DechertOnPoint

June 2008 / Issue 22

A legal update from Dechert's Labor and Employment Group

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Requiring Employees to Dismiss Pending Lawsuits May be Retaliation under the FLSA

by **Jeffrey W. Rubin**

The U.S. District Court for the Northern District of Georgia recently took the "extraordinary and drastic remedy" of issuing a temporary restraining order prohibiting an employer from conditioning the receipt of severance benefits on the dismissal of a wage and hour claim brought under the Fair Labor Standards Act.

Plaintiff Willie Allen, a client technology specialist for defendant SunTrust Banks, Inc., filed a collective action lawsuit against his employer, alleging that he and other client technology specialists were denied overtime pay in violation of the federal Fair Labor Standards Act. The court conditionally certified the collective action, allowing other client technology specialists to opt into the lawsuit. As part of a subsequent reduction in force, SunTrust offered a severance package to 178 employees, 21 of whom were plaintiffs in the FLSA lawsuit. To be eligible for the severance package, the employees were required to sign a release, which provided in part, "[i]f I have already filed any Claim referred to in this paragraph, I agree to withdraw it prior to the date I receive my Severance Pay and never to refile it." The plaintiffs moved for injunctive relief, claiming that SunTrust was discriminating and retaliating against them by refusing to grant them benefits unless they dismiss their FLSA lawsuit, in violation of the FLSA's retaliation provision.

Finding that the plaintiffs were likely to succeed on the merits of their claim and that they would be irreparably harmed absent the injunction, the court entered a temporary restraining order on April 30, 2008, prohibiting SunTrust from considering participation in the FLSA lawsuit as an eligibility factor in the severance program and contractually requiring any plaintiff to dismiss their FLSA lawsuit as a condition of receiving any severance benefit. The court reasoned that although SunTrust may not have intended to discriminate against the plaintiffs on the basis of their participation in the lawsuit, requiring that they dismiss their FLSA suit had the effect of doing so. The severance program was contained within SunTrust's employee manual and had been offered to numerous employees throughout the company, making it "part and parcel of the employment relationship." Conditioning the award of a benefit that is "part and parcel of the employment relationship" on the basis of participation in an FLSA lawsuit constitutes retaliation, the court ruled. The court distinguished the situation before it from a severance agreement that is not "part and parcel of the employment relationship" and does not require employees to dismiss presently filed suits.

This decision highlights that actions taken by an employer in good faith can violate the retaliation provisions of employment laws. Employers should be cautious that benefits that are "part and parcel of the employment relationship" are not awarded in a manner that has the effect of discriminating against employees asserting their rights under federal employment laws. Although this lawsuit involved the FLSA, its application may be more widely felt since most employment laws contain similar retaliation provisions. ■

U.S. Supreme Court Recognizes Retaliation Claims Under Section 1981

by **Betina Miranda**

Upon consideration of a case from the U.S. Court of Appeals for the Seventh Circuit ("Seventh Circuit"), the U.S. Supreme Court has recently held that a plaintiff may pursue a retaliation claim under Section 1981 despite the fact that Section 1981 does not expressly prohibit retaliation or provide for such a cause of action. *CBOCS West Inc. v. Humphries*, No. 06-1431 (U.S. May 27, 2008).

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In this case, the plaintiff, a black former assistant manager for a Cracker Barrel restaurant, alleged that he had been fired because he complained to management about race discrimination directed toward a black co-worker. The trial court dismissed the plaintiff's Title VII claims for procedural reasons and granted summary judgment to the employer on his Section 1981 claims. On appeal, the Seventh Circuit reinstated the plaintiff's Section 1981 retaliation claim and held that there is an implied right of action for retaliation under Section 1981. 474 F.3d 387 (2007).

The U.S. Supreme Court, affirming the Seventh Circuit's decision, found that an implied right to sue for retaliation was supported by two important considerations. First, the Supreme Court had already recognized an implied retaliation cause of action under two other civil rights provisions, Section 1982 and Title IX. To the Court, this precedent required a similar finding under Section 1981. Second, House and Senate committee reports on the 1991 amendments to Section 1981 indicated that Congress intended to provide protection against retaliation despite the lack of an express provision to that effect. In the Court's analysis, these two considerations defeated the employer's argument that the plain language of the statute required a contrary finding.

