

# THE EMPLOYER'S ADVISORY

A QUARTERLY NEWSLETTER  
HIGHLIGHTING CURRENT EMPLOYMENT LAW ISSUES  
PREPARED BY ATTORNEYS BETTY BECHTEL AND MICHAEL SANTO

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3rd Quarter

BECHTEL & SANTO, L.L.P.

2006

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## COLORADO vs. ILLEGAL IMMIGRATION

The Colorado Legislature recently passed several bills dealing with illegal immigration. While the legislators did not vote to build a wall around the State, they did pass aggressive measures, some of which increase the burden on employers to prevent employment of illegal aliens. More specifically:

**Verification requirements.** Effective January 1, 2007, HB 06S-1017 requires Colorado employers to affirm that they have complied with I-9 documentation requirements and have retained all supporting documents for their new hires. This written affirmation must occur within 20 days after hire. Employers must also affirm that they have not altered or falsified the employee's identification documents or knowingly hired an unauthorized alien. These documents must be retained during the period of employment.

The employer's affirmation form and supporting documents must be submitted to the Colorado Division of Labor upon request, and employers are subject to random audits by the Division.

What is the penalty for not complying with this new requirement? It's stiff. Employers who, with "reckless disregard," fail to submit the documents required, or who, with "reckless disregard," submit false or fraudulent documentation, are subject to a \$5,000 fine for the first offense and \$25,000 for the second and additional offenses. The State will use the fines collected only for implementing, administering, and enforcing this Act.

Do you have to complete Colorado's new affirmation form for employees hired before January 1, 2007? No. But remember, the federal I-9 requirement applies to all employees hired after November 6, 1986. And it imposes hefty penalties for noncompliance. Because I-9s must be kept for 3 years after the hire date, or 1 year after termination, whichever is longer, employers should make sure that I-9s are properly completed and on file for employees in this group.

**Contractors who enter into public contracts for services must certify compliance with immigration law and use of the Basic Pilot Program.** Effective August 9, 2006, HB 06-1343 requires any contractor who enters into or renews a public contract for services with a Colorado state

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THE EMPLOYER'S ADVISORY is published quarterly by BECHTEL & SANTO, LLP, 205 N. 4<sup>th</sup> Street, Grand Junction, Colorado 81501, (970) 683-5888. Legal editors are Betty C. Bechtel and Michael C. Santo. The publication is designed to provide information about legal issues facing employers, but not to provide legal advice with regard to specific circumstances. Readers with legal questions should address them to their legal counsel.

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Prepared by Attorneys Betty Bechtel and Michael Santo.  
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agency or political subdivision to certify that, at the time of the certification, it does not knowingly employ or contract with an illegal alien and it has participated or attempted to participate in the Basic Pilot Program administered by the Social Security Administration (SSA) and the Department of Homeland Security (DHS). The contract for services and any subcontract must contain similar provisions. The contract must also state that if the contractor obtains actual knowledge that a subcontractor knowingly employs or contracts with an illegal alien, the contractor shall notify the subcontractor and the state agency or political subdivision of this within 3 days. The contractor must terminate the subcontract if within 3 days after receiving this notice, the subcontractor does not stop employing or contracting with the illegal alien, or fails to provide information establishing that it does not employ or contract with an illegal alien.

If the contractor violates these requirements, the agency or political subdivision may terminate the contract and the contractor shall be liable for actual and consequential damages incurred by the agency or political subdivision. Further, the Secretary of State will be notified and the contractor's name will be placed on a list of contractors whose contracts were terminated for this reason. The contractor will stay on the list for 2 years or until a court determines there was no violation. The list is available at the Secretary of State's office and website.

What is the Basic Pilot Program that Colorado public contractors are required to use? It is a federal program that allows any person or entity (not just parties to a public contract) that conducts any hiring to participate in a legal-status verification program (the "SAVE Program"). Participation is free, but the participant must sign a Memorandum of Understanding (MOU).

