FBT Immigration Update: April/May 2016

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Categories:

Publications

Tennessee requires employers with 50 or more employees to use E-Verify

On April 21, 2016, the Tennessee Lawful Employment Act (TLEA) was amended and, starting January 1, 2017, employers with 50 or more employees must use E-Verify, the U.S. government's online system that assists employers in verifying the work authorization of their employees.

The TLEA, after a phased rollout, was fully implemented on January 1, 2013. Prior to the recent amendment, it required all private employers with six or more employees and government entities to either (1) use E-Verify or (2) maintain one of the identity/employment authorization documents outlined in the TLEA from a newly hired employee or non-employee (i.e., independent contractor). Now, as a result of the amendment, only employers with less than 49 employees still have a choice, as larger employers must use E-Verify.

The amendment also revises the penalties non-compliant employers may face. As a result, the amendment should serve as a reminder to all employers to review their procedures to ensure compliance with the TLEA as well as federal law. Below are a few highlighted items that should be covered in the review.

Consistency

For employers that still have the ability to choose between E-Verify and the TLEA's document retention provision (i.e., employers with less than 50 employees), they are reminded that they must act uniformly and not make the selection on a case-by-case basis.

The only exception is that, as E-Verify cannot be used for non-employees and I-9s should never be completed for non-employees, all employers, regardless of size, must resort to the document retention provision for non-employees. Under the TLEA, a non-employee is an individual, other than an employee, who is paid

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directly by the employer in exchange for the individual's labor or services (e.g., independent contractor).

Penalties

Under the TLEA, the following penalties may be imposed on noncomplying employers:

- 1st violation: $500 penalty + $500 for each employee or non-employee not verified through E-Verify or the document retention provision;
- 2nd violation: $1,000 penalty + $1,000 for each employee or non-employee not verified through E-Verify or the document retention provision; and
- 3rd violation: $2,500 penalty + $2,500 for each employee or non-employee not verified through E-Verify or the document retention provision.

If an employer unknowingly violates the TLEA for the first time, it may receive a warning if it comes into compliance within 45 days. Under the amended TLEA, a $500 civil penalty is imposed every day the employer remains noncompliant after 45 days.

I-9 Reminder

It is worth reminding employers that the TLEA does not alter the obligation of all employers, regardless of size, to comply with federal I-9 requirements. Also, for employers with less than 50 employees that choose not to use E-Verify and, instead, rely on the document retention provision, their current I-9 practices may be sufficient to achieve compliance.

Under current federal law, an employer may, but is not required to, maintain copies of the I-9 documentation chosen and presented by employees as part of the I-9 process. If it does maintain copies, it must do so for all employees to ensure the uniform application of its I-9 practices to its entire workforce. In Tennessee, one benefit of maintaining copies is that the documents presented may satisfy the TLEA, requiring no further action on the part of the employer.

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Canada implements eTA application for visa-exempt travelers

As a reminder to employers that currently send foreign national employees to Canada, Canada's Electronic Travel Authorization (eTA) application is now available. The eTA application, which can be processed in minutes and costs $7 CAD, is similar to the U.S. Electronic System for Travel Authorization (ESTA) that permits foreign nationals from certain countries to enter the U.S. without visas for up to 90 days for business or tourism.

Currently, there is a "leniency" period in place until September 29, 2016. During this period, Canada expects visa-exempt travelers to complete an eTA application, but will permit such travelers to travel as long as they have appropriate documentation. Starting September 29, 2016, the eTA application will be mandatory. U.S. citizens and foreign nationals holding a valid Canadian visa are exempt from the requirement. Employers interested in learning more should visit this website.

Delays persist in USCIS processing of H-1B extensions

The Vermont Service Center (VSC) and California Service Center (CSC) continue to experience significant delays in the adjudication of H-1B extensions. Currently, VSC is processing cases filed on August 31, 2015 and CSC is processing cases filed on October 16, 2015. While processing times are improving, there is still a risk that continued delays could impact employers and H-1B employees. For example, beneficiaries of pending H-1B petitions may encounter difficulties in renewing driver's licenses, making international travel plans, or renewing EADs for eligible spouses. In addition, with such severe delays, beneficiaries may be near the end of the automatic 240-day extension of work authorization. As a result, employers and beneficiaries may be forced into upgrading cases to premium processing at a cost of $1,225 to secure a decision within 15 calendar days.

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In apparent response to the delays, USCIS, on May 10, 2016, made public that it will allow employers that filed H-1B change of employer or extension of status petitions that have been pending for at least 210 days to make inquiries. While the exact benefit of these inquiries is unknown, the news release indicates that they "may be based on the petition being outside of normal processing times," which could spur the Service Centers to take action.

In the May 10, 2016 news release, USCIS provided the following instructions for employers seeking to make inquiries on eligible petitions:

> **Employers**: If your Form I-129 petition has been pending for at least 210 days, you may submit an inquiry by calling the National Customer Service Center at 1-800-375-5283 (TDD for deaf and hard of hearing: 1-800-767-1833). When asking about your case status, please provide us with your original receipt number and specify that your case has been pending for 210 days or more.

USCIS publishes new STEM OPT extension rule

The new STEM OPT extension rule discussed in our March/April 2016 update went into effect on May 10, 2016. The rule, which extends the STEM OPT extension period from 17 months to 24 months, imposes new burdens on employers. Therefore, employers that can only continue to employ F-1 students beyond their typical 12-month Optional Practical Training (OPT) through a 24-month STEM OPT extension should review our earlier update to learn the basics.

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