The Employment Brief

Updates in Labor and Employment Law to Help Your Business Succeed

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Immigration Law

New Rules on No-Match Social Security Letters

by Frank L. Kollman

Last year, I wrote about proposed regulations for dealing with no-match letters sent to employers by the Social Security Administration ("SSA"). No-match letters are sent when the social security number used by the employer for withholding does not match the name of the employee. While a no-match letter can result from typographical errors, it frequently means that the employee is an illegal alien not authorized to work in the United States.

In 2006, the SSA sent more than 138,000 no-match letters to employers. In the past, most of these no-match letters were sent directly to the employees, and their employers were not notified. In most cases, no follow up to these letters occurred. With the introduction of new rules by the Department of Homeland Security ("DHS"), however, these no match letters can place business owners in a difficult legal position.

Beginning in September 2007, the new rules require the SSA to notify employers who submit more than ten non-matching Social Security numbers on their W-2 forms. From the point the employer receives the no-match letter, it must adhere to strict time lines to avoid substantial fines and possibly criminal prosecution. The new rules outline a step-by-step process employers are required to go through in order to avoid penalties.

First, employers must verify that the mismatch was not the result of a record-keeping or clerical error on the employer's part. The employer has 30 days to complete this step. If an error is found, the no-match letter contains instructions on how to correct the clerical error. If no clerical error is found, the employer must go on to the second step.

The second step is to ask the employee to confirm the accuracy of the employer's records. It is possible that the error was due to a handwriting mistake or other simple mistake amounting to a clerical error on the part of the employee. If no such error exists, the employer must ask the employee to resolve the issue directly with the SSA. The sooner the employer gets to this step the better, because the employee may have difficulty scheduling an appointment with the SSA, or the error may lie with the SSA's own records, which could take time to correct.

The employer has 90 days from the date it received the no-match letter to resolve the issue. If, on day 90, the no-match issue is not resolved, the employer is required to complete a new I-9 form within three days, just as if the employee in question were newly hired. This new I-9 form has to be completed without the use of the questionable Social Security number, and the employee must present a document that contains a photograph to establish identity. In other words, in completing the I-9, the List C document cannot be a social security card, and either the List B or C document must contain a photograph.

If the employer is able to resolve the no-match issue, the employer must then follow all the instructions contained in the SSA no-match letter. The DHS also requires that employers verify that the error has been corrected by using the Social Security Number Verification Service ("SSNVS") administered by the SSA, retaining a record of the date and time of verification. This system may be accessed through

http://www.socialsecurity.gov/employer/ssnv.htm.

If the employer is not able to resolve the issue or properly complete a new I-9, the employer is required to terminate the employee or risk criminal and civil charges resulting in severe fines and possible imprisonment. It is important to note that just because an employer does not receive a no-match letter does not mean the employer is safe from civil and criminal action. The no-match letters are only going out to employers who meet the ten no-match letter threshold. Employers are still responsible for verifying the work authorization of employees. The best way to do this is to be familiar with the proper procedures for completing the I-9 form and to conduct an annual internal audit.

Employers also should be cautious in how they react to these no-match letters. Employees should be presumed to be legal absent clear evidence to the contrary until all the steps listed have been exhausted. If an employer acts contrary to this presumption, it risks being charged with discrimination both by the employee and by the government, which can also result in severe fines and civil liability. To manage this new system, employers are required to establish clear policies and procedures. They will need to be able to act immediately upon receipt of the no-match letter and will need to establish some type of tracking system to be able to act within the 30, 90, and three-day deadlines established by the rules.

Finally, I want to thank Ken Gauvey for contributing most of the information contained in this month's article. Ken, who concentrates in the area of immigration law, was hired by my firm because of the increased role immigration issues play in employment law. For more information on Ken, consult our website.

Maryland Employment Law

Maryland Requires Insurance Benefits for Domestic Partners by Ken C. Gauvey

On June 1, 2007, a new law went into effect in Maryland called The Family Coverage Expansion Act (the Act). This Act requires that health insurers provide insurance benefits to domestic partners and their dependent children in certain cases. While the Act does define dependent children, it does NOT define domestic partners or attempt to define marriage or establish any type of civil union in Maryland. The Act applies to all policies, contracts and health benefit plans issued, delivered or renewed in the State of Maryland on or after January 1, 2008.

The Act applies to insurers, health service plans and HMOs who provide benefits under contracts that are issued or delivered in the State of Maryland. These organizations are now required to provide the same benefits that a covered dependent may have to domestic partners of an insured or a child dependent of the domestic partner at the request of the insured or group policyholder. These benefits must be made available if the buyer of the insurance requests them. This means that an individual who purchases an insurance policy may request these benefits on behalf of their domestic partner, or, if the insurance benefits are gained through a group plan, the group plan holder may request these benefits. This does not mean that anyone can request these benefits. It is only the policyholder who may request them. So, if employees insured through their employers wish to have these benefits for their domestic partners, they must ask that their employers request the benefits on their behalf.

