June 2011 Special Immigration Alert

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I. U.S. Supreme Court Sustains Constitutionality of Arizona Legal Workers Act

On May 26, 2011, the Supreme Court of the United States issued its decision in *Chamber of Commerce v. Whiting*, No. 09-115, 563 U.S. __ (2011). In a 5-3 opinion, the Court upheld the constitutionality of the Arizona Legal Workers Act ("Act"), which requires all employers to use the federal E-Verify system and authorizes the state to suspend or revoke the licenses of any business that intentionally employs unauthorized aliens. The U.S. Chamber of Commerce had challenged the Act on preemption grounds because the Immigration Reform and Control Act of 1986 ("IRCA") prohibits states from imposing civil or criminal sanctions on those who employ unauthorized aliens. In the Court's view, the Act was not preempted, either directly or by implication, because it fell within the IRCA provision that permitted states to impose sanctions "through licensing and similar laws."

The Court's decision promises to complicate the legal obligations of employers by breathing new constitutional life into the role of states in regulating the employment of undocumented aliens. Since the Court's decision, Alabama, Georgia, North Carolina, South Carolina and Tennessee have passed similar statutes, and state legislatures around the country are looking more closely into the issue. Thus, employers must satisfy not only IRCA's Form I-9 requirements but also state law requirements applicable to where they operate. In this regard, employers must be conscious of potential substantive differences between state and federal requirements as they seek to simultaneously navigate this statutory minefield and avoid possible discrimination claims.

Following its decision in *Whiting*, the Court also vacated and remanded the decision of the U.S. Court of Appeals for the Third Circuit in *Hazelton, Pa v. Lozano*, 620 F.3d 170 (3d Cir. 2010). In *Lozano*, the Third Circuit had affirmed a district court decision that invalidated a local Hazelton ordinance that, among other things, made it unlawful for employers to recruit, hire, or employ an undocumented worker, required employers to use E-Verify under certain circumstances, and prohibited property owners from "harboring" illegal aliens by leasing housing to them. The Third Circuit was directed reexamine its decision in light of the Supreme Court's decision in *Whiting*.

II. USCIS Updates FY 2012 H-1B Cap Count

Each federal fiscal year, there is a quota on the number of new H-1B petitions that the USCIS can approve. That quota is 65,000 for regular petitions and 20,000 additional petitions for foreign nationals who secured at least a master's degree from an accredited university in the United States. The USCIS has reported that, as of June 13, 2011, approximately 15,200 H-1B cap-subject petitions, and 10,200 master's degree petitions, had been filed for fiscal year 2012.

USCIS will continue to accept all eligible H-1B cases until a sufficient number of H-1B and H-1B1 petitions have been received to reach the statutory limits. Employers considering an H-1B petition for an existing or potential employee should prepare and file the petition as soon as possible.

III. Grand Jury Investigates Misuse of B-1 Visa Classification

A federal grand jury in Texas is investigating Infosys Technologies Ltd. ("Infosys") for possible criminal violations arising out of the company's use of B-1 nonimmigrant business visas. The investigation follows a civil "whistleblower" suit filed by Jack Palmer, Jr., an Infosys employee, in which he accused the company of improperly using the B-1 visa classification to send employees to this country to work. The suit prompted an inquiry to the U.S. Department of State ("DOS") by Senator Chuck Grassley (R-Iowa) about possible abuses of the B-1 program.

The allegations by Mr. Palmer are that Infosys improperly used the B-1 program to circumvent quota and salary restrictions contained in the H-1B nonimmigrant classification. Under the H-1B program, sponsored employees are allowed to work here, but there is a limit on the number of new H-1B petitions that can be granted each year, and there are requirements on the minimum

salaries that H-1B employers are required to pay. B-1 business visitors, by contrast, normally are not permitted to work in this country, and there is no limitation on what they must be paid. Mr. Palmer alleges that employees sent to this country by Infosys were not legitimate business visitors but rather workers that should have been classified as H-1B employees. If these allegations are true, there may be serious criminal charges filed against Infosys and any employees involved in this activity.

