

# The Employment Brief

Updates in Labor and Employment Law to Help Your Business Succeed



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## Immigration

# President Bush Signs Order Requiring All Federal Contractors to Use E-Verify

by Ken C. Gauvey

E-Verify has been hailed as the salvation of America as well as the harbinger of its end. In truth, it is neither of these. E-Verify is a process where employers can check the identification information of new hires against the Social Security Administration's (SSA) database and employment eligibility through the United States Citizenship and Immigration Services (USCIS) database. By the end of 2008, all employers with a federal contract will be required to use it.

On June 6, 2008, President Bush signed an Executive Order requiring all federal contractors to use E-Verify to check the identity of new hires and any employee working directly under the federal contract. Within six days, the Federal Register had published proposed regulations for the implementation of this Order. The regulations themselves can be found at Federal Acquisition Regulation, 73 Fed. Reg. 114, 33374 (June 12, 2008) (to be codified at 48 C.F.R. pts. 2, 12, 22, and 52). The comment period on these proposed regulations run to August 11, 2008. Sometime after this, the final regulations will be imposed.

Essentially, E-Verify is just a website. Employers who participate go to the website and type in some information provided by the employee when completing the Form I-9. That information is then sent to the database where it is confirmed or is returned with a tentative nonconfirmation. This nonconfirmation does not mean that the employer must terminate the employee. There is an estimated 8-12% error rate reported with the database. Employers who terminate employees because of the nonconfirmations face some significant legal problems.

On June 16, 2008 Aramark Facility Services lost an appeal to the 9th Circuit because it terminated employees whose information did not match the data contained in the SSA database. Aramark gave the employees three days to get the information corrected and then

proceeded to terminate the employees. The Ninth Circuit stated that Aramark simply did not provide enough time for employees to correct the SSA database information and therefore, Aramark had to reinstate 33 janitors, presumably with back pay.

In fact, there are specific guidelines in effect that outline the process employers should utilize when those nonconfirmation notices are received. When the database returns a tentative nonconfirmation, the employer is required to provide a "Notice to Employee of Tentative Nonconfirmation." The employee must then indicate on the notice whether they will contest the notice or not. Both employee and employer should sign the notice.

If the employee chooses to contest the notice, the employer prints out a "Referral Letter" from the E-Verify system. This letter contains information about resolving the notice as well as the contact information for the SSA or USCIS, depending on which agency was the source of the nonconfirmation. The employee then has eight days, according to the proposed rule, to contact the proper agency to get the situation resolved. During this time, employers who participate in E-Verify may not terminate an employee who is contesting the nonconfirmation.

It should be noted, that these procedures are from the proposed regulations. The regulations for "No-Match" letters that have been proposed, give employees a much longer time to correct these issues, 30 days.

These regulations, when final, will apply to any company that has a federal contract. This most likely includes any private or public school as well. In 1984, in *Grove City College v. Bell*, the Supreme Court determined that a private college whose students received some federal student aid was subject to federal statutes addressing educational

institutions. Grove City College did not directly receive any federal financial assistance, however, some of its students received basic educational opportunity grants. The Supreme Court determined that this was sufficient to bring the college under the jurisdiction of federal regulations. It is likely that this Executive Order will be interpreted under this expansive view of federal authority.

There are some additional problems, outside of the error rate, with using E-Verify. E-Verify requires that employers verify current employees who will work directly under any federal contract. However, section 274A of the Immigration and Nationality Act provides that employment verification is to take place at the hire of the individual. Therefore, E-Verify's requirement of post hire verification may have to overcome federal law.

In addition, to participate in E-Verify, employers have to sign a Memorandum of Understanding (MOU). This Memorandum outlines the responsibilities of agencies and employers participating in E-Verify. The current MOU states that employers are to use E-Verify for new hires only, and not use it for employees hired before the MOU went into effect.

The MOU also requires that employers allow the Department of Homeland Security and SSA to make periodic, unannounced visits to the employer to review E-Verify records and to interview employees without notice. This provision requires that employers give up certain Constitutionally protected rights. DHS and SSA do not need a warrant to go onto an employer's premises and review records or interview employees when that employer participates in E-Verify.

