

# BUSINESS WATCH

A Newsletter for Business Owners, Executives and Managers,  
Financial Consultants and Their Advisors

Summer/Fall, 2008

## THE CREEPING E-VERIFY AND ITS IMPACT ON ALL EMPLOYERS

By Gregory B. Minter

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George Orwell lived too soon. He wrote 1984 in 1948 and got the title by reversing the last two digits. He was just 12 years too early. In 1996, Congress established the Basic Pilot Program (now E-Verify). The statute authorizing the Basic Pilot Program (hereafter referred to as "E-Verify") provided that participation would be voluntary and permit employers to check the work status of new hires on-line by comparing information from an employee's I-9 form against the Social Security Administration (SSA) and the Department of Homeland Security (DHS) databases. The statutory authorization provided for an expiration in November of this year. Congress has now passed a statute extending the program to March 6, 2009.

Although E-Verify is supposed to be voluntary, the federal government is taking steps to make it mandatory. These include authorizing an optional practical training extension for F-1 students getting a degree in science, technology, engineering and mathematics (STEM) but

requiring the potential employer to register and participate in E-Verify, a new Executive Order and proposed regulation requiring entities contracting with the federal government to participate in E-Verify, and alleged protection against criminal and civil sanctions in raids by the government. These will be discussed below.

**How it Works.** In order to participate, employers must register with the U.S. Citizenship and Immigration Services (USCIS) at <http://www.vis-dhs.com/EmployerRegistration>. The employer must provide the necessary information to the USCIS for such registration and execute the Memorandum of Understanding (MOUS) between the employer, the SSA and the DHS. Included in the undertaking is authorization from the employer to allow the DHS and related governmental agencies access to the employer's facilities and records associated with the E-Verify program.

After registration, the employer will enter the new hire's information from Sec-

tions 1 and 2 of Form I-9 electronically to a database of the DHS and SSA within three employer business days after the hire (but after both Sections 1 and 2 of Form I-9 have been completed). If the information provided by the worker matches the information in the SSA and DHS records, no further action will generally be required and the worker may continue employment. If the SSA is unable to verify information presented by the worker, the employer will receive a "SSA Tentative Nonconfirmation" notice. Employers can receive a SSA Tentative Nonconfirmation notice for a variety of reasons, including inaccurate entry of information, name changes, or changes in immigration status that are not reflected in the database. In such case, the employer must provide the employee with a written notice of the fact, called a "Notice to Employee of Tentative Nonconfirmation." The worker must then indicate on the notice whether he or she contests or does not contest the tentative nonconfirmation, and both the

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## HIGH COURT AGAIN EXPANDS ANTI-RETALIATION LEGISLATION

By Carla Heathershaw Risko



In the 2006 *Burlington Northern v. White* decision, the United States Supreme Court broadened the impact of Title VII's prohibition against retaliation. In that decision, the high court clarified that the anti-retaliation provision contained in Title VII is not confined to only those actions that occur in the workplace, but protects against any actions that are *materially adverse* to a reasonable employee. In other words, any action that might dissuade a reasonable person from making or supporting a claim of discrimination could be considered retaliation. Following the *Burlington Northern v. White* decision, courts began to look at more subtle forms of retaliation and employers across the country have scrambled to implement anti-retaliation policies. The impact of this trend is evident: the EEOC reported receiving nearly 4,000 more claims of retaliation under Title VII in 2007 than it had received in 2006.

Employers now have even more incentive to refrain from retaliatory practices. This spring, the United States Supreme Court again expanded the reach of anti-retaliation legislation. In *CBOCS West, Inc. v. Humphries*, the court determined that 42 U.S.C. § 1981 (commonly known as "Section 1981") protects against retaliation in em-

ployment. Section 1981 provides that all persons have the same rights to make and enjoy contracts as white persons, and thus grants employees additional protection from discrimination in the workplace on the basis of race. In the *Humphries* case, an African-American former employee of a Cracker Barrel restaurant sued after being discharged from employment. Mr. Humphries believed the termination was due to a racial bias and was in retaliation for complaints he made regarding the firing of another African-American employee, so he sued under Title VII and Section 1981. When his Title VII claim was dismissed on a technicality, he asked the court to consider whether Section 1981 prohibited the retaliation. Although the Defendant argued that Section 1981 did not expressly refer to retaliation, the Supreme Court held that the failure to include an explicit anti-retaliation provision was not enough to prove that Congress did not intend for Section 1981 to cover retaliation. The Supreme Court determined that Section 1981 did prohibit retaliation, and remanded the case back to the trial court for a decision on whether the plaintiff had proved retaliation. This decision will have a broad impact because unlike Title VII, Section 1981 applies to all employers; therefore

small employers who are not subject to Title VII must take heed of this ruling. Additionally, employees do not have to first proceed with administrative complaint, such as an NEOC filing, but can file a lawsuit right away. Finally, unlike Title VII which caps damages, there is no cap for claims made under Section 1981.