The MOU requires the employer to agree it will comply with the I-9 verification requirements, and not later than 3 working days after the date of hire, it will initiate the Basic Pilot verification procedures through the SSA's Internet automated system. If a nonconfirmation of legal status is received, there are steps the employer and employee must take. But once nonconfirmation is final, the employer "may" terminate employment. If the employer does not terminate employment, it must inform DHS of this fact, and will be fined no less than \$500 or more than \$1,000 for each failure to report. Continued employment creates a rebuttable presumption that the employer is knowingly employing an illegal alien.

**Threatening to report an illegal alien can be criminal extortion.** Employers are now legally responsible for misusing their knowledge of an employee's illegal status. SB 06S-004 declares that "[a] person commits criminal extortion if the person, with the intent to induce another person against that other person's will to give the person money or another item of value, threatens to report to law enforcement officials the immigration status of the threatened person or another person." This type of extortion is a class 4 felony.

What if an illegal worker is injured on the job, or complains that he is not being paid overtime, can the employer threaten him with deportation if he pursues a claim for workers' compensation or overtime? Not without committing a felony!

**Voters to approve or reject an Act prohibiting tax deductions for wages paid to unauthorized aliens.** HB 06S-1020 refers to the voters in the November 2006 election an Act that, if approved, will prohibit businesses that know of the unauthorized status of an alien when hired from deducting wages paid to the unauthorized alien as

a business expense for state income tax purposes. Also, if the wages were claimed as a deduction in determining federal income tax liability, an equal amount will be added to the business' federal taxable income for determining state income tax liability. If approved in November, it will take effect January 1, 2008. It applies only to amounts paid to employees of \$600 or more per year and only wages paid to individuals hired after the effective date.

## NO-MATCH NOTICES

What should an employer do when it receives notice from the SSA that an employee's name and social security number do not match? If the employer does nothing, the letter may create constructive knowledge by the employer of the employee's illegal status. But the SSA advises employers that they must not terminate the employee based solely on this letter because a no-match does not mean that the person is illegal.

This Catch-22 situation has been perplexing to employers. Recently, DHS issued proposed rules providing that the employer who receives the notice will not be deemed to have constructive knowledge of unauthorized-alien status if:

1) The employer takes reasonable steps, within 14 days, to attempt to resolve the discrepancy. Such steps may include checking the employer's records to determine whether the discrepancy results from a typographical, or similar clerical error, and informing SSA of the correct information, verifying with SSA that, as corrected, there is a match, and making a record of the manner, date and time of such verification. If no error is found in the employer's records, it must promptly request the employee to confirm

that the name and social security account number are correct, and request the employee to resolve any discrepancy with SSA.

2) Within 60 days after receiving the no-match notice, the employer checks with the SSA and if the no-match still exists, the employer takes reasonable steps, within an additional 3 days, to verify the employee's authorization and identity by completing a new I-9 Form with the employee. The same procedures are used as if the employee were newly hired, except that no document containing the social security account number or alien number that is the subject of a no-match notice, and no receipt for an application for a replacement of such document, may be used to establish employment authorization or identity or both; and no document without a photograph may be used to establish identity or employment authorization. Employers must retain the new I-9 with the prior I-9 for the same period required for new I-9s.

**Warning:** These procedures do not protect an employer from liability who has actual knowledge that the employee is an unauthorized alien. Thus, if the employee admits that he or she is not legally authorized to work in the U.S., the employee must be terminated—unless the “admission” is just a joke (a not-so-funny joke!)

## TIPS ON TIPS

No, the Employer's Advisory is not taking the place of Miss Manners, nor are we going to weigh in on the debate in the *You Said It* column of the Daily Sentinel on how much patrons should tip. Instead, this article will discuss wage and overtime issues that are presented when correctly compensating tipped employees.