The *Humphries* decision, while not surprising, broadens the growing liability that employers face from retaliation claims. Section 1981 retaliation claims present larger risk exposure to employers than Title VII retaliation claims, given the longer limitations period, lack of EEOC exhaustion requirements, and uncapped damages available to Section 1981 plaintiffs. Now more than ever, employers must be careful when making decisions about the employment of employees involved in discrimination claims.■

Appeals Court Extends the Protection of the Pregnancy Discrimination Act

by **Leora F. Eisenstadt**

The U.S. Court of Appeals for the Third Circuit recently considered whether the Pregnancy Discrimination Act ("PDA"), 42 U.S.C. § 2000e-3(a), which is an amendment to Title VII, prohibits discrimination against an employee who has an abortion as it does for an employee who is pregnant, a question of first impression for this circuit. In *Doe v. C.A.R.S. Protection Plus, Inc.*, Nos. 06-3625, 06-4508, 2008 WL 2222689 (3d Cir. May 30, 2008), the Court of Appeals faced a case in which the plaintiff informed her boss that she was pregnant, later learned that there were severe medical problems with her pregnancy, and finally made the decision to terminate her pregnancy. Three days after the abortion, Doe learned that she had been fired. Doe's husband testified that he called his wife's boss on her behalf prior to the abortion to inform him of their decision to terminate the pregnancy and requested and received a week of vacation for her for the following week. The defendant denied receiving this call and contended that Doe was discharged because she abandoned her job.

Based on these facts, the Third Circuit reversed the district court's grant of summary judgment. The court held first that the PDA affords employment discrimination protection to women who have abortions. In reaching this conclusion, the court considered the language of the PDA, which provides that "the terms 'because of sex' or 'on the basis of sex' [in Title VII] include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). The Third Circuit then looked to a Sixth Circuit opinion, *Turic v. Holland Hospitality, Inc.* 85 F.3d 1211 (6th Cir. 1996), the EEOC guidelines on the issue, and the legislative history of the statute, all of which maintained that an employer may not discriminate against a female employee because she exercised her right to have an abortion, finding that the phrase "related medical conditions" includes abortion. *See* 29 C.F.R. pt. 1604, App. (1986); H.R. Conf. Rep. No. 95-1786 at 4 (1978).

In addition, the court held that the plaintiff met her prima facie case of discrimination and sufficiently demonstrated that the defendant's proffered legitimate reasons were a pretext for discrimination. The court first clarified that a prima facie case of pregnancy (or abortion) discrimination under the PDA requires the following elements: (1) the employer must have actual knowledge that the employee is or was pregnant; (2) the plaintiff must be qualified for her job; (3) the plaintiff must have suffered an adverse employment action; and (4) the plaintiff must show some nexus between her pregnancy and the adverse employment action.

In *Doe v. C.A.R.S.*, the dispute focused on the fourth element. While the district court found no nexus, the Third Circuit rejected that finding after comparing the defendant's treatment of the plaintiff with that of other non-pregnant, temporarily disabled workers. While the defendant claimed to require all workers to call in every day that they were out on sick leave, the evidence showed that different employees were treated differ-

ently and that "for every employee, CARS has a 'separate set of rules.'" 2008 WL 2222689, at *6. This fact, the court held, raised an inference of discrimination sufficient to satisfy the plaintiff's prima facie burden. In addition to this fact, the court focused on a remark made by the plaintiff's boss to another employee that suggested discriminatory animus and could raise a reasonable inference that the abortion was a factor in the plaintiff's termination. Finally, the court found temporal proximity between the plaintiff's abortion and her termination since only three days passed between the two events. While the district court had found that the defendant offered a legitimate reason for terminating the plaintiff—her failure to show up at work—the Third Circuit concluded that there was a material dispute of fact over whether the plaintiff had been approved for vacation time and held that she had offered sufficient evidence that CARS' asserted reasons were pretextual.

Employers should pay particular attention to two aspects of this case. First, employers should take note of the fact that the Third Circuit has now made it clear that discrimination based on a woman's decision to have an abortion is a violation of Title VII. Second, the decision reminds employers of the need for uniform leave policies and uniform application of those policies to all employees, since deviation from such uniformity may raise an inference of discrimination.■

Employers Bear Burden of Proving "Reasonable Factor Other Than Age" Defense in Disparate Impact Age Discrimination Cases

by **Betina Miranda**

According to a recent decision by the U.S. Supreme Court, an employer defending against a disparate impact claim under the Age Discrimination in Employment Act bears not only the burden of production, but also the burden of persuasion, for the "reasonable factors other than age" ("RFOA") exemption, as is appropriate for an affirmative defense. See *Meacham v. Knolls Atomic Power Lab., Inc.*, 2008 WL 2445207 (U.S. Jun. 19, 2008).

