

WICHITA BAR ASSOCIATION CLE

# IMMIGRATION ISSUES IN BUSINESS & EMPLOYMENT LAW

Presented by Mira Mdivani

**THE MDIVANI LAW FIRM LLC**  
immigration law practice

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June 4, 2004

# IMMIGRATION ISSUES IN BUSINESS & EMPLOYMENT LAW

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*Immigration is a mystery and a mastery of obfuscation, and  
the lawyers who can figure it out are worth their weight in gold.<sup>2</sup>*

## Table of Contents

### I. Introduction

### II. Exposure to Civil and Criminal Liability for “Knowingly” Hiring Undocumented Workers and Use of RICO to Attack Businesses

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<sup>1</sup> A member of the American Immigration Lawyers Association, Attorney Mira Mdivani emphasizes the use of immigration law for the benefit of businesses and individuals by making it a part of an overall business development and risk management strategy. Her areas of expertise include employers’ immigration law compliance plans, I-9 audits, management and HR training on immigration issues, work visas for executives, managers, professionals and essential workers, employment-based permanent residency, and immigration-related issues raised in the context of corporate changes. In addition, she advises families with immigrant members on the issues of permanent residency and naturalization. Ms. Mdivani is a member of Kansas and Missouri Bars. Ms. Mdivani has been invited to present on business immigration law issues by the Kansas City Metropolitan Bar Association, Kansas Bar Association, Kansas Women Attorneys Association, and the National Business Institute. Ms. Mdivani is a recognized expert often quoted in the media when immigration law and policy are addressed. Ms. Mdivani chairs the Pro Bono Service Committee of the Missouri-Kansas Chapter of the American Immigration Lawyers Association. She serves on the Board of Directors of The Association for Women Lawyers of Greater Kansas City.

<sup>2</sup>Washington Post, April 25, 2001, quoting the INS spokeswoman Karen Kraushaar.

## Immigration Issues for Employers

By: Mira Mdivani

www.uslegalimmigration.com

June 4, 2004

A. What is the offense? “Knowingly” hiring workers not authorized to work in the United States

B. “Knowingly” includes “constructive” knowledge, e.g. turning a blind eye

C. The Issues of Contractors: employers may be held liable under RICO for contractor’s failure to comply with immigration law (“they are not my workers defense no longer available”)

D. Further Use of RICO – Recent Case Law

E. Note on Employment/Labor Rights and Unfair Immigration-Related Employment Practices

III. Social Security Mismatch Letters - “Constructive Knowledge?”

IV. Tax Reporting Violations - “Constructive Knowledge?”

V. Solution: Company Immigration Compliance Plans

A. A Four-Part Plan Example

1. Annual I-9 Audits

2. Executive, Management and HR Training

a. Who is authorized to work in the US

b. How to fill and update I-9s

c. How to use existing work visas to address labor shortages

d. Immigration compliance in mergers & acquisitions

3. “Tickler” system to re-verify employment authorization if time-limited

4. Revision of agreements with contractors to protect businesses from liability for contractor’s possible violations of immigration law

VI. Conclusion

## I. Introduction

Immigration law is a two-edged sword: it may be the key to a business' success and survival<sup>3</sup>, or it may bring the business and its owners to their knees.<sup>4</sup>

To some businesses, immigration law may appear to be irrelevant and remote (“We do not sponsor any foreign workers.”) It may also appear relatively simple, (“It is just filling out the forms.”) However, to business immigration lawyers who practice in this area on a daily basis, it is apparent that nothing can be further from the truth. The following example, given with all due respect to our Supreme Court, demonstrates how even the highest court of this land, when faced with an immigration issue, does not exactly “nail” it:

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<sup>3</sup>A case on point is the shortage of nurses in United States: many hospitals are struggling to recruit enough qualified nurses to take care of their patients. A study published in the May 2002 issue of *New England Journal of Medicine* determined that when the ratio of nurses to patients was low, death rates were 2.5 times higher than in hospitals where the nurse-to-patient ratio was high. The American Nursing Association currently estimates that approximately 126,000 nursing jobs are vacant in the United States. Rather than put up with the increased risk of death to their patients, many hospitals seek to obtain immigrant visas for qualified foreign nurses to address this catastrophic shortage.

