"Your Workplace Is Our Work"®

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### 2006 Forecast:



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LEHR MIDDLEBROOKS PRICE & VREELAND, P.C.
LABOR & EMPLOYMENT LAW

# Employment Law Bulletin

## To Our Clients And Friends:

**This issue is our "Crystal Ball" analysis of trends and developments we foresee occurring this year.** We often report to you about what has occurred, and how to learn from the mistakes of others to prevent problems from developing within your own organization. This month we focus on what we believe may occur (how is that for lawyerly equivocation), so we can work with you to develop appropriate strategies.

## EEOC ENFORCEMENT PRIORITIES

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The U. S. Equal Employment Opportunity Commission (EEOC), like many federal agencies, operates on a fiscal year which runs from October 1 through September 30 of the following year. Thus, Fiscal Year 2006 for the EEOC started on October 1st 2005 and will run through September 30th 2006. The EEOC's enforcement objectives, nationwide for Fiscal Year 2006, were included in its five-year strategic plan (for 2004 – 2009) and actually were set in October 2005. As to charge processing, the EEOC included the following general objectives:

- Enhancement of charge processing procedures by repositioning field offices, including the opening of new field offices in Mobile, Alabama and Las Vegas Nevada.

- Reduction of the inventory of private sector charges, including those carried over from FY 2005 (approximately 51,700) by more efficient charge processing procedures.
- Increasing the number of charge resolutions through mediation and/or other alternative dispute resolution methods.
- Increasing the number of case resolutions through conciliation agreements during the administrative phase of charge processing
- Increasing the number of case resolutions during litigation through consent decrees.

The foregoing general objectives do not directly translate into any specific new priority issues for enforcement. Those are already contained in the EEOC's National Enforcement Plan, such as retaliation. Moreover, the Commission does not normally announce which issues will receive special treatment on a yearly basis. However, EEOC Chair, Cari Dominqez, stated that approximately 1 in 6 employees believed they suffered employment discrimination. She added that "*This insight into the perceptions of discrimination by a sampling of the work force will aid us as we continue our emphasis on proactive prevention, outreach, and law enforcement.*"

**Notwithstanding the almost universal prohibition of employment discrimination under state and federal statutes over the last 40 years, there is still a nagging perception among a significant number of employees that minority and gender bias in the workplace is alive and well. Thus, it is likely that in 2006 the Commission will scrutinize claims of:**

1. **Gender bias as to hiring and pay in favor of males;**
2. **Discriminatory terms and conditions of employment with respect to African Americans, Hispanics and Asians; and**
3. **Age discrimination against "middle-aged" females with respect to hiring and wage issues (the poll stated that "middle-aged" women were more likely to experience perceived discrimination than any other group).**

The Commission, during the first quarter of Fiscal Year 2006, also indicated special concerns about certain disability and retaliation issues. Specifically, the Commission devoted a significant amount of comment to mental and visual impairments and prohibitions against discrimination because of one's association with a disabled person. And, as always, the Commission appeared to be preoccupied with retaliation issues, not only against charging parties but also fellow employees who "participated" in the charge investigation process or protested unlawful employment practices.

Incidentally, conspicuous by its absence during the past year, was any mention of discrimination against "undocumented workers" given the media hype about the growing number of illegal immigrants. The Commission rescinded its enforcement guidance on certain remedies available to undocumented workers in June 2002, mainly because of the Supreme Court's holding in *Hoffman Plastic Compounds, Inc. v. N.L.R.B.* foreclosing the possibility of an award of back pay to undocumented aliens not authorized to work in the U.S., but since then it has been silent on the status of undocumented workers. Thus, although Title VII still covers such employees, it would appear that the Commission is not making this issue an enforcement priority.

To summarize, we expect the Commission to emphasize the following priorities during the remainder of Fiscal Year 2006:

- Sex discrimination against females in all aspects of employment, but especially with respect to hiring and wage issues,

paying particular attention to "middle-aged" females;
- Discrimination against African Americans, Hispanics and Asians with respect to general terms and conditions of employment;
- Disability discrimination with respect to mental and visual impairments and the provision of reasonable accommodations;
- Retaliation (already a priority issue under the National Enforcement Plan) against fellow employees who assist or participate in the filing of a charge, as well as against the charging party, him or herself;
- Mediation as the primary means of resolving as many charges as possible; and
- Conciliation Agreements as the preferred means of resolving "cause" cases during the administrative process, and consent decrees for resolving cases in litigation.

