



Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@portfoliomedia.com

Termination After An E-Verify Final Nonconfirmation

Law360, New York (June 22, 2010) -- Receipt of a final nonconfirmation under E-Verify can present employers with a difficult decision. The language of the E-Verify procedures in the memorandum of understanding is somewhat troublesome in the event of an FNC.

Specifically, the MOU states, "the employer can find the employee is not work authorized and terminate the employee's employment" after receipt of an FNC.[1] From this language alone, it is unclear whether the government expects the employer to terminate the employee, or whether this is merely a removal of the employer's prohibition from termination during the verification period.

Since the wording does not expressly require termination, employers can find themselves in a difficult situation when an FNC is received employee organizations and labor unions may look to the language of the MOU which does not expressly mandate termination after an FNC.

These organizations may demand that the employer continue to employ such persons. Faced with such demands on one side and the threat of severe criminal penalties on the other, employers will likely not know which way to turn.

A review of the MOU, the regulatory framework of E-Verify, and interdepartmental administrative agreements suggests that, even if not strictly required, it is nonetheless advisable for employers to terminate employees for whom an FNC has been received.

Destructive Knowledge

The MOU itself provides some guidance on this issue. Specifically, the section on employee responsibility provides a potentially harsh result for employers who continue to employ FNC employees.

"The employer is subject to a rebuttable presumption that it has knowingly employed an

unauthorized alien in violation of Section 274A(a)(1)(A) if the employer continues to employ an employee after receiving a final nonconfirmation." [2] The MOU further required employers affirmatively to report that they are disregarding the FNC, imposing up to a \$1,100 fine per failure to report.

Ironically, many employers use E-Verify specifically to avoid such a presumption. E-Verify provides that employers who comply with its terms are subject to a presumption that they did not employ unauthorized aliens. [3] By continuing to employ an individual after FNC, employers make it easier for the government to convict them, subjecting themselves potentially to heavy fines, and even to property confiscation or imprisonment. By removing the government's requirement to prove intent, E-Verify effectively makes employing an FNC employee a strict liability offense.

Looking at the matter another way, purely under 8 CFR 274A, with regard to an employers' knowingly employing an unauthorized worker, "constructive knowledge is knowledge that may fairly be inferred through notice of certain facts and circumstances that would lead a person, through the exercise of reasonable care, to know about a certain condition." 8 CFR 274A.1(l)(1).

As per the regulation, constructive knowledge is "knowing" for the purpose of criminal liability for knowingly employing, harboring, etc.

Right now there is no specific reference stating that a final nonconfirmation is constructive knowledge. However, there seems to be ample authority to support it through analogy. Indeed, when employers received information from INS that documents are fake, the employers had constructive knowledge and were subject to prosecution. *Mester Manufacturing v. INS*, 879 F.2d 561, 566 (9th Cir. 1989).

Similarly, ICE has been trying to pass a regulation that makes a Social Security no-match letter into constructive knowledge. Under the proposed regulation, though, a no-match letter may impart constructive knowledge, but this is evaluated in view of a totality of the circumstances.

In addition, at present there are a number of such complaints against employers currently before the Office of Special Counsel of the Civil Rights Division of the US Department of Justice, and it is anticipated that these will lead to case law on this point.

When All Else Fails

Looking at administrative rulemaking can provide more insight into this issue. E-Verify regulations were published in the Federal Register on Friday, Nov. 14, 2008. In this administrative discussion of E-Verify, further guidance is available to the troubled employer.

On page 67,684, it states that employers may continue to employ employees after a final nonconfirmation "if the employer has grounds to believe the final nonconfirmation is in error." This language only allows continued employment if there are valid grounds for believing there was an error.

This language seems consistent with the MOU language. Whereas an employer is not strictly required to terminate an employee, even after receiving an FNC, the regulations state that an employer should terminate unless there is a good reason not to do so. For example, if an employer knew positively that the individual was a United States citizen, he could justify continued employment. However, absent certain knowledge, the possibility of presumed liability makes continued employment risky.

