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South Carolina eAuthority

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Update on LLR's Immigration Investigations and Site Visits

The South Carolina Department of Labor, Licensing and Regulations (LLR) investigators are continuing to visit employer sites unannounced to enforce the South Carolina Illegal Immigration Reform Act. They are not only requesting documentation to prove that the employer is not "knowingly or intentionally" employing unauthorized workers, but they are also asking to speak to employees to question them on the employment verification process. As pointed out in our [July 10, 2009 South Carolina eAuthority](#), we believe that LLR's application and enforcement of the law, and its methodology for selecting employers for "random" audits, reach beyond the scope of its legal authority and raise several serious legal issues.

Ogletree Deakins is working closely with the South Carolina Chamber of Commerce and other business organizations to find a resolution to these issues. A meeting has been organized for July 30 and will include representatives from LLR, the state Chamber of Commerce, and industry groups impacted by these potentially unlawful enforcement tactics to determine if a reasonable solution is possible. We will notify our clients of the outcome of this meeting.

In the meantime, please be very cautious in any dealings with LLR or its investigators because complying with their demands could potentially create other legal issues and liabilities for employers.

We have prepared the following questions and answers as preliminary guidance for employers on how to respond to LLR investigators in the course of these "random audits."

Questions & Answers

- Q. If an LLR investigator shows up at the worksite unannounced, what do we do?**
- A. To protect the employer's interests and obtain information needed for potential legal recourse in the future, you should ask the investigator for proper identification such as an official badge with photograph confirming his or her authority as an LLR investigator; a business card alone is insufficient. Record the investigator's name and phone number and/or make a copy of the business card. Take the investigator to a private location (such as an office or conference room)

and ask for an explanation of the purpose of the visit and exactly what the investigator is requesting. Inquire how the employer was targeted for the investigation (*i.e.*, whether it is a random audit or complaint-driven). Ask the investigator if he or she has a search warrant, and if so, ask to see the warrant, read it carefully and make a copy of the warrant. Finally, tell the investigator that it is the employer's intention to comply with all lawful requests and that you are calling the company's attorney to assist.

Q. Is an employer obligated to let the investigator on the premises?

A. Employers have a right to control who may enter their private property. They are not required to consent to an investigation visit. If an LLR investigator produces a search warrant, this would likely be sufficient to compel entry. Absent a search warrant, the employer may refuse the investigator entry onto the premises.

Q. If the investigators ask for documents and employment records (*i.e.*, payroll records, I-9s, etc.) to prove that the employer is not employing unauthorized workers, what do we show them?

A. It is our position that LLR only has authority to review documents that can serve as evidence as to whether the employer is in compliance with employment verification provisions of the Act as of the effective date (*i.e.*, July 1, 2009) for employers with 100 or more employees. Only such documentation should be produced.

To inspect any documents that pre-date the effective date of July 1, LLR must have legally sufficient "good cause" to inspect those documents and "reasonable grounds" must exist to suggest that the employer violated the Act by "knowingly or intentionally" employing unauthorized workers.

To protect the employer's legal interest, the employer should consider asking the investigator to obtain a subpoena for the records or a search warrant.

Q. Is an employer obligated to produce I-9s of its employees?

A. No. According to the federal regulations pertaining to employment eligibility verification, only certain federal agents are authorized to inspect I-9 documents. The employer is entitled to a written notice of inspection to produce the I-9 forms within 72 hours and/or produce the documents in response to a search warrant or a federal subpoena.

Q. What are the consequences of producing or not producing I-9s?

A. I-9 documents contain personal information including name, birth date, Social Security number, and address. If the I-9s are turned over and it is later determined that LLR was NOT authorized to review them, an employer could face potential liability for violating its employees' right to privacy. The employer may have a defense that its disclosure of sensitive personal information was compelled by state authority, which was presumed legal at the time. However, this question of a viable defense is still unanswered.

If the I-9s are not turned over, LLR could possibly issue an administrative subpoena (provided it complies with the requirements for a state agency to issue a subpoena, *e.g.*, on a showing of probable cause that a violation of the Act occurred or based on LLR's random audit/investigation process). The employer has the option to file a motion to quash the subpoena and have a court decide whether compliance is required.

It is possible that LLR will notify U.S. Immigration Customs and Enforcement (ICE) about the employer's refusal to allow inspection and ask ICE to conduct an audit. Under the Act, LLR must notify ICE if it finds unauthorized employees; however, it is not known whether LLR can or will notify ICE simply based on an employer's refusal to comply with the subpoena, without any additional evidence of violations of the Act. It is also not clear whether ICE would initiate an investigation of the employer based merely on LLR's request prompted by an employer's refusal to allow inspection.

Q. Is an employer required to produce personnel files, including personal medical information?

A. No. Documents to serve as evidence of compliance with the Act should be kept in separate folders; there should be nothing in the personnel records that an LLR investigator should need to see to confirm compliance with the Act. The Act does not mandate that employers keep personnel files. Further, there are privacy concerns under the Health Insurance Portability and Accountability Act regarding personal medical information.

Q. Is an employer required to allow investigators to question/interrogate employees?

A. It is our position that while the Act may contemplate such interviews, enforcement of that provision raises serious constitutional issues. Unless the investigator shows a search warrant or arrest warrant (which is unlikely), the employer is not obligated to make employees available for interview during working hours and on the employer's property. Employers should think carefully about allowing investigators to speak to employees as any information gathered by the investigator can be used as evidence against the employer.

Additional Information

Should you have any questions about the new law or its enforcement, please contact the Ogletree Deakins attorney with whom you normally work, a member of our [Immigration Practice Group](#), or the Client Services Department at 866-287-2576 or via e-mail at clientservices@ogletreedeakins.com.