Services and/or Training That LMPV Provides To Employers To Meet These Challenges

1. Comprehensive audits of current employment policies and procedures, including whether any such practices may stimulate charges of discrimination against any protected group under Title VII, the ADEA, the ADA, and the EPA.
2. Customized training seminars for managers and supervisors.
3. Comprehensive training on how to respond to charges of discrimination filed with the EEOC.
4. Comprehensive training on how to investigate allegations of discrimination both before and after a charge is filed with the EEOC.

From all indications, it is expected that the EEOC will continue to execute the enforcement priorities set forth in its National Enforcement Plan in a manner which is consistent with its five-year strategic plan. These plans include a number of the items mentioned above. Some of these issues could directly affect your firm. Please don't hesitate to call if we can be of service in helping you meet any of the above challenges.

## OSHA ENFORCEMENT

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Anticipate no significant changes in OSHA activities and areas of emphasis in 2006. Based upon testimony in budget hearings and major addresses by Acting Assistant Secretary Jonathan Snare, the agency thinks it is on the right course. He proposes to continue OSHA's "balanced approach that emphasizes strong, fair enforcement; outreach, education and compliance assistance; and cooperative and voluntary programs."

**With regard to enforcement, federal OSHA projections indicate that it will conduct 37,700 inspections, the same number planned for last fiscal year. The primary tool for selecting non-construction employers for inspection will be the site-specific targeting (SST) program that has been used for the past several years. This targeting system identifies employers with the worst injury/illness rates as calculated from their own data. The current plan will run through August 2006, unless replaced sooner, and will place worksites on inspection lists when they have DART (days away restricted transferred) rates of 12.0 or higher and DAFII (days away from work injury illness) rates of 9.0 and higher.**

**As has been the case historically, construction employers will again be primary targets for inspection.** These inspections will be scheduled from business

reports of construction activity. Many construction inspections will also result from compliance officer referrals when they observe hazards in their travels.

National emphasis programs will continue to focus on hazards posed by amputations, lead, silica, ship breaking and trenching. A national emphasis program for occupational asthma is being planned. In support of the agency's 5-Year Strategic Plan goal of reducing injuries, illnesses and fatalities, OSHA has identified seven industries for attention. They include the following: (1) landscaping services, (2) oil and gas field services, (3) fruit and vegetable processing, (4) blast furnaces and basic steel, (5) ship/boat building and repair, (6) public warehousing and storage, and (7) concrete and concrete products. These industries have had high injury/illness rates with a high proportion of severe injuries and illnesses and may expect to be targets for inspection.

Additionally, local and regional OSHA offices have many other emphasis programs that target inspections at problems identified in their areas of jurisdiction. There are over 140 such local initiatives. Many of these address areas of national emphasis identified above, such as trenching. Other common local emphasis programs target fall hazards, powered industrial truck operations, electrical hazards and work zone safety. It should be noted that over one half of all OSHA inspections will be generated by local emphasis programs.

Employers with high injury and illness rates and/or engaged in the above activities should be prepared to receive a visit from OSHA.

**OSHA will continue to look closely at employer compliance with injury/illness record-keeping provisions. It is frequently stressed that accurate records are essential since they are used to target employers for inspection and to assess the effectiveness of OSHA activities and programs. Make sure that your records are in order and remember to post your 2005 summary from 2/1/06 to 4/30/06.**

The agency's Enhanced Enforcement Program (EEP) is continuing in 2006. This program targets cases with extremely serious violations related to a fatality, multiple willful or repeated violations, or failure to correct violations. Among other consequences, this program can lead OSHA to visit other site locations of a company to determine whether such violations are widespread.

There is some suggestion that more cases may be developed and referred for criminal prosecution. While OSHA policy requires that all fatality cases with related willful violations be screened for possible referral to the Department of Justice, relatively few pass that stage. In recent months, OSHA compliance officers have received training in criminal investigations.

In the coming weeks we may expect to see final action on a number of OSHA standards. These include a standard on hexavalent chromium, assigned protection factors for respirators, personal protective equipment (who pays?) and revision of the general industry electrical standard (subpart S).

## WAGE AND HOUR ISSUES

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As we begin another year, there continues to be much activity involving both the Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act (FMLA). Not only through private litigation, but also the U.S. Department of Labor continues to be very active in its enforcement of these statutes. While DOL is a

very small agency with less than 1000 investigators nationwide, they do have an impact upon employers. The fact that it is small limits the number of investigations DOL is able to conduct in a year to between one and two percent of all covered businesses in the United States. Therefore, DOL for the past several years has targeted certain industries where they believe they can have the greatest impact. The targeted industries vary from year to year with Washington directing which industries they will target. In addition, each local office may have some separate targeted industries.

