The Labor and Employment Lawyer's

Quick Reference Guide to Immigration Law

By Ingrid K. Brey

Fast Facts:

The Department of Homeland Security (DHS) is watching employers' hiring practices closely.

Using tools such as "no-match" letters, "E-Verify," and criminal indictments, the DHS is strictly enforcing the rules prohibiting the hiring of undocumented workers.

Employers need to be vigilant in developing and maintaining an effective I-9 protocol.

MORE ►

Current "immigration law," with its genesis in the Immigration and Naturalization Act of 1952 (INA),[1] conflates with employment and labor law in ever-expanding ways. This article summarizes, for quick reference, the most significant aspects of immigration law about which the employment and labor lawyer should be mindful.

Employer Liability with Regard to the Undocumented Worker

Since 1986, with the passage of the Immigration Reform and Control Act (IRCA),[2] an employer has faced legal exposure in two major areas relating to the employment of undocumented workers: (1) the employer may not hire or continue to employ a person whom it knows (actually or constructively) is not authorized to work, and (2) the employer must verify the identity and employment eligibility of every person it hires. Significantly, while these obligations have been in place for over 20 years, there is today increased governmental scrutiny with respect to each of these obligations.

An Employer May Not Hire or Continue to Employ a Person whom it Knows (Actually or Constructively) is Not Authorized to Work

The government has, of late, sought to enforce this obligation in both the regulatory and criminal arenas. With respect to regulatory action, there have been two notable developments. First, in August 2007, the arm of the Department of Homeland Security (DHS) responsible for the investigation of employer sanction violations—the U.S. Immigration and Customs Enforcement (ICE)—promulgated a final rule colloquially known as the "no-match" rule. Under this rule, an employer that receives a "no-match" letter from the Social Security Administration (SSA)[3] is required to undergo a detailed series of steps (known as the safe-harbor procedures) to try and correct the "mismatch." If these steps do not resolve the problem, the employer is required to either terminate the employee or face a legal presumption that it possesses "constructive" knowledge of the worker's unauthorized status.

In October 2007, the Northern District of California, in *AFL-CIO v Chertoff*,[4] enjoined the implementation of the rule. This injunction effectively halted the mailing of 140,000 no-match letters to employers, which were thought to cover some 8 million workers. In December 2007, the DHS appealed the preliminary injunction and, on the heels of the appeal, in March 2008, issued a supplemental proposed rule.[5] This supplemental rule made no substantive changes to the enjoined one, but, according to the DHS press release, "provided a more detailed analysis of how DHS developed the no-match policy and will help responsible employers ensure that they are not employing unauthorized workers."[6] On October 28, 2008, the DHS issued a supplemental final rule,[7] which, again, sought to address the concerns of the court. In light of this, the DHS announced that it would seek to have the court lift the injunction so that it could implement the rule and send the no-match letters to employers. As of this writing, the court has declined to do so. Motions were due January 9, 2009.

The second regulatory action occurred in February 2008. At that time, the Department of Justice (DOJ) and the DHS published a final rule, which raised the civil monetary penalties for employers that, on or after the rule's effective date of March 27, 2008,[8] violate, inter alia, the "knowing" hire requirements.

The ICE has also intensified its criminal enforcement of the IRCA's "knowing hire" provisions. In April 2008, it published on its website (www.ice.gov) a fact sheet in which it listed as "notable operations" 13 raids of U.S. employers. In many of these raids, the ICE, armed with criminal search warrants, arrested and charged with criminal offenses not only those alleged to be "illegal aliens," but also managers, executives, and corporate officers of U.S. employers. For example, on August 28, 2008, the ICE issued a press release in which it informed the public that the U.S. Attorney's Office for the Southern District of Texas had issued criminal charges against the president and three former and current managers of Shipley Do-Nut Flour and Supply Company, a Houston, Texas-based supplier of baking materials. These charges included conspiracy to harbor and the hiring of undocumented aliens and the continued employment of such aliens. A mere eight days later, the company pled guilty to conspiring to harbor illegal aliens, and faces a maximum fine of $500,000 and up to five years probation. Three managers also pled guilty to misdemeanor charges of hiring or continuing to hire illegal aliens. Interestingly, the charges against the company arose from a criminal investigation initiated by the ICE after learning about allegations in a federal employment discrimination lawsuit.

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The Employer Must Verify the Identity and Employment Eligibility of Every Person it Hires

The second area of potential liability concerning the employment of undocumented workers surrounds an employer's duty to verify the identity and employment eligibility of all newly hired employees through the proper execution, completion, and retention of the Form I-9. The November 2007 edition of *Handbook for Employers: Instructions for Completing the Form I-9* (publication M-274) provides guidance. Both the form and handbook may be downloaded from the United States Citizenship and Immigration Services' (USCIS) website at www.uscis.gov.