<sup>4</sup>*Administrator, Wage & Hour Division v. Mohan Kutty, M.D. et al*, Case Nos 2001-LCA-00010 to 00025 (Oct. 9, 2002). In that case, a physician business owner who sponsored temporary H-1B work visas for foreign physicians, was ordered to pay over one million dollars in back pay to the workers and in penalties for violations of immigration law. Note two interesting facts: (1) the employer had an in-house lawyer who failed to make sure that the company complied with the law; and (2) a very good immigration lawyer retained by one of the foreign physicians to work on his H-1B visa, advised the company, in writing, out of the pure kindness of his heart, of the need to comply with the law. The employer disregarded this advice. The court not only found the business liable, but in addition, pierced the corporate veil and made the business owner personally responsible for damages in the amount of \$1,000,000.00 in this case.

## Immigration Issues for Employers

By: Mira Mdivani

www.uslegalimmigration.com

June 4, 2004

*On the final day of the hearing, Castro testified that he was born in Mexico and that he had never been legally admitted to, or authorized to work in, the United States...Neither Castro nor the Board's General Counsel offered any evidence that Castro had applied or intended to apply for legal authorization to work in the United States. Based on this testimony, the ALJ [administrative law judge] found the Board precluded from awarding Castro back pay or reinstatement...<sup>5</sup> (Emphasis added).*

Obviously our Chief Justice thinks that there exists a legal process through which the undocumented worker in this case could have applied for legal authorization to work in the United States. Based on logic and intuition, the needs of our economy and our country's respect for the law, there should be such a process, right? Well, in this particular case, like in many others, our law simply does not provide any legal way for such workers to "apply for legal authorization." This is a problem for both workers and businesses. In his January 7, 2004 speech, President Bush acknowledged that our immigration law fails to provide what is necessary to resolve the issue of legal employment of foreign workers for jobs not filled by U.S. workers. He also proposed a guest worker program. Such a program would allow workers to step out of the shadows and become work-authorized through temporary visas, and will allow U.S. businesses to legally employ necessary workers without fear of going to jail or forfeiting their assets. It is, however, unclear whether the President's proposals will ever become law, and what shape it will take. Meanwhile, we must advise our clients on how to comply with existing immigration law while addressing their labor shortages in the atmosphere of increased anti-immigrant sentiments and immigration enforcement.

If our Supreme Court Chief Justice failed to grasp the extent to which our immigration law fails both employees and employers, what can possibly be expected of employers whose primary focus is not necessarily on studying the "quaking quagmires" of immigration law? It is unfortunate that neither the Chief Justice nor his clerks found it necessary to consult with an immigration lawyer while writing this truly amazing opinion. However, this option is always open to lawyers advising employers as well as executives, managers, and HR personnel whose freedom and livelihood is on the line because frustrated government officials, together with anti-immigrant activists, use Racketeering and Influenced Organization Act (RICO) to go after U.S. businesses in an attempt to "clear" this country of undocumented immigrants.

## II. Exposure to Civil and Criminal Liability for "Knowingly" Hiring Undocumented Workers and Use of RICO to Attack Businesses

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<sup>5</sup>*Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 2 (2002).

**A. What is the offense?**  
**“Knowingly” hiring workers not authorized to work in the United States**

The Immigration Reform and Control Act (IRCA)<sup>6</sup> makes it illegal for an employer to hire, recruit or refer for a fee someone not authorized to work in the United States.<sup>7</sup> The statute covers employers who are natural persons and business entities.<sup>8</sup> Successor employers who retain a predecessor’s employees are either responsible for executing new I-9s or are liable for predecessor’s failure to complete or defective completion of I-9s.<sup>9</sup> An employer violates the Immigration and Naturalization Act when:

- (i) It employs an alien knowing that the alien is not authorized to be employed under the Immigration and Naturalization Act or by Attorney General.<sup>10</sup>
- (ii) It continues to employ an alien knowing that the alien has become unauthorized.

Where the employer is informed that the employee is or may be unauthorized to work by the government, it must inquire further because it is on constructive notice of unlawful employment.<sup>11</sup> **Actual knowledge is not required, the “should have known” standard is applied where the employer fails to verify and re-verify the employee’s status to determine**

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<sup>6</sup>Immigration and Naturalization Act § 274A.

<sup>7</sup>8 USC § 1324a, INA § 274(a)(1).

