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September 2010

Immigration Compliance Update

Important Changes in U.S. Immigration Laws for Employers

New Guidance Issued on Form I-9 Verification Time Frame

On June 30, 2010, U.S. Citizenship and Immigration Services (USCIS) made a public announcement that employers now have four business days to complete Form I-9. Contrary to prior guidance found in the earlier version of the *M-274 Handbook for Employers: Instructions for Completing Form I-9*—which provided that Section 2 of Form I-9 must be completed within three business days of the first day of employment—USCIS clarifies that the employer has until the third business day after the date the employee started work to review original documentation evidencing the employee's identity and employment authorization and to sign Section 2 of the form. Section 1 of Form I-9 must still be completed and signed by an employee on or before the employee's first day of work. For those employers who use E-Verify, the same deadline applies. While the announcement was phrased as a clarification of existing policy, it represents a surprising new interpretation of a long-standing rule.

On its website, USCIS explains the new "Thursday rule" as follows: "If the employee starts work for pay on Monday, the third business day after the employee started work for pay is Thursday (assuming all days were business days for the employer). The first day the employee starts work for pay is not included in the three business day calculation."

As Immigration and Customs Enforcement (ICE) is generally responsible for conducting I-9 audits and other enforcement actions, ICE also has confirmed that they will respect the "Thursday rule" but will not be issuing separate guidance on this issue. As such, employers need not rush to change existing policies regarding completion of Form I-9s. Applying consistent policies for all employees is critical to avoid any discrimination claims. Please contact your Vedder Price attorney to discuss any questions regarding further compliance and avoiding exposure.

Wage and Hour Enforcement on the Rise

With increased funding and additional investigator hires, the Department of Labor's Wage and Hour Division (WHD) has indicated that it will be using its additional resources towards legal immigration status enforcement. Assuming recent responsibilities over the enforcement of the H-2B visa program, the WHD is expected to begin a pilot enforcement initiative at the beginning of fiscal year 2011 (beginning October 1, 2010) aimed at the hospitality industry. This pilot initiative will include audits of the employer facility as well as all employees (not just foreign workers) employed at the facility, and will investigate employer compliance with all laws administered by the WHD. Additional regulations governing the H-2B visa program are expected in November 2010.

In addition, Secretary of Labor Hilda Solis announced a new campaign aimed at enforcing federal wage and hour laws on behalf of low-wage and immigrant workers. As part of the "We Can Help" campaign by the Department of Labor (DOL), DOL has launched a broad campaign to inform workers of their rights and encourage them, regardless of their immigration status, to report violations of wage and hour laws on the job. DOL's campaign is twofold: (1) it intends to raise awareness of workers' rights among "vulnerable" classes of workers; and (2) it adds 250 field investigators who will target employers in communities that have a history of labor problems. The campaign will focus on violations under the Fair Labor Standards Act and related federal rules governing minimum wages, overtime payments and hours worked.

ICE Publishes Final Rule on Electronic Form I-9

On July 22, 2010, ICE published a final rule providing that employers and recruiters or referrers for a fee who are obligated to retain Employment Eligibility Form I-9 may sign the form electronically and retain it in an electronic format. This final rule, which took effect on August 22,

2010, amends and updates an interim rule published on June 15, 2006.

The final rule provides that employers may use paper or electronic systems, or a combination of paper and electronic systems, for Form I-9 completion and retention. In other words, an employer may choose to prospectively transition its Form I-9 procedures to an electronic system while retaining paper Form I-9s for employees whose employment eligibility has already been verified. In addition, an employer may transition to an electronic system and scan and incorporate previously executed paper Form I-9s into its new electronic system.

The final rule provides additional clarification regarding the audit trail requirements for electronic systems. The electronic system must retain an audit trail, not for each time a Form I-9 is electronically viewed, but, rather, only for when a Form I-9 is created, completed, updated, modified, altered or corrected. The audit trail must be able to establish the identity of the individual who accessed the electronic record and the particular action taken.

Under the final regulation, the Form I-9 electronic system must have the capability to issue a receipt or confirmation of a Form I-9 transaction. While the rule confirms that there is no obligation to issue such receipt or confirmation within the three-day deadline, an employer may produce such receipt or confirmation upon request by the employee within a reasonable period of time.

Please contact your Vedder Price attorney for additional guidance and assistance with any current or future transition to Form I-9 electronic storage. We also provide Form I-9 training, internal auditing, assistance with ICE audit inspections and E-Verify counseling for employers.