E-Verify is not a complex system. Employers should be able to sign up and begin using it if this Order goes into effect. However, if employers have any questions about the program or have any concerns about how to react to nonconfirmation notices, employers should contact legal counsel.

### Immigration **USCIS Makes it Easier for H-1B's to Stay in the U.S.** by Ken C. Gauvey

One of the biggest criticisms of the U.S. immigration policy has been the inability to bring educated and skilled workers into the U.S. This issue has been so contentious that Microsoft actually

moved some of its facilities to Canada in order to bring in the engineers they needed from outside of the U.S. While members of Congress are attempting to address this problem by raising the yearly allotment of H-1B's, this issue has been addressed by Congress before. The American Competitiveness in the Twenty-First Century Act of 2000 (AC21) was passed, in part, to give some greater amount of flexibility to employers who wish to keep their H-1B employees after the H-1B expires.

An H-1B is a temporary visa that allows an employer to bring in a foreign worker for no more than two consecutive three year periods, for a total of six years. Before AC21, at the expiration of those six years, the employee had to return home for at least a year before returning to the U.S. An employer who wanted to keep that employee could file a petition to obtain lawful permanent resident status (LPR) for the employee, which is euphemistically called "green card status." This adjustment of status application can take years. However, if the LPR application was not approved before the six year period ended the employee had to return home and wait. In the meantime, the employer had to fill that position, resulting in the employer's inability to hire back the foreign national and the abandonment of the LPR petition.

To adjust status, an employer must first file an Immigrant Petition for Alien Worker, an I-140. This is a petition for an employment visa, which is provided by the Department of State. The backlog for visas can result in a visa approval, but a delay in the visa becoming current. Once the visa is approved, the employer can file an Application to Adjust Status, I-485, however, this I-485 will not be processed until the visa is current (This is a gross generalization but is to demonstrate a point). This process can take a long time. For example, the USCIS website states that USCIS is currently reviewing I-140's submitted before April 1, 2006. The July 2008, Department of State Visa Bulletin states that in July, visas approved for Chinese foreign nationals before April 1, 2004, will be considered current. The USCIS website states that they are now reviewing applications to adjust status filed before July 24, 2006. By these numbers, a Chinese H-1B who files today, would have to wait more than two years for an approval of the I-140, four years before his I-140 was current and then an additional two years for his I-485 to be approved.

AC21 made several changes in the immigration laws. Among these changes was a provision that allowed

employees in the U.S. to extend their H-1B status if they had a pending LPR application that had been pending for more than a year. This means that an H-1B employee could now remain in the U.S. and continue working for their employer while their adjustment of status application is pending. AC21, however, achieved this in two ways.

Section 106(a) of AC21 requires that USCIS to grant an H-1B extension in one year increments if the employer filed a labor certification with the Department of Labor, the first step in filing the I-140, or the I-140 was filed at least 365 days prior to the exhaustion of the employee's H-1B status. Section 104(c) of AC21 requires USCIS to grant an H-1B extension in up to three year increments if the H-1B employee has an approved I-140, but, because of the per country limitations, the I-140 is not current.

Clearly, a better option for an employer is to have the approved I-140 and request the three year extension of the employee's H-1B. Otherwise, by the time USCIS grants the extension under §106 each year, the employer will have to file another application for the next year in time for it to be approved so that the employee does not lose their H-1B status.

On June 11, 2008, USCIS announced that it would be accepting applications for premium processing for I-140's. This means that for an extra \$1,000, USCIS will review the I-140 within 15 days. To be eligible, the I-140 must be filed on behalf of an H-1B whose status will be expiring within 60 days and who has not had a labor certification or I-140 filed within 365 days of the H-1B expiring. By getting this I-140 approved before the expiration of the employee's H-1B, the employee becomes eligible for §104(c)'s three year extensions.

While it is always preferable to start the adjustment of status process well before 365 days prior to the H-1B expiring, there are now options for employees to remain in the U.S. while their I-140 is pending if the proper paperwork was not filed in that time frame. If you have any questions on how the H-1B program works or employment based adjustment of status, please contact Kollman & Saucier, P.A.

