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Ballard Spahr Andrews & Ingersoll, LLP can assist employers with determining whether a policy is appropriate, drafting policy language and training employers on the uniform and nondiscriminatory enforcement of a valid policy.

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Learn to Serve Your Clients Better at ACC's Corporate Counsel University®

If you are new to in-house practice, or are moving up as a manager in the law department, ACC's 6th Annual Corporate Counsel University® (May 21–23, 2008, San Francisco), is for you. Open only to in-house counsel, Corporate Counsel University® will teach you how to excel in your new role during this time of change. A separate track of programs will again be offered this year for paralegals, which will provide the basis for acquiring knowledge and enhancing skills to serve the corporate client further. Note: this track will be separate from the corporate counsel tracks; paralegals and/or other non-legal registrants will not be eligible to register for sessions on these other tracks. Questions? Contact education@acc.com.



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Mark Rogers President's Message

Greetings to all of the members of the Arizona Chapter!

As we head into calendar year 2008, I'd like to highlight a few items for you.

First, we made a concerted effort in the fall to attract new members to our board and increase the number of officers. I'm very pleased to report that the following slate of directors and officers was approved and will start meeting soon.

Mark Rogers—president, board member

Gary Smith—secretary, board member

Jim Curtin—treasurer, board member

David Glynn—vice president (scholarships and ASU/U of A relations), board member

Ruth Hay—vice president (special programs and skills discussions), board member

Margaret Gibbons – vice president (relations with national and membership surveys), board member

John Kaminsky—vice president (sponsorships), board member

Robb Itkin—vice president (membership relations), board member

Mary Beth Orson—vice president (newsletter and website), board member

Virginia Llewellyn, board member
Kelleen Brennan, board member

Paul Ward, board member
Steve Twist, board member
Catherine Brixen, board member
Cyndy A. Valdez, board member
Kevin Groman, board member

You'll see from the list some of the areas we will focus on in the upcoming year: scholarships at Arizona's law schools; special programs, including the second series of monthly meetings focusing on "soft skills" and tapping our members in informal, roundtable settings; member satisfaction and communication with members; and sponsorships. We're very excited about the upcoming year.

Second, we enter 2008 with a larger chapter membership than ever before. Please continue to refer in-house counsel to ACC. More people in the membership means more people at meetings, more energy for chapter activities, and more opportunities. It is a great upward spiral.

Third, as part of being a bigger chapter, we enter the year with greater financial capacity and security. You'll see from some of the focus items for this year that we plan to spend some of that on worthy projects. Your input on that would be appreciated.

Many thanks for your support, and I hope to see you soon at a chapter meeting.

Welcome New Members

We wish to welcome the following new members who have joined our chapter recently:

Clark D. Bien, Gowan Company
Kristi S. Bonfiglio, Avnet, Inc.
Michael E. Brown, Mayo Clinic
Susan W. Costigan, Tekco Management Group LLC
Nicole M. Holt, Arizona Credit Union System
Erin F. Lewin, Avnet, Inc.
L. Richards McMillan, Freeport-McMoRan Copper & Gold, Inc.
Carmen L. Neuberger, Phoenix Children's Hospital
Roman Rudolf, Avnet, Inc.
Catherine B. Thompson, Raytheon Systems Company
Page Underwood, Mayo Clinic

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Focus on CLOs: CLO ThinkTanks, Chapter Networks, Insights & Beyond

By Renee Danker, associate general counsel, advocacy and CLO services, ACC

ACC focuses many of its services towards different segments of its membership, including those who are new to in-house practice, legal specialists, law department managers, chief legal officers (CLOs), and small and large department practitioners. While resources and programs may be initially created or styled with one of these segments in mind, anyone may find value in these materials. Large law departments, for instance, invest in resources that can then benefit smaller practices; and something created for an IP specialist may inform a legal generalist who has an IP problem arise that needs attention.

Whether you are the CLO for your law department or you ultimately report to the person who is, ACC's CLO materials and services can help provide a window into thought leadership and issues that are top-of-mind in top law departments around the world. Featured below are some of the initiatives and links to materials we've created for our CLO membership segment. For more information on our

CLO services or resources, check out our CLO "homepage" at www.acc.com/php/cms/index.php?id=59, or contact Renee Dankner, associate general counsel, advocacy and CLO services (dankner@acc.com; 202.293.4103 x358), or Susan Hackett, senior vice president and general counsel (hackett@acc.com; 202.293.4103 x318).