Semantics

Looking at another source, the E-Verify Users Manual for Employers, further guidance on termination emerges. The manual states that upon receipt of a final nonconfirmation (FNC), the employer "may" terminate the employee. On its face, this seems to be allowing employers discretion on whether to terminate.

Taken in context of the rest of the guidelines, though, this seems to be more a removal of a prohibition than a cognitive choice by the employer. Prior to the final nonconfirmation, employers are forbidden from firing the employee who is contesting a tentative nonconfirmation.

In this context, the "may" seems to mean that this prohibition is removed with the issuance of a final nonconfirmation. At this point, the employer is once again to close the matter by terminating the employee.

Double Agents

Recalling the earlier discussion, after receiving an FNC, an employer must either terminate the employee OR notify the Department of Homeland Security of continued employment. Savvy employers will wonder how this information will be used in enforcement proceedings.

The answer is found in an MOU between USCIS and ICE. Here it states that USCIS will report

to ICE specific instances of misconduct, including (among other things), "specific cases of ... retaining employees after an E-Verify final nonconfirmation."

This is more than a back-door downstream passing of information; it appears to be active sharing. ICE will investigate those employers that choose to employ workers for whom they have received FNC.

Ultimately, this means that ICE will have access to this information and reserves the right to conduct an inspection and audit of the employer. If the employer is determined to have knowingly hired or continued to employ an unauthorized worker, the employer may be fined, have its federal contract cancelled, and in certain situations, fall subject to criminally prosecuted.

Furthermore, the offending employer may be barred from participating in future federal contracts and from receiving other government benefits.

While ICE will decide whether to act on this information, it is important for employers to keep in mind that ICE will have direct knowledge of each instance of continued employment following an FNC. Obviously, if ICE has direct knowledge of potential violations, audits are significantly more likely. ICE audits are never simple affairs, and they frequently cost thousands of dollars in legal fees, diverted resources, and lost employee time. For those who cringe when the ICE-man cometh, this information sharing should be motivation enough to terminate employees from whom an FNC is received.

Choosing Scylla

Considering the parade of horrors that awaits an employer who is presumed to have knowingly employed an unauthorized employee, the decision should not be taken lightly. Employers should consider the significant risk that disregarding an FNC can carry: audits become more likely, and employers are stripped of protections otherwise available to them.

On the other hand, E-Verify provides significant protection for employers who follow its procedures. In addition to creating a presumption that the employer did not knowingly employ unauthorized workers, the MOU provides for certain immunity for prosecution.

Specifically, Article II, Part C, paragraph 6 states: "no person or entity participating in E-Verify is civilly or criminally liable under any law for any action taken in good faith based on information provided through the confirmation system."

This is a provision for a good faith defense, and it applies to any law, including civil liability. Employers faced with angry employee organizations may successfully be able to hide behind this defense for adverse action taken in regard to termination an employee based on an FNC.

Viewed in this light, the flak that will ensue from terminating an FNC employee is significantly less daunting than an administrative grudge match with ICE. As the Greeks of old learned, it is far better to sail near Scylla and suffer a little loss than to sail to Charybdis and lose the whole ship.

--By Eileen M. G. Scofield and Kyle R. Woods, Alston & Bird LLP

Eileen Scofield is counsel with Alston & Bird in the firm's Atlanta office and head of the firm's immigration practice. She also chairs the national AILA E-Verify Liaison Committee. Kyle Woods is an associate with the firm in the Atlanta office.

The opinions expressed are those of the authors and do not necessarily reflect the views of Portfolio Media, publisher of Law360. [1] E-Verify MOU, Art. II, Sec. C: Responsibilities of Employers, para. 10 (2009).

[2] Id. Paragraph 6.

[3] Id.

All Content © 2003-2010, Portfolio Media, Inc.