### 1981 **Section 1981 Prohibits Retaliation by Darrell VanDeusen**

In a somewhat surprising move given the Supreme Court's recent

decisions, the Court held 7-2 that Section 1981 of the Civil Rights Act of 1866 (42 U.S.C. §1981) protects individuals from retaliation. *CBOCS West Inc. v. Humphries*, No. 06-1431, \_\_\_U.S.\_\_\_, May 27, 2008). Although Section 1981 does not expressly prohibit retaliation, the Court found that its prior decisions recognizing implied rights to sue for retaliation under another part of the 1866 Act (42 U.S.C. § 1982), and under Title IX of the Education Amendments of 1972, require the same result under Section 1981.

The Court also looked to House and Senate committee reports on the Civil Rights Act of 1991, where Congress broadened the scope of Section 1981 as evidence that Congress intended to provide a private cause of action against retaliation. In dissent, Justices Thomas and Scalia said the majority ignored the plain text of the statute which, unlike other federal civil rights laws, does not explicitly prohibit retaliation.

The case involved a black former assistant manager for a Cracker Barrel restaurant who sued the company, alleging that he was fired for complaining to management about race discrimination against a black co-worker. His Title VII claim was untimely, so he looked to Section 1981. Ultimately the Seventh Circuit held that Section 1981 did provide the basis for a retaliation claim. The Supreme Court affirmed the Seventh Circuit. Seven other circuits had also held that Section 1981 prohibits retaliation. The remaining three circuits had not addressed the issue. Despite this agreement among the lower courts, the answer to the question of whether Section 1981 permits retaliation claims was not really all that clear, primarily because Section 1981 says nothing about retaliation. The Supreme Court's shift away from its oft-stated view that "if the statute does not say it, it is up to Congress not the Court to change it" is what is surprising.

What are the practical implications of the *CBOCS West* decision for practitioners? Remember that Section 1981 is race based. There are three areas of significance: First, the statute of limitations for most claims under Section 1981 is four years, not the 300 days for filing a Title VII charge. Second, damages under Section 1981 are unlimited. Third, there is no minimum number of employees for coverage. So, all employers, but particularly small employers, now need to be aware that an individual can now file a retaliation claim up to four years after the alleged illegal behavior and potentially recover unlimited damages.

## Maryland

### Governor Signs Flexible Leave Act into Law by Eric Paltell

On May 22, 2008, Governor O'Malley signed into law the "Flexible Leave Act." The new law, which takes effect October 1, 2008, requires Maryland businesses that employ 15 or more persons to allow employees to use any paid leave available to them to take time off when a child, spouse, or parent is ill.

While the bill certainly has a well-intended purpose and does not require employers to grant new paid leave benefits to employees, it still creates some significant burdens for Maryland employers. In particular, the law prohibits employers from taking disciplinary action against any employee who "exercise rights granted" under the law. Although employees taking leave under the law are required to comply with the terms of the employer's attendance and leave policies, an employee cannot be disciplined for taking leave under the new law. Therefore, employees with chronic attendance problems may have a new way to insulate themselves from discipline – they can claim they have an "ill" family member.

The potential for abuse under the new law is made worse by the fact that there is no definition of what an "illness" is, nor are there any age parameters on the definition of "child." As a result, it appears as though an employee would be entitled to take time off to spend time with an adult child who has a cold. The law does not require that the employee taking leave show that he or she is needed to provide care to the ill family member, nor does the law provide employers with any mechanism to verify the legitimacy of the illness.

We are hopeful that Maryland business groups will be able to lobby for some clarifications in the law next year. For example, there is already discussion of providing better definitions of covered family members, raising the threshold for coverage, and providing employers with a means to verify the family member's illness. For a copy of the new legislation, go to <http://mlis.state.md.us/2008rs/bills/hb/hb0040e.pdf>

## Immigration

### Some EAD's Extended to Two Years by Ken C. Gauvey

The Employment Authorization Document (EAD) is the card foreign nationals may use to gain employment in the U.S. On the Form I-9, the EAD is a List A document, meaning that the card itself is enough to demonstrate employment eligibility in the U.S. These cards can be legitimately obtained by foreign nationals in several different ways. They are given to people lawfully in the U.S. as an asylee or refugee, those who have filed an application to adjust status (I-485) to become what is called a "green card holder," and they are given to foreign nationals who are in the U.S. under a visa that allows them to obtain employment in the U.S. However, these cards expire.

