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Insight — February 21, 2007

The largest immigration sweep in U.S. history, which netted almost 1,300 unauthorized workers, took place in December at the facilities of Swift & Co. in six different states, including Colorado. Even before the Swift & Co. raids, however, compliance with immigration laws has been an area of primary concern for employers. This is even more true for Colorado employers as Colorado recently enacted new legislation designed to ensure compliance with federal laws that prohibit the employment of unauthorized workers.

Of the newly-enacted laws, two in particular are impacting the practices of Colorado employers. These laws impose new employment verification requirements on Colorado employers. The first law, Colorado House Bill 1017 (HB 1017), will impact all employers, while the second law, Colorado House Bill (HB 1323), impacts only employers who contract with the State of Colorado or other political subdivisions. This article addresses these two laws and the particular changes that employers need to make to their employment verification procedures in order to comply.

Colorado's Verification Requirements Go Beyond Federal Law

HB 1017 (C.R.S. § 8-2-122), which was signed into law by Governor Bill Owens on July 31, 2006, creates affirmation and documentation requirements that go beyond what is required by the federal Immigration Reform and Control Act ("IRCA") and its I-9 requirements. The law took effect on January 1, 2007 and applies to all employers in the State of Colorado.

Under HB 1017, employers in Colorado are now required, within twenty (20) days of hiring a new employee, to: (a) affirm that the employer has examined the legal work status of the employee; (b) affirm that the employer has retained file copies of the identification documents reviewed pursuant to IRCA; (c) affirm that the employer has not altered or falsified the employee's identification documents; and (d) affirm that the employer has not knowingly hired an unauthorized alien. The Colorado Department of Labor and Employment ("CDLE") has released a form that can be used by employers to comply with this requirement. The document is entitled "Affirmation of Legal Work Status" and can be found at www.coworkforce.com

Additionally, HB 1017 requires that employers keep a copy (written or electronic) of the affirmation document and all documents that the employer used to complete the I-9 Form for the term of the employment of each employee. While under the federal law, employers are allowed, but not required, to copy the documents reviewed pursuant to IRCA at the time

of the completion of the I-9 Form, with the passage of HB 1017, copying and retaining of I-9 supporting documentation is mandatory.

With regard to the length of retention, HB 1017 requires an employer to retain the affirmation document and I-9 supporting documents only for the term of employment. Under IRCA, however, an employer is required to retain the I-9 Form for the term of employment and, after termination, either for three (3) years from date of hire or one (1) year after termination, whichever is later. It is therefore advisable that all of the documents, including the I-9 Form, the I-9 supporting documents, and the affirmation document, be kept for the longer (federally-required) period of time.

The law does not require employers to submit the affirmation document and I-9 supporting documentation to any state agency. The employer, however, must make the documentation available upon request by the CDLE. HB 1017 also allows the CDLE to audit an employer's compliance with the law. Employers who with “reckless disregard” fail to submit documentation when requested, or who with “reckless disregard” submit false or fraudulent documentation, may be fined up to $5,000 for the first offense and up to $25,000 for any subsequent offense.

New Requirements For State Contractors

HB 1343 (C.R.S. § 8-17.5-101 and 102) took effect August 9, 2006, and prohibits any governmental body (meaning any government agency or political subdivision) from entering into or renewing contract agreements with contractors who knowingly employ illegal aliens. Though undefined in the statute, the likely definition of “illegal alien” is an alien who lacks employment authorization. Although effective on August 9, 2006, HB 1343 does not operate retroactively. So, the obligations are imposed only on new or renewed agreements.

As a condition of entering into a public contract, HB 1323 requires prospective contractors to certify that they do not knowingly employ or contract with illegal aliens and that the contractor participated in (or attempted to participate in) the Basic Pilot Employment Verification Program (Basic Pilot Program). The Basic Pilot is an automated program that verifies the employment authorization of all newly hired employees by accessing the Social Security Administration (SSA) and the Department of Homeland Security (DHS) databases. To participate in the program, an employer must register and sign a Memorandum of Understanding that sets forth the responsibilities of the DHS, the SSA, and the employer.

In addition, each public contract must include specific provisions that the prospective contractor shall not: (1) knowingly employ or contract with an illegal alien to perform work under the contract; and (2) will not enter into a contract with a subcontractor that fails to certify to the contractor that the subcontractor shall not knowingly employ or contract with an illegal alien to perform work under the contract. The law also requires that the public contract include a provision requiring the contractor to verify, through the Basic Pilot Program, the legal status of its employees working under the contract and certifying that the employer has not used the Basic Pilot

Program for pre-employment screening.

Additional public contract provisions are set out in the new law that govern such things as notification requirements, termination of public contracts, and cooperation with the CDLE. For example, one provision requires that if a contractor discovers that a subcontractor is knowingly employing an illegal alien, the contractor must notify both the governmental body for whom the work is being performed and the subcontractor within three days. The contractor is also required to terminate the subcontract within three days of receiving the notice required under law, unless during that time period the subcontractor provides information to establish that it has not knowingly employed an illegal alien.

Under the new law, if a contractor violates a provision of the public contract, including the HB 1343 provisions, the governmental body may terminate the public contract and the governmental body can hold the contractor liable for actual and consequential damages that it suffers as a result of the termination. In addition the governmental body must notify the Office of the Secretary of State who, absent a court ruling that the contractor did not violate the statutory requirements, publishes a list of terminated contractors on its website for two years.

HB 1323 also authorizes the CDLE to investigate whether a contractor is complying with the provisions of the public contract, through on-site inspections and requests to review documentation. In addition, the law authorizes the CDLE to receive complaints of suspected violations, and contemplates promulgating procedures for investigation of such complaints in the future.

Bottom Line

All Colorado employers need to make sure that, under their I-9 procedures for new hires, they retain copies of the I-9 supporting documents they review at the time of completion of the I-9 Form, and complete the written affirmation required by HB 1017. In addition, employers that contract with any governmental body must participate in the Basic Pilot Program. For more information go to www.coworkforce.com

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seek the advice of your legal counsel.