

IMMIGRATION CRACKDOWN ON EMPLOYERS: Q & A

By Bill Flynn

The Fowler White Boggs Banker law firm prepares periodic columns for the Greater Tampa Association of Realtors on pertinent immigration law topics.

Q: Did Congress pass Comprehensive Immigration Legislation which would affect employers and others?

A. No.

Q: In the absence of Federal legislation, did something just happen which will affect employers?

A: Yes. On August 10th, the Department of Homeland Security (DHS) released an advance copy of a final regulation dealing with employers' responsibilities with reference to undocumented workers.

Q: What does the Rule say?

A: In essence, the Rule will cause employers to fire workers who use false Social Security numbers or face very strict civil and/or criminal penalties.

The Rule expands the definition of "Constructive Knowledge." Constructive Knowledge refers to a situation where an employer should have known that an employee was not in proper immigration status. "No-Match" letters from the Social Security Administration (SSA) are regarded as the primary indicator of such lack of status. These are notices from SSA that a given social security number does not match SSA's records. The new Rule provides guidance on how employers might reach a "safe harbor" by taking certain steps within certain time periods.

Q: And so if an employer complies with the government directives there should be no risk, right?

A: Not necessarily. Employers have always been placed on a tightrope by the laws enacted over 20 years ago which require I-9 verifications. Employers could and have been sued by fired employees if employers do not observe the so-called antidiscrimination rules. As usual, the government rules do not define all contingencies and this new Rule provides that whether an employer would be found to have constructive knowledge in any particular case will depend on the "totality of relevant circumstances." Obviously, that test is able to be interpreted several ways.

Q: How will the new Rule affect my business?

A: It is likely that this major tightening of the immigration enforcement system will have disastrous effects on several industries, including hotel/restaurant, landscaping, janitorial,

agribusiness and construction. One wonders how the agribusiness and construction industries will survive without access to undocumented workers.

Q: When does this rule take effect?

A: Estimated to be mid-September.

Q: What can we do about the potential for unfair application of this Rule?

A: Your elected representatives in Congress declined to take action on Comprehensive Immigration Reform (CIR) which is sorely needed. Among other provisions in the proposed CIR, were forgiveness and guest worker provisions which would have allowed U.S. employers to have access to the workers they need. To implement Draconian enforcement rules such as this one without dealing with the root issues through CIR will likely create a huge problem, not only for employers but for the economy in general. We recommend that you write or call your U.S. Senators and Congressperson to express your concern.

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