ACC CLO ThinkTanks

ACC CLO ThinkTanks are invitation-only discussion forums at which a small group of large company CLO thought-leaders discuss in-depth their ideas, concerns, best practices, and forward-thinking advice on the hot topics confronting the in-house bar and their clients.

To date, ACC has held 14 CLO ThinkTanks in the United States and Canada; sessions have included CLOs from more than 100 top-ranked companies. Topics have included: Corporate Governance and Compliance; Establishing and Sustaining an Ethical Culture in a Global Organization; Managing Corporate Business Information: Ediscovery and Beyond; Hot Topics for Private Companies; Compensation and

Career Advancement for In-house Lawyers; and the Law Department's Role in Financial Compliance and Relationships with Auditors.

Advance Participant Briefing Binders and Executive Reports of past CLO ThinkTank sessions are available at www.acc.com/php/cms/index.php?id=264. The Participant Briefing Binders include discussion outlines and links to related resources of interest. The Executive Reports summarize key takeaways and discussion highlights. Stay tuned for materials relating to upcoming sessions on FCPA Enforcement, Enterprise Risk Management, CLO as Gatekeepers, and more.

CLO Chapter Networks

Several of ACC's chapters are implementing exciting initiatives to help promote networking and leadership discussions among CLO leaders in their local communities. From CLO lunch clubs, to general counsel forums, to roundtable dinners or GC Brown Bag lunches, chapters are bringing together CLOs to expand their network of peers and share ideas on challenges and best practices. For more on what the DELVACCA,

Mountain West, Charlotte, Central Ohio, San Diego, and WMACCA chapters are doing, see www.acc.com/php/cms/index.php?id=381.

Coming soon: posts for additional chapter CLO initiatives—stay tuned and please send an email to dankner@acc.com if your chapter is implementing initiatives you'd like us to add, or to request information on how to create or participate in CLO networks within your chapter area.

CLO Executive Bulletin

ACC's *CLO Executive Bulletin* is a periodic electronic newsletter designed for CLOs. Read featured perspectives of leading CLOs on hot topics, find executive briefings on ACC public policy initiatives undertaken on behalf of the bar, and find resources of particular interest to law department leaders. Most issues include a lead article that features insights and perspectives of a leading CLO on a hot topic of interest.

Past issues feature insights on a broad range of topics, including: Optimizing Business Needs Through Risk Management (Mick McCabe, Allstate); Leading with a Vision for Innovation (Mike Dillon, Sun Microsystems); CLO as Spokesperson with the Media (Don McCarty, Imperial

Tobacco Canada); and Six Key Principles for Creating an Effective and Sustainable Pro Bono Program (Ken Handal, CA). Links to past issues and featured CLO perspectives articles are available at www.acc.com/php/cms/index.php?id=266.

CLO Club/ACC Annual Meeting CLO Program Series

Each year at its Annual Meeting, ACC offers special programming designed with CLOs in mind. ACC's Annual Meeting 2007 included our signature CLO Club programs (sophisticated networking forum that hosts peer-to-peer discussion groups targeted to the unique executive practice, management, and benchmarking needs of CLOs), plus an entire new line of CLO programs: our CLO Executive Leadership Series sessions.

The CLO Executive Leadership Series sessions are open to all annual meeting participants and feature top CLOs as panelists. In addition, the AM 2007 program slate included ACC insights and presentations on "Cutting Edge Practices from the World's Largest Legal Departments," and "Top of Mind: What General Counsel are Thinking/Worried About." Look for these program materi-

als soon in the Virtual LibrarySM at www.acc.com/vl.

While the CLO Club sessions are open only to CLOs, we've posted session materials and key takeaway summaries on our website to help provide insights into these discussions and possibly even serve as 'tool kits' for hosting these types of discussions within your law departments. Visit ACC's webpage for more information on ACC's CLO Club and materials, including hypothetical scenarios, reference lists, and key takeaway summaries from this year's sessions on Financial Compliance and Emergency Response Preparedness, available at www.acc.com/php/cms/index.php?id=267.