The grand jury's investigation into Infosys is a wake-up call to many multinational employers that utilize the B-1 nonimmigrant classification for business visitors. Often, U.S. branches of foreign companies are not in a position to monitor the travel of business visitors sent by foreign parents or affiliates. Moreover, these foreign entities may not appreciate the limitations imposed on the activities of business visitors in the United States. This can result in unforeseen legal liability for the U.S. company, unless it carefully monitors these visitors and their activities in this country.

IV. DOS Issues Revised Online Nonimmigrant Visa Application (DS-160)

In late June 2011, the DOS issued a revised DS-160 nonimmigrant visa application. Among other things, the new online form contains features that give foreign nationals greater flexibility when attempting to save applications they are preparing. The accompanying instructions advise foreign nationals that they can seek assistance from others in completing the new form, but they must electronically sign and submit their own application. In this regard, the DOS emphasized that applicants must click the "Sign Application" button even if they receive assistance in preparing their application. According to the DOS, the DS-160 may not be accepted if someone else clicks that button.

The DS-160 is a long and complicated application. This new DOS rule promises to make the process that much more challenging for foreign nationals who need assistance in completing the form.

V. NLRB's Counsel Updates Regions on Immigration Issues in NLRB Proceedings

On June 7, 2011, Richard A Siegel, Associate General Counsel of the National Labor Relations Board ("NLRB"), issued a memorandum ("Siegel Memo") to all regional offices that contained guidance on how to address the immigration status of employees involved in representation cases and unfair labor practice cases before the NLRB. The Siegel Memo supplements a memorandum issued nine years ago by the NLRB's General Counsel following the decision by the Supreme Court of the United States in *Hoffman Plastic Compounds Inc. v. NLRB*, 535 U.S. 137 (2002). In *Hoffman*, the Court held that undocumented workers are not entitled to receive back pay awards in proceeding under the National Labor Relations Act ("NLRA") if their employment was not lawful under the IRCA.

In the Siegel Memo, the NLRB acknowledged that immigration issues can be injected into NLRB proceedings. However, the Siegel Memo emphasized that the NLRA protects all employees, "regardless of immigration status" and that the status of an employee generally is not relevant in representation cases or in proceedings concerning the merits of unfair labor practice charges. In this regard, the Siegel Memo instructs the NLRB's regional offices that:

(1) Regions generally should presume that employees are authorized to work, should refrain from conducting immigration investigations, and should object to any inquiries into an employee's status;
(2) Regions should investigate a complainant's immigration status only after the employer-respondent establishes a genuine issue during the remedial stage of the proceeding; and
(3) Regions should conduct an investigation by asking the Union, the charging party, or the employee to respond to the employer-respondent's evidence.

The Siegel Memo suggests that it simply reiterates NLRB policy, but the immigration issues in NLRB proceedings, as in other forms of litigation, have become extremely complex. Many states have looked to the actions of the employer to determine the rights of an undocumented litigant. If the employer was complicit or at looked the other way, regarding the worker's status, these courts have found it unfair for the employer to benefit from its own legal violations. Where, however, the employer satisfied all legal requirements and was misled by misrepresentations from the complaining worker, that conduct is relevant to the proceeding and the worker should not be able to avoid the consequences of these unlawful actions. How this will play out in future NLRB proceedings remains to be seen.

VI. FTC Settles Charges Regarding Privacy Concerns About Form I-9 Software Product

On May 3, 2011, the Federal Trade Commission ("FTC") announced that it had approved a settlement with Lookout Services, Inc., a Form I-9 software solutions company ("Lookout"), arising out of FTC charges that the company failed to take reasonable measures to protect consumer information, including Social Security numbers, in the Form I-9 software that the company designed, developed, and licensed to businesses. Lookout claimed that its product maintained the security of sensitive personal information contained in the completed Forms I-9. According to the FTC, Lookout had easily compromised security features and, as a result, experienced serious security breaches that exposed the sensitive data of approximately 37,000 individuals to an employee. The settlement bars Lookout from making false claims about the security of personal information in its Form I-9 software when marketing the product.