Currently, the version of Form I-9 dated June 5, 2007 is required to be used by employers. Beginning January 31, 2009, however, the version published in the Federal Register on December 17, 2008 must be used. This most recent version of Form I-9 makes several minor changes, but, significantly, requires that all documents used in the verification process be unexpired.

An employer's duties and obligations with respect to the Form I-9 are many. They include ensuring that the employee fully completes Section 1 on his or her first day of employment, examining the original documents presented by an employee and recording the examination, and attesting that the documents appear genuine. An employer may not dictate to an employee which documents he or she may present. To do so is a separate violation of the IRCA known as document abuse. An employer must retain the completed Form I-9 for a period of three years from the date of hire or one year from the date of termination—whichever date is later.

Pursuant to enabling legislation,[9] the USCIS implemented a program designed to aid U.S. employers in their obligation to verify employment eligibility. The current name for this program is the electronic employment verification system, commonly called "E-Verify." This is an Internet-based system that allows employers to electronically verify the employment eligibility of newly hired employees by comparing the information provided on the Form I-9 with the databases of the DHS and SSA. Except in a handful of states that mandate the use of E-Verify in varying situations (Michigan is not among them) and with respect to certain federal contractors and subcontractors (which are required as of January 15, 2009 to E-Verify not only new hires, but existing employees assigned to work on projects covered by a federal contract),[10] this is a voluntary program set to expire March 6, 2009 (legislation extending E-Verify through 2013 is in Congress).

To participate in E-Verify, an employer must sign a "memorandum of understanding" (MOU). In light of the heightened ICE enforcement discussed, supra, an employer may wish to be especially judicious when deciding whether to do so. By signing the MOU, an employer agrees, inter alia, to allow the DHS and SSA to make periodic visits to the employer to review the employer's E-Verify-related records (i.e., I-9s, SSA transaction records, and DHS verification records) and to interview the employer and its employees concerning their experiences with the program. Significantly, the DHS has clarified that "it is important that the MOU informs participating employers that program information may be used to assist in enforcing the INA and federal criminal laws as needed, including those violations of law involving the integrity of the E-Verify program such as employees' false claims of identity or work-authorized status made through the system."[11]

Finally, the MOU provides that the employer must notify the DHS if it continues to employ any employee after receiving a final non-confirmation of employment eligibility and subjects the employer to civil monetary penalties for failure to so notify. An employer is thus faced with a dilemma: either subject itself to a rebuttable presumption that it is knowingly employing an unauthorized alien in violation of the IRCA or terminate the employee.

Employer Liability with Respect to Discrimination against Certain Protected Statuses

Immigration law provides a separate forum in which allegations of certain employment-based discrimination may be addressed. The IRCA made unlawful the "unfair immigration-related employment practice" (UIREP).[12] A UIREP involves discrimination on the basis of two statuses: national origin and citizenship. It also includes protection if an employer intimidates or retaliates against a person for the purpose of interfering with that person's rights under the statute and for document abuse.[13] The statute is enforced by the Office of Special Counsel for Immigration-Related Unfair Employment Practices, which is within the Civil Rights Division of the DOJ.

The interrelationship between the IRCA, Title VII,[14] and the Elliott-Larsen Civil Rights Act (Elliott-Larsen)[15] can be confusing when analyzing which employers, which workers, and what conduct is covered by which statutes.

National Origin Discrimination

The IRCA's national origin provisions cover any person except an "unauthorized alien." Thus, every U.S. citizen and national is covered (this includes a person born in the U.S. as well as a person born of a U.S. citizen, and all persons born in Puerto Rico, Guam, the Virgin Islands, Northern Mariana Islands, American Samoa, and Swains Island). However, only an alien who is a legal permanent resident, or green-card holder, possesses a specific nonimmigrant status that allows him or her to work, such as an H or L status, or possesses other USCIS-issued employment authorization; e.g., a student who obtains an employment authorization document (EAD) on completion of his or her studies, is covered. Accordingly, by way of example, a person whose EAD has expired or is a visitor is not protected by the IRCA's national origin discrimination provisions. This contrasts with Title VII and Elliott-Larsen, which cover all persons irrespective of whether they are authorized to work in the U.S.

Only employers with 4 to 14 employees (counting all part-time and full-time employees) are covered by the IRCA's national

origin provisions. This contrasts with Title VII, which covers only employers with 15 or more employees, and with Elliott-Larsen, which covers employers with one or more employees.

National origin discrimination must be knowing and intentional. Therefore, disparate impact claims are not covered by the IRCA.[16] This contrasts with Title VII and Elliott-Larsen, which recognize disparate impact as a means for establishing illicit discrimination.

Finally, national origin discrimination under the IRCA pertains only to "hiring," "recruitment or referral for a fee," or "discharge."[17] Accordingly, unlike Title VII and Elliott-Larsen, the IRCA does not apply to terms and conditions of employment.[18]

National origin discrimination must be knowing and intentional.