When EAD's expire, employers are required to complete the reverification section of the Form I-9 to show that the employee has a new EAD that is valid. Unfortunately, EAD's can take more than four months to renew, so some employees may not have a new EAD when the old one expires. This creates havoc with the employer who is then forced to terminate the employee who could be granted a new EAD any day.

On June 12, 2008, USCIS announced that they would start issuing two-year EAD's for those who have applied to adjust status but who are being held up because of visa availability limitations. This change is to take effect on June 30, 2008, and will be applied at the discretion of USCIS on a case by case basis. This should go a long way in alleviating some of the unnecessary strain on employer's resources in reverifying EADs.

## Kollman's Corner

### The Complexity of Things by Frank L. Kollman

I had two experiences recently that convinced me even more that Congress should not meddle in the workplace. Earlier today, I accompanied my wife to Jo Ann Fabrics. There was a family with young children there. The husband was dressed like a Jamaican beach worker – tee shirt and cut offs – with a high tech wireless head phone stuck in his ear. His three daughters were dressed in tradi-

tional American garb; his wife was wearing a full black burka with a slit for her eyes.

I could only imagine the dilemma for my clients confronted with this woman seeking employment. (I am assuming, of course, that women wearing burkas are not prohibited from working. They may be, but I am not an expert on the subject). There are issues of sex, religious, and national origin discrimination. Plus, people in my culture are distrustful of people whose identities are obscured by masks or costumes. We read "body language" all the time. What would my clients do if this woman asked for a job?

Employers should be able, within reason, to project a certain image to its customers. We have no problem with bans on tattoos, excessive piercings, and strange manner of dress like underwear worn on the outside. But when these things become matters of religious or cultural application, we send American employers scurrying to talk to labor lawyers about the legality of refusing to hire them.

The second experience was more personal. A few weeks ago, I had some chest pain that turned out to be temporary and definitely not a heart attack. Nevertheless, I finally decided that I would take medicine to control my blood pressure and lower my cholesterol. These medicines, according to the literature accompanying them, could result in depression, fatigue, dry mouth, dizziness, and a variety of other side effects, many of which could be controlled by drugs with more side effects.

Under the Americans with Disabilities Act, a guy with my profile may have more rights than a guy with 110/70 blood pressure and LDL numbers under 100. At what point does an employer have the right to say that a person's medical condition, which may also be a disability, is affecting his or her ability to work? Any one of these side effects could result in a costly mistake or a lack of productivity. Why should it be my employer's problem that I have developed some of the diseases of aging, reducing my value to the company? Can we really legislate compassion? Shouldn't I have some responsibility to my employer to control my conditions with diet and exercise, which have fewer complications and side effects than beta blockers and statins?

I suppose I should be grateful that I get paid to interpret the very laws that I question, on a daily basis, for their wisdom. I just wish Congress would be more thoughtful as it contemplates further changes to our nation's labor laws. I get the feeling that Congress wears its

own kind of burka, with very narrow slits for seeing the real world.

For more thoughts and comments by Frank Kollman, visit his blog at <http://kollmanlaw.com/blogs>

## Maryland Corrective Legislation Signed for Private Suits Under 49B by Ken C. Gauvey

Last year's creation of a private cause of action in state court for employment discrimination raised a number of questions that were not addressed in the statute. This year a collaborative effort was made to enact corrective legislation that will make application of the law less cumbersome for employers. K&S's Darrell VanDeusen, working on behalf of the Maryland Chamber of Commerce, represented employer interests in this process. On May 22, 2008 the Governor signed this corrective action into law. It takes effect October 1, 2008.

For a copy of this bill, see <http://mlis.state.md.us/2008rs/bills/hb/hb0399t.pdf>.

Highlights of the law are:

- \* A two year statute of limitations from the date of the alleged discrimination for filing a claim under Article 49B.
- \* The immediate termination of any administrative proceedings before the MCHR if a lawsuit is filed.
- \* Mitigation of backpay by amounts that are earned or reasonably could be earned.
- \* The right of employers to move a case from the Office of Administrative Hearings to court (previously the law only gave that right to the plaintiff or the MCHR).

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