DHS ISSUES PROPOSED REGULATION RESCINDING NO-MATCH RULE

On August 19, 2009, the Department of Homeland Security (DHS) issued its proposed regulation rescinding the procedures that employers may take to acquire safe harbor from receipt of no-match Social Security letters. The 2007 final rule was preliminarily enjoined by a Federal District Court in California on October 10, 2007. After further review, DHS has determined to focus its enforcement efforts relating to the employment of aliens not authorized to work in the U.S. on increased compliance through improved verification, including participation in E-Verify, the IMAGE Program, and other programs.

As a basis for its policy change, DHS explains that other programs provide better tools for employers to reduce incidences of unauthorized employment and to better detect and deter the use of fraudulent identity documents by employees. The targets of ICE investigations are employers who hire undocumented workers to obtain a financial advantage over their competitors by paying lower wages, offering few if any benefits, failing to comply with tax laws, and avoiding health and safety related complaints. ICE focuses on the most egregious violators, namely employers who engage in human smuggling, identity theft, and Social Security number fraud.

DHS gives some hint at future direction of enforcement by stating that it has established and distributed to all field offices guidance about the issuance of administrative fines and standardized criteria for the imposition of such fines.

DHS also makes an oblique reference to the significance of procedures similar to those suggested in the previous regulation that is being rescinded. It states that Social Security no-match letters have formed a basis for multiple criminal investigations by ICE and prosecutions on charges of harboring or knowingly hiring unauthorized aliens. “ICE has determined that focusing on the management practices of employers would be more efficacious than focusing on a single element of evidence within the totality of the circumstances.”

Wimberly Lawson Comments

The first question readers may ask is about the possible effect of a pending House bill that would withhold any funding for rescission of the no-match rule. Because this funding pertains to the next fiscal year, and other factors, it is not expected that the House bill will adversely affect the current proposed regulation.

There is some question suggested in the DHS discussion that no-match letters, officially known as “Employer Correction Requests,” may not be utilized by Social Security in the future. Such letters have not been issued over the
DEMOCRATS MAKE CARD-CHECK COMPROMISES TO ENCOURAGE PASSAGE

Reports continue to circulate that a group of Democratic senators have worked out a compromise to change the Employee Free Choice Act (EFCA) in order to secure the sixty votes necessary to avoid a filibuster and pass the Bill. A compromise would drop the card-check provision in favor of mandated “quickie” union elections. Elections would have to be held within ten days and after thirty percent of workers sign cards in favor of union representation. Currently such union campaigns average about six weeks.

All of the other onerous provisions of EFCA would remain, however. These include the provision that if the parties are unable to reach agreement on a contract within 120 days, the union could refer the dispute to binding arbitration. The arbitrator would write a first contract for the parties without the contract, and without employees having a vote on the contract. In addition, penalties for labor law violations by employers would dramatically increase. Legislation would award triple back pay to employees who are unlawfully discharged while involved in a union campaign. Additional civil penalties could be imposed. In addition, the Labor Board could seek injunctive relief in Federal Court where there is reasonable cause to believe that the employer interfered with employee rights.

Union chances have improved since Al Franken has been installed as the Democratic Senator from Minnesota, and a “swing-vote,” Sen. Arlen Specter, has allegedly announced his support for the compromise legislation. However, the recent death of Sen. Edward Kennedy may complicate the process, as well as the continuing absence of Sen. Robert Byrd, who is recuperating from illness.

KNOW YOUR ATTORNEY

James W. Friauf

JAMES W. FRIAUF is an Associate in the Knoxville, Tennessee office of the Firm, which he joined in September 2009. He practices in the areas of general civil litigation with an emphasis on workers’ compensation defense and subrogation. James received his A.S. degree from Richard Bland College of the College of William and Mary. He attended the University of Virginia and Middle Tennessee State University, graduating cum laude in 2005 with a B.S. Degree, majoring in Political Science. James received his J.D. from T.C. Williams School of Law at the University of Richmond in 2008 where he was awarded for outstanding oral advocacy in 2006, was a Member of Moot Court Board 2006-08, a member of Moot Court Interscholastic Competition Team 2007, and Executive Member and Treasurer of Moot Court Board 2007-08.