At the end of each year, DOL issues a performance report regarding their activities during the prior year and their plans for the upcoming year. In reviewing the goals, it appears that DOL has set a target of concluding complaint investigations within an average of 6 months. While that may seem like a long time, there had been periods where their average time for completing a complaint investigation exceeded a year. Thus, employers should be aware that there might be several months between the time a complaint is filed and when the employer is contacted for an investigation. Also, in most situations DOL still follows its policy of more that 40 years and will not tell you whether they have received a complaint. The only time they may do so is when they have written permission from the complainant to disclose his/her name or when they are attempting to resolve a dispute through an informal process (normally by telephone) for a particular employee.

**Some areas where you can expect activity during the remainder of FY-2006 (runs through 9/30/06):**

1. **For at least the past 10 years, DOL has concentrated on "low wage" industries such as agriculture, construction, health care and garment manufacturing as well as the fast food industry, retail establishments and service industries. Indications are that they will continue to devote substantial resources in these areas. Thus, if you are in one of these industries there is a greater chance that your firm will be selected for an investigation.**
2. **The recent ruling by the U. S. Supreme Court regarding time employees spend "donning and doffing" specialty equipment and clothing prior to the beginning and after the conclusion of their shift, as well as the time spent walking from the locker (clothes changing) room to the employee's work station began as a result of a DOL initiative in 1996 and 1997.** During that time DOL investigated over 50% of all poultry processing plants in the U.S. These investigations revealed that most of these plants did not compensate the employees for the time spent before and after their scheduled shift in clothes changing and time spent traveling from the locker room to their workstation.
3. **Another area where you can expect activity is in follow-up investigations where they are seeking to determine if employers have come into compliance after they have been investigated.** Thus, if you were investigated during the previous year, you could be the target of another investigation to determine whether you followed DOL recommendations and are in fact complying with the FLSA. A word of caution: if an employer is found to have repeated or willful violations of the Act, the employer can be subject to a Civil Money Penalty of $1100 for each employee that is found to be improperly paid. DOL considers any violations of the minimum wage or overtime provisions that occurred after the previous investigation to be repeated violations. Thus, if an employer was found to have failed to pay proper overtime in a 2004

investigation and in a later investigation was found to have misclassified an employee as exempt that was actually non-exempt, the employer would not only be subject to back wages but also could have a penalty of up to $1100 assessed. DOL reports indicate that they found over 25% of employers did not come into full compliance after their initial investigation. Consequently, we expect to see this program to continue in FY-2006.

4. **While the FLSA minimum wage has not increased for almost 10 years (the longest period without an increase since the statute was passed in 1938) several states have implemented a higher minimum wage.** The highest minimum wage in the country is in Washington, where it is $7.63 per hour effective January 1, 2006. Other states with higher minimum wages include Alaska, California, Connecticut, Florida ($6.40), Hawaii, Maine, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, Wisconsin and District of Columbia. Several other states also have a minimum wage law that only requires rates equal to or less than the FLSA minimum wage. Any employer that operates in multiple states should check with their local state Department of Labor office to ensure they are paying the proper minimum wage in that state.

5. **Another high priority area for DOL is ensuring that minors are employed in compliance with the FLSA.** During FY 2005, DOL concentrated their child labor activity in fast food establishments. During this year, we understand that they will be looking very closely at independently owned grocery stores. There are several areas in grocery stores where there are potential problems when employing persons less than 18 years old. This includes the operation of paper balers, trash compactors, power driven meat-processing equipment and motor vehicles used in delivery. There are some very strict hours requirements that must be followed for minors ages 14 and 15. If you have a minor who is injured at work and you file a workers compensation report, in all probability you will receive a visit from DOL. Employing minors illegally can get very expensive as DOL may assess a penalty of up to $11,000 per minor for such employment. When Congress increased the amount of penalties that may be assessed several years ago, they designated that such money is returned to DOL to be used in enforcement of the child labor laws. Also, during 2005 DOL asked Congress to increase the amount of the penalty that can be assessed to $100,000, so it is imperative that employers make sure they are complying with the child labor requirements. In addition to the FLSA there are state statutes that track the FLSA very closely and provide for criminal penalties against the employer.

