Employment Law Matters

December 2007

A Newsletter from the Law Firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

Employers Must Use Revised I-9 Form When Hiring New Employees

The federal government has issued a revised Employment Eligibility Verification Form (I-9). Even though the revised form was just announced in November, employers are supposed to start using it by December 26, 2007.

The new form must be used when hiring new employees on or after December 26, 2007. It need not be used to generally update all current employees who were hired before that date. However, it must be used for any required re-verifications of current employees when their old eligibility to work in the U.S. expires.

The main change in the form deals with the types of documents that you may accept as proof of identity and employment eligibility. Five documents have been removed from the list of acceptable documents. They include: Certificate of U.S. Citizenship (Form N-560 or N-570); Certificate of Naturalization (Form N-550 or N-570); Alien Registration Receipt Card (Form I-151); the unexpired Reentry Permit (Form I-327); and the unexpired Refugee Travel Document (Form I-571). They were removed because they lack sufficient features to help deter counterfeiting, tampering, and fraud. One document (Employment Authorization Document (Form I-766)) has been added to the list. The instructions for the form have also been updated.

You can download or print the form from www.uscis.gov/files/form/i-9.pdf . Employers can order forms from U.S. Citizenship and Immigration Services by calling (800) 870-3676. (The form has a revision date of 06/05/07, which is printed in the lower right corner.)

Employers Be Prepared for New and Aggressive Enforcement of Federal and State Employment Laws

Federal Contractors and Subcontractors Face More Aggressive OFCCP Review of Hiring Practices

Employers who are required to have Affirmative Action Plans because they are either federal contractors or subcontractors, should be aware of the fact that the Office of Federal Contract Compliance Programs ("OFCCP") has substantially changed the way it investigates new hire discrimination. This new more aggressive approach has resulted in more audits of Affirmative Action Plans and produced an increased number of citations which the OFCCP uses as leverage to demand large monetary settlements of employers found to be in violation.

The OFCCP's regulations, and more specifically the "Uniform Guidelines on Employee Selection Procedures", have always required government contractors to monitor hiring trends to make sure that applicants are hired in a non-discriminatory manner. This is why contractors when preparing and updating their Affirmative Action Plans must monitor, record and analyze their personnel activity (e.g., hires, promotions and terminations). The analysis conducted on this information is generally referred to as "adverse impact analysis". It is designed to reveal whether minorities or women are disproportionately affected in these personnel decisions on a statistical basis. In other words, if women or minorities are chosen less frequently for hire or more frequently for termination, the analysis would show what is commonly referred to as "systemic discrimination". Systemic discrimination can be demonstrated statistically without any evidence of racial or gender prejudice or other improper motives.

With little fanfare, the OFCCP has transformed itself during the past few years from an agency concentrating on affirmative action and diversity to an agency focused on systemic discrimination. The OFCCP has hired numerous statisticians to investigate potential systemic discrimination in contractor personnel selection processes.

Continued on next page

In This Issue …

Employers Be Prepared for New and Aggressive Enforcement of Federal and State Employment Laws (cont'd)

If the OFCCP finds systemic discrimination in a contractor's hiring practices during an audit of its affirmative action plan, the OFCCP will commence a lawsuit to recover monetary damages on behalf of all of the applicants adversely effected by the process. In other words, the OFCCP will seek monetary damages from the employer and distribute any monies recovered to minority and/or female applicants who were not selected for employment. Generally speaking, the amount of monetary damages sought is equivalent to the annual salary of each minority/female applicant that the OFCCP statistically determines "should have" been hired in the absence of systemic discrimination. For example, if on a statistical basis, the OFCCP determines that an employer should have hired 10 minority applicants for positions which pay $30,000.00 annually, they would seek damages in the amount of $300,000.00 from the employer to distribute among all of the minority individuals who applied for those jobs.

Since 2003, OFCCP's new approach has brought increasingly larger monetary settlements. Specifically, in 2003 OFCCP collected approximately $26 million from contractors on this basis. In 2006, that number had grown to more than $51 million. Recent reports from the OFCCP indicate that 2007 will likely result in substantially larger collections.

Given this more aggressive approach toward affirmative action plan reviews and audits, contractors and subcontractors are encouraged to update their affirmative action plans and conduct the necessary statistical analysis on its hiring, promotion and termination practices to insure that they have a strong defense should they be audited.