Permanent Resident Card Will Be Green Again

On May 11, 2010, USCIS unveiled the newly designed Permanent Resident Card (commonly known as the "green card") to incorporate several major new security features. Unlike earlier versions, the new card will actually be green in color.

The redesigned card includes state of the art technology to reduce counterfeit and fraud efforts. The changes incorporate optical media to store biometrics identification data, as well as holographic images, laser engraved fingerprints and high-resolution micro-images intended to make the card nearly impossible to reproduce. Tighter integration of the card design with personalized elements is intended to make it more difficult to alter the card if stolen. Radio Frequency Identification (RFID) capability will allow Customs and Border Protection (CBP) officers at ports of entry to read the card from a distance and compare it immediately to file data. In addition, a preprinted return address will enable the easy return of a lost card to USCIS. USCIS said it will replace green cards already in circulation as individuals apply for renewal or replacement.

Consular Fees Increase

Recently, the U.S. Department of State (DOS) announced that visa application fees at consular posts abroad would increase, depending on the visa category. As of June 2010, the previous fee of $131, in effect since 2008, is no longer applicable. The new fees now in effect range from $140 to $390.

Common employment-related visas impacted are the H-1B, L-1A, L-1B, E-1 and E-2 categories. The application fee for H-1B (specialty occupation workers) and L-1 (intracompany transferees) increased to $150. The fee for E-1 (treaty traders) and E-2 (treaty investors) increased to $390. The remaining petition-based visa categories, which require that an employer file a petition with USCIS before an individual applies for a visa at a consulate abroad, also require payment of the new $150 fee. Those categories are O (extraordinary ability or achievement), P (artists, athletes and entertainers), Q (cultural visitors) and R (religious workers). The new fee for F and M (students), J (exchange visitors), B-1 (visitors for business) and B-2 (visitors for pleasure) visas is now $140.

Please note that these consular fee increases apply to visa applications submitted to a U.S. Consulate abroad. With the exception of: (1) individuals from Visa Waiver Program (VWP) countries traveling to the United States for short-term (90 days maximum) business or tourism trips; and (2) Canadian citizens, most individuals traveling to the United States must obtain visa stamps issued into their passports from a U.S. Consulate abroad before traveling. Upon entry, the Customs and Border Protection (CBP) officer then issues an "I-94 Arrival/Departure Record" confirming the visa status and authorized period of stay.

Changes in Filing Fees for Certain Employers

On August 13, 2010, a new law went into effect that requires the submission of additional filing fees for certain H-1B (specialty occupation) and L-1 (intercompany transferee) petitions. This new law applies to employers with 50 or more employees in the United States where more than 50 percent of its employees are in the United States in H-1B or L-1 non-immigrant status. The additional

fees will be $2,000 for H-1B petitions and $2,250 for L-1A and L-1B petitions. In its update regarding these changes, USCIS recommends that employers note on their H and L petitions whether this new fee is required. If USCIS does not receive such an annotation, it may issue a Request for Evidence to determine whether the petition is covered by this new law. Please note that these additional fees, if applicable, are in addition to the normal filing fees for H-1B and L-1 petitions.

DHS Institutes Fee for Electronic System for Travel Authorization (ESTA) Travelers

Beginning on September 8, 2010, the U.S. Department of Homeland Security (DHS) will require travelers from Visa Waiver Program (VWP) countries to pay a fee of $14 when applying for ESTA. This is the first time that a fee has been charged for applications to ESTA.

ESTA is an automated system that determines the eligibility of nationals and citizens from a VWP country to board a carrier for travel by air or sea to the United States. If approved, the authorization is valid for multiple entries for up to two years or until the traveler's passport expires, whichever is shorter. ESTA does not guarantee admission to the United States. CBP officers will continue to make a determination of admissibility at the U.S. port of entry. The Visa Waiver Program allows nationals and citizens of VWP countries to travel to the United States as visitors for business or pleasure for a temporary period of 90 days or less without first obtaining a B-1/B 2 visa stamp from a U.S. Consulate. Eligible VWP countries are as follows: Andorra, Australia, Austria, Belgium, Brunei, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, The Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland and the United Kingdom.