Continuing its expansion of anti-retaliation legislation, the Supreme Court also decided that the Age Discrimination in Employment Act (ADEA) protects federal employees from retaliation. The ADEA expressly prohibits retaliation by private employers. However, the provision covering public employers, which was added later, includes no specific prohibition against retaliation. Instead, there is a general requirement that federal agency personnel actions affecting employees or applicants at least 40 years of age shall be free from any discrimination. The Court in *Gomez-Perez v. Potter*, ruled that the prohibition against "discrimination" based on age included retaliation.

These two cases are significant because the Court in both cases read an anti-retaliation provision into the statutes, even though neither statute explicitly addressed retaliation. The Court thus



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appears inclined to err on the side of protection against retaliation. Employers should be sure to have solid anti-retaliation policies and should remind managers that they must avoid any actions that might suggest a retaliatory motive against a complaining employee. If you have any questions about your anti-discrimination/anti-retaliation policy or your policy needs review, contact the FSBB employment lawyers. ■

## THE CREEPING E-VERIFY



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worker and the employer must sign the notice.

If the worker chooses to contest the tentative nonconfirmation, the employer must print a second notice called a "Referral Letter" which contains information about resolving the tentative nonconfirmation as well as contact information for the SSA or USCIS depending on which agency was the source of the tentative nonconfirmation. The worker then has 3 government work days to visit an SSA office or call USCIS to try to resolve the discrepancy. Under the E-Verify MOUS, if the worker contests the tentative nonconfirmation, the employer is prohibited from terminating or otherwise taking adverse action against the worker while he or she awaits a final resolution from the appropriate agency. If the worker fails to contest the tentative nonconfirmation, or if the SSA or USCIS is unable to resolve the discrepancy, the employer will receive a notice of final nonconfirmation and the employee may be terminated.

It should be noted that if the employer is registered for participation in E-Verify, it must use E-Verify for all new hires and the employee must, if he or she submitted a document on List B of Form I-9, submit a document with a photograph. Compliance with the condi-

tions of E-Verify creates a rebuttable presumption that the employer has not violated the Immigration and Nationality Act with respect to the hiring of the individual. If the employer continues to employ any employee after receiving a final nonconfirmation, it must notify the DHS that it is doing so and is subject to a civil money penalty between \$500 and \$1,000 for each failure to notify DHS of continued employment. Moreover, if the employee is subsequently found to be an unauthorized alien, the employer is subject to a rebuttable presumption that it has knowingly employed an unauthorized alien in violation of the law. No person or entity participating in E-Verify is criminally or civilly liable under any law for any action taken in good faith based on information provided through the confirmation system.

**The Creeping E-Verify.** Several new developments have occurred which have the effect of making E-Verify mandatory in certain instances:

**(A) Extended Optional Practical Training.** The USCIS adopted an interim final rule on April 4, 2008, extending the period of optional practical training (OPT) from 12 to 29 months for qualified F-1 nonimmigrant students who received a degree in the designated major subjects in science,

technology, engineering or mathematics (STEM) and who are employed by businesses enrolled in the E-Verify program. The rule also permits F-1 students whose OPT expires before he or she can begin employment under the H-1B visa program to continue in status under the OPT until the possible approval and commencement of employment under the H-1B visa.

**(B) E-Verify Requirements in Government Contracts.** On June 9, 2008, President George W. Bush issued an Executive Order requiring that executive departments and agencies of the United States that enter into contracts must require, as a condition of each contract, that the contractor agree to use E-Verify to verify the employment eligibility of all persons hired during the contract term by the contractor (or subcontractor) to perform employment duties within the United States and all persons assigned by the contractor (or subcontractor) to perform work within the United States on the federal contract, including existing employees. On June 12, 2008, the Department of Defense, General Services Administration, and National Aeronautics and Space Administration jointly published a proposed regulation requiring that there be inserted into government prime contracts that include work in the United States,

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Gregory B. Minter practices in the areas of Corporate, Business, Securities and Immigration Law.

