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Immigration & Nationality Law Update

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State Immigration Laws: A New Minefield For Employers?

It is widely accepted that the power to regulate immigration is exclusively vested in the federal government. In 2006, however, state legislators introduced hundreds of bills to address immigration matters, including employment verification, access to public benefits and education, and identification issues. This explosion of activity stems from growing frustration with Congress' inability to pass immigration reform and what some perceive as an immigration crisis.

A primary focus for states has been enforcement of employer obligations. While the federal government already prohibits the hiring of undocumented workers under the federal Immigration Reform and Control Act of 1986 (IRCA), many state legislative efforts attempt to impose and enforce tougher sanctions on employers who hire unauthorized workers. State immigration laws are also exposing employers to new and intrusive investigative procedures by state officials. Recurring features of this type of legislation include:

- imposing state fines on employers who hire unauthorized workers;
- prohibiting the grant of government contracts to employers who hire unauthorized workers;
- revoking the business or operating licenses of such employers; and
- allowing state administered agencies to enforce immigration laws.

Most, if not all, of these state and local measures are vulnerable to federal preemption and constitutional challenges. The breadth of the Immigration and Nationality Act (INA), it has been argued, demonstrates that Congress intended to fully occupy the field of immigration regulation, thereby preempting all state immigration laws.

Most importantly, the INA clearly states that its provisions on employer sanctions "preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ or recruit or refer for a fee for employment, unauthorized aliens." According to this language and the federal preemption doctrine, even if a state law mirrors federal IRCA requirements, the state law is expressly preempted. State laws that deny licenses or permits to businesses that employ illegal immigrants are not preempted. It is not clear, though, whether the parenthetical exemption covers state laws that prohibit the granting of contracts, loans, or other economic incentives to employers.

To date, there has been only one lawsuit challenging a local immigration-related ordinance. In September 2006, the ACLU and other advocacy groups successfully obtained an injunction order to prevent the enforcement of the "Illegal Immigration Relief Act Ordinance" passed by Hazelton, Pennsylvania. Under the ordinance, businesses and landlords would have been required to confirm that their customers and tenants were legal residents before providing them with any services. In addition, business owners could be fined and lose their licenses for hiring unauthorized workers. The ACLU successfully prevented this ordinance from being enforced by arguing that the federal government had the exclusive authority to regulate immigration; that the due process rights of businesses and landlords were violated because compliance was near impossible; and that the statute was overbroad and vague.

As the landscape of immigration laws affecting employers is changing on both the federal and state level, it is critical that employers become familiar with the applicable laws in their states to determine whether they expose employers to greater liability. It remains to be determined how effective these new state and local immigration initiatives will be, and to what extent they may be preempted by federal legislation. We will continue to provide employers with guidance as we move through this new minefield.

Senate Passes Amendment On Employment Of Undocumented Immigrants

On January 25, 2007, the Senate voted 94-0 in favor of an amendment to the Fair Minimum Wage Act of 2007 (H.R. 2), a bill introduced in the House of Representatives as part of the Democratic leadership's 100 hours agenda. The amendment would bar companies that employ undocumented immigrants from receiving government contracts for seven years, or ten years if that company held a government contract at the time of the offense. The amendment, proposed by Senator Jeff Sessions (R-AL), would exempt employers that voluntarily participate in the U.S. Citizenship and Immigration Services' (USCIS's) Basic Pilot program for employment eligibility verification (EEV). The EEV Basic Pilot program is an Internet-based system operated by USCIS in partnership with the Social Security Administration (SSA), providing an automated link to federal databases to help employers determine employment eligibility of new hires and the validity of their Social Security numbers.

A conference of House and Senate members will have to meet to reconcile the differences between the House version of the bill, which does not include the undocumented worker provision, and the Senate version, before the measure can be sent to the President. There is some question whether the Senate's provision will survive the conference committee, as the majority of House members have expressed a desire to send a "clean" minimum wage bill to the President. We will keep you apprised as this, and other immigration-related legislation, is considered by Congress.

Consulates Will No Longer Accept I-130 Petitions For Processing

Enacted on July 27, 2006, the Adam Walsh Child Protection and Safety Act (Adam Walsh Act), amends the INA to render any U.S. citizen or permanent resident petitioner who has been convicted of a specified offense against a minor ineligible to file a petition for immigrant status under INA 203(a) (I-130 or I-600), or for nonimmigrant status under INA 101(a)(15)(K). As a result, the U.S. Department of State (DOS) announced on February 8, 2007, that U.S. Consulates will no longer accept family-based petitions from U.S. citizens or permanent residents residing abroad. Previously, most U.S. Consulates would allow eligible individuals, such as a U.S. citizen with foreign national spouse, to submit the immediate relative petition directly to the Consulate, which would process the petition and the foreign national spouse's subsequent immigrant visa application. The Consulates often permitted a couple to walk in and submit the petition and related fees in person, which both increased the speed of processing and allowed the couple to address any questions early and in person with a Consular officer.

