

Intersection of Immigration and Employment Law

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New Challenges for Labor, Management, and Immigrant Workers

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Noncitizens

- Lawful Permanent Residents
- Nonimmigrant Workers
- Employment Authorized Workers
- Undocumented Workers

Lawful Permanent Resident

- Green Card
- Protected same as U.S. citizen except:
 - Citizenship discrimination if no timely application for naturalization
 - Subject to Removal

Nonimmigrant Worker

- Employer Petition-Based Work Authorization
- H-1B, L-1, O-1, E-3 etc.
- Requests for Evidence, Interviews
- Worksite Visits (increasing)

Nonimmigrant Workers with LCA

- H-1B / H-1B1 / E-3
- Labor Condition Application
- DOL specific remedies
- Backpay, civil penalties, debarment
- Repayment Agreements

Employment Authorized Worker

- Employment Authorization Document (“EAD card”)
- Status varies, e.g.
 - Temporary Protected Status
 - Withholding of Removal
 - Adjustment of Status Applicant

Undocumented Worker

- Not yet documented
- May be eligible to receive work permission or a green card, e.g.
 - U and T visas and Deferred Action
 - Cancellation of Removal and Asylum

Victims of Crime and Trafficking

- T visa for victims of severe trafficking
- U visa for victims of criminal activity
 - Includes victims of unprosecuted crimes including sexual assault, abusive sexual contact, false imprisonment, etc.

Cancellation of Removal

- Immigration Judge Can Grant Green Card
- 10 years physical presence
- Exceptional and Extremely Unusual Hardship to USC/LPR spouse, parent child
- Good Moral Character

Employment Laws and Application

- Employment Laws Apply Regardless of Status
- FLSA, OSHA, and Title VII applicable regardless of status, e.g.
 - Decision to fire for status pretextual

Employment Law Remedies

- Remedies may be limited
- *Hoffman* limits undocumented from backpay and reinstatement
- Key is being “available” for work
- Consider avenues for gaining permit

Discovery of Immigration Status

- Immigration Status not relevant:
 - Where no backpay or reinstatement requested
 - To FLSA claim for underpayment for work performed

Enforcement Actions

- ICE, DOL, NLRB and EEOC MOU
- ICE will not conduct enforcement actions during labor dispute
- Some exceptions

New Era of Enforcement Actions

- ICE February 2017 Memo
- ICE Enforcement Actions in Courthouses
- Chilling effect on claims
- Collateral arrests

Immigration Related Unfair Employment Practices

- INA 274B prohibits national origin or citizenship status
- Prohibits unfair documentary practices during the I-9 process
- Prohibits retaliation or intimidation

Immigration Related Unfair Employment Practices

- Office of Special Counsel
- Most common violations are with Lawful Permanent Residents
- Requiring more or different documents than presented

I-9 Verification

- Be consistent
 - Copy for All or None
- To E-Verify or Not
- No Match Letters – Act but Don't Fire
- Actual Knowledge – Terminate

Suggestions for Employers

- Communicate
- Treat Workers Equally
- Provide Reasonable Time to Reverify
- Compensate for Time Worked
- Consider Impact of Dishonesty Policy

Suggestions for Employees

- Do Not Panic
- Right to Remain Silent
- Request Notification in Writing
- Present Valid or Updated Documents
- Seek immigration counsel

QUESTIONS?

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