ACC's CLO Page

In addition to some of the more specialized services and resources noted above, ACC has dedicated a portion of its website to promote the executive, legal and department management roles of today's CLO. Find the resources and connections you need at www.acc.com/php/cms/index.php?id=59.

OSHA Publishes Final Regulation Mandating Employers Pay for Personal Protective Equipment

By Steven W. Suflas and William J. Simmons

The Occupational Safety and Health Administration (OSHA) has published a final rule mandating that employers pay for personal protective equipment (PPE) required by OSHA's general industry, construction, and maritime standards. Under the new regulation, employers also must pay for replacement equipment, unless the employee has lost or intentionally damaged the item. Employers will have six months to comply with the new rule before enforcement begins.

Importantly, the regulation does not require that employers provide personal protective equipment where none has been required before. Instead, the regulation mandates that where the OSHA standards already require an employer to provide personal protective equipment, generally employers will be required to provide that equipment at no cost to the employee. Employers are responsible for paying for the minimum level of PPE required by the OSHA standards. If an employer decides to use upgraded PPE to meet the requirements, the employer must pay for that PPE. If an employer provides PPE at no cost, an employee asks to use different PPE, and the employer decides to allow him or her to do so, then the employer is not required to pay for the item. The

employee's choice to use his own equipment, however, must be completely voluntary.

The rule also specifies certain equipment that an employer is not required to pay for: non-specialty safety-toe protective footwear, non-specialty prescription safety eyewear, shoes with integrated metatarsal protection if the employer provides and pays for metatarsal guards that attach to the shoes, logging boots, and ordinary clothing used solely for protection from ordinary weather, such as winter coats, jackets, gloves, and parkas.

The full text of the final regulation was published in the *Federal Register* November 15, 2007 and is available online.

Ballard Spahr's Labor, Employment and Immigration Group can assist employers in developing compliance plans for the new OSHA rule and develop strategies for the rule's effect on current collective bargaining agreements. For more information, please contact Steven W. Suflas, (856) 761-3466 or William J. Simmons, (856) 761-5511.

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E-Verify Options and Pitfalls

By Julie A. Pace, David A. Selden and Heidi Nunn-Gilman

The Legal Arizona Workers Act (LAWA) requires that, after January 1, 2008, all employers use the federal program, E-Verify, to verify the employment of all newly hired employees. E-Verify has many vague rules and requirements, and the requirements may differ depending on whether a company is using E-Verify directly or outsourcing its E-Verify responsibilities. Some parts of E-verify contradict other laws. As a result, many questions and issues have arisen regarding the imple-

mentation of E-Verify. We currently have submitted questions to USCIS, which administers E-Verify, to obtain clarification and policy guidance regarding some of the issues. USCIS does not know when it will be able to provide a response. The responses we eventually receive from USCIS may alter some of the suggested strategies and procedures below.

1. E-Verify Options: To Use Or Not To Use

Always keep in mind that E-Verify can be used only for new

hires. **E-Verify cannot be used for existing employees** and it cannot be used to screen applicants. The person must be hired and should have completed an I-9 form before the company runs the name through E-Verify.

Currently, the federal government has found that 42% of the users of E-Verify check the employment eligibility of applicants before hiring them and 30% check existing employees more than three days after they are hired. *Social Security Administration, Congressional Response Report: Employer Feedback on the Social Security Administration's Verification Programs*, 6-7 (2006) <http://www.ssa.gov/oig/ADOBEPDF/A-03-06-26106.pdf>. Both actions are violations.

Employers still have several options regarding the E-Verify Program, which is still considered by USCIS to be a voluntary federal program. The options are:

- (1) Sign up for E-Verify. You can sign up for E-Verify on a location basis or state basis. You also later can provide a 30-day written notice to withdraw from the program based on some of the issues underlying the E-Verify program. The link to register for E-Verify is <https://www.vis-dhs.com/employerregistration>.
- (2) Companies can choose to not sign up for E-Verify until the time the company needs to hire someone new after January 1, 2008, because only newly hired employees can be checked using the program. Further, the preliminary injunction hearing is January 16, so some companies may want to wait until the district court and/or Ninth Circuit rules on the constitutionality of the law before utilizing E-Verify as it appears that appellate court decision could occur in February 2008.
- (3) Some companies may weigh the differences between using I-9s as an affirmative defense versus the rebuttable presumption provided by using E-Verify and opt to rely on the stronger affirmative defense provided by fully complete I-9s and delay a decision to use E-Verify until the court's decisions in February. E-verify does not contain uniform hiring procedures and that causes concern to some employers. The E-Verify Memorandum of Understanding for

employers requires companies to treat non-citizens differently than citizens.

