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# THE GLOBE

The newsletter of the ISBA's Section on International & Immigration Law

## Message from the Chair

By Lewis F. Matuszewich

David Austin has pulled together a continuing legal education proposal for the International and Immigration Law Section Council entitled, "Pulling no Punches: Effective Representation of Immigrant Survivors of Domestic Violence." The proposal was developed with the assistance of Mary Meg McCarthy of the National Immigrant Justice Center.

The proposal has been approved by the ISBA Continuing Legal Education Committee for a presentation during the Spring of 2008. We hope to know the date for the program by December. The topics include: "Welcome, Introductions and Orientation to the Training," "Crossing Borders: Family Law and Immigration Practice Basics," "Working With Immigrant Survivors of Domestic Violence," "The Violence Against Women Act: What It Is and How You Can Use It," "How to Craft

the Perfect VAWA Petition: Tips from the Vermont Service Center," and "Ethical Boundaries for Attorneys Working with Immigrant Survivors of Domestic Violence."

Cindy Buys, Secretary of the International and Immigration Law Section Council and Associate Professor of Law at Southern Illinois University School of Law, provided, "Putting Employers Between a Rock and a Hard Place with Respect to Verifying Employment Eligibility."

This issue also include Matthew DeFlorio's article, "Public-Private Supply Chain Initiatives: The Relationship Between C-TPAT, CSI, and the WCO." Matt spent ten years in the international transportation arena and has his J.D. from The John Marshall Law School with a certificate in international business and trade law.

Robin Newberger is a Business Economist with the Federal Reserve

Bank of Chicago. Her article, "Financial Access and Insurance: A Preliminary Description of Factors that Affect Immigrants" appeared in the May 2007 issue of Profitwise News and Views. It is reprinted with the permission of Robin and the Federal Reserve Bank of Chicago.

Howard Stovall is a frequent contributor to *The Globe*, concentrating his practice in Middle Eastern commercial law matters. His article is, "Summary of Commercial Agency/Distributorship Law in The United Arab Emirates."

Thank you to our authors and to David Austin for developing the CLE proposal that was accepted by the ISBA Continuing Legal Education Committee.

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## Putting employers between a rock and a hard place with respect to verifying employment eligibility

By Cindy G. Buys

Earlier this year, the Illinois legislature passed and Governor Blagojevich signed into law H.B. 1744, which puts employers in an even more difficult position with respect to verifying their employees' eligibility to work. H.B. 1744 amends the Illinois Right to Privacy in the

Workplace Act to prohibit employers "from enrolling in any Employment Eligibility Verification System, including the Basic Pilot Program, 8 U.S.C. 1324a, . . . until the Social Security Administration (SSA) and the Department of Homeland Security (DHS) databases are able to make a

determination on 99 percent of the tentative nonconfirmation notices issued to employers within three days, unless otherwise required by federal law."

When asked to comment on the proposed law prior to its enactment, the International and Immigration Law Section Council of the ISBA opined that the law would likely be unconstitutional because it would be preempted by federal immigration laws. Apparently, the U.S. Department of Justice agrees. It filed a lawsuit against the State of Illinois in September 2007, alleging that the Illinois law is preempted by federal law. See Complaint of the United States, *United States v. Illinois*, Civ. Action No. 07-3261 (C.D. Ill. Sep. 24, 2007) ("Complaint").

The relevant federal law, section 8 U.S.C. §1324a of the Immigration and Nationality Act (INA), states that it is unlawful to hire or continue to employ an alien knowing the alien is unauthorized to work. Subsection (b) requires that employers attest that the person is not an unauthorized alien by reviewing certain identification documents. If the employer complies in good faith with these requirements, the employer will not be subject to liability even if it is later determined that the alien is not authorized to work.

In addition, the INA authorizes the President to engage in "demonstration projects" that deviate from this general scheme. The Basic Pilot Program, now known as E-Verify, is one such demonstration program. Under this program, participating employers submit certain documentation regarding new hires to the federal government to confirm the employees' identity and employment eligibility. The employer receives a response from the verification system as to whether the employee is authorized to work in the United States and whether the employee has presented a valid Social Security number that matches the employee's name in the SSA's records. At present, all employers are encouraged to participate in E-Verify, but not all employers are required to do so.

According to the Complaint filed by the U.S. Department of Justice, one of the primary purposes of the program created by 8 U.S.C. § 1324a, is to ascertain the most effective and efficient means for verifying whether an individual is legally authorized to work in the United States. The effectiveness of the

program and the federal government's ability to meaningfully evaluate the program depends upon participation by employers. Any obstacle to the employers' continued participation in or limitation on enrollment in the program impedes the federal government's ability to evaluate the program's effectiveness in enforcing the INA's employment eligibility requirements. The federal government views the participation of employers in the state of Illinois as particularly important because Illinois has been identified as one of the five states with the highest estimated populations of unauthorized aliens.

The new Illinois law does allow an employer who is required by federal law to participate in the E-Verify Program to do so, but prohibits employers from voluntarily participating. While the Illinois law does not specify what sanctions will apply to an employer who might choose to participate in the federal program, it certainly creates a legal risk for employers that is not good for business. Now an employer must choose between complying with federal law and complying with state law.

Employers who operate in more than one state are placed in a particularly difficult situation. For example, Arizona has taken the exact opposite approach of Illinois by enacting a new employer sanctions law that requires Arizona employers to verify their workers eligibility by using the Basic Pilot or E-Verify Program or face revocation of the employer's business license. A.R.S. § 13-3706. Because the Illinois law only allows employers to participate in the E-Verify Program if required by federal law, that exemption will not assist an employer who is subject to the Arizona state law. Thus, an employer that operates in both Illinois and Arizona will not be able to comply with both states' laws.

Proponents of the new Illinois law argue that it is necessary because the databases used by DHS and SSA for the program are not sufficiently up-to-date and accurate. As a result, persons who are authorized to work in the U.S. have been denied jobs or terminated from their employment due to faulty information in the government databases. See Ronald R. Powell, President, Local 881 and UFCW International Vice President, Letter to the Editor, *SOUTHERN ILLINOISAN*, Oct. 4, 2007, at 4A.

While there are valid concerns

about the accuracy of the federal government's databases, this state-by-state approach to the problem is not the right one to take. Immigration is a national issue that has historically been handled comprehensively at the federal level. Because it touches on U.S. foreign relations, the United States must have a uniform policy nationwide when dealing with other countries and their nationals. It is federal law that determines whether an alien may work in the United States; federal law also should define the documentation and process necessary to verify that employment eligibility. Allowing each state to determine whether to permit employers operating in that state to participate in a federal program or under what conditions the employer may participate has the very real potential to create a patchwork of conflicting regulations and allow states to dictate policies over national issues to the federal government. Accordingly, the U.S. District Court should strike down the new Illinois law as unconstitutional because it is preempted by federal law.

Cindy G. Buys is an Associate Professor of Law at the Southern Illinois University School of Law where she teaches immigration law and constitutional law. Professor Buys also is the Secretary of International and Immigration Law Section Council of the ISBA.

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