If you need assistance in performing this analysis and/or updating your affirmative action plan, please contact our office at 315-437-7600.

Expanded HIPAA Privacy Enforcement Team

The Department of Health and Human Services ("HHS"), which enforces the privacy provisions of the Health Insurance Portability and Accountability Act ("HIPAA"), recently announced that its "Privacy Enforcement Team" is being expanded to investigate more individual complaints of HIPAA violations. As most employers are aware, HIPAA's "Privacy Rule" protects the use and disclosure of employees' "protected health information" by "covered entities". Generally speaking, a "covered entity" includes health care providers, health plans and health care information clearing houses. Employers are not covered by this rule unless they provide self-insured benefits to employees (e.g., self-insured dental plans, self-insured optical plans, self-insured health benefits, etc.)

While individuals do not have the right to sue for violations of HIPAA, they may file complaints with HHS. The law grants HHS the authority to impose monetary and even criminal penalties for those violations. The expansion of HHS' Privacy Enforcement Team will likely result in the greater imposition of such penalties.

Employers covered by this law, as well as health plan sponsors, should review their HIPAA privacy policies and procedures as well as their business associate agreements and other notices to guard against potential civil and criminal penalties. If you need assistance in this review process, please contact our attorneys at 315-437-7600.

New Task Force to Address Misclassified Independent Contractors in New York

Governor Eliot Spitzer, along with the Department of Labor Commissioner, Patricia Smith, and various labor leaders, recently announced a new Executive Order that creates a Joint Enforcement Task Force to address "employee misclassification". The "misclassification" referred to here is where an employer unlawfully treats an individual as an independent contractor rather than an employee. According to Governor Spitzer "misclassified employees can be deprived of numerous protections to which they are legally entitled. Businesses can use misclassification to avoid complying with laws governing unemployment insurance, workers compensation, social security, tax withholding, temporary disability insurance, minimum wage, and overtime."

The Executive Order will allow for greater coordination among state agencies charged with classification enforcement and would create this new task force led by the Department of Labor. The task force will strengthen enforcement and avoid duplication of efforts by sharing information, coordinating investigations and enforcement actions. For example, if the Unemployment Insurance Division determines that an individual is an employee rather than an independent contractor in a dispute over UI benefits, the task force is charged with ensuring that that information is shared with other state agencies such as the Department of Labor, Department of Taxation and Finance, Workers' Compensation Board, etc.

In addition to filing complaints and identifying businesses that are misclassifying workers, the task force will report annually on the amount of wages, premiums, taxes and other payment/penalties it collects.

Given this more aggressive enforcement posture established by the Governor's Office, employers should conduct an audit of all its workers to ensure that they are properly categorized. Some business owners mistakenly believe that they have engaged

Continued on next page

Employers Be Prepared for New and Aggressive Enforcement of Federal and State Employment Laws (cont'd)

independent contractors when actually they have employees performing certain work for them. While there is no single factor that determines proper classification, it generally depends on the degree of supervision, direction and control that a business owner exercises over a worker. According to the Department of Labor, factors which should be considered in determining the degree of supervision, direction and control include:

- determining when, where and how services will be performed
- providing facilities, equipment, tools and supplies
- directly supervising the services
- stipulating the hours of work
- requiring exclusive services
- setting the rate of pay
- requiring attendance at meetings and/or training sessions
- requiring oral or written reports
- reserving the right to review and approve the work product
- evaluating job performance
- requiring prior permission for absences
- reserving the right to terminate the services

Independent contractors, on the other hand, are free from supervision, direction and control in the performance of their duties. They are in business for themselves, offering their services to the general public.

Indicators of independent contractor status may include:

- having an established business advertising in the electronic and/or print media
- maintaining a listing in the commercial pages of the telephone directory
- using business cards, business stationery, and bill heads
- carrying insurance
- maintaining a place of business and making a significant investment in facilities, equipment and supplies
- paying one's own expenses
- assuming risk for profit or loss in providing services
- determining one's own schedule
- setting or negotiating own pay rate
- providing services concurrently for other businesses, competitive or non-competitive
- being free to refuse work offers
- being free to hire help

If you have any questions regarding this matter or need assistance in performing an audit of your current work force, please feel free to contact us.

