Arnall Golden Gregory LLP

# Immigration Compliance Newsletter

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## FEDERAL DEVELOPMENTS

### USCIS Handbook Release

On September 16th, the U.S. Citizenship and Immigration Services (USCIS) announced the release of a print version of its "*Handbook for Employers: Instructions for Completing Form I-9*." USCIS stated that it would publish a limited number of magazine-style color copies of the Form I-9 instruction manual for free by request. In order to request a copy, you may either call the USCIS Forms Request Line toll-free at 1-800-870-3676 or click here and select "M-274 Handbook for employers." The digital version remains available here.

The Handbook, whether utilized in print format or online, is a must have resource for those responsible for completing Forms I-9. However, it is important that you are working off the current version (June 2011) as it is periodically updated.

### Employer Held Liable for H-1B Worker's Termination despite the Fact that the Employee Never Worked in H-1B status for the Company

On June 30, 2011, Department of Labor (DOL) Administrative Law Judge (ALJ) William Dorsey, in the matter of *Limanseto v. Ganze and Company*, OALJ Case No. 2011-LCA-00005, held that employer Ganze was obligated to pay $156,424.84 in back wages and $1,500 in legal fees to an H-1B nonimmigrant employee whom the company had terminated three years earlier. The court found that employer Ganze had failed to notify U.S. Citizenship and Immigration Services (USCIS) of its termination of the H-1B nonimmigrant employee and had failed to fulfill its obligation to pay for the transportation costs of the H-1B nonimmigrant's return to his home country.

Judge Dorsey wrote, "informing the immigration authorities that the employment has been terminated is the quid pro quo to be relieved of one of the duties the employer promises to fulfill when it signs the labor condition application: the duty to pay the required wage rate." Dorsey concluded that until an employer notifies immigration authorities as to the employee's termination, "the employer remains on the hook for the H-1B worker's wages and benefits."

*Limanseto v. Ganze and Company* is representative of at least one DOL ALJ judge's enforcement of the DOL's definition of bona fide termination of an H-1B nonimmigrant employee. Bona fide termination engenders three obligations on behalf of the employer: (1) notice to the employee, (2) notice to USCIS, and (3) payment of transportation costs for the worker to return home. In this case,

the judge ruled that failure to fulfill these obligations implied that no bona fide termination of the H-1B employment had occurred, and ordered the employer to pay back wages to the H-1B nonimmigrant employee for from the start date of his H-1B status until the date the company notified USCIS of his termination, nearly two years later. One interesting fact about this case is that the employee never actually started working in H-1B status for the employer; he had only worked for the employer while he was an F-1 student. Moral of the story, if you employ H-1B employees, understand that their employment carries with it certain obligations upon termination.

### DHS Study in the States Initiative

On September 16th, the Department of Homeland Security (DHS) launched its Study in the States Initiative with the stated mission of increasing American competitiveness by discovering ways to encourage international students to study and remain in the United States. As part of this campaign, DHS has launched a website with pertinent information for international students seeking to study within the United States.

In particular, this website serves as a helpful resource for international students seeking additional information regarding their study options as well as employment eligibility. DHS Secretary Janet Napolitano described the website as a "one stop shop" for student visas, visa renewals and informational material regarding visa qualifications. She concluded that she hoped the website would "help us maintain that critical balance between opening our doors to lawful international students who want to contribute their time and talents and energy" and the "necessary precautions to protect against [threats and] protect our schools and universities from exploitation."

## STATE DEVELOPMENTS

### Georgia Employers and 1099 Workers on Public Contracts

**Question** – you are a Georgia employer working on a public contract and a subcontractor provides 1099 workers driver's licenses or ID cards in lieu of the E-Verify affidavit AND some of the cards are from one of the 17 "non-compliant" or "compliance verification pending" states as listed in the report provided by the Attorney General of Georgia entitled *Report of the Attorney General on States Compliant with the Immigration Verification Requirement of the Illegal Immigration Reform and Enforcement Act of 2011*.

A very good question which requires a long-winded and fuzzy response. According to state authorities, the unofficial response is the following -- if a subcontractor forwards a license or ID card from a 1099 worker in order to satisfy the requirements of the Georgia immigration law and it is a license or ID card from a "non-compliant" or "compliance verification pending" state, it cannot be accepted. Therefore, in order to be substantially compliant with the law one would need to require that the 1099 worker(s) in such a situation show a document from the List of Secure and Verifiable Documents also provided by the Attorney General of Georgia. However, you may notice that the List has foreign documents as well as U.S. documents and therefore presumably one should only accept U.S. issued documents.

Fuzzy answer because the statute, as drafted, doesn't specifically say this but in order to achieve the intent of the law (*i.e.*, verify that workers are lawfully present and authorized to work in the United States) this is how it could be done. **Note** – this is not intended to provide legal counsel and specific questions should be addressed to legal counsel as I have yet to find a situation under our immigration laws which is cookie cutter perfect and equally applies to all.

**Alabama Immigration Bill H.B. 56 Update**

On October 7th, the Department of Justice (DOJ) filed an appeal with the 11th U.S. Circuit Court of Appeals in Atlanta seeking a temporary injunction prohibiting Alabama's immigration law (H.B. 56) from going into effect. A few days later, the Circuit Court blocked two provisions of the law from remaining in the effect while the appeal of the district court's ruling continues, namely section 10 (making it a state crime to be undocumented in Alabama) and Section 28 (requiring public school students to prove their immigration status).

The bill would implement, among other things, a mandatory statewide E-Verify program, provide government officials the power to arrest and detain those suspected of being in the country illegally, and would make it a crime for undocumented workers to apply for a job. DOJ claimed that the legislation "invites discrimination against many foreign-born citizens and lawfully present aliens." DOJ's request for an injunction would delay H.B. 56 from going into effect until lingering questions regarding its constitutionality are resolved. DOJ, in particular, took issue with the "panoply of new state offenses that criminalize, among other things, an alien's failure to comply with federal registration requirements that were enacted pursuant to Congress's exclusive power to regulate immigration."

DOJ's appeal follows Federal District Court Judge Sharon Lovelace's September 28th ruling in *U.S. v. State of Alabama, 11-14532* upholding much of the bill. Judge Lovelace issued a preliminary injunction against several sections of the bill that she ruled may be pre-empted by federal immigration law. These sections include a provision that would have made illegal the harboring or transporting of illegal immigrants, and another that would have prohibited illegal immigrants from attending or enrolling in state universities. Lovelace's ruling, if upheld, would enact the nation's strongest immigration legislation to date.

***Note that the E-Verify requirement is still scheduled to take effect and all employers in Alabama must enroll in E-Verify by April 1, 2012.***

Birmingham News Metro Columnist John Archibald told National Public Radio on October 11th that Lovelace's ruling had already instigated "people kind of dropping off the grid, taking their kids out of schools, they're planning to not show up for work really on a large scale (...) and people just disappearing." News media has also focused on Allgood Alabama Water Works' issuance of a warning to its customers that a failure to provide identification proving their legal status in the United States would result in a loss of water service.

The Department of Justice has established a phone and e-mail hotline to field public complaints regarding the Alabama law. DOJ spokeswoman Xochitl Hinojosa stated that the lines were "for the public to report potential civil rights concerns related to the impact" of H.B. 56.

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Arnall Golden Gregory LLP

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