Citizenship Discrimination

The IRCA's citizenship discrimination provisions cover only "protected individuals." The definition of a protected individual is complex. Initially, a protected individual must be one of the following:

- A citizen or national of the U.S.
- A legal permanent resident.
- A U.S. temporary resident. This refers to a person who is a "legalized alien," which essentially encompasses certain individuals who performed seasonal agricultural services in the U.S. for at least 90 days during the 12-month period ending on May 1, 1986, or certain persons who entered the U.S. before January 1, 1982, and have resided continuously in the U.S. in an unlawful status since that date and through the date of seeking permanent status. A temporary resident for this purpose does not mean persons in temporary nonimmigrant status, such as H, L, or E.
- A person admitted as a refugee or granted asylum.

Secondly, to be protected, one must make an application for citizenship within six months of becoming eligible to do so (this is generally a period of five years after becoming a green-card holder, but is reduced to three years if the basis for becoming a green-card holder is marriage to a U.S. citizen).

Thirdly, one must actually become a citizen within two years of applying, although dispensation is provided if the failure to become a citizen is not due to the green-card holder's lack of effort. In this regard, time spent by the USCIS in processing the application does not count when calculating the two years.

Employers of four or more employees are covered by the IRCA's citizenship status protection. Thus, unlike its national origin protection, the IRCA covers employers with 15 or more employees. Title VII and Elliott-Larsen do not specifically protect against citizenship discrimination.

As with national origin discrimination, the IRCA protects against citizenship discrimination only in hiring, recruitment, or referral for a fee of an individual or the firing of an employee. It does not cover other terms and conditions of employment. Moreover, it, too, does not cover disparate impact claims.

Significantly, the statute allows an employer to discriminate on the basis of citizenship to comply with a law; regulation; executive order; or federal, state, or local government contract; or if the attorney general determines it to be essential for an employer to do business with an agency or department of the federal, state, or local government. As well, an employer is permitted to give preference to a U.S. citizen or national over a non-citizen, with respect to hiring, recruiting, or referring for hire, if both persons are "equally qualified."[19]

Conclusion

Immigration law exposes a U.S. employer to potential civil and criminal liability with regard to the employment of undocumented workers and discrimination on the basis of national origin and citizenship. Heightened government scrutiny suggests now is a propitious time for an employer to review its procedures and policies to be certain it is fully complying with the IRCA's requirements in these areas. ■

Ingrid K. Brey practices immigration law exclusively. She is an active member of the American Immigration Lawyers Association, having served on several national committees and as chair of the Michigan chapter. She is a frequent speaker on the topic and has authored numerous articles, including a chapter on immigration law in the Institute of Continuing Legal Education's Employment Law in Michigan: An Employer's Guide 2nd Ed.

FOOTNOTES

1. 8 USC 1101 through 1537.
2. PL 99-603, 100 Stat 3359.
3. The SSA receives from employers quarterly earning reports (W-2 Forms), which contain each employee's name and Social Security number. If a name doesn't match the number, the SSA sends to the employer an "employer correction request." This is known as the "no-match" letter.
4. *American Federation of Labor v Chertoff*, 552 F Supp 2d 999 (ND Cal, 2007).
5. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Initial Regulatory Flexibility Analysis, 73 FR 15944-55 (March 26, 2008).
6. DHS Press Release: DHS Issues Supplemental Proposed Rule With Employer Guidance Regarding No-Match Letters (March 21, 2008).
7. 73 FR 63843-01 (October 28, 2008).
8. Inflation Adjustment for Civil Monetary Penalties Under Section 274A, 274B and 274C of the INA, 73 FR 101130-01 (February 26, 2008).
9. Illegal Immigration Reform and Immigrant Responsibility Act, Division C of the Omnibus Appropriations Act, PL 104-208, 110 Stat 3009.
10. Exec Order 13465. See also 73 FR 33285–33286 (June 11, 2008). On December 23, 2008, the U.S. Chamber of Commerce filed a lawsuit in the U.S. District Court for the District of Maryland seeking declaratory and injunctive relief from regulations promulgated by the agencies charged with implementing the Executive Order.
11. Q & As on E-Verify Program Administration and the MOU, AILA InfoNet Doc 08061761 (June 16, 2008).
12. See 8 CFR 274a *et seq.*
13. 8 USC 1324b(5) and (6).
14. Title VII of the Civil Rights Act, 42 USC 2000e.
15. 1976 PA 453, as amended.
16. PL 99-603, 100 Stat 3359.
17. 28 CFR 44.200.
18. See Statement of OSCs general counsel, 65 No 37 Interpreter Releases 991.
19. 8 USC 1324b(a)(2) and (4).