Arizona subcontractors need to take note of a special Arizona statute relating specifically to contracting licenses. Under A.R.S. § 32-1154(12), a contractor risks the suspension or revocation of its license if the contractor fails to comply with any federal, state, or local employment law. The Legal Arizona Workers Act (LAWA) will be considered an employment law so it is important to take this potential risk into consideration when making decisions regarding E-Verify.

2. E-Verify & making photocopies of documents shown for identification when completing the I-9

(a) Summary

Federal I-9 regulations state that employers may but are not required to keep copies of documents that employees provide to complete the Form I-9, but if the employer copies any documents, it is supposed to copy all documents or it could be subject to a potential discrimination charge. For a variety of reasons, we generally recommend that employers do not keep photocopies of documents used to complete I-9s.

However, the lengthy written E-Verify Memorandum of Understanding (MOU) that employers must sign when they register for E-Verify requires employers to copy and maintain copies of only certain documents: the Permanent Resident Card (Form I-551) or Employment Authorization Document (Form I-766). These copies are then used by an employer to complete the Photo Screening Tool on E-Verify.

There is a different set of rules for designated agents (i.e., third party vendors who handle E-Verify for a company). The MOU for designated agents does not require employers to make and keep copies if the employer uses a designated agent for E-Verify. Further, the MOU for designated agents does not require that the designated agent use the Photo Screening Tool on E-Verify.

Also, in the MOU for designated agents, it indicates that if

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there are other laws that contradict or if there is a discrepancy, the other laws trump the MOU. USCIS thus far agrees that I-9 regulations trump the MOU.

Further, there currently has not been monitoring by USCIS of compliance by employers and designated agents with E-Verify. It appears that there generally is no financial penalty for violations of the MOU. USCIS could terminate an employer's right to use E-Verify, however. Also, some actions regarding misuse of E-Verify could trigger discrimination complaints.

Finally, we have the Legal Arizona Workers Act (LAWA), which expressly states that if anything in LAWA is in violation of other laws, a company does not need to follow LAWA regarding that issue. If a company in good faith believes that an action to comply with LAWA violates another state or federal law, it does not have to comply with LAWA.

Why is the foregoing review important? Because the MOU for employers contains provisions that are contrary to federal laws. In the face of conflicts between E-Verify, I-9 rules, and other applicable federal regulations, an employer has four options:

- (1) Make and maintain photocopies of only the I-551 Permanent Resident Card and the I-766 Employment Authorization Document. This complies with the MOU for employers, but places the company at potential risk for discrimination charges based on national origin or citizenship discrimination because, for example, the MOU is only requiring that non-citizens' documents be photocopied. Pursuant to compliance with various discrimination laws, including Title VII, employers generally should have uniform hiring procedures that apply to all new hires;
- (2) Make and maintain photocopies of all documents used to complete the Form I-9 for every employee. This option would satisfy the MOU requirement to copy the I-551 and I-766 documents and could avoid discrimination charges by not selectively maintaining copies of documents, but potentially subjects the employer to other risks and issues for which we gener-

ally recommend that employers do not retain photocopies of documents;

- (3) Make a photocopy of the I-551 Permanent Resident Card or I-766 Employment Authorization Document just long enough to use the Photo Screening Tool, then shred the picture and identification for confidentiality purposes after receiving a final confirmation or nonconfirmation (unless you have received a government audit letter and then you should not discard any documents until the government investigation is over). This satisfies the requirement that employers use the Photo Screening Tool and also satisfies federal anti-discrimination and I-9 regulations by not maintaining copies of any documents and thus not selectively or discriminatorily maintaining copies of documents. This option does not fully comply with the E-Verify MOU, but would comply with federal law, which arguably overrides the MOU. Many employers are choosing this option as it does assist in demonstrating good faith; or
- (4) Use a designated agent, as the designated agent does not currently use the Photo Screening Tool. If the Photo Screening Tool is not used, then there is no need to copy the Permanent Resident Card or Employment Authorization Document. The employer is then free to follow a policy to not copy any documents used to complete the I-9, but rather to fully and accurately complete the I-9 and rely on the I-9, not the photocopies. USCIS said it may change the MOU for designated agents and eventually make the designated agents follow the same rules as employers regarding use of the photo tool and maintaining photocopies.