At this time we do not know all of the areas that DOL may be looking at, but you can be sure they will be making investigations, assessing civil money penalties and requesting the payment of back wages. In addition, both Fair Labor Standards Act and Family and Medical Leave Act litigation continues to be very prominent. Therefore, employers should be very aware of their potential liability and make sure they are complying with these statutes to the best of their ability. If we can be of assistance do not hesitate to contact me.

## OFCCP TRENDS

**Perhaps the main issue the agency will face in 2006 is dealing with the beast it may have created with its final regulation defining "Internet Applicant."** The OFCCP will have to grapple with how its various offices interpret and apply the definition (and the potentially onerous

record-keeping requirements that go hand-in-hand with the definition), and will have to assess just how workable the definition turns out to be. Of course, contractors will have to struggle with these same questions.

The OFCCP is clearly moving away from on-site compliance checks; a June 2005 final regulation allows contractors to choose whether to provide compliance check documents to the OFCCP on-site or deliver them off-site. Although it is not clear, this regulation *suggests* that Compliance Officers will neither remove documents off-site nor make copies for their files if the contractor exercises its option to display the documents on-site. The regulation also broadens the scope of documents that can be reviewed, however.

**The OFCCP is continuing to turn its attention more toward detecting and eradicating systemic discrimination, than to enforcing technical affirmative action protocols and requirements.** In a similar vein, it is pretty clear now that the agency views the annual EO Surveys as useless – which would naturally lead to the question, "why must we still do them?" The problem is that the OFCCP cannot do away with the surveys without issuing a regulation, with the appropriate notice and comment period. Thus, for now, the EO surveys will continue to be sent out, but our guess is they won't form the basis of any critical decisions.

Continuing efforts from previous years, the OFCCP is looking for a more effective way to determine which contractors should be audited. The Federal Contractor Selection System ("FCSS") is not proving any more accurate than the old EED (Equal Employment Data) system. Director James stated in October 2005 that OFCCP would send a "Notice of Desk Audit" to approximately 1500 establishments representing approximately 200 contractors. The lower number of letters sent this year means that those contractors who receive the notification letter are likely to be audited. OFCCP has stated that it hopes to complete those audits by summer of 2006, and then, using whatever new selection system it develops, send out additional audit letters to other contractors.

Finally, after the initial barrage of information about regression analysis and systemic compensation discrimination, things have been eerily quiet. There's little doubt that, statistically-speaking, regression analysis is the most accurate way to analyze compensation issues, but it's also proving to be very difficult to implement. Currently, the agency is gathering data and will *potentially* be very competent in performing regression analysis in three to four years. For now, the agency is analyzing where it wants to take this program and will probably not hire more statisticians until that question is answered. Stay tuned.

## UNION ORGANIZING AND COLLECTIVE BARGAINING TRENDS

Historically, union organizing has not started because of money, but rather because of how employees are treated by supervisors and management. **However, in 2006 we expect money, benefits and job security to be issues provoking employee interest in unions, even if they're treated fairly and like their supervisors and employer.** Our nation's workforce sees what occurred to the jobs, pay and benefits in key leading industries, such as steel, auto and airline. Employees are saying to themselves "I will do everything possible to be sure that doesn't happen to me." Of course, employees also know that millions of employees adversely affected in key industries were union represented, but employees may still consider unions as their only alternative for pay, benefits and job security protection.

Employers most vulnerable to organizing are those with some unionized facilities and other facilities that are union-free. If employers negotiate terms at the unionized facilities that provide greater protection for the workforce than those at the non-union facilities, that contract will become an effective "calling card" to the union-free workforce. Just as businesses know

how much of an increase in business comes from current customers; unions know how much of an increase in representation numbers comes from companies where they already enjoy a presence. **When bargaining in 2006, two key questions to ask are: first, how will anything that I agree to affect our right to manage and direct the business? and second, what is the potential impact of this agreement on our non-union locations?**

Due to a combination of pressure to sign up new members within the Change-to-Win Coalition and AFL-CIO, and unions feeling "burned" by concession bargaining in the steel and airline industries, we expect strike activity to increase in 2006 and unions overall to be much more aggressive with employers. This may include public pressure on the employer (such as the campaign directed toward Wal-Mart and Cintas) and "squeezing" the employer through its vendor and contractor channels. Expect unions to increase their coordination internationally to organize companies who have an international presence.

