March 2011 Immigration Alert

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I. Potential Immigration Consequences of Government Shutdown

Employers need to consider the potential immigration consequences of a government shutdown due to the current budget impasse. While contingency plans have not been published, it is instructive to look at what happened during the last government shutdown for guidance. At that time, both the U.S. Citizenship and Immigration Service ("USCIS") and the U.S. Department of Labor ("DOL") stopped processing applications. Also, the U.S. Department of State ("DOS") stopped all visa-processing operations.

If there is a government shutdown, it could have significant consequences for employers and foreign national ("FN") employees in a number of respects. Employers will have to file nonimmigrant extensions, but they may not be adjudicated. This may affect the FN employees' ability to extend their drivers licenses unless states make accommodations for these unusual circumstances. FN employees who need new visas to return to the United States will not be able to secure them, and this may sharply curtail foreign travel. Organizations involved in mergers and acquisitions may not be able to transition FN employees from the target organization and, thus, may have to make contingency plans to maintain their employees' status.

No one wants a government shutdown. If one does occur, however, employers need to include immigration concerns in their contingency plans.

II. Employers Must Now Complete Revised Form I-129 and Answer Questions Relating to Export Controls and "Deemed Exports"

On November 23, 2010, the USCIS issued a new version of its Form I-129 that includes a new section – Part 6 – related to export controls. Entitled "Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States," this new section requires employers to certify that they will not allow a sponsored FN access to controlled technology or technical data (including source code or other software) in the workplace unless the necessary export license is obtained. This reflects the U.S. Department of Commerce's "deemed export" rules that appear in the Export Administration Regulations ("EAR") and the International Traffic in Arms Regulations ("ITAR"), which prohibit giving certain FNs access to controlled technology or technical data unless an export license is secured.

Organizations that regularly deal with controlled technology generally have programs in place to control access. This new form, however, will affect many organizations that may deal with controlled technology inadvertently and may not realize the need for an export license. The new form took effect on *February 20, 2011*. The civil and criminal penalties for export control violations can be serious. For this reason, HR professionals who oversee their organization's immigration activities need to familiarize themselves with the deemed export rules so they can properly respond to Part 6 of the new Form I-129.

III. ICE Sends Out Form I-9 Audit Notices to 1,000 Employers

The announcement by U.S. Immigration and Custom Enforcement ("ICE") on January 20, 2011, that it has established a large Employment Compliance Inspection Center ("Center") is a warning shot across the bow of all large organizations operating in the United States. In the past, ICE has been criticized for focusing its Form I-9 compliance activities on smaller organizations. With the establishment of this new Center, ICE has now assembled teams of specialists who are able to examine large numbers of Forms I-9 and support increased regional activities in this area. Indeed, ICE Director John Morton has touted the new Center by emphasizing the fact that ICE no longer would be bound by the size of an organization in its expanded audit activities.

Wasting no time, ICE announced on February 23, 2011, that it had issued over 1,000 Notices of Inspection ("NOIs") to employers across the country. These NOIs advise employers that the

agency will audit their Forms I-9 and other hiring records to determine whether they are in compliance. This is the third major ICE initiative in this area since July 2009. The existence of the new Center, however, indicates that these NOIs are a harbinger of increased ICE worksite compliance activity involving larger organizations. Worksite enforcement violations carry significant civil fines and, if the violations are willful or part of a business model based on undocumented labor, criminal liability. It thus remains imperative for all employers to incorporate worksite enforcement into their overall risk management policies.

IV. DHS Plans to Implement E-Verify Self-Check System

On February 7, 2011, the Department of Homeland Security ("DHS") published a notice announcing that it would implement on March 18, 2011, a new E-Verify feature that will allow individuals to check their own work authorization status and, if necessary, correct potential errors. As our readers know, the E-Verify program is an electronic system established by the DHS and implemented in collaboration with the USCIS and the Social Security Administration that allows registered employers to verify the employment authorization of new employees based on the information they provide in their Form I-9. Currently, E-Verify is a voluntary system, except for employers in certain states or that may have government contracts.