Be sure to visit our website often www.wimberlylawson.com for the latest legal updates, seminars, alerts and firm biographical information!

Upcoming Seminars

October 19, 2009 – ADAAA Update and Accessibility Law
Northeast State Technical Community College – Blountville

October 20, 2009 – Aiming at a Moving Target: Tips for Complying with Recent Changes in Workers’ Compensation and Employment Law
South Central Tennessee Career Center – Columbia

October 20, 2009 – ADAAA Update and Accessibility Law
Walters State Community College – Morristown

October 27, 2009 – Mandates, Manuals, and Manicures: A Comprehensive Employment Law Seminar
Motlow State Community College – Tullahoma

November 5 – 6, 2009 – Target Out of Range – The Wimberly Lawson Labor & Employment Law Update
Knoxville
(There's still time to register – please see enclosed brochure).
Employers that rely on employees to use employer-supplied laptops, BlackBerries, PDAs, Smart Phones, cell phones and remote access to keep them connected to their work site outside the office, on nights and on weekends, have to face numerous legal issues. That is, they face new liability risks on wage and hour issues, confidentiality breaches, inappropriate use of equipment, and safety concerns.

Under the Wage-Hour laws, employers must pay non-exempt employees for all “hours worked.” Such “hours worked” include work done off-premises as long as the employer knows or has reason to know that the work is being performed.

Employers often think they have a simple solution by maintaining a policy against off-the-clock work or unauthorized overtime. Unfortunately such policies are not a complete defense, as it remains the employer’s duty to insure that only authorized work is performed. While these issues do not arise in connection with exempt salaried personnel, the problems with non-exempt employees are significant. Time spent sending and receiving work-related emails is likely to be compensable.

In a recent case handled by Wimberly Lawson, plaintiffs are seeking all emails from and to off-site employees, almost certainly to support a claim that certain “work” was being performed off the clock. There is another publicized settlement involving a Fortune 500 company in which certain personnel were required to login and do certain brief work on their computers before traveling to work. They claimed that the time on their computers was not only “hours worked” but also started the “continuous work day” principle which made their commuting time to work also compensable. The case was ultimately settled for a large amount of money.

There are certain exceptions to the “hours worked” principle, including the de-minimis concept. A number of courts have concluded that any task or group of tasks is not compensable or is de-minimis if it takes less than 10 minutes, but other courts have tied the de-minimis test to the administrative burden of tracking the additional time. Since time spent checking Blackberries, PDAs, cell phones, etc. is probably time which can be tracked, an employer should be cautious in exercising this exception if the total time spent each day in these activities exceeds 10 minutes. For time which cannot be tracked, employees often have a different view of how much time it takes to perform the tasks. Some employers, as a precaution, add “add-on” or “plug” time to give employees a few extra minutes of paid time to compensate for such offsite work, but even that is not a complete defense in every case.

An example of the problem is shown by the recent Ninth Circuit ruling in Rutti v. Lojack Corp., Inc., 2009 WL 2568661. There, an employee brought a class action under the wage-hour laws, seeking compensation for time the technicians spent commuting to and from work sites and for time spent on preliminary and postliminary activities performed at their homes. The plaintiffs argued that they spent time in the morning receiving assignments for the day, mapping routes and prioritizing jobs, and logging on to a hand-held computer device that informed plaintiffs of jobs for the day. The plaintiffs argued that, under the continuous work day doctrine, because their work began and ended at home, they were entitled not only to be paid for the homework time but also for their travel time to and from work. The employer was fortunate to prevail on most of the claims on the basis that such preliminary activities were not related to the commute and were not principal activities or were de-minimis.

What is an employer to do with such difficult legal issues existing? One potential but unattractive solution, is simply not to issue BlackBerries to non-exempt personnel. Another potential solution is to devise a BlackBerry policy detailing all aspects of its expectations and directives regarding offsite work and BlackBerry use.

