Management Alert

E-Verify Ups the Ante, Shares Employee and Employer Information with OSC

On the heels of the release of a reputation-damaging report (citing a high error rate and employer misuse), the E-Verify program is upping the ante for employers. Under a memorandum of agreement with the Justice Department's Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC), U.S. Citizenship and Immigration Services (USCIS) will share information with the OSC relating to possible misuse of E-Verify by employers.

The memorandum of agreement took effect on March 17, 2010 and states that USCIS will provide data, including citizenship status, to the OSC from the queries that employers run through E-Verify. The OSC will use the information to identify violations of the Immigration and Nationality Act's anti-discrimination provisions. The OSC may use the information it obtains from E-Verify to initiate investigations of potential citizenship, immigration status, or national origin discrimination; document abuse (unfair documentation requirements or practices during the I-9 process); and/or retaliation.

This means that employers must exercise additional caution when registering for and using E-Verify. Employers should ensure that any company representative who will use the E-Verify system receives proper training and understands the obligations that the system imposes upon employers. Employers should provide anti-discrimination training to employees that specifically covers citizenship, immigration status, and national origin discrimination.

It is unclear what patterns of use may trigger an OSC investigation; it is clear, however, that OSC plans to use E-Verify information against the employers who use the system. To employers who registered for E-Verify voluntarily in an effort to ensure compliance with the law, this unexpected side effect may seem like a punishment.

E-Verify

The E-Verify program is an online tool that allows employers to confirm the employment authorization of certain employees by comparing the employee information against government databases. Use of the E-Verify system is voluntary for many employers, but laws in about a dozen states have made the system mandatory for some or all employers in those states. More employers found themselves rushing to learn about and register for E-Verify last fall, when the federal government began requiring use of the system for the majority of federal contractors and subcontractors.

The Westat Report

According to Westat (the research company that evaluated the system for the Department of Homeland Security (DHS)), E-Verify wrongly confirms the employment eligibility of individuals who are not authorized to work in the U.S. more than 50% of the time. The main reason for the high error rate is that E-Verify cannot detect identity theft. (If an employee provides an employer with the name, date of birth, and social security number of an individual who *is* authorized to work in this country, E-Verify is unable to determine that the information does not pertain to the employee presenting it.)

The Westat report suggested that the government take additional steps to improve its error rate and to educate workers and employers of their rights and responsibilities under the E-Verify system to curb discrimination and improper use of E-Verify.

USCIS posted the Westat report (without fanfare) on its website at the end of January 2010. The Westat report is available *here*.

Other Efforts to Improve E-Verify

In addition to the information-sharing initiative described above, USCIS announced that it will create an E-Verify telephone hotline for employees. The hotline will allow employees to obtain general information about E-Verify, ask questions about completing the Form I-9, get information about contesting an E-Verify result, and initiate a complaint against an employer for possible discrimination or misuse of the E-Verify system. The hotline will be available beginning April 5, 2010.

USCIS has also posted videos to help E-Verify employers understand their responsibilities and to inform employees of their rights when working for E-Verify employers. The videos are available on the *DHS website* and on *YouTube*.

A fact sheet on the memorandum of agreement, hotline, and videos is available *here*.

Where to Find Help

The Seyfarth Workforce Authorization Team (SWATeam) is a team of attorneys and paralegals with experience in the workforce authorization area. The SWATeam provides employers with detailed information about and support for E-Verify registration, use, and compliance.

For more information about E-Verify, state laws relating to E-Verify, I-9s, or other workforce authorization matters, please contact the Seyfarth attorney with whom you work, or any Business Immigration attorney on our website. We stand ready to assist you.

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