In *Meacham*, the employer, needing to reduce its workforce pursuant to a government directive, had its managers score employees on various performance qualities to determine the lowest-performing employees. Of the 31 employees that were subsequently laid off, 30 were age 40 or older. At trial, the jury found for the plaintiffs on their disparate impact age claim. On appeal, the Second Circuit initially affirmed; then, however, the Supreme Court vacated in light of an intervening decision. The Second Circuit, on remand, ruled in favor of the employer, this time using the correct "reasonableness" test instead of a "business necessity" standard in assessing the employer's reliance on factors other than age in the layoff decisions. However, the Second Circuit required the plaintiffs, as opposed to the employer-defendant, to carry the burden of persuasion as to the reasonableness of the employer's non-age factors, a decision which the plaintiffs then challenged in the case's second appeal to the Supreme Court on the basis of a circuit split with the Ninth Circuit.

The Supreme Court ruled that the RFOA exemption was indeed an affirmative defense, as evinced by its textual placement in the statute, and that, therefore, the burden of persuasion fell upon the entity which sought to avail itself of that defense—the employer. In so holding, the Court noted that the "bona fide occupational qualification" ("BFOQ") exemption was listed in the same statutory section as the RFOA exemption, and it was already established that the burden of persuasion as to the BFOQ exemption fell upon the employer. The Court found it "impossible" to conclude that the RFOA would operate differently from the BFOQ exemption as to the burden of proof.

The Court also took the opportunity presented by *Meacham* to clarify that in disparate impact age claims, a plaintiff must do more than point to a generalized policy, such as a pay plan, that leads to statistical imbalances. Rather, the plaintiff must identify the specific test, requirement, or practice within the generalized policy that had an adverse impact on older employees. According to the Court, this requirement would temper employers' concerns about the heightened difficulty in defending disparate impact age claims due to the placement of the burden of persuasion for the RFOA exemption on employers.

However, as even the Court admitted, placing the burden of proof for the RFOA exemption on employers will make disparate impact age claims harder and costlier to defend than they would be otherwise. Therefore, employers would be well advised to consider the statistical significance of their employment decisions even when based on factors other than age and to avoid implementing decisions that have a disparate impact on older employees if the reasons for the decision may appear unreasonable or are otherwise difficult to explain.■

New Jersey Supreme Court Holds that After-Acquired Evidence of an Employee's Misreprentation May Limit an Employee's Damages in an Employment Discrimination Lawsuit

by **Terry D. Johnson**

In a case of first impression, the New Jersey Supreme Court unanimously held that an employer can limit the economic damages available to a former employee alleging wrongful discharge by establishing that the employer subsequently discovered "resume fraud or similar misrepresentations of one's employment-related credentials" that would have otherwise resulted in the employee's immediate termination. See *Cicchetti v. Morris County Sheriff's Office, et al.*, 194 N.J. 563 (2008). The case involved a plaintiff law enforcement officer who failed to disclose an expunged criminal conviction on his 1994 application for employment with the Morris County Sheriff's Office. Although the application did not specifically inquire about convictions that had been expunged, state law required applicants to report expunged convictions when seeking employment with any law enforcement agency. In December 1994, the plaintiff was appointed as a sheriff's officer.

Two years after he was hired, the plaintiff learned that he had contracted Hepatitis C. According to the plaintiff, when word of his illness spread throughout the sheriff's office, his co-workers began to ostracize, harass, and ridicule him on a daily basis. The plaintiff contended that his co-workers' behavior eventually escalated to threats of physical violence. On November 14, 2000, the plaintiff signed out of work early because he felt "anxious, nauseated, frustrated and deeply hurt that he was still being treated like a leper." The plaintiff refused to return to work after that date, but did not submit a resignation letter to his employer until February 25, 2002.

Following his resignation, the plaintiff filed a complaint in the Law Division against the Morris County Sheriff's Office, the Sheriff, the Undersheriff, and two co-workers. The plaintiff alleged that the defendants discriminated against him on the basis of his disability in violation of the New Jersey Law Against Discrimination ("NJLAD"). Two of the defendants filed a motion for summary judgment, arguing that the plaintiff's failure to disclose his criminal conviction on his employment application completely barred the plaintiff from pursuing any employment-related claims because the conviction would have automatically disqualified the plaintiff from working for the Sheriff's Office. The Law Division granted the motion and dismissed the plaintiff's claims against all of the defendants. The Appellate Division rejected the Law Division's decision and reinstated the plaintiff's claims against the Morris County Sheriff's Office, the Sheriff and the Undersheriff. The Appellate Division, however, dismissed the plaintiff's claims against his co-workers because they could not be held personally liable under the NJLAD.