The FTC's settlement with Lookout serves as a warning to those employers considering electronic solutions to their Form I-9 and possibly E-Verify obligations. There are numerous vendors selling products that purport to address and handle these responsibilities. We can expect additional products to be offered as states pass new legislation mandating the use of E-Verify. Employers need to ensure that the products they consider will satisfy all Department of Homeland Security and state requirements and are compatible with not only their own HR software systems but also the processes and procedures that employers must use to comply with their hiring and orientation patterns. The Lookout settlement instructs that employers also need to assess the security features of these products to make sure that they protect all the workforce information they contain.

VII. USCIS Proposes Enhancements to EB-5 Program

On May 19, 2011, the U.S. Citizenship and Immigration Services ("USCIS") proposed significant enhancements to the administration of its Immigrant Investor Program, commonly referred to as the "EB-5 Program." Under the EB-5 Program, 10,000 green cards are set aside annually to immigrants who invest between $500,000 and $1 million in a commercial enterprise that creates at least 10 jobs for Americans. The EB-5 Program potentially is attractive to citizens of certain countries, such as China, that have experienced lengthy backlogs in the employment- and family-based green card quotas. Unfortunately, the EB-5 Program has not attracted much interest due to the USCIS's administrative delays and inflexibility and the fact that the issuance of the green card is conditional and can be revoked after two years when the USCIS reviews the success of the investment. In the current, uncertain economy, many foreign nationals who might otherwise be interested in the EB-5 Program are not willing to risk this level of investment, unless the outcome is much more certain.

In its announcement, the USCIS proposed three fundamental changes to the way in which the EB-5 Program is administered. First, it promised to accelerate processing initial Regional Center applications and to permit premium processing of these cases. Second, the USCIS proposes to create new specialized intake teams with expertise in the specific economic analyses required to properly assess these applications. Finally, the USCIS will convene an expert Decision Board, composed of an economist, experienced adjudicators, and legal counsel, to render decisions on Regional Center applications.

VIII. DOS, USCIS, and CBP Issue Summer Travel Reminders for Foreign Nationals

The DOS and USCIS again remind foreign travelers to plan ahead when seeking to enter the United States. Summers are busy times for most American embassies and consulates, and travelers may experience delays with visa applications. Delays also can result due to enhanced security checks and unanticipated changes in the world situation. Those planning on using the Visa Waiver Program ("VWP") must first make sure that they are eligible for the VWP and, if so, that they have registered in the Electronic System for Travel Authorization and have a passport that satisfies all VWP requirements.

At the same time, U.S. Customs and Border Protection ("CBP"), the agency responsible for screening and admitting foreign nationals at U.S. ports of entry, announced that its Trusted Traveler Program ("TTP") recently had reached one million members. The TTP is a pilot program that streamlines the international arrival process for pre-approved travelers who use self-service kiosks located in 20 major airports. Applications can be submitted online at www.globalentry.gov. There is a $100 fee, and applicants must submit to an interview and fingerprint collection at one of the 20 airports. If approved, membership lasts for five years.

There also are two separate TTPs for travelers crossing the Canadian and Mexican borders. NEXUS is a joint CBP-Canada Border Services Agency program. SENTRI is the program that provides expedited admission from Mexico. Additional information on all these programs is available at the CBP website at http://www.cbp.gov/xp/cgov/travel/.

IX. ICE and DOJ Continue Immigration-Related Enforcement Actions

The federal agencies that are responsible for enforcing the nation's immigration laws remain active. In June 2011, U.S. Immigration and Customs Enforcement ("ICE") announced that it had issued Form I-9 audit notices to another 1,000 companies across a broad range of industries. This continues the Obama administration's aggressive worksite enforcement activities against employers.