One of the major criticisms of E-Verify is that the database contains too many errors, resulting in employers refusing to hire individuals who are actually authorized to work. Through this new system, DHS hopes to eliminate these errors by allowing individuals to check the system and correct the errors in advance of new employment.

V. Second Circuit Directs Discovery of Immigration Status in NLRB Proceeding to Determine Eligibility for Backpay

On February 18, 2011, the U.S. Court of Appeals for the Second Circuit issued its opinion in *NLRB v. Domsey Trading Corporation*, Docket Nos. 10-3356, 08-5165, 08-4845 (2d Cir. Feb. 18, 2011), reversing a decision of the National Labor Relations Board ("NLRB") and remanding the proceeding for discovery into the immigration status of employees who might otherwise be eligible for backpay awards.

Domsey Trading arose out of a strike in January 1990. Several Domsey workers filed a complaint with the NLRB claiming that the company had committed unfair labor practices. After the strike was settled, the NLRB upheld the workers' complaint and ordered reinstatement of the complaining workers with backpay. Thereafter, the NLRB issued a Compliance Specification and Notice of Hearing before an administrative law judge ("ALJ") to determine the backpay due to the striking workers. At the time, Domsey raised the issue of the immigration status of the workers and claimed that the undocumented ones would not be eligible for backpay. The ALJ rejected Domsey's request for discovery into this issue based on the U.S. Supreme Court's decision in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984). The ALJ interpreted *Sure-Tan* as requiring backpay regardless of the workers' immigration status.

The *Domsey Trading* NLRB proceeding was still pending when the Supreme Court decided *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), and held that undocumented

aliens are not entitled to backpay under the National Labor Relations Act ("NLRA"). On September 30, 2007, more than five years after the *Hoffman* decision, the NLRB issued a supplemental decision that precluded a backpay award to those workers who had admitted that they were undocumented during the backpay period but refused to grant Domsey the discovery it sought into the immigration status of the remaining complainants. After remand, the ALJ also issued a supplemental decision affirming the backpay awards to several employees and refusing Domsey's continued request for discovery into the complainants' immigration status.

In a decision sharply critical of the NLRB, the Second Circuit found that the NLRB abused its discretion by failing to remand this proceeding for discovery into the claimants' immigration status consistent with the Supreme Court's decision in *Hoffman*. According to the Second Circuit, "it is now clear that undocumented immigrants are ineligible for backpay under the NLRA and, therefore, that immigration status is relevant to the question of backpay eligibility." *Domsey Trading*, slip op. at 9.

VI. Illinois District Court Directs Discovery into Immigration Status in Personal Injury Action

On February 14, 2011, a magistrate judge in the U.S. District Court for the Northern District of Illinois issued a decision in a personal injury action that permitted discovery into the plaintiff's immigration status to determine eligibility for lost wages. *Zuniga v. Morris Material Handling Inc.*, Case No. 10-C-696 (N.D. Ill. February 14, 2011). Zuniga sued for injuries and lost wages he allegedly sustained while working for the defendants. During his deposition, defense counsel asked Zuniga about his immigration status, but Zuniga's counsel objected and instructed him not to answer.

The defendants subsequently moved to compel Zuniga to answer questions directed at his immigration status. They claimed that this information was relevant to Zuniga's claim to lost future earnings because it might limit or preclude such an award. To support its claims, the defendants relied on, among other cases, the Supreme Court's decision in *Hoffman* and its progeny. Zuniga countered that Illinois' workmen's compensation law allowed claims for lost wages regardless of immigration status, and that public policy thus barred the discovery sought by defendants. The *Zuniga* court, however, rejected Zuniga's arguments and found them inapplicable to suits for common law torts. For the purpose of such a tort claim, the court found that Zuniga's ability to work legally in the United States might affect his claim for lost wages and, thus, was discoverable. *Zuniga*, slip op. at 8.