<sup>8</sup>8 CFR § 274a1(g). Employer also includes “an agent or anyone acting directly or indirectly in the interest” of the person or entity who “engages the services or labor of an employee... for wages or other remuneration.” The regulation was upheld in *U.S. v. Wrangler County Café*, 1 OCAHO 138 (Mar 6, 1990), *aff’d sub nom., Steiben v. INS*, 932 F.2d 1225 (8th Cir. 1991), where the owner of the corporation unsuccessfully sought dismissal of himself because his corporation was a defendant.

<sup>9</sup>Ira J. Kurzban, *Immigration Law Sourcebook*, 7<sup>th</sup> edition, at 694.

<sup>10</sup>INA §§ 274A(a)(1)(A) and (h)(3), 8 USC §§ 1324a(a)(1)(A), (h)(3).

<sup>11</sup>*Mester Mfg. Co. v. INS*, 879 F.2d 561, 566-67 (9th Cir. 1989).

## Immigration Issues for Employers

By: Mira Mdivani

www.uslegalimmigration.com

June 4, 2004

**the continuing validity of the employee's employment authorization.**<sup>12</sup> The applicable government regulation adopts a broad view in its definition of "knowing" as including "not only actual knowledge, but also knowledge which may be fairly inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition."<sup>13</sup> **Under INS regulations, knowledge may be inferred where the employer fails to complete or improperly completes an I-9; has information available to it that the indicated employee is not authorized to work; or acts with reckless disregard by permitting another individual to introduce unauthorized workers to the work force.**<sup>14</sup> However, knowledge cannot be inferred from an employee's foreign appearance or accent.<sup>15</sup>

(iii)The Immigration and Nationality Act is violated where the employer fails to comply with the IRCA-imposed verification system.<sup>16</sup>

Under IRCA, the employer must attest under penalty of perjury on INS Form I-9 that an employee produced either documents establishing both employment authorization and identity or separate documents showing employment authorization and establishing identity. It is the employer, and not the employee, who is liable for any defects in the completion of section 1 and defects in the completion and accuracy of section 2 of Form I-9.<sup>17</sup> The examination and verification of documents should take place within three days of the hiring date.<sup>18</sup> While demanding compliance, IRCA at the same time prohibits the employer from requiring or specifying which documents an individual is to present. This would constitute a violation of the Unfair Immigration Employment Practices provision.<sup>19</sup> Employers must retain I-9s for three

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<sup>12</sup>*U.S. v. Buckingham Limited Partnership*, 1 OCAHO 151 (Apr. 6, 1990).

<sup>13</sup>8 CFR § 274a.(1)(1).

<sup>14</sup>*Id.*

<sup>15</sup>8 CFR § 274a.1(1)(2).

<sup>16</sup>INA § 274A(a)(1)(B), 8 USC § 1324a(a)(1)(B).

<sup>17</sup>*Mester Mfg. Co. v. INS*, 879 F.2d 561, (9th Cir. 1989).

<sup>18</sup>8 CFR § 274a.2(b)(1)(i).

<sup>19</sup>INA § 274B(a)(6), 8 CFR § 1324(b)(a)(6).

## Immigration Issues for Employers

By: Mira Mdivani

www.uslegalimmigration.com

June 4, 2004

years after the date of hiring or referral or one year after the worker's employment is terminated, whichever is later. If a worker's employment authorization expires or the INS informs the employer that the authorization is not sufficient, the employer must re-verify the I-9 or be on notice that the person is not eligible for employment.<sup>20</sup> It is important to note that false attestations on Form I-9 are a separate criminal offense.<sup>21</sup> In addition, it may be treated as a crime of misrepresentation to federal officers.<sup>22</sup>

### Civil Penalties for I-9 Violations

Civil penalties under IRCA for employing an unauthorized alien (excluding I-9 paperwork violations) include:

First offense: \$275.00 to \$2,220.00 for **each** alien;

Second offense: \$2,200.00 to \$5,500.00 for **each** alien;

Subsequent offenses: \$3,300.00 to \$11,000.00 for **each** alien.<sup>23</sup>

In addition, fines may be imposed for I-9 paperwork violations, i.e. failure to fill out and maintain I-9s correctly, in the amounts of \$110.00 to \$1,100.00 for **each** I-9 form.