On May 17, 2011, the U.S. Department of Justice ("DOJ") announced a settlement with Iflowsoft LLC, a New Jersey-based company that provides computer programming services ("Iflowsoft"). The DOJ alleged that Iflowsoft had discriminated against American citizens by preferring H-1B visa holders for positions at the company. The action followed a complaint filed by an American citizen who was refused employment. Under the settlement, Iflowsoft must pay $13,558 in administrative penalties plus back pay.

On April 25, 2011, the owner of a personnel company that provided undocumented workers to hotels and restaurants in Pittsburgh, Pennsylvania, and in Cincinnati, Cleveland, and Columbus, Ohio, was sentenced to 56 months in prison and three years of supervised release. The conviction followed an investigation by ICE that found that the defendant's company has supplied more than 100 undocumented workers and also received kickbacks for each illegal employee it placed.

X. Congress and State Legislatures Propose New Immigration Legislation

Both Congress and state legislatures around the country have been busy in recent months proposing immigration legislation. On June 14, 2011, Representative Lamer Smith (R-Texas) introduced the Legal Workforce Act (HR 2164), which would require all employers to use E-Verify within two years. That same day, Representative Zoe Lofgren (D-California) introduced the Immigration Driving Entrepreneurship in America Act (HR 2161), which would allow U.S. companies to sponsor for green cards those employees with advanced degrees in science, technology, engineering, and math ("STEM"), and would help employers attract and retain highly skilled foreign graduates of U.S. universities with STEM degrees. On May 3, 2011, Representative Sue Myrick (R-N. Carolina) introduced the 10K Run for the Border Act (HR 1698), which would substantially increase the civil fines for employers that hire undocumented workers.

According to the National Conference of State Legislatures, state lawmakers in 44 states introduced 279 immigration-related bills. Several of those bills were enacted in Georgia, Alabama, Tennessee, and North Carolina. In Georgia, the governor signed GA House Bill 87, which contains provisions similar to Arizona SB 1070 and is intended to crack down on illegal immigration to and in the state. Two of the major enforcement provisions of this law, however, have been enjoined. See *Georgia Latino Alliance for Human Rights v. Deal*, No. 1:11-CV-1804-TWT (N.D. Ga. June 27, 2011).

On June 7, 2011, Tennessee Governor Bill Haslam signed HB 1378, which requires all Tennessee employers to use E-Verify or maintain documentation demonstrating employment authorization for all employees. On June 9, 2011, the Alabama governor signed HB 56, which requires, among other things, employers to use E-Verify, and public schools to verify the

immigration status of students and parents. HB 56 also prohibits property owners from renting to illegal immigrants. On June 23, 2011, North Carolina Governor Bev Purdue signed Session Law 2011-263, which requires counties and municipalities and businesses or other organizations with 25 or more employees to use E-Verify and phases in the E-Verify requirement, depending on the size of the business or organization, starting October 1, 2012. On June 27, 2011, South Carolina Governor Nikki Haley signed S.B. 20, which will require employers to participate in E-Verify starting on July 1, 2012, and contains police stop provisions similar to those enjoined in Georgia that are expected to take effect on January 1, 2012.

The exponential growth of this state legislation requires employers to be even more vigilant about Form I-9 compliance in these jurisdictions.

XI. DOS Issues July 2011 Visa Bulletin

The DOS recently issued its Visa Bulletin for July 2011. The Bulletin determines who can apply for U.S. permanent residence and when. The cutoff dates for family-based immigration continue to show backlogs and regressions due to the heavy demand for these visas. The cutoff dates for the Employment-Based Third Preference category are as follows: October 8, 2005, for all chargeability, including the Philippines; July 1, 2004, for China; July 1, 2005, for Mexico; and May 1, 2002, for India. The cut-off dates for the Employment-Based Second Preference category are as follows: Current for all chargeability, including Mexico, the Dominican Republic, and the Philippines; and March 8, 2007, for China and India. The DOS's monthly Visa Bulletin is available at: http://travel.state.gov/visa/bulletin/bulletin_1360.html.

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