contract (as of September 8, 2009).
- Begin verification of current employees within 90 days from the date of enrollment in E-Verify.
- Verify all current employees who will be working on the federal contract.

E-VERIFY "DON'Ts"

- Require specific documents from an employee for I-9 completion (except to the extent that List B documents must contain a photo ID).
- Require documentation of an Alien Registration Number or I-94 number provided by an employee who is not a U.S. Citizen or Permanent Resident.
- Begin verification of the employee if the employee has an application for a Social Security Number pending.
- Terminate an employee while an application for a Social Security Number is pending.
- Verify current employees (unless a federal contractor and then may verify current employees who will work on the contract).
- Use E-Verify to discriminate against an employee.
- Use E-Verify selectively.
- Use E-Verify to prescreen applicants.
- Re-verify employees who have already been verified by you.
- Coerce or influence an employee's decision about whether to contest a TNC.
- Take any adverse action against an employee during the verification process or while a TNC resolution is pending.
- Require documentation from an employee related to contesting the TNC.
- Terminate an employee while a TNC resolution is pending.