Regarding specific industries, we expect unions whose focus is healthcare and social services to expand to non-profit organizations. Unions win approximately 68% of all elections in the healthcare and social service sector. The major union organizing increase for 2006 will be in the service sector, construction and hospitality industries. The public sector remains a fertile opportunity for continued union growth, as public employees have constitutional rights to join a union, although in most states employers have no legal obligation to deal with or bargain with the union. Unions will also focus on bringing those individuals who may feel vulnerable into the safety net. This includes those in low wage industries, first generation immigrants, and minorities.

## LIKELY LITIGATION TRENDS

Labor and employment litigation continues to be a primary concern of U.S. companies. Nearly 90% of U.S. companies are engaged in some type of litigation, and on average across all sectors, U.S. companies carried a U.S. docket of 37 lawsuits. The top two types of lawsuits against U.S. companies remain contract claims and labor/employment matters.

Wage and Hour lawsuits continue in popularity. In the first eight months of 2005, 2,750 Fair Labor Standards Act lawsuits were filed. 734 of those were "collective actions" compared to only 79 "collective actions" in 2000.

**We continue to see an increase in lawsuits seeking enforcement of covenants not to compete and protection of confidential business information. This trend is likely to continue given forecasts that in 2006 competition for qualified workers will intensify, attention to employee retention will increase, and investment in corporate training will increase.**

**We expect to see a sharp increase in lawsuits against employers under state privacy laws, and the Fair and Accurate Credit Transaction Act (FACTA), which was amended in June 2005 to include rules governing the disposal of consumer report information and records.** Intended to combat identity theft cases, this recent amendment to FACTA requires any individual or company disposing of "consumer information for a business purpose" to do so in a manner that prevents unauthorized persons from accessing it. Because "consumer information" covers any information that could identify an individual, *e.g.*, a social security number, phone number, physical or e-mail address, the Federal Trade Commission predicts that almost all businesses will be affected. Because violations of the Disposal Rule are expected to be wide spread, and the rule provides for the recovery of compensation, civil penalties and attorney fees, we anticipate a significant increase in FACTA lawsuits.

**Regardless of the type of claim asserted, who decides your employment dispute has a**

**direct impact on its outcome. The conventional wisdom is employers should prefer and fare better in bench trials. However, the latest study by the U.S. Department of Justice Bureau of Justice Statistics reporting on civil trials in state courts found plaintiffs have a better win rate with judges than with juries.**

Juror research also reflects that jurors continue to favor employees (rather than employers). In large part, this is because jurors tend to find "against the company," rather than "for the employee:"

- 88% of jurors believe companies care more about profits than about employees.
- 78% of jurors believe an employer's management will lie to win a lawsuit.
- 61% of jurors agree that there has been a significant decline in corporate ethics over the last 20 years.
- 72% of jurors believe it is an important function of juries to send messages to companies to improve behavior.
- 71% of jurors believe that it is more important to see that "justice is done" than to follow "the letter of the law."

Additionally, juror research shows that jurors are simply more inclined "believe" the plaintiff in employment cases:

- 71% of jurors believe that sexual harassment is a common occurrence in the workplace.
- 50% of jurors have felt they were discriminated against at work.
- 37% of jurors agree that if a person files a sex discrimination lawsuit, that person usually was wronged.
- 75% of jurors are inclined to believe that sexual harassment took place if a lawsuit is filed.
- 91% of jurors believe that a company is negligent if it does not properly document an employee's performance problems.
- 66% of jurors believe that most organizations "say" they strictly enforce policies against sexual harassment, but really don't.
- 53% of jurors believe employers will retaliate against an employee if they claim they were discriminated against at work.

**One trend remains constant, there is an increased emphasis being placed on effective employment law training. Many employers are ramping up their employment law training efforts because they realize effective employment law training is a company's best weapon against unlawful employment practices and employment lawsuits. Additionally, recent Supreme Court decisions and EEOC Guidelines make it clear that employers must do more than simply hand out an anti-harassment policy; employers must now provide training to employees on how to prevent sexual harassment and other forms of workplace harassment.** California – not surprisingly – has gone one step further by requiring all employers with 50 or more employees to provide supervisors with extensive anti-harassment training and education. Because not all anti-harassment training programs will meet California's new legal training requirements, employers can expect a flurry of litigation in California in the upcoming year over the adequacy of anti-harassment training programs. The results of these lawsuits will almost certainly prompt an increase in litigation beyond California challenging the adequacy of employers' anti-harassment training programs.

