



CONSTRUCTION LAW ALERT

August 2008

Is Your Construction Company at Risk When Your Foreign Supervisor is Arrested?

Any construction company will have workers who get in trouble with the law from time to time, whether they are jailed for failing to make child support payments, arrested for a DUI, or charged with misdemeanor domestic assault. However, for your foreign workers there are special issues to consider, whether the charges are criminal, immigration or both. Consider the typical case of Jorge Alvarado.

At 6:30 am, you receive a call from your supervisor's wife, who says the "police" pulled Jorge out of his pick-up truck as he was backing out of the driveway to go to work. You know little else about Jorge other than he was born in El Salvador, has been in the United States since 2000, and is one of your most valuable crew leaders, earning \$60,000 a year with 5 years seniority. What questions should you immediately begin asking?

Who arrested Jorge?



Immigration and Customs Enforcement (ICE) Agents responsible for removing or deporting illegal aliens may work in tandem with local sheriff's offices or even state police. This is particularly true if they are making an arrest at the suspect's house or in close proximity to the home. The arresting officer usually leaves a call back number with the suspect's relative, but not always. Work with your company's legal counsel to determine if Jorge is being held by local police, ICE or both.

What company records will be helpful?

Call your lawyer, first, and then your Human Resources Manager to request Jorge's I-9 Form. This form is completed by each new hire who presents documents showing identity and work authorization. Foreign nationals may present a driver's license, social security card; or a List A document such as an Employment Authorization Document (EAD) or Green Card. These documents will have a seven digit or eight digit A# that will be extremely useful to counsel in finding Jorge.

Using the A#, your lawyer can find out if Jorge had already been ordered removed (deported) at the time he crossed into Texas from Mexico; and the lawyer can use the A# to find Jorge as he is moved around from the local jail to one of the regional jails that ICE uses on a contract basis. Keep in mind that the first priority of ICE is to arrest and remove any of the 500,000 illegal aliens previously ordered removed but who never left the U.S. If Jorge is a fugitive from justice, there is little or nothing that can be done.

Has Jorge been arrested on criminal charges?

There are a number of factors that you, as a construction site manager, need to be aware of concerning the charges against Jorge and how they may affect his ability to return to work. For example, although a DUI is not a removable offense, conviction of two or more DUI offenses will result in the cancellation of Temporary Protected Status (TPS) for citizens of El Salvador or other countries. There are over 400,000 workers using TPS from El Salvador and other Central American countries. Jorge's local criminal defense at-

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torney will need to be careful in handling any plea bargain.

Secondly, do not assume that a misdemeanor for petty larceny, a weapons charge, or assault or battery that results in a suspended sentence means that Jorge will be able to go back to work. Some misdemeanors are treated as aggravated felonies for deportation purposes, not allowing any defense in Immigration Court; and will result in a one way ticket back to El Salvador after detention for 30-90 days by ICE. Others, such as simple assault, are not removable offenses, even if Jorge has to serve a jail term. How the defense attorney plea bargains Mr. Alvarado's case will have a big impact on the immigration consequences.

Further, given the sharing of records between local police and ICE, it may be important to avoid a detainee being placed on Jorge by immigration authorities, even if the criminal charges are dismissed. The county Sheriff may not want to lock up Jorge but may have to keep him in jail if ICE issues a detainee. Jorge may need a global plea bargain involving an agreement with ICE and the local prosecutor to return to work.

Can Jorge be released on bond?

Let's assume Jorge has been arrested by ICE. The prospect for posting bail and getting him released is often bleak. Certain criminal offenses may not allow the posting of bond if they result in immigration charges against Jorge. If Jorge entered the United States illegally and is not in status, ICE may oppose bond, even if his wife and children are U.S. citizens. Additionally, it may take weeks for ICE and its Office of Detention and Removal to review Jorge's file and set bond even once he's been detained; and obtaining a bond hearing before an Immigration Judge can also take 10-15 days or more to schedule. You should assume that if Jorge is picked up by ICE, it may be challenging to get bond and you should plan on encountering delays in getting him released, if at all.

What are the next steps for Jorge in the immigration trial process?

Assuming this is a new immigration charge, after being arrested, Jorge will be served with a Notice to Appear in Immigration Court. If detained until his

preliminary hearing or Master Calendar Hearing, he can expect to appear by videoconference from jail within two to three weeks. At the Master Hearing, a case can be made for bond. Jorge will be expected to plead to the charges and assert any defenses and then a trial date will be set. If Jorge loses at trial, he can appeal to the Board of Immigration Appeals and ultimately to the Fourth Circuit Court of Appeals.

As with most criminal trials, very few immigration cases go to a full trial on the merits. This will be particularly true if Jorge is facing mandatory detention as the case winds its way through the system.

If Jorge is removed to El Salvador, what are the chances he can come back and work for your construction company?

