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IMMIGRATION ALERT

New Rules for State Contractors and Other Beneficiaries: Missouri Government Contractors and Beneficiaries Must Use E-Verify

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Under legislation passed by the Missouri legislature in 2008, to be implemented by regulations that could go into effect as early as July 1, 2009, as a condition for any contract or grant in excess of \$5,000 with the state of Missouri or with any political subdivision of the state, or for receipt of a state-administered or subsidized tax credit, tax abatement or loan from the state, a business entity must provide:

- A sworn affidavit and documentation of enrollment in a federal work authorization program for the employees working in connection with the contracted services; and
- An affidavit of not knowingly employing any person who is an unauthorized alien in connection with the contracted services.

“Business entity” is broadly defined and includes most entities that are employers.

“Employee” is broadly defined as “any person performing work or service of any kind or character for hire within the state of Missouri.”

“Political subdivision” is broadly defined as “any agency or unit of this state which now is, or hereafter shall be, authorized to levy taxes or empowered to cause taxes to be levied.” In addition to the state and its agencies, this definition would include cities, towns, counties, school districts and fire protection districts.

“Federal work authorization program” is any electronic verification of work authorization program operated by the U.S. Department of Homeland Security to verify information of newly hired employees. The present program is known as “E-Verify”.

“Unauthorized alien” means an alien who does not have “legal right or authorization under federal law to work in the U.S.”

The new legislation also provides that no business entity or employer shall knowingly employ, hire for employment, or continue to employ an unauthorized alien to perform work in Missouri. This employment requirement reiterates existing federal law.

Enrollment and participation in E-Verify is an affirmative defense for a business entity that the entity has not violated the employment requirement. If enrolled, an employer must verify the employment eligibility of every employee who starts employment after enrollment, and retain a copy of the dated verification report received from the program.

A general contractor or subcontractor is not liable for a direct subcontractor who violates the employment requirement if:

- (a) the contract affirmatively states the direct sub is not knowingly in violation of the employment requirement;

- (b) the contract affirmatively states the direct sub will not knowingly violate the requirement; and
- (c) the direct sub provides a sworn affidavit under penalty of perjury that the direct sub's employees are lawfully present in the U.S.

We anticipate all state government agencies and political subdivisions and most upstream contractors will require these three "safe harbor" provisions in their contracts. If you are a contractor or subcontractor, you need to consider requiring these provisions from all downstream contractors and you will likely be asked to sign a statement or affidavit with these three provisions. If you are asked to sign, consider adding a knowledge qualifier to the third provision, that is, "to my knowledge, our employees are lawfully present in the U.S." even though the statute does not mention such a qualifier.

This new state law is enforceable by the Attorney General after receipt of a complaint submitted by "any state official, business entity or state resident." If it is found that a business entity did not knowingly violate the law, then the business entity must:

- (a) terminate the unauthorized alien's employment, or acquire additional information from the employee and request a secondary or additional verification;
- (b) submit a sworn affidavit that the violation has ended that includes a description of the specific measures and actions taken; and
- (c) submit documentation that the entity is enrolled in and participating in E-Verify.

If it is found a business entity did knowingly violate the law, then:

- (a) for first violation, business permits, licenses and exemptions can be suspended for 14 days;
- (b) for second violation, suspension for 1 year;
- (c) for third or subsequent violations, permanent suspension;
- (d) for first violation, state may terminate any state contract and suspend or debar the business entity from doing business with the state for 3 years;
- (e) for second or subsequent violation, state may terminate any state contract and permanently suspend or debar the business entity from doing business with the state; and
- (f) with termination of a state contract, withhold up to 25% of the total amount due.

This Immigration Alert was prepared by David J. Harris of the Immigration Law Practice Group of Gallop, Johnson & Neuman. If you wish to obtain further information regarding these matters, please contact either Mr. Harris or the Gallop, Johnson & Neuman attorney who normally provides or manages your legal services.

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