



Employment Law Newsletter

Major Focus of Immigration Reform Proposal is on Employers

By Philip M. Keating

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For much of the past ten years there has been talk about the need for the reform of U.S. immigration laws and of various proposals to do so. Yet no laws have been passed and the issue of immigration to the U.S. comes and goes on the list of priorities of politicians and voters. At present, the issue has moved back up the priority list, although whether or not anything actually will be done is due an appropriate measure of skepticism.

In recent weeks, an immigration reform proposal was distributed by Democrats in the U.S. Senate. It is widely believed that this proposal is the framework for any legislation that would progress this year. As would be expected, a significant portion of the proposal involved measures that directly would impact employers.

The primary employment related measures in the immigration reform proposal are the following:

- The issuance of new biometric Social security cards linked to fingerprints, coupled with scanners that all employers would use to verify employment eligibility. This would be phased in from 18 months to 6 years from enactment;
- Offer U.S. permanent residence status (“green card”) to foreign students completing advanced degrees (at least a Master’s) in the sciences, technology, engineering, or mathematics provided they have a U.S. job offer in their field of study. The proposal also would end the annual numerical caps that have resulted in substantial backlogs sometimes approaching 10 years for highly educated immigrants from China and India;
- Create a new temporary visa (H-2C) for lower skilled non-agricultural workers that would be valid initially for 3 years and eligible for one three year extension.

There would be an annual cap for this visa based on unemployment and other economic data, although the employer could still obtain an H-2C if the cap had been reached by paying a supplemental fee and higher wages;

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- The H-1B category would face modifications including revised prevailing wage determinations, internet posting of available positions and job descriptions, and enhanced U.S. worker displacement protections and penalties. The proposed law also would impose limits on the number of H-1B and L-1 individuals companies with more than 50 employees may hire;
- Require immediate registration, fingerprinting and background checks for all individuals presently in the U.S. without legal status. Those individuals who do not have any criminal records would be granted provisional immigration status, including employment authorization. After 8 years, individuals who pass new criminal background checks, can understand and speak English, who pay taxes and required fees may become U.S. permanent residents; and,
- Increase by 300% the penalties on employers who knowingly hire someone not authorized for employment, fail to verify employment eligibility, or continue to employ an unauthorized alien knowing the alien is or has become unauthorized for employment. Employers would be responsible for unauthorized aliens hired by sub-contractors if the employer knew or recklessly disregarded that the subcontractor hired or continued to employ an unauthorized person.

As stated above, it is uncertain whether any immigration reform bill will be enacted this year. However, it is certain that employers are a primary focus of enforcement efforts. There is renewed enforcement of the provisions of the Immigration Reform and Control Act (“IRCA”) and its I-9 requirements. Furthermore, the E verify requirements that presently apply to federal contractors are likely to be expanded to cover

greater numbers of employers.

Please contact Philip Keating at pkeating@beankinney.com if you have any questions on U.S. immigration matters, including visa, permanent residence and citizenship acquisition, and employer obligations such as I-9 requirements.

Independent Contractor v. Employee Designation Remains Area of Scrutiny

By: Philip M. Keating

The decision of businesses to designate an individual as an employee or an independent contractor remains a primary area of enforcement activity by the Internal Revenue Service (“IRS”), the U.S. Department of Labor (“DOL”), and state departments of labor. Both the IRS and the DOL have announced their intention to dramatically increase the number of investigators pursuing this issue.

In April 2010, Senator Sherrod Brown of Ohio introduced in the U.S. Senate the Employee Misclassification Prevention Act (S. 3254) to amend the Fair Labor Standards Act (“FLSA”). An identical bill (H.R. 5107) has been introduced in the U.S. House of Representatives by Representative Lynn Woolsey. Both bills are now being reviewed by committees, although it presently is unclear as to the timing of the legislative process.

The bills introduced in Congress will require employers to maintain records concerning the decision to designate an individual an independent contractor instead of an employee. Furthermore, the bills would require employers to provide a written notice to individuals being classified as independent contractors informing them of the classification, directing them to a DOL website providing information on this topic and their rights, providing them with the address and telephone number of the local DOL office, and a general statement telling them to contact the DOL if they have any concerns about their classification as an independent contractor.

The bills also create a civil penalty of up to \$1,100

for violations of the law, and \$5,000 for repeated Independent Contractor v. Employee Designation Remains Area of Scrutiny
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or willful violations. The DOL also will be directed to coordinate enforcement efforts with state unemployment agencies.

As can be seen both under existing law and the new proposed law, the improper classification of an individual as an independent contractor can have serious consequences for a business. These obviously include the payment of back taxes, but also could include back wages for violation of wage-hour laws, liability under the Immigration Reform and Control Act (IRCA) for I-9 violations, and liability under employment laws such as the various discrimination statutes. Therefore, businesses should review their existing independent contractor relationships and be certain that they satisfy the existing standards as set forth by the IRS (see, March 2010 Employment Law Newsletter). In addition, businesses should be certain they utilize appropriate and effective independent contractor agreements.

Please contact Philip Keating at pkeating@beankinney.com if you have any questions about this issue.

Genetic Discrimination Law Regulations Expected Soon

By: Philip M. Keating

As discussed in the January 2010 issue of the Employment Law Newsletter, the Genetic Information Nondiscrimination Act of 2008 (“GINA”) took effect on November 21, 2009. GINA applies to employers who have 15 or more employees and prohibits discrimination against employees or applicants for employment because of genetic information.

The Equal Employment Opportunity Commission (“EEOC”) has been engaged in a regulatory process designed to develop and implement the regulations pertaining to GINA. The final regulations are expected to be issued in the next few weeks and likely will be discussed in greater detail in a future Employment Law Newsletter. These regulations will provide the actual rules for employers concerning compliance with GINA and the standards by which the EEOC and courts will judge complaints of alleged violations.

According to the EEOC statement concerning the final rule making process, GINA is a response to the availability of genetic tests “...that can inform individuals whether they may be at risk for developing a specific disease or disorder ...” and the corresponding concern that individuals “... may be at risk of losing access to health coverage or employment if insurers or employers have their genetic information.” Whether the final regulations will address how the provisions of GINA interact with the provisions of the recently enacted health care bill is not yet known. However, the EEOC indicated that GINA does include what it is labeled a “firewall” intended to eliminate “double liability” for claims that may fall under GINA as well as other laws such as ERISA.

The EEOC also stated that “...GINA does not preempt any state or local law that provides equal or greater protections from employment discrimination on the basis for genetic information or improper access or disclosure of genetic information.” As such, GINA is similar to the Family and Medical Leave Act (“FMLA”) in that it sets a minimum standard that state and local governments may choose to exceed. Thus, this is an area of the law where employers with locations in multiple states may be subject to different laws depending on the location of a given office.

By way of a brief review, genetic information is defined to include information concerning genetic tests of employees or applicants for employment,

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or condition of the employee's or applicant's family members. The definition includes a family medical history. The discrimination provisions of GINA apply to all employment related decisions. Harassment and retaliation also are prohibited. Furthermore, disclosure of genetic information about an employee or applicant for employment also violates GINA.

Employers should review their files and be certain that any family medical history about employees or applicants for employment is separated from the main personnel file, and kept in a confidential location. Furthermore, employers must post a new workplace poster that includes the GINA provisions. The poster is available through the EEOC at www.eeoc.gov.

If you have any questions concerning the Genetic Information Discrimination Act, employment discrimination issues or other labor and employment issues, please contact Philip Keating at pkeating@beankinney.com.

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