### **B. "Knowingly" Includes "Constructive Knowledge"**

Defenses and mitigating circumstances may include: the size of the employer, good faith of the employer, seriousness of the violation, employee in fact being authorized to work, and any history of previous violations by the same employer.<sup>24</sup> Please contrast this with the INS

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<sup>20</sup>8 CFR § 274a.2(b)(1)(vii).

<sup>21</sup>18 USC § 1546(b).

<sup>22</sup>18 USC § 1001.

<sup>23</sup>INA § 274A(e)(4); 28 CFR § 68.52.

<sup>24</sup>INA § 274A(e)(5), 8 CFR § 274a.10(b)(2); *U.S. v. Felipe, Inc.* (For the good faith defense, it is necessary to demonstrate "honest intention to exercise reasonable care and diligence to ascertain what IRCA requires and to act in accordance with it.") See also, *U.S. v. Great Bend*

## Immigration Issues for Employers

By: Mira Mdivani

www.uslegalimmigration.com

June 4, 2004

regulation described above and understand that “good faith” does not equal “turning a blind eye,” i.e. **Actual knowledge of unauthorized employment is not required, the “should have known” standard is applied where the employer fails to verify and re-verify the employee’s status to determine the continuing validity of the employee’s employment authorization.<sup>25</sup> The applicable government regulation adopts a broad view in its definition of “knowing” as including “not only actual knowledge, but also knowledge which may be fairly inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition.”<sup>26</sup> Under INS regulation, “knowledge may be inferred where the employer fails to complete or improperly completes an I-9; has information available to it that the indicated employee is not authorized to work; or acts with reckless disregard by permitting another individual to introduce unauthorized workers to the work force.”<sup>27</sup>**

In addition, businesses should be aware that a federal contractor may lose its right to do business with the federal government for IRCA violations under Executive Order 12989 (Feb. 13, 1996).

### Employers’ Criminal Liability

Criminal penalties, including up to \$3,000 and/or six months in jail, may be imposed under 8 CFR § 274a.10 if a “pattern and practice” of IRCA violations is found.<sup>28</sup> It is also a criminal offense, under 8 USC § 1325a(a)(3)(A), carrying a penalty of up to five years in jail for “any

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*Packing Co., Inc.*, 6 OCAHO 835 (Feb. 13, 1996) (“Good faith is determined by the company’s actions at the time of the violations and not willingness to cooperate subsequent to investigation.” (Emphasis added). *Id.* at 6.

<sup>25</sup>*U.S. v. Buckingham Limited Partnership*, 1 OCAHO 151 (Apr. 6, 1990).

<sup>26</sup>8 CFR § 274a.(1)(1).

<sup>27</sup>*Id.*

<sup>28</sup>See, *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867 (1984); *U.S. v. Mayton*, 335 F.2d 153 (5th Cir. 1964); *U.S. v. DavCo Food, Inc.*, Case No. 88-00253-A (E.D. Va. 1988) (charged with pattern and practice where seventeen employees were arrested in two of 106 Wendy’s restaurants owned by the company); *U.S. v. Chauvin*, Case No. 88000236-A (E.D. Va. Oct. 4, 1988) (charging company officials under 18 USC § 1546(b) and the attorney, based on strict liability theory of INA § 210(b)(7)(A)(ii)).

## Immigration Issues for Employers

By: Mira Mdivani

[www.uslegalimmigration.com](http://www.uslegalimmigration.com)

June 4, 2004

person who during a twelve month period knowingly hires for employment at least ten individuals with actual knowledge” that these individuals are not authorized to work and where such individuals were brought to the U.S. in violation of 18 U.S.C. §1324. These laws were used by the Department of Justice to file a federal suit in the U.S. District Court for the Eastern District of Tennessee against Tyson Foods, Inc., the world’s largest producer of poultry products, for alleged participation in a scheme to smuggle and employ illegal aliens. In December of 2001, the charges resulted in the Grand Jury’s thirty-six count indictment against the company’s executives and managers.<sup>29</sup> INS Commissioner James Ziglar said in the Department of Justice Release on December 19, 2001:

*“This case represents the first time INS has taken action against a company of Tyson’s magnitude. INS means business and companies, regardless of size, are on notice that the INS is committed to enforcing compliance with immigration laws...”*

Eventually, some of the accused in this case pleaded guilty in return for light sentences and testified against their interests and against the company. However, the jury in this case acquitted both the company and the remaining defendants. I guess the government did not argue a persuasive case and the jury decided that they would rather have undocumented workers cut their chicken than have no chicken or awfully expensive chicken.

