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Immigration & Nationality Law Update

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Dealing with Immigration Issues: What Does the Future Hold for an Employer?

No one in the United States has been able to avoid the issue of immigration during the past year, most certainly not the U.S. employer. It has been a tumultuous year. The Department of Homeland Security has engaged in a series of high-profile raids and arrests at business premises. States and local governments have passed laws and regulations with the express purpose of creating greater liability for employers who might intentionally or even inadvertently hire undocumented aliens. Initiatives to institute immigration reform in Congress ended in failure and disarray. The legal immigration system is in disrepair as basic employment visas such as the H-1B for professional workers are generally unavailable and quotas for legal immigration based upon employment are backlogged, then become current, and then become backlogged again!

This, while the global market is such that almost no employer can avoid the reality that non-U.S. workers are a significant part of the workforce and U.S. businesses cannot ignore that pool of talent.

So what does an employer do?

In this brave new world, an employer must understand that he is an enforcement agent on behalf of the U.S. government, and perhaps of the state government as well. There will be more obligations imposed on employers beyond those relating to I-9 processing, Social Security Administration no-match letters, proper supervision of independent contractors, and state filing and recording requirements. Congress and the states will not remain silent in the coming year when it comes to enforcement and burdening the employer.

Hiring of non-U.S. citizens and residents will remain difficult until legislation is introduced and passed to alleviate the shortage of non-immigrant and immigrant visas. Employers will have to work closely with counsel to devise appropriate strategies to make use of the array of talent, both outside and within the U.S.

We, at the Immigration Law Practice Group at Proskauer Rose LLP, will continue to carefully monitor developments nationally, statewide and locally and report to you. I, as head of the Practice Group, will continue to reach out to you with my observations and solicit from you your concerns and your input.

David Grunblatt

IMMIGRATION ENFORCEMENT: STATE AND LOCAL LAW SUMMARY

In 2007, states enact and introduce an unprecedented number of immigration bills, treading dangerously on territory reserved exclusively for the federal government.

Introduction

Growing frustrated with Congress' inability to pass comprehensive immigration reform and what is perceived by some to be a growing illegal immigration crisis, an unprecedented number of bills have been introduced by state lawmakers around the country. According to an August report by the National Conference of State Legislatures, in 2007 the 50 states had introduced 1,404 pieces of immigration-related legislation in their home legislatures – roughly two and a half times more bills in 2007 than in 2006. In the first half of the year, 170 of these bills became law in 41 states – more than double the total number of 2006 enactments (84). This record number of state immigration laws and bills cover a wide variety of issues affecting both legal and undocumented immigrants including employment, health care, law enforcement, public benefits, education, and driver license identification requirements.

Employment-Related Immigration Laws Passed by States

A primary area of focus for states has been employment-related immigration bills. 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 attempted to impose and enforce tougher employer sanctions on employers who hire unauthorized workers.

Over the course of this year, 19 states successfully enacted 26 employment-related immigration laws – Arkansas, Arizona, Colorado, Georgia, Hawaii, Kansas, Kentucky, Maine, Minnesota, Mississippi, Montana, New Mexico, Nevada, Oregon, Tennessee, Texas, Utah, Virginia, and West Virginia.

19 States Enact Employment-related Immigration Laws

State immigration laws have generally resulted in employers bearing an increased burden of verifying work eligibility and facing additional sanctions. State immigration laws also have exposed employers to new and intrusive investigative procedures by state agencies, in addition to authorized federal agencies. Recurring features of this type of legislation include:

- imposing state fines on employers who hire unauthorized workers;
- prohibiting state agencies from employing or contracting with businesses that employ unauthorized workers;
- prohibiting the provision of government contracts to employers who hire unauthorized workers;
- eliminating unemployment insurance or worker's compensation benefits for undocumented workers;
- revoking business or operating licenses of employers who hire unauthorized workers; and
- allowing state-administered agencies to enforce immigration laws.

Not all of the state bills aim to punish employers who hire unauthorized employees. The Illinois legislature passed a bill that prohibits businesses from using the federal government's "Employment Eligibility Verification Program" ("EEVP") until its reliability and accuracy can be improved. Illinois Governor Blagojevich is still considering whether to sign the bill.

A Closer Look at the Strictest Law in the Nation: Is This Where States Are Heading?

In July 2007, Arizona's Governor Janet Napolitano signed and passed arguably the toughest law against employers of undocumented workers in the nation, "Legal Arizona Workers Act." This law, effective January 1, 2008, has two key features: 1) It provides business license penalties for employers who knowingly or intentionally hire undocumented workers; and 2) it requires all employers to use the federal EEVP to determine an employee's
legal status.

Under the Arizona law, the State Attorney General or County Attorney must investigate complaints regarding employers hiring undocumented workers to determine whether an employer "knowingly" or "intentionally" hired the employee(s). With non-frivolous complaints, the Attorney General or County Attorney must then notify the U.S. Immigration and Customs Enforcement ("ICE") of its findings and proceed to bring a lawsuit to suspend or revoke the employer's business license. Unlike federal immigration law, the Arizona law does not impose monetary penalties against employers.