State Division of Human Rights More Aggressive with Employment Discrimination Investigations

The new head of the New York State Division of Human Rights ("SDHR"), Kumiki Gibson, has made it clear that she believes that the SDHR has not been aggressive enough in its investigation and prosecution of alleged discrimination in the workplace. In a recent report published by the SDHR, it notes that:

> In the prior administration, the Division focused solely on its individual complaint process, and did not investigate or prosecute any alleged wrongdoing -- despite its mandate and authority to do so.
>
> Because the major problems of discrimination exist in systematic and systemic ways -- as evidenced, in part, by the growing segregation across the State, the growing disparities between men and women in opportunities in certain professions and/or at certain levels of employment, and the continued inaccessibility of accommodations for people with disabilities -- the new Commissioner decided to use the entire arsenal of weapons available to her under the Law to fight discrimination. This arsenal includes, among other things, high impact investigations and prosecutions, legislative changes, and collaboration with other State agencies and organizations to address systemic and widespread forms of discrimination.

The number of complaints and investigations has substantially increased over the last year bearing out this new approach. From the charts below, you can see that the total number of complaints statewide has risen from less than 5000 to more than 6000 in a single year. Moreover, "probable cause findings" have increased 15% over the same time period, or more than three times what they were in 2006. (A "probable cause finding" is an initial determination that discrimination has taken place based on the SDHR's field investigation of a discrimination claim.)

Continued on next page

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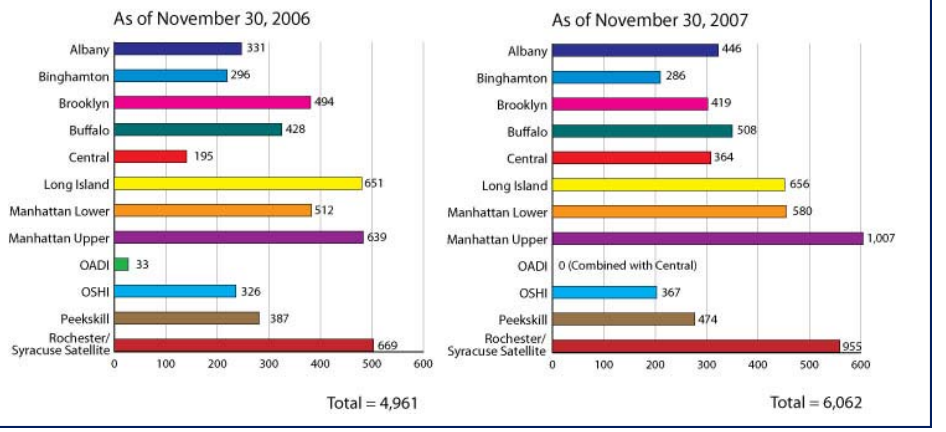
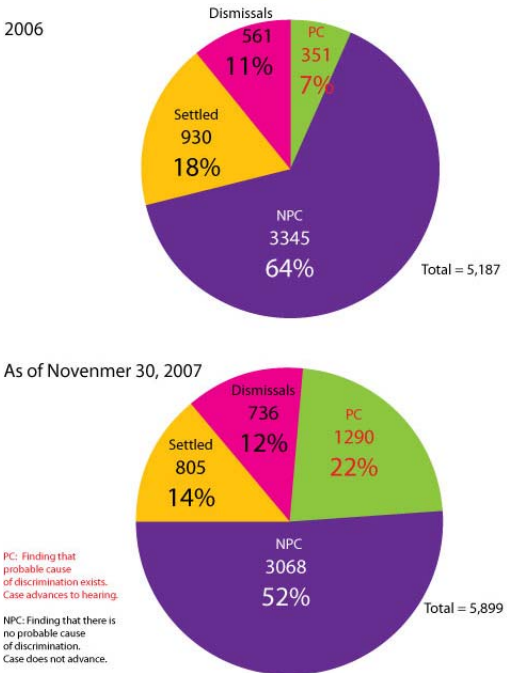
Employers Be Prepared for New and Aggressive Enforcement of Federal and State Employment Laws (cont'd)

Number of New Complaints



(Source: New York State Division of Human Rights Website)

Investigation Results



Given these facts and figures, employers in New York need to be prepared to defend each and every employment action they take with proper documentation of the legitimate reasons for those actions. For example, if you are terminating an employee for poor performance, you need to have documentation which clearly describes the employee's performance problems. This should include poor performance evaluations, examples of shoddy work, warning notices, , etc. Should you need assistance in reviewing employment actions or creating proper documentation, please contact our office.

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