## A LEGISLATIVE UPDATE

By *Dustin J. Kessler*



This article contains brief descriptions of a sampling of some of the more notable bills that were passed in the most recent legislative session of the Nebraska Unicameral categorized by committee. This is not a comprehensive list of bills that were passed.

### Business and Labor

LB 204 expanded regulations for professional contractors. Under current law, contractors performing work in Nebraska must be registered with the state Department of Labor if they have at least one full-time employee and they perform work in counties with populations greater than 100,000. LB 204 expands these provisions to include contractors performing work in any part of the state. The bill also increases penalties for failure to register from \$500 to \$5,000 for a first offense and from \$5,000 to \$10,000 for subsequent offenses. Exempted from the bill are contractors who earn less than \$5,000 per year, work only on weekends and holidays or work only on property they own. Finally, the contractor registration fee will increase from \$25 to \$40.

### Banking, Commerce and Insurance

LB853 prohibits some viatical settlement transactions in which a life insurance policy is purchased so it can be sold to an investor, particularly stranger-originated life insurance (STOLI). A STOLI investor solicits a person to purchase a life insurance policy, pays for the policy and then receives the policy's death benefit when the insured person dies. In exchange, the insured person receives an immediate cash payment and free life insurance, in effect allowing the "stranger," or investor, to speculate on his or her life. The bill discourages STOLI policies by extending the current two-year

restriction on selling a life insurance policy to five years. The bill allows exceptions to the five-year wait if the insured experiences life-changing events such as bankruptcy, terminal or chronic illness, divorce, disability, retirement or death of a spouse.

LB851 updates laws relating to bank charter applications, trust company and trust department reports and publications and provides for the annual re-enactment of the wild-card statutes for state-chartered banks, building and loan associations and credit unions. The bill also contains provisions that:

- clarify that restrictions in the Interstate Branching by Merger Act of 1997 apply to a broad range of financial institutions, including industrial loan companies.

- provide that a financing statement with minor errors or omissions is not seriously misleading if a search of the debtor's correct last name in the filing office records would disclose the financing statement.

- clarify that a state-chartered bank may exclude a licensed executive officer from the definition of executive officer for purposes of insider lending restrictions if such officer is not authorized to participate in major policy-making functions of the bank and does not actually participate in such functions.

- extend from 20 to 30 years the period of time in which a cause of action for the foreclosure of a mortgage or deed of trust accrues with respect to the rights of subsequent purchasers and encumbrancers for value.

- allow employees and agents of a bank to take acknowledgments of third parties to any written instrument given to the bank and to administer oaths for

any other stockholder, director, officer, employee or agent of the bank.

- provide that the holding company deposit cap of 22 percent of total bank and savings and loan deposits in Nebraska does not apply to segregated deposits from nonresidents of Nebraska in an owned or controlled bank.

### Government, Military and Veterans Affairs

LB720 restricts the use of robocalls in political campaigns. A robocall is a prerecorded telephone call made using a computer or automated dialing device typically used in election campaigning and telemarketing. The bill applies to robocalls other than telephone solicitations. A telephone solicitation is defined in the bill as a telephone call or message using an automatic dialing-announcing device to encourage the purchase or rental of property, goods or services. In addition, a person contracting with a third party to conduct robocalls for reasons other than telephone solicitations will be required to file the prepared message with the Public Service Commission within 24 hours of its transmission. The bill provides exemptions for robocalls made to students, parents or employees by schools, to employees advising them of work schedules and to persons with whom the transmitter of the message has an established business or personal relationship. Further, robocalls made by political subdivisions also are exempt.

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other than those that do not exceed the micro-purchase threshold (generally \$3,000.00), or that are for commercially available off-the-shelf items (COTS) or items that would be COTS items but for minor modifications to require the contractor or subcontractor to enroll in E-Verify within 30 days of the contract award, begin verifying the employment eligibility of all new employees of the contractor or subcontractor that are hired after enrollment in E-Verify, and continue to use E-Verify program for the life of the contract. It also requires that the contractors and subcontractors use E-Verify to confirm the employment eligibility of all existing employees who are directly engaged in the performance of work under the covered contract. It applies to all solicitations issued and con-

tracts awarded after the effective date of the final regulation. It also requires that all departments and agencies of the federal government amend existing indefinite-deliveries/indefinite-quantity contracts to include the clause for future orders if the remaining period of performance exceeds at least six months after the effective date of the final rule and the amount of work or number of orders expected is "substantial." The comment period for the proposed regulation has now expired and we will await further developments.