Once removed from the U.S., rarely is there any possibility of returning to the United States. The typical illegal alien is facing an automatic 10-year bar to return, based upon unlawful presence of more than 1 year in the United States, even if the alien is allowed to avoid removal by applying for the privilege of voluntarily departing the United States for his home country at his own expense.

What are the risks to your company?

The arrest of a single employee can result in ICE turning its focus to your company, particularly if it turns out that Jorge is not working legally in the United States. ICE is using the arrest of individual employees to take a closer look at whether employers are complying with the laws against hiring unauthorized workers. An employee may offer information against his employer as a bargaining chip to gain favorable treatment from ICE.

So don't be surprised if as a result of Jorge's arrest, you receive a Notice of Inspection from ICE for review of your I-9 records. Now is this time to get your paperwork in order, with the help of knowledgeable counsel. Other foreign nationals who are working for you may or may not raise concerns about continued employment now that Jorge has been arrested.

If you are dependent upon foreign workers, serious morale issues may arise, as foreign workers wonder if

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they will be the next targets of ICE. You may need to consult with immigration counsel if you know or are in a position to have known that other illegals are on your payroll. If you are a subcontractor for Verizon, Wal-Mart or work any state or federal jobs, you may have special immigration reporting obligations by reason of flow-through clauses between the owner and general contractor as a result of Jorge's arrest or an ICE inspection of records. Consider whether your overall position concerning past and future hires of foreign labor is on solid ground.

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House Passes Legislation Renewing E-Verify Program for Five Years: Bill Headed to Senate for Consideration

On July 31, 2008, the House of Representatives passed House Bill 6633, which renewed the Department of Homeland Security's ("DHS") electronic employment verification system known as E-Verify. The legislation passed by a vote of 407-2. Senate action is now required to continue the program, which is due



to sunset on Nov. 30, 2008 absent congressional action and presidential approval.

The E-Verify program is an Internet-based system that allows participating employers to electronically verify the employment eligibility of newly hired employees. Over 70,000 employers check new hires using the program, up from 25,000 just two years ago. The federal E-Verify program is administered by the DHS and the Social Security Administration. The federal program is both free and voluntary by federal standards, although some states mandate its use. Employers can currently register for E-Verify on-line at www.dhs.gov/E-Verify.

Controversy surrounds the current iteration of the E-Verify program due to its reliance on the often criticized Social Security Database.¹ Inaccurate results derived from Social Security Database checks can create unwanted situations for potential employees and employers alike.

On June 9, 2008, President Bush issued an Executive Order mandating that all federal contractors use the E-Verify program, and proposed regulations would extend the reach of the Executive Order to all subcontractors on federal contracts, adding a potential 200,000 employers to the program. As a result, critics of the program, such as the Society for Human Resource Management, have become concerned that the program may ultimately become mandatory for all employers. Such critics also note that the E-Verify system could negatively impact small business owners who do not have the infrastructure or resources to manage their participation in the program.

In an attempt to address these concerns, House Bill 6633 requires the Government Accounting Office ("GAO") to conduct studies on "erroneous tentative non-confirmations," or false negatives, under the present E-Verify system. The scope of the study is to examine the causes of such errors, the remedial processes for such errors, and the effect of such errors on individuals, employers and federal agencies. Furthermore, House Bill 6633 requires GAO to conduct studies and report on E-Verify's impact on small businesses. The GAO's study of small business implementation must detail (1) compliance costs, (2) the number of small entities participating in the program, (3) projected compliance re-

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quirements, (4) factors that impact small business enrollment, and (5) the possible steps to minimize economic impact of enrollment.

Regardless of this legislation's fate in the Senate, the controversy surrounding E-Verify and employment verification is likely to continue. Complicating matters, 12 states have created, or are presently creating their own policies concerning the implementation of E-Verify. Some states, like Arizona, require that all employers use E-Verify. Other states only require certain employers to use E-Verify. For example, several states mandate that state agencies and those entering into state government contracts exceeding a certain value use E-Verify. Further complicating matters, these states have different rules regarding the imposition of penalties for failing to use the E-Verify system. In an attempt to provide clarity to this patchwork of state laws, Williams Mullen compiled the attached chart that lists the E-Verify requirements of

those states with specific E-Verify legislation, as well as relevant penalty provisions.

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Williams Mullen Summer Associates Elizabeth Forbes and Josh Hanbury wrote and provided the research and analysis for this timely *Alert*. For further information concerning the status of E-Verify in the states where you do business and congressional action on the future of the program, please contact Eliot Norman at 804.783.6482, enorman@williamsmullen.com, or visit www.williamsmullen.com/immigration.

Williams Mullen's Immigration Team provides worldwide visa services to U.S. and foreign companies, including processing of temporary and permanent work visas and advice and training on compliance with I-9 and E-Verify regulations and worksite enforcement rules.

¹ The Society for Human Resource Management ("SHRM") estimates that the Social Security database has a 4.1 percent error rate. SHRM further estimates that if all U.S. employers were to use the currently available E-Verify system, as many as 6 million U.S. citizens or legal residents could be denied employment due to bureaucratic error.