## EMPLOYEE BENEFITS

Employee benefits legislation in 2006 will focus on compromising the two pension measures passed by the House and Senate late last year and presenting the compromised version to the White House for consideration. **The likely reform measure has been called the most significant law regarding employee benefits since the 1974 passage of ERISA.** The two measures, the Senate's "Pension Security and Transparency Act of 2005" passed on November 16, 2005, and the House's "Pension Protections Act" passed on December 15, 2005, are similar in most aspects. One common characteristic is that the White House has indicated that neither measure is sufficient to adequately address the circumstances and that the White House might veto any compromised bill that is presented if the bill has not been strengthened.

**The time to address the pension "crisis" is certainly upon us. According to the PBGC, traditional single-employer defined benefit pension plans are underfunded by some $450 billion.** Additionally, several industries, particularly the commercial airline industry, are struggling to maintain their defined benefit pension programs. For example, in May 2005, United Airlines transferred trusteeship of its $6.6 billion pension obligations. Other commercial airlines may soon follow.

The central focus of both bills is to tighten pension funding and disclosure requirements and increase employers' federal pension insurance premiums for the first time since 1991. The bills include similar, but not identical, provisions to induce employers to offer "automatic" enrollment in their 401(k) plans to encourage personal retirement planning. The House version, but not the Senate version, would also make permanent the higher contribution limits for both 401(k) retirement accounts and IRA's that are currently set to expire in 2010.

The two bills vary in the time allowed for the "smoothing period" to value pension plan assets to determine whether a pension plan is adequately funded, as well as cost differences imposed by the two bills that are linked to tax provisions added by the House version. Unlike the House version, the Senate version incorporates an assessment of a company's credit rating to assess whether a plan is "at risk" and subject to heightened funding requirements. The bills also differ in how a company may use credit balances from excess contributions to their pension plan, with one version allowing the excess to be used to fund retiree death benefits. The Senate version includes industry-specific funding extensions designed to assist commercial airlines in satisfying their pension obligation. The House version contains no similar favorable provision, although several Representatives from geographic areas where commercial airlines are large employers have indicated that this matter is to be addressed during negotiations with Senate representatives on a final version of the reform bill.

It is certain to be an interesting legislative year relative to pension reform. Many of the measures that could be incorporated as part of the reform could have effects that reach well beyond traditional defined benefit pension plans and employers should remain in tune to the changes and the impact the changes will have on their plans.

## IMMIGRATION BUSINESS

The past year saw significant substantive and procedural changes in the manner in which U.S. employers are able to hire foreign workers. Both the changes in the process for obtaining employment based Lawful Permanent Resident ("green card") status and the caps on the number of available specialty-occupation worker visas, the popular H-1B visas, altered the availability of foreign workers to U.S. employers.

**Regarding the green card process, the shift of the labor certification process from a state-based "paper" system (where the state agency assessed an employer's recruiting efforts) to a federal "electronic" system (that relies on an employer's affirmations regarding recruitment) reduced the time required to complete the labor certification process from several years to several months.** The compressed time frame had the expected but unfortunate consequence of shifting the backlog in the green card process from the Department of Labor's certification process to the Citizenship and Immigration Service's visa process. The allotment of available visas was quickly exhausted by the influx of approved labor certifications and the visa process is backlogged for the foreseeable future. However, note that a backlog at this juncture is less restrictive in that where the employee holds certain types of visa status, he or she is permitted to extend work eligibility beyond the typical limit. Expect this problem to be legislatively addressed in 2006.

**A second business immigration issue of concern for 2006 is the continued unavailability of H-1B visas. In 2005, the quota for fiscal 2006 (October 1, 2005 – September 30, 2006) visas was exhausted in mid-August 2005, nearly two months prior to the earliest start date for the visas.** That means that no H-1B employee who has not previously been counted against the quota can be employed for a period of at least fourteen months after August 2005. Thousands of H-1B petitions were returned to employers as of the date that the available visas were exhausted. For fiscal 2007, the available H-1B visas will be exhausted much earlier and the viability of the H-1B as a recruiting tool now requires planning and strategy that was not required before the current quota was implemented. Both business and immigration advocates stress that this situation is ongoing and we can expect legislative movement on this issue this year. Additionally, efforts are underway to provide relief to employers who need laborers from foreign sources, and action on the guestworker initiatives is anticipated in 2006. Lastly, funding for immigration enforcement, including employment eligibility issues, increased in 2005 and all employers should take time to assess their current I-9 procedures to ensure compliance with applicable law.


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