(b) The Photo Screening Tool

Employers may either choose to fulfill the E-Verify requirements themselves or they can outsource the E-Verify duties to a third party agent, called a "designated agent." Many third party vendors have recently opened in Arizona, soliciting the E-Verify business of Arizona employers. There are some questions and concerns regarding whether a third party designated agent is needed to avoid maintaining copies of documents with the I-9 forms.

E-Verify recently added an additional feature known as the Photo Screening Tool (PST). The PST contains roughly 14.8 million images from the Department of Homeland Security's (DHS) immigration databases. These images are only of non-citizens. Also, DHS only started to maintain the images on databases in 2004, so any non-citizen with documentation issued before 2004 will not be listed in the database.

The E-Verify Memorandum of Understanding (MOU) for employers states the employer's responsibilities regarding the PST:

If an employee presents a DHS Form I-551 (Permanent Resident Card) or Form I-766 (Employment Authorization Document) to complete the Form I-9, the Employer agrees to make a photocopy of the document and to retain the photocopy with the employee's Form I-9. The employer will use the photocopy to verify the photo and to assist the Department with its review of photo non-matches that are contested by employees. Note that employees retain the right to present any List A, or List B and List C, documentation to complete the Form I-9. DHS may in the future designate other documents that activate the photo screening tool.

Thus, the MOU requires employers using E-Verify to make photocopies of all Permanent Resident Cards and Employment Authorization Documents presented to them. This language regarding the requirement to make photocopies of certain non-citizen documents is absent from the MOU for third party designated agents.

We contacted E-Verify Customer Support and confirmed that the database for third party designated agents currently does not have PST capability, and thus, employers using third party vendors do not use the PST. Because designated agents do not use the PST, employers using designated agents do not need to maintain copies of the DHS documents. The federal government has announced that it eventually plans to expand the PST to include additional documents (such as state drivers' licenses) and the capability for third party designated agents to use the PST, but it may be years before those features are active.

(c) I-9 Rules and Regulations Do Not Require Photocopies of Documents

The E-Verify MOU for employers conflicts with I-9 regulations. DHS publishes a "Handbook for Employers" (Form M-274) regarding the completion of the Form I-9. In that handbook (most recently published in November 2007—after E-Verify and the PST were actively used and therefore, DHS had full knowledge of E-Verify and its procedures), DHS again stated its long-standing rule that "[t]he law does not require [employers] to photocopy documents. However, if [employers] wish to make photocopies, [they] should do so for all employees.." Federal regulations also state that employers are permitted but not required to keep copies of documents provided by employees to complete the Form I-9. "An employer . . . should not, however, copy or electronically image only the documents of individuals of certain national origins or citizenship statuses. To do so may violate section 274b of the [INA]." 8 C.F.R. sec. § 274a.2(3).

This language is in direct conflict with the MOU language for employers requiring them to maintain photocopies of only I-551 and I-766 documents. First, the I-9 rule states that employers are not required to keep photocopies of any documents, but the E-Verify MOU for employers requires employers to keep certain photocopies, even if it is of just two types of documents. I-9 regulations give the employer a choice about whether to make photocopies of documents. E-Verify is a voluntary federal program, but LAWA does not make E-Verify optional for Arizona employers. Thus, the Arizona law seems to take away the federally given choice of employers regarding the photocopying of documents for I-9 purposes and we now have a contradiction of the laws. USCIS states that I-9 rules govern.

Second, the I-9 rule states that if employers choose to make copies, they should do so for all employees. In the employer MOU for E-Verify, the employer only has to make photocopies for non-citizen employees presenting certain documents. Under regulations, making photocopies of only some documents is viewed as potentially discriminatory—particularly given the fact that only non-citizen immigration documents would be required to be photocopied under the

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employer MOU requirements. Some employers are only going to keep the designated photocopies until they complete the Photo Tool step of E-Verify and then they will not retain such documents.