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This information is provided as an educational service and is not meant to be and should not be construed as legal advice. Readers with particular needs on specific issues should retain the services of competent counsel.

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CLARIFYING THE CONFUSION: A GUIDE TO STATE E-VERIFY LEGISLATION

State	Effective Date	Impact	Penalties for Noncompliance	Statutory Section
Arizona	January 1, 2008	Requires all employers to participate in E-Verify.	Penalties not in effect until March 1, 2008. Penalties include various measures, including suspending all licenses required to operate the business.	Ariz. Rev. Stat. § 23-211 to § 23-214
Colorado	August 9, 2006; amended to include the Department Program option on May 13, 2008	Requires employers who have a contract with a Colorado state agency or political subdivision to use E-Verify or the Colorado Department Program.	If a violation is discovered, the state agency or political subdivision can terminate the contract for a breach. The contractor will be liable for actual and consequential damages incurred by the state agency or subdivision.	Colo. Rev. Stat. § 8-17.5-101 & § 8-17.5-102
Georgia	July 1, 2007	Requires state departments, agencies and subdivisions and their contractors and subcontractors to use E-Verify.	If contractors are found in violation of the legislation, they are deemed to have materially breached the contract, are subject to the contract's termination and are prohibited from entering contracts with the state for one year.	S.B. 529, Gen. Assem., Reg. Sess. (Ga. 2006)
Illinois	January 1, 2008*	Prohibits employers from enrolling in E-Verify until SSA and DHS make a showing that the program is 99% accurate. Employers that do enroll must attest to certain information.	If the employer does not attest to the accuracy of the employment information, they may be prosecuted for perjury.	820 Ill. Comp. Stat. 55/12
Minnesota	January 29, 2008	Requires all executive branch employers as well as those entering state government contracts valued over \$50,000 to participate in E-Verify.	No penalty is specified.	Exec. Order No. 08-01, 32 S.R. 1284-85 (Minn. 2008), <i>available at</i> http://www.comm.media.state.mn.us/bookstore/stateregister/32_29.pdf .
Mississippi	July 1, 2008 for state agencies with over 250 employees; July 1, 2009 it begins to apply to private employers	Requires all state agencies, departments and subdivisions to use E-Verify; eventually requires all employers to use E-Verify.	If an employer knowingly hires an unauthorized alien, it is a felony offense, with various potential consequences.	S.B. 2988, Gen. Assem., Reg. Sess. (Miss. 2008)
Missouri	January 1, 2009	Requires any employer in a contract with the state in an amount exceeding \$5,000 to participate in E-Verify, as well as any employers receiving subsidized tax credits, tax abatements or loans. For private employers, using E-Verify is an affirmative defense to the unlawful hiring of unauthorized workers.	Civil action will be brought by the attorney general.	H.B. 1549, 94 th Gen. Assem., Reg. Sess. (Mo. 2008)

State	Effective Date	Impact	Penalties for Noncompliance	Statutory Section
North Carolina	January 1, 2007	Requires all state agencies, departments, institutions and universities to use E-Verify.	No penalty is specified.	N.C. Gen. Stat. § 126-7.1 (2008)
Oklahoma	November 1, 2007; however the U.S. District Court for the Western District of Oklahoma has issued an injunction barring the state from enforcing the statute until a final decision is reached on whether the law is preempted; Oklahoma has appealed the decision.	Requires all state agencies, departments and subdivisions to use E-Verify, as well as all entities contracting with public employers.	If an employer contracting with the state cannot provide documentation to verify authorization, the employer will be taxed at the top income tax rate.	H.B. 1804, 51 st Gen. Assem., 1 st Sess. (Ok. 2007)
Rhode Island	March 27, 2008	Requires the executive branch as well as all executive branch agencies to use E-Verify, as well as those contracting with the state.	No penalty is specified.	Exec. Order No. 08-01 (R.I. 2008), <i>available at</i> http://www.governor.ri.gov/documents/Immigration_Exec_Order_08-01.pdf
South Carolina	January 1, 2009 for state employers with over 500 employees; July 1, 2009 it begins to apply to private employers	Requires every state department, agency or political subdivision to use E-Verify or have employees produce a valid driver's license; eventually requires all employers to comply.	Will not penalize for good faith violations; those done knowingly will constitute a felony offense with various punishments associated.	H. 4400, 117 th Gen. Assem., Reg. Sess. (S.C. 2008)
Tennessee	January 1, 2008	Does not require employers to use E-Verify, but using E-Verify is a defense to the unlawful hiring of unauthorized workers.	Knowing violations will be punished by suspending various licenses.	H.B. 729, 105 th Gen. Assem., Reg. Sess. (Tenn. 2007)

*DHS filed suit against Illinois in the Central District of Illinois, arguing that the state statute was preempted by federal law. Until this litigation is resolved, the statute will not be enforced.