VII. New York District Court Finds Employer Violated FLSA by Refusing to Reimburse H-2B Workers for Visa, Travel, and Other Expenses

On February 15, 2011, the U.S. District Court for the Western District of New York denied a motion to dismiss a complaint by foreign H-2B workers that alleged that their employer violated the minimum wage provisions of the Fair Labor Standards Act ("FLSA") by refusing to reimburse the workers' transportation, visa, and recruitment expenses. *Teoba v. Turgreen Landcare LLC*, No. 10-6132 (W.D.N.Y. Feb. 15, 2011). In *Teoba*, the plaintiffs sought to represent a class of H-2B workers who were recruited over a three-year period by Trugreen, a

landscape services company, but not reimbursed for the recruitment, visa, and transportation costs they incurred to accept employment. The district court recognized that there was a split of authority on this issue in the circuits but sided with the courts that found FLSA violations for the failure to reimburse these challenged expenses.

The *Teoba* decision is important for employers in the hospitality and other industries that employ H-2B workers to address seasonal and other labor shortages. In past alerts, we have reported the growing number of criminal prosecutions against staffing companies in this area due to fraud in the application process, and advised hospitality employers to carefully monitor their use of H-2B employees to avoid complicity in these illegal activities. The *Teoba* decision highlights another potential exposure to employers of these workers under the FLSA and reinforces the need for employers to carefully plan for, control, and oversee the recruitment and employment of these workers.

VIII. Eighth Circuit Rejects Discrimination Claim Based on Immigration Status

On February 14, 2011, the U.S. Court of Appeals for the Eighth Circuit issued an unpublished decision in *Liu v. BASF Corporation*, No. 09-1850 (8th Cir. Feb. 14, 2011), that affirmed a lower court's decision to reject discrimination claims based solely on immigration status. In *Liu*, the plaintiff alleged that BASF violated Title VII of the Civil Rights Act ("Title VII") by discriminating against him due to his national origin. Liu's claim arose out of a decision by BASF to close his worksite and transfer certain employees to its North Carolina facility. At the time, Liu was in valid H-1B status but had only 13 months left in that nonimmigrant classification until he reached the six-year limit. Liu claimed that BASF's refusal to support an extension of his H-1B status discriminated against him.

The district court granted the motion by BASF for summary judgment. Liu appealed to the Eighth Circuit, which affirmed the district court's decision and found that BASF based its decision not to transfer Liu to its North Carolina facility on the fact that his visa would expire in less than two months after the reorganization was scheduled to take place. The Eighth Circuit rejected Liu's argument that BASF violated Title VII by refusing to support an extension for Liu. The Eighth Circuit also found that nothing in the record demonstrated that BASF acted on the basis of Liu's national origin. Rather, BASF's decision was based on his immigration status, not national origin, and this was not actionable under Title VII.

IX. IRS Instructs Employers Regarding Alien Withholding

On February 2, 2011, the Internal Revenue Service ("IRS") issued Notice 2011-12 ("Notice"), in which it announced that employers would have to revert back to the withholding rules in effect in 2005 for FN employees. The Notice was a response to Congress's failure to extend the Making Work Pay credit ("MWPC") in Section 36A of the Internal Revenue Code ("IRC"). The MWPC was adopted in 2005 and allowed the IRS to establish withholding tables for alien employees designed to approximate the income tax liability of nonresident FNs under IRC Section 3402. The withholding rules in effect in 2005 have been incorporated into the current withholding tables for 2011.

Employers are required to implement the 2011 withholding tables by January 31, 2011. Implementation may result in questions by FN employees. The elimination of the MWPC has resulted in the changes.

X. DOS Issues March 2011 Visa Bulletin

The DOS recently issued its Visa Bulletin for March 2011. The Bulletin determines who can apply for 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 are as follows: July 1, 2005, for all chargeability, including the Philippines and Dominican Republic; January 22, 2004, for China; January 8, 2004, for Mexico; and March 15, 2002, for India. The cut-off dates for the Employment-Based Second Preference are as follows: Current for all chargeability, including Mexico, the Dominican Republic, and the Philippines; May 8, 2006, for India; and July 8, 2006, for China. The monthly Visa Bulletin is available at http://travel.state.gov/visa/bulletin/bulletin_1360.html.

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