

IMMIGRATION LAW ALERT FOR MICHIGAN EMPLOYERS

BY AZIZA YULDASHEVA

Recent developments in immigration-related laws, as well as increased government enforcement of these laws, make it imperative for employers to carefully review and, if necessary, revise their internal compliance programs and policies. This summary addresses several points of change and concern for employers.

FORM I-9

Employers are required to complete and retain Form I-9 for all new employees. Employers must verify the employee identity and work authorization documents using Form I-9. The current form is dated May 31, 2005, and its OMB control number expired on March 31, 2007. The government is working on a new version of the form, which is not yet available. Although the 2005 form (Form I-9) has expired, employers are still required to comply with employment eligibility verification responsibilities. Further, regardless of the advertisements by various vendors, *the Department of Homeland Security ("DHS") instructs employers to continue to use the current version of the Form I-9, dated May 31, 2005, until an updated form is posted.* Form I-9 can be found at <http://www.uscis.gov/files/form/i-9.pdf>

SOCIAL SECURITY NO-MATCH RULE

The U.S. Government has recently amended the regulations relating to the unlawful hiring or continued employment of unauthorized aliens. The new rule is titled "*Safe-Harbor Procedures for Employers Who Receive a No-Match Letter*" and has an effective date of August 14, 2007. The rule

requires employers who receive a notice of discrepancy from the Social Security Administration ("SSA") or the DHS to take certain steps to avoid liability. If the no-match issue is not resolved as required, the employer may have to either terminate the employee or risk potential liability under the applicable laws.

"Although the 2005 form (Form I-9) has expired, employers are still required to comply with employment eligibility verification responsibilities."

On October 10, 2007, the United States District Court for the Northern District of California issued a preliminary injunction, which stops the government from implementing the new rule while the lawsuit seeking a permanent injunction is pending. If the injunction is dissolved by

the trial court or an appellate court, the regulation will take effect. In the interim, if an employer receives a no-match letter from the government, the employer should immediately contact its attorney.

BACKGROUND

Under the Immigration and Nationality Act, it is unlawful to hire an alien for employment in the United States knowing that the alien is an unauthorized alien with respect to such employment. It is also unlawful, after hiring the alien in compliance with the laws, to continue to employ the alien knowing that the alien is or has become unauthorized. Under the corresponding regulations, "knowing" means actual knowledge or constructive knowledge. The regulations define constructive knowledge as "knowledge that may fairly be inferred through notice of certain facts and circumstances that would lead a person, through the exercise of reasonable care, to know about a certain condition." The regulations provide several non-exclusive examples of situations where the employer may have constructive knowledge

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that the alien is not authorized. The regulations caution that knowledge may not be inferred from an employee's foreign appearance or accent.

THE NEW RULE

According to the federal register, the final rule adds two more examples of constructive knowledge. These additional examples involve an employer's failure to take "reasonable steps" in response to either of two events: (1) the employer receives a written notice from the SSA (such as an "Employer Correction Request" commonly known as an employer "no-match letter") that the combination of name and Social Security account number submitted to the SSA for an employee does not match agency records; or (2) the employer receives written notice from the DHS that the immigration status or employment-authorization documentation presented or referenced by the employee in completing Form I-9 was not assigned to the employee according to DHS records.

The amended regulation describes the "safe-harbor" procedures that the employer may follow in response to a no-match letter. These procedures allow the employer to be protected from the DHS using the no-match letter as part of an allegation that the employer had the prohibited constructive knowledge. The "safe-harbor" procedures include attempting to resolve the no-match and, if it cannot be resolved within a certain period of time, verifying again the employee's identity and employment authorization through a specified process. The employer must complete these procedures within 93 days in order to have the benefit of the safe harbor.

The rule states that DHS will continue to review the totality of relevant circumstances in determining if an employer had constructive knowledge in a situation described in any of the regulation's examples. Thus, the final rule does not provide a safe harbor for employers that for some other reason have the prohibited actual or constructive knowledge. On the other hand, there may be other procedures a particular employer could follow in response to a no-match letter, procedures that would be considered reasonable by DHS. However, an employer that fol-

lowed a procedure other than the "safe-harbor" procedures described in the regulation would face the risk that DHS may not agree.

EFFECT OF THE PRELIMINARY INJUNCTION

If an employer receives a no-match letter while the preliminary injunction is in effect, the employer should contact its employment lawyer. The lawyer may recommend that the employer follow the safe harbor procedures described in the new rule. Such procedures could be considered the required "reasonable steps," potentially defeating a claim that the employer had constructive knowledge that the employee was an unauthorized alien. If the employer follows the safe harbor procedures and does not resolve the discrepancy, the employer should contact its lawyer before taking further steps.