A first "knowing" violation results in requiring the employer: 1) To terminate the employment of all undocumented employees; 2) to file an affidavit stating that it has terminated all unauthorized workers and that it will continue to comply with the statute; and 3) to file quarterly reports with the County Attorney on all new hires while on a three-year probationary period. The employer's business license can be suspended for up to 10 business days. A first "intentional" violation results in the same penalties, except that the employer's license *must* be suspended for at least 10 days and the probationary period is five years.

Businesses face the possibility of losing their business licenses permanently if they are found to have violated the statute during the three-or five-year probationary period. Since almost all of Arizona's businesses are required to have a valid license, under this new state law, all Arizona businesses face the temporary or permanent possibility of losing their ability to operate if they are found to have "knowingly" or "intentionally" hired undocumented workers

The Arizona law does, however, provide for some employer defenses: 1) If an employer can demonstrate that it utilized the EEVP program, there is a rebuttable presumption that it did not hire an undocumented worker "knowingly" or "intentionally;" and 2) If an employer proves that it has complied in good faith with the federal I-9 requirements, the employer can establish an affirmative, complete defense to the charge that it violated the Arizona statute.

The U.S. Chamber of Commerce, along with a number of Arizona business groups have brought a lawsuit against the State in the hopes that this sweeping piece of legislation will never take effect. The plaintiffs argue that the Arizona law is unconstitutional and preempted by federal law.

Are These State Laws Preempted by Federal Immigration Law?

Most, if not all, of these state and local pieces of legislation are vulnerable to federal preemption and constitutional challenges. The starting points in a preemption discussion regarding state immigration laws are that: 1) Under the Constitution, Congress has the power to preempt state law; and 2) It is has been widely accepted that the power to regulate immigration is exclusively vested in the federal government.

It has been argued with regard to immigration legislation in general that the breadth of the Immigration Nationality Act ("INA") demonstrates that Congress intended to fully occupy the field of immigration regulation, thereby preempting all state immigration laws. Moreover, in the specific case of employer sanctions for employment of unauthorized workers, the Immigration and Nationality Act (INA) § 274A(h)(2) explicitly states that its provisions "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." Under this language and the federal preemption doctrine, even if a state law mirrors federal IRCA requirements, the state law is expressly preempted.

It is important to emphasize that according to this INA provision, states **may not** be preempted from denying licenses or permits to businesses that employ illegal immigrants. It is not clear whether this exemption covers state laws that prohibit the granting of contracts, loans, or other economic incentives to employers.

We received the first glimpse of how courts will interpret the constitutionality of state immigration laws in July 2007, when a federal district court overturned Hazelton, Pennsylvania's local immigration-related ordinance. Under Hazelton's "Illegal Immigration Relief Act," businesses and landlords were required to confirm that their customers and tenants were legal residents before providing them with services. Over the past two years, more than 40 other local and state governments have passed similar ordinances and legislation aimed at making it very difficult for undocumented individuals to reside in certain communities. In the landmark decision regarding Hazelton's ordinance, the federal district court found that the ordinance was unconstitutional because it did not afford illegal immigrants with due process protections, and it undermined the federal government's exclusive power to regulate immigration.

Moving Forward

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. We will keep you updated on how the Arizona lawsuit unfolds, as this will provide some critical indication on how courts will handle preemption challenges to state immigration laws affecting employers. If you would like further information on how your business or organization may be particularly impacted by the provisions of state immigration laws, please contact our Immigration Law Practice Group.

Vermont and Arizona To Issue Driver's Licenses that Comply with WHTI

On August 20th, DHS announced an agreement with the State of Vermont to work together to produce a driver's license document that comports with the security and tamper-resistant requirements of the Western Hemisphere Travel Initiative ("WHTI"). A similar agreement with the State of Arizona was announced on August 24th. Beginning on January 31, 2008, U.S. and Canadian citizens traveling in the Western Hemisphere will be required to present either a WHTI-compliant document, or a government-issued photo identification, such as a driver's license, coupled with proof of citizenship, such as a birth certificate, for admission to the U.S.

October 2007 Employment-Based Immigrant VISA Cutoff Dates Projected

On August 20th, the Department of State (“DOS”) offered to the American Immigration Lawyers Association (“AILA”) informal projections on employment-based visa availability for the October 2007 Visa Bulletin. DOS intimated that October availability in the First and Second Preference categories for all countries should closely match that seen in the September 2007 Bulletin. In the Third Preference categories, the cut off dates are likely to be similar to those found in the January 2007 Visa Bulletin. For the Other Worker category, the cut off date is likely to be October 1, 2001. The DOS was not able to project Fourth Preference, but did suggest that the Employment-Based Fifth Preference category for Investors would be current for all countries.

DOS Posts Diversity VISA 2009 Online Entry Dates

The DOS has posted the Diversity Visa 2009 online entry dates on its website. Online entry begins at noon EDT on Wednesday, October 3, 2007, and ends at noon EST Sunday, December 2, 2007. The Congressionally mandated Diversity Immigrant Visa Program makes available 50,000 immigrant visas annually, drawn from random selection among all entries to persons who meet strict eligibility requirements from countries with low rates of immigration to the U.S.