The Act also states that the insurer may require proof of eligibility of the domestic partner or child dependent. However, the Act does not provide the standard for demonstrating the validity of a claim of domestic partnership. In addition, the Act purposefully fails to define a domestic partner. The Act simply states that the insurer may require that a party provide proof of eligibility of the domestic partner or child dependent for coverage under this section. The Act goes on to state, "The Commissioner shall adopt regulations to implement this section."

It is important to note that the Act does not say that the employer has to pay for the coverage. The Act also does not say that the employer has to provide coverage at all. At this point, the Act simply requires that the insurance carriers provide these benefits should the policy owner request them.

The second part of the Act defines a dependent child as one who resides with the insured, is unmarried and is under the age of 25 years. In the past, for an insurance plan to cover a child after the age of 18, the child had to be enrolled in some type of higher education program. However, the Act has done away with this requirement and purports to cover all dependent children until the age of 25. The Act does not apply to certain types of coverage such as disability or long-term coverage. In addition, the Act does not apply if additional benefits are provided under a separate contract such as with dental or vision. The Act requires that each policy that provides coverage for dependents include coverage for a child dependent, with the same health insurance benefits to a child dependent that are available to any other covered dependent and at the same rate as any other covered dependent.

As always, should have any questions regarding the implementation of this new law, seek legal counsel. While the law only affects policies issued or renewed after January 1, 2008, it is always best to make sure that you are properly prepared to manage changes in the law before the law goes into effect.

Fair Labor Standards Act

Hourly Paid Engineer Cannot be Exempt from Overtime Obligations

by Eric Paltell

Under the Fair Labor Standards Act, generally employees must be paid a "salary" to be exempt from overtime obligations. Although there are limited exceptions to this rule for computer programmers, doctors, lawyers and teachers, an employer loses the exemption when it pays any other type of employee on an hourly

basis. Unfortunately for a Virginia defense contractor, it learned this lesson the hard way when it paid a software engineer on an hourly basis and then got stuck with a bill for unpaid overtime. Intracomm, Inc. v. Bajaj, No. 06-1516 (4th Cir. 7507).

The case arose when the employer decided to hire Baback Habibi as a software engineer. Instead of paying him a conventional salary, the company paid him $7.00 an hour, plus the potential for a large payout if the company decided to purchase technology he had designed. In early 2005, Habibi demanded that the employer exercise its option to buy his technology for 1.5 million dollars. The company refused, and terminated his employment. Habibi responded by suing for unpaid wages and overtime. The United States District Court for the Eastern District of Virginia ruled in favor of Habibi, and the Fourth Circuit affirmed its decision. The Courts ruled that the decision to pay him hourly converted him to a non-exempt employee, regardless of what his job duties entailed.

The decision reenforces how important it is to follow the FLSA's basic rules. Although in this case, it was Habibi, not the Company, that came up with the idea for the hourly compensation and the right to revenue from the sale of his product, the employer was still liable for unpaid overtime. The FLSA prohibits "unsupervised" waivers of employee rights, meaning that even a highly-skilled, well-educated worker cannot voluntarily give up his right to overtime pay if he is paid on an hourly basis.

Firm News

Some Exciting New Tools for Employers Are Coming Soon from Kollman & Saucier, P.A.

Keeping up with the continually changing regulations of employment law can be difficult for companies. Kollman & Saucier recognizes that its clients often need help recognizing how changes in the law affect them. To help our clients succeed, Kollman & Saucier is launching a series of new initiatives to help keep our clients informed.

The first of these initiatives is this on-line newsletter. Published monthly, this newsletter will examine specific and important issues in greater detail than the email newsletter allows.

The second of these initiatives is an email newsletter with up-to-date news on the most recent changes in employment and labor law.

As some of you already know, Kollman & Saucier has launched a series of blogs covering issues from employment and labor laws to immigration matters. You can read these blogs at: www.kollman-saucier.com/blogs The Kollman & Saucier blogs can be subscribed to with your RSS reader. For those of you who are not familiar with this technology, RSS readers allow you to subscribe to web content. Whenever the content on the page is updated, your RSS reader will give you a summary of the new material and allow you to go to the site to get the full text of the update.

Finally, in addition to the blogs, Kollman & Saucier will be instituting a podcast. The podcast will feature periodic discussion on important employment law matters by some of the most experienced attorney's in the field. This podcast will also feature a subscription service, either through the blog page or through iTunes.

We hope that you find these offerings of benefit. As always, if you have questions or concerns, do not hesitate to contact one of our attorneys.

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