"It is critical for employers to have up-to-date internal compliance programs and to keep abreast of developments in the employment and immigration laws."

CONCLUSION

It is critical for employers to have up-to-date internal compliance programs and to keep abreast of developments in the employment and immigration laws. Contact your Fraser Trebilcock Davis & Dunlap, P.C. labor and employment attorney if you receive a no-match letter from the Social Security Administration or the Department of Homeland Security. Also contact your Fraser Trebilcock Davis & Dunlap, P.C. attorney if you would like to discuss the new employment rules, if you would like information about government systems, including the E-Verify system, designed to help employers determine employment eligibility, or if you would like to undergo training in I-9 compliance and documentation of employment authorization.

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Aziza Yuldasheva is an attorney with Fraser Trebilcock Davis & Dunlap, P.C., specializing in Immigration Law. If you have any questions regarding the topics in this issue or Immigration Law in general, you may contact her at (517) 377 0869 or by email at ayuldasheva@fraserlawfirm.com

ATTORNEY ACTIVITIES OF NOTE:

■ LINDMAN ADDRESSES CPA CONFERENCE

Darrell Lindman, shareholder with Fraser Trebilcock, addressed the Michigan Association of Certified Public Accountants at their Nonprofit Conference, held at the Lansing Center on October 2nd. Mr. Lindman spoke on 'Retirement Plan Options for Exempt Organizations.' His focus was on retirement plans and deferred compensation alternatives that are unique to exempt organizations, including 403(b) plans, 457(b) plans, and nonqualified deferred compensation plans under Code Section 457(f).

■ MILLER EXPLAINS MBT TO GLAR

John Miller, associate with Fraser Trebilcock, addressed the Greater Lansing Area REALTORS® on the new Michigan Business Tax on October 4th at the offices of the GLAR. There were over 50 realtors and business people from the greater Lansing area in attendance. John's presentation addressed such various components of the new MBT as the Business Income Tax, modified Gross Receipts Tax, the extensive credit and incentive system, the allocation system for multi-state business, and the new nexus standards.

■ PERRY GIVES ROCK SOLID COUNSEL

Michael H. Perry, shareholder with Fraser Trebilcock, spoke at the 44th Annual Meeting of the American Institute of Professional Geologists. The meeting was held October 8th-10th at the Park Place Hotel in Traverse City, MI. His presentation was entitled "The Relationship between the Geologist and Counsel in the Civil Litigation Process."

The message pertained to how a client's attorney and geologist can best work together to maximize that client's opportunity for success in an environmental litigation case. He discussed the need for the parties to communicate timely and effectively about the costs of the project, the goal or task to be achieved, the process by which the parties will work toward that goal, and the need for all of the parties (lawyer, geologist, client) to remain focused upon that goal until the matter is completed, illustrating the practical aspects of each topic with examples from past and present cases.*

*(Client confidentiality was preserved throughout.)

■ HARRIS & MOYNE TALK 'BOTTOMLINE' IP

On October 18, Toni L. Harris and Mary M. Moyne, shareholders with Fraser Trebilcock, spoke at the Lansing Regional Chamber of Commerce's Bottom Line Breakfast, a monthly event presenting topics of interest and timeliness to the Capital Area business community.

Ms. Harris and Ms. Moyne, whose practices focus on Intellectual Property, addressed the breakfast audience on such matters as patents, copyrights, trademarks, trade secrets and trade dress. Rather than luxuries, attorneys Harris and Moyne pointed out that these are valuable corporate assets, vital to the success of any business. In today's global marketplace, businesses of every size must be knowledgeable about whether and when they have intellectual rights of others and how to avoid or minimize such exposure.

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YULDASHEVA AND CRABTREE ELECTED TO STATE BAR SECTIONS

Last month, at the Annual Meeting of the State Bar of Michigan International Law section, Aziza Yuldasheva was elected to the Section Council for a three year term.

The International Law Section of the State Bar of Michigan provides education, information and analysis about issues of concern through meetings, seminars, the State Bar of Michigan website, public service programs, and publication of the journal, *The Michigan International Lawyer*.

In addition, Graham Crabtree was elected to a three-year term on the Appellate Law Section Council, which is a small group of preeminent appellate lawyers who govern the Appellate Section of the State Bar of Michigan.

The Section addresses issues of interest to appellate practitioners, interacts with appellate court judges and staff, and makes recommendations for beneficial changes in the law and court rules governing appellate practice in the state and federal appellate courts.

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Plato

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