Homeland Security Plans to Eliminate Paper I-94W Issuance for Visa Waiver Program Travelers

Recently, Department of Homeland Security Secretary Janet Napolitano announced the elimination of the paper arrival/departure form (Form I-94W) for authorized travelers from countries participating in the Visa Waiver Program, in an effort to streamline secure travel for millions of visitors to the United States every year. This will consolidate the collection of traveler information and enhance security by automatically providing DHS with important passenger information prior to departure. Following a successful pilot program, DHS expects the use of paper I-94W forms to be eliminated for all VWP travelers with an approved Electronic System for Travel Authorization (ESTA) arriving in the United States at all airports in the near future.

"The Visa Waiver Program facilitates secure and hassle-free travel for citizens of participating countries—making international travel safer and easier," said Secretary Napolitano. "This step to eliminate the paper I-94W leverages the latest technology to further bolster security, increase convenience for visitors and better protect privacy." The elimination of the paper I-94W form enables travelers to provide basic biographical, travel and eligibility information automatically through ESTA prior to departure for the United States, thereby reducing redundancy and enhancing the security of sensitive personal information, as CBP stores and protects all VWP data electronically on secure servers.

ESTA became mandatory on January 12, 2009 for all travelers entering the United States pursuant to the Visa Waiver Program. This requirement does not affect U.S. citizens or citizens of VWP countries traveling on a valid U.S. visa stamp.

USCIS to Begin Contacting Employers by Telephone

Since 2007, the U.S. Department of State (DOS) has verified the details of many visa applicants through the Petition Information Management Service (PIMS) database, maintained by the U.S. Department of Homeland Security (DHS). As part of an attempt to better verify its data, DHS has initiated a pilot program for verifying information relating to employees sponsored for non-immigrant visas, principally employees in E, H, L and O status, by contacting employers by telephone. These checks will be performed at random and will be unannounced. Employers should expect that they may be contacted by telephone shortly after an immigration-related petition has been approved, particularly if the employee will be traveling abroad to obtain a visa. A number of contractors have been authorized to conduct these telephonic interviews with employers. They may request to speak to an authorized official, and will then ask a series of questions confirming the validity of the information contained in the petition filed by the employer. Employers should request the name of the contractor and confirm their credentials prior to providing any information. These telephone interviews are similar to the USCIS "site visits" discussed in previous Vedder Price Alerts. We strongly recommend that employers not speak

to government agents or contacts without an attorney or witness present. Please contact your Vedder Price attorney in the event that you are contacted by USCIS for a telephonic interview.

Please contact your Vedder Price attorney or a member of our Business Immigration Practice Group should you have any questions regarding this issue.

Gabrielle M. Buckley
gbuckley@vedderprice.com
312-609-7626

P. Michelle Jacobson
mjacobson@vedderprice.com
312-609-7761

Future Seminars and Webinars

Immigration Basics Webinar—Overview of Visa Options

September 22, 2010

12:00 p.m.–1:00 p.m. CDT

To find out more and to register, please visit www.vedderprice.com (select "events")

Immigration Law Update Seminar

September 30, 2010

8:00 a.m.–11:00 a.m.

The University Club of Chicago, Chicago, Illinois

To find out more and to register, please visit www.vedderprice.com (select "events")

VEDDERPRICE®

222 NORTH LASALLE STREET
CHICAGO, ILLINOIS 60601
312-609-7500 FAX: 312-609-5005

1633 BROADWAY, 47th FLOOR
NEW YORK, NEW YORK 10019
212-407-7700 FAX: 212-407-7799

875 15th STREET NW, SUITE 725
WASHINGTON, D.C. 20005
202-312-3320 FAX: 202-312-3322

www.vedderprice.com

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Vedder Price P.C. is a national business-oriented law firm with more than 250 attorneys in Chicago, New York and Washington, D.C.

The Vedder Price Business Immigration Group

The Vedder Price Business Immigration practice group counsels U.S.- and foreign-based companies with regard to all aspects of business-related immigration laws, including assisting clients in obtaining temporary and permanent immigration status for their executive, managerial and professional employees in virtually every visa category. Building on the firm's strong corporate compliance practice, we work with clients to develop policies and internal processes to ensure compliance with federal and state-level immigration laws and minimize exposure to civil and criminal immigration enforcement. We also provide proactive advice to best position a company and its workforce before and after corporate changes, including acquisitions, mergers, divestitures and reorganizations.

Additional questions or comments concerning the Update or its contents may be directed to the firm's Corporate Practice Leader, John R. Obiala (312-609-7522), the Managing Shareholder of the firm's New York office, Neal I. Korval (212-407-7780), or, in Washington, D.C., Amy L. Bess (202-312-3361).