On May 28, 2008, the New Jersey Supreme Court affirmed in part and reversed in part the Appellate Division's decision. First, the court held that the Appellate Division should not have reinstated the plaintiff's claims against the Sheriff and the Undersheriff because, like the plaintiff's co-workers, they also could not be held personally liable under the NJLAD. The Court then affirmed the Appellate Division's holding that the plaintiff was not barred from pursuing his employment-related claim simply because he failed to disclose his expunged offense when he completed his application. The court reasoned that, although the plaintiff should have disclosed his prior conviction, there was nothing in the record that even suggested that failure to disclose the conviction would have resulted in an automatic disqualification from employment with the Morris County Sheriff's Office. Absent such a "well-publicized, clear, explicit, consistently applied policy" of automatic disqualification from employment for such an omission, the court found that the plaintiff should be entitled to benefit from the protections of the NJLAD.

The court then reasoned that some form of sanctions should nevertheless be imposed on the plaintiff—and other employees like the plaintiff—for purposely omitting requested information from an employment application because the NJLAD is not "intended to condone resume fraud or similar misrepresentations of one's employment related credentials." After reviewing various remedies imposed by other jurisdictions, the court concluded that, on remand, the Morris County Sheriff's Office should have the opportunity to limit the economic damages available to the plaintiff by establishing that the Sheriff's Office would have terminated the plaintiff's employment immediately upon discovering the plaintiff's misrepresentation. If the Sheriff's Office meets its burden, any damages awarded to the plaintiff would be cut off at the date the misrepresentation was discovered. Stated differently, the date that the evidence of misrepresentation was acquired by the Sheriff's Office could be used to limit back-pay damages and eliminate any front-pay damages. The court noted, however, that the plaintiff's misrepresentation could not be used to limit the non-economic damages, such

as a punitive award, available to the plaintiff. According to the court, the public policy considerations underlying an award of punitive damages under the NJLAD outweigh an employer's argument that it would have terminated an employee if it had previously known about the employee's misconduct.■

A Key Lesson for Multi-National Employers Seeking to Protect their Business from Competition by Departing Employees

by **Charles Wynn-Evans** and **Georgina Rowley**

In *Samengo-Turner et al. v. J&H Marsh & McLennan (Services) Ltd et al.,* [2007] EWCA Civ 723, the Court of Appeal of England and Wales held that a multinational business should expect to be subject to the employment laws applicable to employees based in different jurisdictions. In this case, the employer could not rely upon a clause in its Bonus Plan conferring exclusive jurisdiction on the New York courts as against its UK employees.

Mr. Samengo-Turner and two colleagues (the "Brokers") were employed by J&H Marsh & McLennan (Services) Ltd ("MSL"), a UK company which is part of the well known Marsh & McLennan group of companies (the "MM Group"). The Brokers lived and worked in England. During their employment with MSL, the Brokers participated in a Bonus Plan, which contained a New York choice of law clause and provided for the exclusive jurisdiction of the New York courts to settle disputes. The definition of "the Company" within the Bonus Plan was widely drafted so as to include the MM Group holding company ("MMC") and its subsidiaries and affiliates. Awards under the Bonus Plan were paid in installments and could be clawed back in the event that the recipient-employee was involved in activity detrimental to the MM Group, including the solicitation of MM Group employees. The Brokers each received part of their respective awards under the Bonus Plan.

In the first half of 2007, the Brokers resigned from MSL to join a competitor, Integro. Integro was alleged to have approached (and in some cases recruited) nearly half of MSL's 32 London-based broking team. Perhaps not surprisingly, the Brokers were suspected to have been involved in soliciting their former colleagues.

MMC and one of its U.S. subsidiaries sought an injunction in a New York court requiring the Brokers to comply with covenants in the Bonus Plan and to repay the bonus awards made to them. The injunction was granted. The Brokers' challenge to the jurisdiction of the New York courts was rejected by the New York judge.