TO SUBSCRIBE to our complimentary newsletter, please go to our website at www.wimberlylawson.com or email bhoule@wimberlylawson.com
last two years. Regardless of whether or not such letters are discontinued in the future, employers continue to receive similar letters from Social Security, entitled “Request for Employer Information” and occasionally, “Request for Employee Information.” Without a safe harbor regulation, employers will need to develop strategy and protocols as to how to respond to such requests that may or may not put them on constructive notice of unauthorized status, or at least warranting some further action. While some employers may choose to follow procedures similar to those suggested in the no-match regulation that is being rescinded, others may decide to implement either less stringent or more stringent protocols. The key is to take some responsible corrective action or investigation in response to the letters, and to document that such steps have been taken.

E-VERIFY REQUIREMENT FOR GOVERNMENT CONTRACTORS GOES INTO EFFECT

The Federal Acquisition Regulations (FAR) regarding E-Verify went into effect on September 8, 2009. The U.S. Chamber of Commerce and other groups had attempted to enjoin the regulation pending their appeal of a District Court ruling on the validity of the new regulation. Thus, employers who are covered contractors or subcontractors must comply with the FAR regulations or possibly lose the opportunity to work on government contracts.

Must an employer re-screen existing employees who have been screened through E-Verify? No. An employer, however, must screen all existing employees hired after November 6, 1986 who work on the government contract in the United States and who have not been screened through E-Verify.

If the employer is a supplier of goods to a federal contractor, does the employer have any additional obligations under the new regulations? Not necessarily. The new regulations apply to subcontracts for commercial and non-commercial services and construction. The new regulations do not apply to subcontracts for commercially available off the shelf (COTS) items. The tier does not matter.

Does an employer who is a contractor have to verify the employees of a subcontractor? No, but the contractor is responsible for the subcontractor's compliance with the E-Verify requirements if the subcontract (1) is for construction or for commercial or noncommercial services (except for commercial services that are part of the purchase of a COTS item [or an item that would be a COTS item, but for minor modifications], are performed by the COTS provider, and are normally provided for that COTS item); (2) has a value of more than $3,000; and (3) includes work performed in the United States.

What is a COTS item? Commercially available off-the-shelf (COTS) item means any item of supply (other than real property) that is (1) used by the general public and made available for sale to the general public; (2) sold in substantial quantities in the commercial marketplace; and (3) offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace. COTS does not include bulk cargo. “Bulk Cargo” means cargo that is loaded and carried in bulk onboard ship without mark or count, in a loose unpackaged form, having homogenous characteristics. Bulk cargo loaded into intermodal equipment, except LASH or Seabee barges, is subject to mark and count and, therefore, ceases to be bulk cargo.

NEW FORM I-9

The Department of Homeland Security (DHS) issued a new Form I-9 that is available at www.uscis.gov/forms. The new form has a revision date of August 7, 2009 in the lower right hand corner and an expiration date in the upper right hand corner of August 31, 2012.

DHS also announced that employers may continue to use the Form I-9 with the February 2, 2009 revision date even though the expiration date is June 30, 2009.

Accordingly, Form I-9 with either revision date (February 2, 2009 or August 7, 2009) can be used by employers until August 31, 2012.
We invite you to attend our 30th Annual Labor and Employment Law Update

TARGET OUT OF RANGE

THE WIMBERLY LAWSON LABOR & EMPLOYMENT LAW UPDATE

Knoxville Marriott Downtown
500 Hill Avenue, Knoxville, Tennessee
November 5 & 6, 2009

A FEW COMMENTS FROM PRIOR YEARS

- Accurate updates - excellent presentations

- This is always the most valuable seminar of the year.

- Very informative - great resource

- So well organized - materials, speakers; the best seminar presentation of any I have attended.

GUEST SPEAKER
Hallerin Hilton Hill
Author, Motivational Speaker, Trainer, Talk Show Host

www.wimberly-lawson.com
Dear Clients and Friends:

Our Annual Conference is truly the high point of the year for us -- a time to gather with friends and discuss important, contemporary employment issues. Please plan now to join us.