(d) I-9 Regulations Should Trump E-Verify MOU Provisions

There are inconsistencies between the E-Verify MOU and I-9 rules and regulations, and unfortunately, E-Verify Customer Support has not yet been able to explain how the conflicts should be resolved. The I-9 rules, as well as Title VII anti-discrimination requirements, should trump the E-Verify MOU. All of the rules and regulations for I-9 compliance go through standard agency rulemaking procedures. Changes and additions to E-Verify's MOU do not go through rulemaking and do not carry the weight of administrative rules. Moreover, the language of the MOUs demonstrate that the MOU should defer to I-9 regulations and other federal laws such as Title VII of the Civil Rights Act.

The designated agent MOU clearly affirms that any provisions in the MOU that contradict other laws and regulations will be deemed invalid. Specifically, the MOU states:

Nothing in this Agreement is intended to conflict with current law or regulation or the directives of the DHS-USCIS or SSA. ***If a term of this agreement is inconsistent with such authority, then that term shall be invalid***, but the remaining terms and conditions of this agreement shall remain in full force and effect.

(emphasis added). It is clear that DHS and the SSA understand that the E-Verify MOU cannot trump established laws, regulations, and procedures. Thus, it does not matter that this same exact language is absent from the employer MOU. Further, the employer MOU references that the MOU does not exempt an employer from complying with the "requirements of applicable regulations or laws."

But the E-Verify database for employers will not allow employers to bypass the PST if the employer is presented

with an I-551 or an I-766 document. Thus, until a policy decision is made by E-Verify, employers choosing to complete E-Verify requirements on their own (versus a third party designated agent) can make photocopies of the I-551 and I-766 documents to use during the PST portion of the E-Verify process and then shred those photocopies for confidentiality reasons after receiving an employment authorization confirmation from E-Verify. This procedure should help keep the employer in compliance with federal anti-discrimination laws. If the employer has received a government audit letter, the company should also reassess whether documents must be retained during the time of the government investigation.

Employers utilizing the services of a third party vendor will not need to make photocopies of any documents because the designated agent database on E-Verify does not have PST capabilities as of yet.

As the DHS and SSA, as well as state and federal civil rights agencies, issue additional guidance or formal policies to address these issues that they are currently unable to answer, a company may want to reassess its procedures.

3. Company transfers & I-9 and E-Verify

The general I-9 rule is that an employer does not have to complete a new I-9 (and thus, no E-Verify query needs to be run) if an employee is transferred or promoted within the company. After contacting E-Verify Customer Support, we received conflicting information on two separate occasions. One agent stated that whenever an Employer Identification Number (EIN) changed, the employee had to fill out a new I-9 and run a new E-Verify query.

But our most recent contact with E-Verify responded with the information that seems more in line with the general I-9 rule. The E-Verify Customer Support Agent told us that as long as the employee filled out an I-9 when he or she started with the company, it did not matter if the employee was transferred to another affiliated company that had a separate EIN. He said that no new I-9 would need to be completed and no E-Verify query needed to be run. Therefore, (again, pending any formal E-Verify policy announcements), employ-

ees do not need to complete new I-9 forms and employers do not need to run E-Verify queries for employees if they are transferred among affiliated companies even if the company is a stand-alone entity with a separate EIN.

This is consistent with federal regulations, which state an employee is not required to complete a new I-9 if the employee transfers "from one distinct unit of an employer to another distinct unit of the same employer" or "an individual continues his or her employment with a related, successor, or reorganized employer, provided that the employer obtains and maintains from the previous employer records and the Forms I-9 where applicable." 8 C.F.R. § 274a.2(b)(1)(viii)(A)(6)-(7).

4. Problems with e-verify customer support

It is very difficult for Arizona employers to contact E-Verify Customer Support. USCIS provides the customer support for E-Verify. The office hours are very much geared towards the East Coast—Monday through Friday, 6:30 a.m. to 5:00 p.m. Eastern Standard time. Depending on the time of year, Arizona employers operate two or three hours behind the Eastern Time Zone. Therefore, the latest possible time to contact E-Verify Customer Support in the winter is 3:00 p.m. Arizona time, and in the summer it will close at 2:00 p.m. Arizona time.