The Brokers then turned their attention to the English courts to pursue their challenge. They applied for a declaration that the New York courts did not have jurisdiction and sought an anti-suit injunction preventing legal proceedings concerning the Bonus Plan anywhere other than England. The basis for the Brokers' jurisdictional challenge was European Council Regulation 44/2001 which governs jurisdiction and the recognition and enforcement of judgments in civil and commercial disputes (the "Jurisdiction Regulation").

Section 5 of the Jurisdiction Regulation provides that, in disputes relating to individual contracts of employment, an employer may bring proceedings only in the courts in the Member State in which the employee is domiciled unless alternative jurisdiction arrangements are agreed upon by the parties after the dispute has arisen. Clearly, in this case the question of jurisdiction had been agreed to by the parties prior to the dispute arising.

In deciding whether the Jurisdiction Regulation applied, two issues were at stake: (1) whether the Bonus Plan was an individual contract of employment; and (2) whether the New York proceedings were brought by the Brokers' employer. The Court of Appeal found that the Bonus Plan was an integral part of the Brokers' terms of employment because it modified and supplemented obligations in the employment contract. Accordingly, it was held to constitute an employment contract for the purposes of the Jurisdiction Regulation. Moreover, since the two U.S. corporations who brought the New York litigation were parties to the Bonus Plan (since they came within the wide definition of "the Company") and were litigating a claim relating to a contract of employment as employers, they were employers for the purposes of the Jurisdiction Regulation. An anti-suit injunction was therefore granted, effectively restraining the New York litigation in order to give effect to the Brokers' statutory rights in the UK.

Multinational companies seeking to tie litigation under employment incentive plans to the jurisdiction in which the corporation's headquarters are based need to appreciate the limitations of such a strategy. LTIPs, bonus plans, restricted stock, or stock option plans and employment agreements will often include a clause which purports to confine litigation to the employer's home courts. However, European legislation limits the

ability of the parties to agree to the forum in which their employment disputes will be litigated. It is important to note that the issue of jurisdiction is distinct from that of choice of law (although the latter may also be fettered by European legislation under the Rome Convention). For further discussion of the impact of European legislation on the enforceability of choice of law clauses, please refer to "British Court Refuses to Enforce U.S. Restrictive Covenants," Dechert OnPoint, Issue 21 (April 2008).■

New York Court of Appeals Clarifies Exemptions From New York Labor Law

by **Eric C. Kirsch**

The New York Court of Appeals clarified the exemptions of executive employees from portions of the New York Labor Law governing the payment of wages in *Pachter v. Bernard Hodes Group, Inc.*, 2008 N.Y. Slip Op. 05300 (N.Y. June 10, 2008). Individuals employed in a bona fide administrative, professional, or executive capacity are exempt from certain provisions of Article Six of the New York Labor Law, which governs the payment of wages. In New York, deductions from "earned wages" are limited to deductions for the benefit of the employee, such as insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for United States bonds, payments for dues or assessments to a labor organization, and similar payments for the benefit of the employee, or deductions in accordance with laws, rules, or regulations. N.Y. Labor Law § 193(1) (McKinney 2008). In *Pachter,* the court had to decide whether an executive's commission payments were subject to this protection.

As an initial matter, the New York Court of Appeals held that individuals employed in a bona fide executive capacity are protected by the provisions restricting deductions from earned wages. *Pachter*, 2008 N.Y. Slip Op. 05400 at *4–5. The court next addressed the question of whether the commissions were "earned wages." In general, the court noted that under the common law a commission is earned when a ready, willing, and able buyer commits to make a purchase. However, the employee and the employer are always free to agree to different terms. In this case, there was no written contract. However, for more than a decade, the employer did not treat commissions as earned until the associated expenses were calculated and, along with customer non-payments, deducted. Because of this implied agreement, the court held that the commission was not earned wages and, therefore, could not support a cause of action for impermissible deductions from wages. *Pachter* should reemphasize for employers that executives are protected by the law protecting deductions and that it is important to have clear agreements regarding the calculation of commissions for all employees, including those employed in an executive, administrative, or professional capacity.■

Newly Amended Executive Order Will Require Federal Contractors to Use E-Verify

by **Jane E. Patullo**

An amendment to Executive Order 12989 issued earlier this month by President Bush will require most federal contractors to begin using the U.S. Citizenship and Immigration Services' (USCIS') E-Verify system to verify that certain of their employees are legally eligible to work in the United States. E-Verify is an internet-based system operated by USCIS in partnership with the Social Security Administration (SSA). Requirements for obtaining access to the system and procedures for its use are established by the Department of Homeland Security (DHS), USCIS's parent agency.