Initially, the issue is to determine what constitutes a tip. Only discretionary gratuities by customers may be treated as “tips” in determining whether an employee is a tipped employee and whether the employer can pay less than minimum wage in cash wages and take a tip credit to make up the rest. Any “gratuity” that is a mandatory charge for services is a service charge, not a tip. The employer may call it a gratuity, but it must be treated as a service charge, which is not a tip. Another difference between tips and service charges is that tips belong to the employee, not the employer. Service charges belong to the employer and the employer can keep it or distribute it to employees however the employer chooses.

Additionally, employers are entitled to count tips toward the minimum wage obligation of \$5.15 per hour only for tipped employees. The minimum amount of cash wages the employer can pay a tipped employee is \$2.13 per hour. The minimum amount of cash wages the employer can pay to an employee who is sharing in service charges, and not tips, is \$5.15, but 100% of the service charges paid to the employees are counted as wages. The Employer’s Advisory also recommends that employers give employees written notice if it is counting tips as wages for purposes of satisfying its obligation to pay minimum wage.

Another difference between tips and service charges is that tips are considered nondiscretionary wages. If an employer holds onto tips or splits tips among employees via a tip pool, the employer must pay that money to the employee at the end of the pay period. Service charges, on the other hand, are considered income received by the employer. If an employer gives employees part of the money received from earned service charges, that must be added to the employee’s compensation to determine their

regular rate of pay for overtime purposes. And employers are not required to pay employees money from service charges during the pay period. Instead, service charges may be withheld until a pre-determined time (e.g., the end of the season). But remember that if service charges are provided to the employee as a nondiscretionary bonus, that amount must be added to the employee’s total compensation to determine their regular rate of pay for overtime purposes.

The maximum amount of tips that can be counted as wages is \$3.02 per hour ( $\$5.15 - \$2.13 = \$3.02$ ). For purposes of computing overtime, only the base wage and tip credit are counted for tipped employees. The rest of the tips, although income to the employee, are not considered wages or part of the regular rate of pay and, therefore, have no effect on the overtime rate. For example, a tipped employee who earns \$10.00 per hour in tips on top of the \$2.13 cash wage paid by the employer, is only entitled to an additional \$2.58 for each hour of overtime ( $\$2.13 + \$3.02$  tip credit = \$5.15 regular rate;  $.5 \times \$5.15 = \$2.58$  additional compensation per hour of overtime).

For purposes of computing overtime on service charges, 100% of service charges must be counted in computing the regular rate of pay for purposes of computing overtime. For example, an employee who earns \$10.00 per hour from service charges plus an additional \$2.13 in cash wages has a regular rate of pay of \$12.13 and must be paid an additional \$6.07 for each hour of overtime ( $.5 \times \$12.13 = \$6.07$ ), versus the tipped employee’s additional overtime rate of \$2.58.

Finally, employers must keep records of hours worked, cash wages paid, tips received, tip credit taken, and overtime paid.

## EMPLOYER'S INCONSISTENT MESSAGES SEND CASE TO THE JURY

It has long been recommended by the Employer's Advisory that employers shouldn't be stingy with that "employment at-will" stamp. Put it in the application, the employee handbook, written reprimands, company coffee mugs, we have advised. Well, thanks to a recent Colorado case you can add one more place to reinforce that language – job descriptions.

In June 2000, Victoria Giannola interviewed for a position with the Aspen/Pitkin County Housing Authority. During the interview process, she was told that the offer was for a "five-year contract of employment." During that interview, Giannola also asked for, and received, a written job description. The job description contained the following language: "this is a five-year position with renewal beyond the five-year period dependent on the [Authority's] long range plan." Subsequently, the Authority provided Giannola an employment handbook. In that handbook, all employees were told, "Nothing in this Manual shall create or is intended to create, or shall be construed to constitute a contract of employment, express or implied... Employees are free to resign at any time just as the City is free to terminate employment at any time."

During the lawsuit following her termination, the Authority alleged that it could terminate Giannola because, as set forth in its Handbook, all employment was at-will. But Giannola contended that such an argument misconstrued her argument because she was not claiming that the Authority breached a contract found in the handbook. Rather, the Authority breached the contract in the written job description as well as in subsequent oral statements made by Authority officials.