Not only are the office hours frustrating, but the lack of staff makes talking to a live person difficult. For example, on December 26, 2007, we made roughly 12 attempts to contact E-Verify Customer Support. On 8 of those attempts, after waiting on hold as much as 20 minutes, we were directed to a "general mailbox" where we were instructed to leave a message and that someone would return our call. On other attempts, agents disconnected our call. And even though E-Verify has been fully aware of the potential that all Arizona employers would be required use E-Verify for newly hired employees beginning in January 1, 2008, we were informed by an E-Verify Customer Support agent that not one E-Verify policy employee would be in the office until after the first of the year so some of the key questions we submitted could not yet be answered by USCIS.

Further, while attempting to find answers to the PST requirements vis-à-vis the I-9 regulations, we received inconsistent information from E-Verify Customer Support from three separate agents within one hour on December 26, 2007:

(a) Telephone Call #1: 10:17 a.m.

The first agent stated that the PST was not required for employers using E-Verify, only recommended. These statements seemed out of step with the MOU, but the agent was insistent, even when presented with various scenarios.

(b) Telephone Call #2: 10:39 a.m.

After reexamining the employer MOU, the designated agent MOU, and the E-Verify User Manual, we were not satisfied with the first agent's answer. Therefore, we decided to contact E-Verify Customer Support again and see what another agent had to say. After several phone calls sending us to the "general mailbox," we were finally able to speak with a live agent. This agent's information was almost directly opposite of the first agent. He stated that all employers, whether using a designated agent or not, were required to keep copies of I-551 and I-766 documents. When pressed further regarding the I-9 rule allowing employers to choose whether to keep copies of documents, his only response was "it's in [the company's] best interests to keep copies of all documents." But knowing that this was not a requirement under law, and because there are other reasons to not keep photocopies of documents, we kept asking for further information.

Because the agent felt he was in over his head in terms of his E-Verify knowledge (and this is the agent who works for E-Verify and is supposed to provide us assistance), the second agent transferred us to a senior veteran E-Verify Customer Support agent. She reiterated that the I-9 was the "law of the land," and trumps E-Verify and that E-Verify is a "voluntary" enhancement of that law. E-Verify is a voluntary program for most employers. She had no response when she was reminded that it was not voluntary in Arizona.

The agent confirmed that designated agents have no current capability to utilize the PST, and thus, there was no E-Verify

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requirement to do so. She also confirmed that employers using E-Verify directly were required to use the PST and thus were required to keep copies of the I-551 and the I-766 documents under the MOU for employers. She was unable to definitively answer many of our “conflict” questions, but she promised to pass them on to the E-Verify policy employees who currently were not working until sometime in January 2008. The agent further noted that the E-Verify database is essentially geared towards non-citizens (and thus, the PST requirement to check the photos of only non-citizens), and she said that E-Verify was not focused on American citizens. This statement is troubling in that it appears to profess a policy to treat citizens and non-citizens differently—an action clearly unlawful. She did acknowledge that employers must run E-Verify queries for all newly hired employees to avoid discrimination regardless of citizenship status.

Please remember that companies may not discriminate based on citizenship. Companies cannot ask whether a person is a citizen. Such questions or targeting of individuals based on citizenship can violate the federal and state discrimination laws.

C. Conclusion

The foregoing information is instructive because it demonstrates that there are mixed messages coming from USCIS. USCIS and E-Verify Customer Support are not yet fully up-to-speed with consistent or accurate answers. Following some

of the advice from E-Verify Customer Support can place a company in violation of other laws, including discrimination laws. A company may have to make a choice among competing laws to minimize violations as some of the E-Verify requirements in the MOU—which is not a law—are directly contradictory to existing laws. Companies cannot violate other federal and state laws and regulations. The burden appears to be on the companies to figure out the myriad laws and ensure that they do not violate other laws when trying to implement the E-Verify MOU.