The amended executive order grants rulemaking authority to DHS concerning the terms and conditions for contractors' use of E-Verify and procedures for monitoring their use; to the General Services Administration (GSA), Department of Defense (DOD), and National Aeronautics and Space Administration (NASA) respecting amendment of the Federal Acquisition Regulation as necessary and to implement the debarment responsibility; and to all other heads of federal departments and agencies respecting remaining related responsibilities. The new requirements are likely to take effect in 2009 after final rules have been issued.

In the meantime, GSA/DOD/NASA have already published for notice and comment a set of proposed regulations amending the Federal Acquisition Regulation in accordance with the new requirements. 73 F.R. 33374, June 12, 2008. Employers should review these proposed regulations. Under the proposal, an "Employment Eligibility Verification Clause" requiring use of E-Verify must be inserted into every federal agency solicitation and contract except: those under the micro-purchase threshold (generally, under $3,000); those for commercially available off-the-shelf items (COTS) and items that, but for minor modification, would be COTS items; and those that did not include any work in the U.S. The proposed regulations also limit application of the clause to subcontracts exceeding $3,000 for com-

mercial or non-commercial services or construction (and not materials) including work performed in the U.S. Moreover, within 30 days of a contract award, the contractor would be required to enroll in E-Verify and once enrolled would have 30 days to verify the employment eligibility of its employees assigned to the contract at the time of enrollment. Following the initial period, the contractor then would have to initiate verification of all new hires as well as any employees newly assigned to the contract within three business days of their date of hire or assignment to the contract. In exceptional cases, the head of a contracting agency would be able to waive the requirement to insert the Employment Eligibility Verification Clause for a contract or subcontract or a class of contracts or subcontracts.

In order to register to use E-Verify, a subject federal contractor or subcontractor would have to sign a memo of understanding (MOU) with USCIS and SSA containing, among other things, an agreement to abide by current legal hiring procedures and to ensure that no employee is unfairly discriminated against as a result of the E-Verify program. The contractor/subcontractor would continue to be subject to I-9 completion requirements.

The newly proposed process would work as follows: After an I-9 is completed, the employer would enter the worker's information in E-Verify for review against information in the SSA and USCIS databases. In the case of a match, the employer would only need to properly annotate the I-9. In the case of a mismatch, the employer would have to provide the worker a written "Notice . . . of Tentative Non-Confirmation," which the individual would have the option of contesting. If the worker contests the mismatch, the employer would have to provide the worker with a second written notice, called a "Referral Letter," containing information about how to contact USCIS and SSA in order to resolve the tentative non-confirmation. The worker would then have eight federal government work days to contact USCIS and SSA to try to resolve the discrepancy. In the case of a contest, the employer would be prohibited from terminating or otherwise taking adverse action against the worker until final resolution by USCIS or SSA. If a worker fails to contest, or contests the mismatch but USCIS or SSA notify the employer of final non-confirmation, the employer could then terminate the worker's employment.

Violation of the terms of an MOU agreement with SSA/USCIS would be grounds for immediate termination from the E-Verify program. Also, an employer who continues to employ a worker after receiving final non-confirmation for the worker would be required to notify DHS of the continued employment or would risk a civil penalty of between $500 to $1,000 for each failure to notify. If an employer continues to employ a worker subsequently found to be an unauthorized alien, the employer would be subject to a rebuttable presumption that it had knowingly employed an unauthorized alien in violation of federal law.

Specific aspects of the proposed regulations on which GSA/DOD/NASA have invited comments are:

- whether E-Verify participation should be a pre-award eligibility requirement or, as has been proposed, a post-award contract performance requirement;
- whether use of E-Verify should be required for existing employees of a contractor as well as new hires assigned to work under the covered government contract, or only for new hires (the former has been proposed);
- whether contractors should be required to use E-Verify only for new hires assigned under the government contract, or more broadly for all new hires of the contractor (the proposal requires the latter);
- whether E-Verify use should be required for contracts calling for COTS items (the proposal currently excludes them); and
- whether use of E-Verify should flow-down to subcontracts for material/supplies or, as has been proposed, only to those for services or construction.

The deadline for submitting comments concerning the proposed regulations is August 11, 2008. Employers should be aware of these proposed changes in the law and should begin to prepare for the enactment of the final rules expected in 2009.■

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