The magistrate initially determined that while the job description did refer to a five-year position, nothing about that language expressly or impliedly indicated that Giannola would necessarily occupy the position for that term. But on appeal, the district court decided that the issue wasn't so clear cut. That Court determined that when the language in the job description was coupled with the Authority's management continually assuring Giannola that the offer was for a five-year term, these facts required the issue to be determined by a jury. The Court also found persuasive the evidence that another Authority employee signed similar acknowledgments and manuals, and was not considered an at-will employee by the Authority. Finally, the Court determined that there was nothing in the employee handbook that superseded the language in the job description or the subsequent oral assurances; after all, the Court found, the manual stated specifically that it "was not a contract." *Giannola v. Aspen/Pitkin County Housing Authority*, 165 Fed.Appx. 661 (10<sup>th</sup> Cir. (Colo.) 2006).

**Practical Tip.** This case reinforces the requirement for employers to closely monitor all employment offers and statements made to employees. Further, while the Authority's handbook informed employees that employment was at-will, it did not inform employees that supervisors and managers were not authorized to make promises or modifications that change the employee's employment-at-will status. The handbook also did not inform employees that the handbook repealed and replaced all prior handbooks and all prior verbal or written statements to the extent that they related to the subjects covered by the handbook. Both provisions could have greatly assisted the Authority and should be in all employer's handbooks. Most importantly, the job description should have stated that employment is at will.

## Q & A

Q. *We do not hire individuals as regular employees until they have worked for us for at least 90 days through a temporary employment agency. If we then hire the individual, does this period of temporary status count in determining whether the employee has satisfied the 12-month and 1,250 hours-of-work requirements for Family & Medical Leave under the FMLA?*

A. Yes. Where there is no break in service, and it is understood that employment with the temporary agency is how individuals gain regular-employee status, the “joint employer” rules under the FMLA will apply. This means that both the time working for your company through the temporary agency and as a regular employee of your company will be counted in determining FMLA eligibility. 29 C.F.R. § 825.106; 2003 WL 1790941.

Q. *Can an employer use an applicant’s or employee’s arrest record as a basis for denying employment?*

A. It depends. An arrest is not a conviction, and there is the old adage “Innocent until proven guilty.” But if is an active criminal matter, there is no law prohibiting the employer from denying employment until the charges are resolved. Further, unless it is a sealed record, the employer should at least question the applicant about any arrests regarding the circumstances and outcome of the arrest. If the arrest record is sealed, C.R.S. §24-72-308(f)(I) prohibits employers in any application or interview, or in any other way, from requiring an applicant to disclose any information contained in sealed records.

An applicant may state that no such action has ever occurred, and may not be denied employment solely because of the applicant’s refusal to disclose arrest and criminal records information that has been sealed.

Q. *When an ex-employee is rehired, do we have to require him to sign a new I-9 form regarding his legal status?*

A. If you rehire an employee who previously completed an I-9 Form, and the rehire is within 3 years of the initial date of hire, only section 3 of the original I-9 needs to be completed if the employee is still eligible to work on the same basis as when the original I-9 was completed. In other words, if the documents originally provided do not indicated that legal status has expired, you don’t have to complete Sections 1 and 2 of the I-9. You can require completion of a new I-9, but it is not mandatory under these conditions. See <http://www.formi9.com> for a copy of Form I-9 with instructions. This website also provides information about the Basic Pilot Program for verifying legal-status, which is discussed in the article *Colorado vs. Illegal Immigration*, above.

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## UPCOMING SEMINAR

Michael Santo will present a seminar regarding recent cases and updates to employment laws to the Montrose Human Resources Association on October 18, 2006 at the Montrose Chamber of Commerce Building, from 9:00 a.m. to 12:00 p.m.

See our website at [www.bechtelsanto.com](http://www.bechtelsanto.com) for details or contact Fay Roberts at: [FRoberts@ci.montrose.co.us](mailto:FRoberts@ci.montrose.co.us).