Since consular officers do not have access to the necessary criminal background information, they cannot determine a petitioner's ineligibility under the Act. Therefore, DOS and USCIS now require submission of the petition at the USCIS overseas office responsible for the U.S. citizen or permanent resident petitioner's residence. Any petitions that are pending with a Consulate are now in the process of being transferred to the USCIS office with jurisdiction, which is expected to result in significant processing delays for affected families.

Although U.S. consular officers are no longer authorized to accept I-130s, they will continue to provide guidance to American citizen petitioners and their family members.

USCIS Introduces Change of Address Online Function

All non-citizens in the U.S. are legally required to advise USCIS of any address changes within 10 days of their move by completing an Alien Change of Address Card (Form AR-11). On January 12, 2007, USCIS launched a new web-based service permitting submission of change of address information online. Additionally, individuals with pending immigration cases may electronically notify USCIS of any changes. With this initiative, USCIS seeks to ensure that customers receive notices or decisions related to their case in a timely manner. USCIS will also continue to accept change of address cards through the mail; case-related notification must be directed separately to the USCIS office where the case is pending.

USCIS Publishes a Proposed Rule to Increase Fees

USCIS has proposed to increase immigration filing fees by an average of 66%. The proposed rule was announced under the banner “Building an Immigration Service for the 21st Century.” Fees collected from persons requesting immigration benefits are deposited into the Immigration Examinations Fee Account. The fees are used to fund the full cost of processing immigration and naturalization benefit applications and petitions, biometric services and associated support services. In addition, these fees cover the costs of providing similar services for asylum and refugee applicants and other immigrant groups at no charge. The fees that fund the Fee Account were last updated in October 2005, based on a review implemented in fiscal year 1998.

USCIS proposes that fee adjustments are needed to prevent significant service reduction, backlog increases and reduced investment in infrastructure. USCIS has received appropriate funding for the past several years to improve processing times as part of a five year effort to reduce a backlog of immigration applications. The agency purports that during the time since the last comprehensive fee adjustment, USCIS has increased emphasis on national security and public screening of applicants, and on quality control. At the same time, USCIS believes certain immigration benefit determinations have become more complex as legislation has created new programs and eligibilities that have resulted in a funding gap between revenues and costs, leading to a decrease in performance and services.

Of note, under the proposed fee schedule, premium processing revenues will be fully isolated from other revenues and devoted to the extra services provided to premium processing customers and to broader investments in new technology and a business process platform to improve USCIS capabilities and service levels.

The American Immigration Lawyers Association (AILA) opposes the proposed increases as a barrier for some immigrants and a tax on applicants seeking to immigrate or become citizens. Representative Zoë Lofgren (D-San Jose), Chair of the House Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law, announced that the Committee will review the proposal for fairness, before the new fees are implemented, beginning with a hearing on February 14, 2007.

If approved, the proposed fee increases could be instituted within the year, and would significantly raise the costs associated with the immigration process. To compare the impact, imagine the following scenarios:

- A company filing an H-1B petition for a new professional worker.

	Current Fee	Proposed Fee
I-129 petition	$190	$320
Training & Education	$1,500	$1,500 (no change)
Anti-Fraud	$500	$500 (no change)
	$2,390	**$2,620**
(Premium Processing)	$1,000	$1,000 (no change)
Total:	**$3,390**	**$3,620**

- A family of three (principal applicant, spouse and child under the age of 14) filing just the final stage of the green card process (I-485).

	Current Fee	Proposed Fee
I-485 application (principal)	$325	$905
I-485 application (spouse)	$325	$905
I-485 application (child)	$215	$905
Biometrics (principal)	$70	$80
Biometrics (spouse)	$70	$80
Biometrics (child)	$0	$0
I-765 EAD (principal)	$180	$0*
I-765 EAD (spouse)	$180	$0*
I-131 Advance Parole (Pr.)	$170	$0*
I-131 Advance Parole (Sp.)	$170	$0*

I-131 Advance Parole (Ch.)	$170	$0*
Total:	**$1,875**	**$2,875**

*The proposed I-485 filing fee includes submission of an EAD application and an Advance Parole application. Subsequent applications for renewal are subject to a per application fee of $340 for the I-765 and $305 for the I-131.

