# **Tennessee Immigration** Law Update

Kate E. Tucker, Partner **Kramer Rayson LLP TCPA Employment Seminar** November 13, 2012

800 S. Gay Street, Knoxville, TN 37929 • (865) 525-5134

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# I-9 Compliance

- ☐ Must verify employment eligibility:
  - Inspection of Documents (identification & employment authorization).
    Completion of I-9 Form.

  - For all employees, not just "the foreigners".
- ☐ I-9 Employer Handbook (<u>www.uscis.gov</u>)
- Written materials
- ☐ Exhibit A I-9 "DO's & DON'Ts"

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# WHY SO IMPORTANT?

- □ DHS Audits (all types of employers)
- □ Penalties (civil = money / criminal = jail)
  - Hiring/employing illegal aliens
  - Document violations
- □ Balance unlawful hiring & unlawful discrimination

# **RECOMMENDATIONS**

- $\hfill\Box$  Written policy and procedure.
- ☐ Training for employees responsible for I-9 compliance.
- □ Careful completion (careless mistakes = fines).
- □ Self-Audits (to catch mistakes and track reverification).
- □ Proper correction (improper correction = fines).
- □ Termination (consult an attorney).

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# **Special I-9 Issues**

- □ Requesting docs/info for other purposes.
- $\Box$  Start date = 1<sup>st</sup> day of work for pay.
- □ Employer must check inconsistencies.
- □ Off site employees.
- □ Re-verification
  - Documents NOT to re-verify.
  - Rehire within 3 years.
  - Interruptions in Employment.

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## **E-VERIFY**

- □ Free
- □ Internet Based
- □ Operated by SSA & DHS
- □ Not mandatory (unless federal contractor or mandated by state law)

# KRAMER RAYSON LLP **VERIFICATION PROCESS** □ MUST STILL COMPLETE THE I-9 FORM! □ Verifies I-9 information against SSA and DHS records. □ Results: Confirmation – authorized Tentative Non-Confirmation - needs resolution (strict procedure) Final Non-Confirmation - can terminate □ E-Verify User Manual (<u>www.uscis.gov</u>) ■ Written Materials □ Exhibit B – E-VERIFY "DO's & DON'Ts" 800 S. Gay Street, Knoxville, TN 37929 • (865) 525-5134 KRAMER RAYSON LLP **BENEFITS** ☐ "Safe Harbor" – rebuttable presumption of no unlawful hiring/employment. ☐ Relatively user friendly. **DETRIMENTS** ☐ Additional step in process. ☐ Inaccuracy in SSA and DHS records (name changes, multiple names, etc.) lacksquare Additional penalties for improper compliance (i.e. failure to notify employee) 800 S. Gay Street, Knoxville, TN 37929 ■ (865) 525-5134 KRAMER RAYSON LLP TENNESSEE LAWFUL **EMPLOYMENT ACT ("TLEA")** Tenn. Code Ann. §50-1-701 et seq

# KRAMER RAYSON LLP **EXISTING LAW** □ Immigration Reform and Control Act of 1986 (IRCA) □ Tennessee Code Annotated §50-1-103 □ GOAL OF TLEA = toughen restrictions on illegal employment. **EXISTING LAWS STILL APPLY!** KRAMER RAYSON LLP REQUIREMENTS □ All New Employees (choose one) E-Verify Identification Document □ Be Consistent □ No internet access? Ask TDOLWD KRAMER RAYSON LLP **NON-EMPLOYEES** ☐ Cannot E-Verify / must obtain identification document. ☐ I-9 regulations: no verification required for independent contractors. ☐ Individual paid directly for labor/services (independent contractor).

☐ Does NOT apply to companies.

# ACCEPTABLE DOCUMENTS Driver's License – issued in Tennessee; Driver's License – issued by another state; U.S. Passport; Birth Certificate – issued by U.S. state, jurisdiction or territory; Birth Certificate – issued by U.S. government; Certificate of Birth Abroad – issued by DOS; Certificate of U.S. Citizenship; Certificate of U.S. Naturalization; U.S. Citizen Identification Card; U.S. Lawful Permanent Resident ("Green") Card; Proof of immigration status authorizing work.

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#### **DOCUMENTATION – I-9 v/s TLEA**

- □ Document lists are similar but not identical.
  - Don't assume dual compliance.
- □ I-9 prohibits document selection by employer.
  - TLEA does not.
  - Either allow employee to choose, OR
  - Keep document requests separate.

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## **TIMELINE**

- □ E-Verify unclear
  - Enroll prior to hiring new employees.
  - Advice: enter information w/in 3 days.
- □ Identification Documents
  - Prior to beginning work (employee).
  - Prior to beginning service (non-employee).
  - Stricter than I-9 requirement of 3 days.