Keep in mind that E-Verify is a voluntary experimental program that very few employers in the country have chosen to use. E-Verify only had 9,000 active users in the fall, whereas Arizona has approximately 150,000 businesses. E-Verify has not had much experience with a large volume of companies actually using E-Verify. E-Verify does not yet have answers to some key questions that companies need answers to so that they may revise their hiring procedures and train managers regarding the new hiring procedures. A company's strategies and procedures are likely to change as E-Verify revises the MOU or other government agencies resolve and issue new guidance or provide clarifications. Stay tuned as these rules, as well as SSA no match letters and other procedures, continue to evolve.

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Employers Have the Right to Restrict Employee Use of Its Email System

In a long awaited decision that has already drawn howls of protest, the National Labor Relations Board (NLRB) held that “absent discrimination, employees have no statutory right to use an employer's equipment or media for Section 7 [union-related] communications.” *The Guard Publishing Co. d/b/a/ The Register Guard and Eugene Newspaper Guild, CWA Local 37194*, 351 NLRB No. 70. In doing so, the NLRB also upheld an employer's right to restrict union-related email

solicitation. This ever-evolving area of law is subject to change with an almost certain imminent appeal by the union. But for now, the NLRB's decision may guide employers' communication policies.

Company Policy Prohibited “Non-Job-Related Solicitations”

The Guard Publishing Company (the Company) publishes a

daily newspaper in Eugene, Oregon called *The Register-Guard*. After the Company installed a new computer system and provided most employees with email access, the Company implemented a policy that governed employees' use of its communications system including email. The Company's Communications Systems Policy (CSP) provided that:

Company communication systems and the equipment used to operate the communication system are **owned and provided by the Company** to assist in conducting the business of the Register-Guard. Communication systems are **not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations.**

Employees used email regularly for work-related matters, as well as personal matters. The record contained evidence of emails such as baby announcements, party invitations, and the occasional offer of sports tickets or request for services, such as dog walking. There was no evidence that employees used email to solicit support for or participation in any outside cause or organization other than the United Way, for which the Company conducted a periodic charitable campaign.

An employee who was also a union president was disciplined for sending three emails regarding the union. Two emails solicited union activity and the third email focused on clarifying facts about a previous union rally. The union challenged the Company's CSP. In a 3-2 decision, the NLRB held that a company may restrict non-work-related use of its email system, but the restriction may not primarily focus on prohibiting union-related communications protected by Section 7. The NLRB found that the Company did not violate federal law by maintaining its CSP.

Enforcement of the Email Policy Must Not Be Discriminatory

The NLRB explained that “unlawful discrimination consists of disparate treatment of activities or communications of similar character because of their union or other Section 7-protected status.” The National Labor Relations Act does not

prohibit employers from drawing the lines on a non-union-related communication. For example, the decision supports that an employer may draw the line between allowing charitable solicitations (i.e., Red Cross, Salvation Army) while prohibiting non-charitable solicitations (i.e., perfume, jewelry, retail sales, union).

In the current case, the fact that union solicitation generally fell on the prohibited side of the line did not mean that the Company's policy discriminated along protected union-related communication lines. While the evidence in this case showed tolerance of personal emails, there was no evidence that the Company permitted employees to use email to solicit other employees to support any group or organization. Therefore, the emails by the union president to employees' Company email accounts that solicited union participation was in violation of the Company's written policy and enforcement of the CSP did not discriminate along Section 7 lines.

The NLRB decided, however, that discipline of the union president for sending a third email, pursuant to the CSP, was improper. Unlike the other two emails that solicited union participation, the third email merely clarified facts about a previous union rally, and did not solicit union participation. Because the third email was information, and did not solicit union participation, the NLRB found that enforcement of the CSP against the third email was discriminatory.

Conclusion

This decision represents the NLRB's first definitive pronouncement regarding an employer's right to restrict union-related email solicitation. This is an evolving area of law in which, with limited exceptions, we have few court decisions. See *Richmond Times-Dispatch v. NLRB*, 181 LRRM 2632 (4th Cir. Mar. 15, 2007). Also, this decision is subject to an almost certain appeal by the union. Moreover, as Administrations change, the NLRB's position also may change. For now, employers can be guided by the NLRB's decision in adopting e-communication policies that restrict use of employer facilities for certain non-personal solicitation, provided that such restrictions are evenly enforced

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