DOL Announces Plan to Seek Application Fees for PERM Labor Certification Processing

On February 5, 2007, the Department of Labor (DOL) announced its intention to submit a legislative proposal to establish a fee structure to recoup operating costs of the PERM labor certification program. DOL explains that the foreign labor certification program – including both the web-based PERM program in place since March 28, 2005 and the backlog elimination program for Reduction in Recruitment and traditional labor certification cases filed prior to PERM implementation – is currently funded by Congressional appropriations. The expected proposal is intended to seek a per-application fee to cover the program's operating costs.

Based on both the USCIS and DOL proposals, companies who employ foreign workers, and sponsor those employees for immigration benefits such as work visas and permanent residence, should expect that the costs involved in sponsoring employees will rise significantly in the near future.

REMINDER: Passport Requirements for Air Travel Began January 23, 2007

Citizens of the U.S., Canada, Mexico and Bermuda are now required to present a passport to enter the U.S. when arriving by air from any part of the Western Hemisphere. The air requirement is part of the Departments of State and Homeland Security's Western Hemisphere Travel Initiative. The only acceptable alternatives to passports will be the Merchant Marine Mariner Document and the NEXUS air card. A separate proposed rule addressing land and sea travel will be published at a later date with specific requirements for travelers entering the U.S. through land and sea border crossings.

U.S. and Canada NEXUS Program

NEXUS is designed to expedite the border clearance process for low-risk, pre-approved travelers into Canada and the U.S. The Canada Border Services Agency (CBSA) and U.S. Customs and Border Protection (CBP) are cooperating in this joint venture to simplify border crossings for members, while enhancing security. To become a member in this program, an applicant must:

- submit an application and go through a registration process;
- satisfy the eligibility criteria;
- be admissible in Canada and the U.S.; and
- pass risk assessments by both countries

If approved to participate in NEXUS, the applicant will receive a membership identification card to use when entering Canada or the U.S. at all participating NEXUS air, land and marine ports of entry. Membership will allow the traveler to save time by crossing the border more quickly, using automated NEXUS self-serve kiosks in designated areas at participating international airports; enjoying a quick and simplified entry process while traveling between Canada and the U.S., and using dedicated lanes at the land border.

Will Substitution of Aliens in Labor Certification Applications be Eliminated?

Substitution is the replacement of the named beneficiary in a labor certification with another, equally qualified individual. There are rumors that a final ruling from the DOL eliminating the substitutions of aliens in the labor certification process is imminent. On February 13, 2006 the DOL proposed a rule that would eliminate labor certification substitutions, and other changes to the process; many organizations and individuals submitted comments in response. After nearly a year of considering those comments, on January 26, 2007 DOL submitted to the Office of Management and Budget (OMB) the final version of this rule. Although OMB typically has as many as 90 days to review rules, there is no way to predict how long it might be before the final rule is published in the Federal Register, nor what the rule will contain. It is widely believed that substitutions will in fact be eliminated. Stay tuned!

March 2007 Visa Bulletin: No Progression in Immigrant Visa Availability

The visa bulletin for the month of March 2007, published by the DOS, shows no progression in the employment-based (EB) green card categories since January 2007. Green card availability in the first EB preference category (EB1) remains “current” for all nationalities. The India-born and China-born second EB preference category (EB2) has not progressed, with availability remaining only for the priority dates January 8, 2003, and April 22, 2005, respectively. Prior bulletins indicated that increased demand in the EB2 category for applicants born in India and China will limit progression of availability until the demand subsides.

The deep retrogression in the third EB preference category (EB3) remains for all nationalities, as it does for the EB3 “other worker” category. The EB3 professionals and skilled worker category shows immigrant visas available for applicants with a priority date of May 8, 2001 (India-born applicants), May 15, 2001 (Mexico-born applicants), or August 1, 2002 (applicants born in all other countries). Prior bulletins predicted that the EB3 category for all nationalities is likely to retrogress during Fiscal Year 2007 (FY2007) due to the tens of thousands of labor certifications expected to be certified by the DOL’s Backlog Elimination Centers (processing long-pending RIR or traditional labor certification applications).

National Visa Center Expands List of Appointment Review Posts

The National Visa Center (NVC) has expanded the list of Appointment Review posts to include Beirut, Lebanon, and Manila, Philippines. NVC is the U.S.-based DOS clearinghouse for immigrant visa cases, and is a conduit between the USCIS in the U.S. and all U.S. consular posts abroad. Depending on the Consular post's location, the NVC performs either a Standard Review, which entails collecting only the required fees and limited documentation before the file is transferred to the Consulate to schedule the appointment, or a much more extensive Appointment Review. In the latter, NVC gathers significant documentation from the applicant, and is responsible for scheduling the appointment for the applicant's immigrant visa interview. Other Appointment Review posts include Montreal, Canada; Abu Dhabi, United Arab Emirates; Ankara, Turkey; Tirana, Albania; and all posts in Africa.