### C. State Mandatory E-Verify.

Eleven states, including Arizona, Colorado and Rhode Island, have adopted legislation requiring that contractors with the state participate in E-Verify. Illinois, on the contrary, has adopted legislation prohibiting

employers from using E-Verify. The effectiveness of the Illinois legislation has been stayed, however, pending the outcome of a suit by the DHS against the state of Illinois.

It is anticipated that there will be further actions taken by the federal governmental departments and agencies to make E-Verify mandatory, notwithstanding that the enabling legislation provides for voluntary participation. It is a potential burden on all employers and appears to prove George Orwell to be a valid prognosticator that Big Brother will, indeed, be watching.

Please contact the author of this article or Dustin J. Kessler if you have any questions.■

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Questions, comments, and address changes can be directed to Larry P. Grill, Office Administrator, 10050 Regency Circle, Suite 200, Omaha, Nebraska 68114-3794 (402) 342-1000.

## A LEGISLATIVE UPDATE



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LB889 allows some political subdivisions to utilize construction alternatives for certain public projects. The bill broadens the Nebraska Schools Construction Alternatives Act to allow counties, cities, villages, school districts and community colleges to enter into design-build or construction management at risk contracts. Political subdivisions are prohibited from using the alternative methods for road, street, highway, water, wastewater, utility or sewer construction projects. An exception is provided for metropolitan class cities using such contracts to comply with state or federal requirements to control or minimize overflows from combined sewers. A two-thirds vote of a political subdivision's governing body is required to adopt a resolution selecting the design-build or construction management at risk contract delivery system.

### Health and Human Services

LB395 bans smoking in indoor public places statewide beginning June 1, 2009, with the following exemptions: private residences, unless being used as child care facilities; guest rooms and suites that are designated as smoking; areas used for research on the health effects of smoking; and retail stores selling only tobacco and products directly related to tobacco. The bill specifies that products directly related to tobacco do not include alcohol, coffee, soft drinks, candy, groceries or gasoline.

### Natural Resources

Public power districts will be able to negotiate certain bids for construction and maintenance contracts under LB939 which changes Nebraska laws

requiring sealed bids to procure certain goods and services. Currently, if the contract under bid involves onsite labor and all bids received are non-responsive or in excess of fair market value, the public power district cannot reject the bids and negotiate. The bill removes the onsite labor restriction and allows power districts to reject bids and negotiate contracts in those instances. The provisions apply to public power districts, agencies created under the Municipal Cooperative Financing Act and joint entities formed under the Interlocal Cooperation Act.

### Urban Affairs

LB1096 requires cities with populations exceeding 37,500 to hire a qualified, career fire chief responsible for training and administrative oversight. The bill also requires the fire chief in such cities to review recruitment and performance data annually. It also prohibits volunteer departments from collecting fees for emergency response services involving the use of city-owned property and equipment and requires any such fees to be returned to the sponsoring city or fire protection district. The bill also creates employment protections for volunteer emergency responders who are absent or tardy due to an emergency call prior to the start of their scheduled shift.

LB1056 allows first-class cities that share a common border to voluntarily merge, subject to voter approval. Upon such approval the two cities would become a single city. Under the bill, city councils of first-class cities are authorized to adopt joint



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resolutions of their intent to pursue a merger and develop a joint plan for such merger. Any proposed merger plan will require a public hearing and voter approval before the cities would be merged. The bill prohibits merging cities across county lines.

Please contact the attorneys of Fitzgerald, Schorr, Barmettler and Brennan, PC, LLO, with questions regarding these, or any other recently, or not so recently, passed legislation.■

## In House




**Gregory B. Minter** has been appointed as the Vice-Chair of the H-2A-H-2B Committee of the American Immigration Lawyers Association and as an Ambassador of the American Immigration Lawyers Foundation. He presented a talk at the University of Nebraska Law College Estate and Business Planning Seminar on Immigration Law - A Primer and also presented a Lunch and Learn Seminar sponsored by the Nebraska State Bar Association entitled "An Introduction to Immigration Law."

**Susan J. Spahn** spoke at the University of Nebraska College of Law's 2008 Annual Institute on The Survey of Nebraska Law on the subject of Taxation.

**Dustin J. Kessler** is currently serving as Chair of the Nebraska State Bar Association Immigration Committee.

**Nick R. Taylor** will be speaking at a National Life Insurance Conference in November.

The **Employment Law Group** hosted its annual Employment Law Seminar in October. The seminar was well attended by business owners, human resource specialists, lawyers and others and was followed by a wine and cheese reception.



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