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The Colorado Department of Labor withdrew interpretative guidelines issued in December 2006 that would have required employers doing business in Colorado to verify work status of all new hires using the federal Social Security payroll verification system.

Colorado DOL Reconsiders Requiring Work Authorization Verification Beyond Federal I-9

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Effective January 1, 2007, Colorado became the first state in the U.S. to impose employment verification obligations on all employers, adding new state requirements to the existing federal statutory scheme for completing I-9 forms and inspecting work authorization documents for all new hires. (A.B.-S1017, passed in August 2006) The Colorado statute requires that, in addition to I-9 requirements, all Colorado employers keep copies of employment authorization documents submitted by new employees during the I-9 process and that the employer (or its representative) sign a special "affirmation" confirming his/her inspection of the legal work status of new employees. More information about the Colorado statute is available at The Colorado Department of Labor and Employment.

Since publication of Colorado Department of Labor (DOL) questions and answers about A.B.-S1017 on December 26, 2006, it appeared that the Colorado DOL, charged with enforcement of A.B.-S1017, read the statute to require "legal work verification" steps more onerous than those required by federal law, by suggesting that compliant employers should enroll in the Social Security Basic Pilot program or use the Social Security payroll verification system "SSNVS" to confirm a new employee's social security number. Many employer representatives, including Littler attorneys, urged Colorado officials to reconsider this position. Employer representatives argued that the Colorado DOL exceeded statutory authority and the use of the Social Security SSNVS program for work authorization purposes is contrary to federal Social Security guidelines strictly limiting access to and use of that data.

Now, the Colorado DOL has withdrawn its December 26 questions and answers and has replaced them with new responses more in line with all employers' obligations under federal law. The revisions are likewise available on the Colorado DOL website. For A.B.-S1017, gone are all references to participation in the Basic Pilot Program or use of SSNVS to check on new employees. Instead, the new questions and answers tell employers to follow the federal I-9 rules, to make copies of work authorization documents provided by new employees, and to fill out an affirmation in connection with completing the I-9 within 20 days of the new employee's hire date. Affected employers can start using the revised affirmation form immediately.

The revised affirmation, also available on the Colorado DOL website, requires that the person who reviews work authorization documents to affirm:

- the employer has examined the legal work status of each new employee hired since January 1, 2007;
- the employer has retained file copies of required I-9 documents;
- the employer has not altered or falsified the documents; and
- the employer has not knowingly hired an illegal alien.

The new affirmation does not require the employer representative to sign under penalty of perjury.

This development likely represents an appreciation by Colorado authorities of serious questions about the enforceability of A.B.-S1017, especially as initially interpreted in

the now superseded questions and answers. Immigration and foreign workers' work authorization has long been thought to be the exclusive province of the federal government, and any state laws similar to A.B.-S1017 are likely subject to legal challenge.

Note that this interpretive change does not affect obligations of public contractors in Colorado to enroll (or attempt to enroll) in the Basic Pilot Program under a different Colorado statute, A.B.-1343. That law remains in effect and employers who have agreed in public contracts to enroll in Basic Pilot must continue the practice.

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