#### MAINTAINING DOCUMENTATION

- What to Retain:
  - o Copy of identification document; OR
  - o Copy of E-Verify case verification report.
  - o I-9 regulations do NOT require retention of documents.
- □ Period of Retention:
  - o Duration of employee's employment; AND
  - o The later of:
    - · 1 year after termination date; OR
    - · 3 years after hire date.

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#### PHASED APPLICATION

- $\hfill\Box$  January 1, 2012 government employers & those with 500 or more employees.
- □ July 1, 2012, employers with 200 to 499 employees.
- □ January 1, 2013 employers with 6 to 199 employees.
- □ Employers with fewer than 6 employees are exempt.
- □ TDOLWD: out-of-state employees "count".

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# **TDOLWD INQUIRY**

- □ TDOLWD oversees compliance.
- ☐ Investigation of employer's compliance based on:
  - o Routine inquiry, or
  - o Complaint (TN resident or federal employee)
- ☐ Failure to submit proof w/in 30 days = Initial Order of Non-Compliance.

#### **MONETARY PENALTIES**

- First Offense (waived if violation not "knowing" & remedial measure taken)
  - o \$500 penalty
  - \$500 per employee/non-employee
- □ Second Offense
  - o \$1,000 penalty
  - o \$1,000 per employee/non-employee
- □ Third Offense
  - o \$2,500 penalty
  - o \$2,500 per employee/non-employee

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# **OTHER PENALTIES**

- □ Failure to submit evidence within 60 days of final order = suspension of business license.
- Employer information posted on TDOLWD website:
  - o Name
  - o Place of Business
  - o Description of Violation
  - Designation of Offense (first, second, third)
  - o Penalties Assessed

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# **SAFE HARBOR**

- □ Absolute defense to unlawful hiring/employment charge.
- Who gets it?
  - o IS available to employers using E-Verify.
  - IS NOT available to employers accepting identification documents.

# **UNANSWERED QUESTIONS**

- □ Does it apply to out-of-state employees?
- □ Can the employer select the identification documentation?
- □ Is the "good faith compliance" defense available?

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## **CONCLUSION**

- □ No significant differences.
- □ But E-Verify may be simpler.
- □ Wait for TDOLWD to promulgate regulations interpreting/clarifying TLEA.

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## **IMMIGRATION REFORM**

- □ Surprise: Obama administration has deported more undocumented individuals per year than any other in U.S. history!
- □ 2010 almost 400,000 removed (same in 2011).
- □ All sides agree reform is needed (just disagree on the solution).

## **DACA**

- □ Stop-gap provision until immigration reform.
- □ Deferred Action for Childhood Arrivals.
  - For "dreamers"
  - Approximately 1.7M young people affected.
- □ Presidential Directive June 2012
  - Bush deferred action for Liberians (2007)
  - Bush E-Verify for govt contractors (2008)

## **DEFERRED ACTION**

- □ Temporary relief from removal/deportation
  - Good for 2 years.
  - Renewal if extended by current administration.
- □ Doesn't confer lawful status.
- ☐ Benefits (aside from not removal for 2 years)
  - Work authorization (with petition, if needed)
  - Driver's license through EAD (not in all states)
  - Travel authorization (post approval, if needed)

# **REQUIREMENTS**

- □ Under 31 on June 15, 2012.
- □ Under 16 when brought to U.S. illegally.
- □ Continuous residency since June 17, 2007.
- □ Present in the U.S. on June 15, 2012.
- ☐ In school, graduated (incl. GED), or honorably discharged from the military.
- □ No felony, significant misdemeanor, 3 minor misdemeanors, or constitute a threat.

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# Arizona Law (SB 1070)

- □ "Attrition through Enforcement"
  - Aggressive enforcement = self deportation.
- □ 4 Provisions at Issue
  - Section 3 Additional state penalty for not registering or carrying required I.D.
  - Section 5(c) Prohibits applying for or soliciting work.
  - Section 6 Police can arrest without a warrant if "probable cause" indicates removable offense.
  - Section 2(b) Police can check status based on "reasonable suspicion" of unlawful presence.

# U.S. v/s ARIZONA

- □ Obama Administration filed suit (preemption)
- ☐ Amicus Briefs (by individuals, cities, counties, states and foreign countries)
- □ Supreme Court strikes 3 of 4 provisions
  - Leaves Section 2(B) open for challenge.
- □ A blow to state immigration laws?
  - If laws are sufficiently similar.
  - Not laws addressing other issues (i.e. AL HB56)

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