Our day and a half program covers important legal decisions and societal trends affecting employment. Topics are carefully selected to address the concerns of all employers and to give you an opportunity to select from a wide array of topics dealt with in detail. Some of the twenty-five or more topics are:

- FMLA Amendments and Issues
- Records Retention and Destruction
- Amendments to Americans with Disabilities Act
- COBRA Regulations
- Genetic Information Non-Discrimination Act
- Wage/Hour Compliance under New Administration
- Lilly Ledbetter Fair Pay Act
- Employee Free Choice Act
- I-9, E-Verify and Immigration Issues
- Recession and RIFs – Tips for Dealing with the Downturn
- Workers’ Compensation Strategies

Join us in Knoxville on November 5 and 6! We promise you an informative, but light-hearted, thorough and practical journey through today’s workplace issues.

Hope to see you there!

Respectfully,

Ronald G. Daves
Managing Member

We are also pleased to announce that our keynote speaker will be author, motivational speaker, trainer, radio talk show host and one of the nations most sought after public speakers,

Hallerin Hilton Hill
AGENDA

Thursday, November 5, 2009 (9:00 a.m. - 5:00 p.m.)
8:00 a.m. – 9:00 a.m.  Registration and Continental Breakfast

9:15 a.m. - 10:45 a.m. - General Session
The Year in Review - Employment/Labor Update
Wage and Hour Insights Regarding U.S. Department of Labor Enforcement of FLSA
ADAAA - What Difference Does it Make?
Pending Workplace Legislation - Are You Ready for Change?

11:00 a.m. - 12:00 p.m. - Breakout Sessions
Employee and Employer Rights and Obligations Under the FMLA
HR Jeopardy - the Game (Interplay between ADA/FMLA/WC)
OSHA - There is a New Sheriff in Town
Workers Compensation - Strategies to Manage Claims
Immigration Issues from A to Z

12:00 p.m. - 1:30 p.m. - Lunch (Courtesy of Wimberly Lawson)

1:30 p.m. - 2:30 p.m. - General Session
“Striking the Right Chord with the Six Strings of Success for Maximum Personal and Professional Effectiveness” (by Hallerin Hilton Hill)

2:45 p.m. - 3:45 p.m. - Breakout Sessions
Recession, RIFs and Reality: Tips for Dealing with the Downturn
Major Labor Law Reform - EFCA, NLRB Decisions, and More
Workplace Violence - Prevention and Policies
Wage and Hour Issues - A Refresher Course for Compliance
Individual Employee Contracts - Who, What, When & How

4:00 p.m. - 5:00 p.m. - General Session
Records Retention and Destruction
Dress Codes and Employee Appearance Issues
Ledbetter Fair Pay Act - What It Means to You
Electronic Discovery Rules - What They Mean to You Before a Lawsuit is Filed

5:00 p.m. – 7:00 p.m. - Reception (please join us for scrumptious hors d’oeuvres)

Friday, November 6, 2009 (8:30 a.m. - 12:30 p.m.)
8:00 a.m. – 8:30 a.m. - Continental Breakfast

8:45 a.m. - 9:45 a.m. - General Session
OFCCP and Affirmative Action Update
Class Action Lawsuits - Could This Mean You?
Developing a Crisis Management Plan

10:00 a.m. - 11:00 a.m. - Breakout Sessions
Union Organizing Update - Don't Be Caught Unaware
Alternative Dispute Resolution - Mediation & Arbitration Analyzed
Socialism Run Amok - Employee Benefit Strategies in an Era of Governmental Mandates
Immigration Worksite Enforcement
HR Jeopardy - the Game (Interplay between ADA/FMLA/WC)

11:00 a.m. - 12:30 p.m. General Session
EEOC Enforcement Initiatives
New Prohibitions Regarding Use of Genetic Information
Diversity - Why Can't We All Get Along?
2009 COBRA Subsidy

12:30 p.m. - 12:45 p.m. Conclusion and Prizes
FOUR WAYS TO REGISTER

1. Mail to: Bernice Houle
   Wimberly Lawson Seale
   Wright & Daves, PLLC
   P.O. Box 2231
   Knoxville, TN 37901

2. Fax to: 865-546-1001

3. Email to: bhoule@wimberlylawson.com

4. Via website: www.wimberlylawson.com

Name _______________________________________________________________
Company __________________________Address____________________________
City __________________________________    State_________    Zip______________
Phone ________-________-____________  Fax ________-________-____________
Email______________________________________________________________
BPR and State for CLE:_________________ No. Attending Reception: ____________