Who was the next big target chosen by the government? In October 2004, the ICE (Immigration’s Enforcement Hand) raided Wal-Mart stores in several states and arrested over 200 undocumented workers. In an expected scenario, the government then raided Wal-Mart’s headquarters and removed boxes of documents from its offices. The federal indictment for violations of IRCA and RICO followed several weeks later, and, of course, a civil class action by the company’s workers followed very shortly. This is all happening while Wal-Mart said that it had no knowledge of the violations, and that the arrested undocumented workers were not employed by the company, but were in fact, a contractor’s employees. Let us look at the law

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<sup>29</sup>In addition to charging Tyson Foods, Inc., the indictment included two corporate executives, a former Human Resources manager, and several other former managers of the company. U.S. Department of Justice, Press Release # 654 (December 19, 2001). Tyson Foods vigorously denied the charges. On April 20, 2002, The New York Times reported that one of the former Tyson Foods managers, thirty-six year-old Jimmy Roland, who was freed on \$100,000 bond, was found with a gunshot wound in his chest. A suicide is suspected. Mr. Rowland was to stand trial in February of 2003. He was allegedly told by prosecutors that his maximum possible sentence would be 395 years in prison.

Immigration Issues for Employers  
By: Mira Mdivani  
www.uslegalimmigration.com  
June 4, 2004

that made this mess possible.

**Civil Liability for Substantive Violations: Use of RICO in Class Action Law Suits Against Employers - The Commercial Cleaning Case**

The Second Circuit Federal Court of Appeal's recent decision in *Commercial Cleaning Services, L.L.C v. Colin Service Systems, Inc.*<sup>30</sup> may have opened the door to a new kind of liability, i.e. treble damages under RICO for "knowingly" employing workers who are not authorized to work in the United States. Commercial Cleaning Services, L.L.C. ("Commercial"), a small cleaning services company, together with similar firms, filed a class action law suit against Colin Service Systems, Inc. ("Colin"), one of the nation's largest corporations engaged in the business of cleaning commercial facilities. The class action complaint alleged that Commercial and the members of the plaintiff class are victims of Colin's pattern of racketeering activity in violation of 18 USC § 1962(c), referred to as the "illegal immigrant hiring scheme." The theory of the case was that Colin obtained a significant business advantage over the firms in the "highly competitive" and price-sensitive cleaning service industry by hiring "hundreds of illegal immigrants at low wages." The complaint alleged that Commercial lost its lucrative cleaning contract with Pratt & Whitney because of Colin's illegal immigrant hiring scheme. The complaint referred to the hiring of at least one hundred and fifty undocumented workers, continuing to employ aliens after their work authorization had expired, and failing to prepare, complete, and update employment documents. The allegations asserted that Colin was part of an enterprise composed of entities associated-in-fact that included employment placement services, labor contractors, newspapers in which Colin advertised for laborers, and others. The complaint alleged that Colin's participation in the enterprise through the illegal immigrant hiring scheme violated 8 USC § 1324(a), which prohibits hiring certain undocumented aliens, and which is a RICO predicate offense if committed for financial gain.

The Second Circuit reversed the lower court's decision to dismiss the claim and allowed the class action to go forward. The Second Circuit found that Commercial was directly injured by Colin's unlawful hiring scheme.<sup>31</sup> If successful on remand, Commercial Cleaning could recover damages of three times its actual losses under RICO's civil remedy provision, in addition to having stopped the alleged unlawful activity. The decision may have an impact beyond a competitor's use of illegal aliens. RICO applies to any party that has maintained an enterprise and caused injury through a pattern of racketeering activity. A pattern of racketeering can involve repeated

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<sup>30</sup>271 F.3d 374 (2001).

<sup>31</sup> *Id.* at 381.

## Immigration Issues for Employers

By: Mira Mdivani

[www.uslegalimmigration.com](http://www.uslegalimmigration.com)

June 4, 2004

violation of a long list of federal laws, including mail and wire fraud. As a result, the *Commercial Cleaning* decision may provide additional grounds for civil and criminal liability.<sup>32</sup>

### **C. The Issue of Contractors: Employer's RICO-Based Liability for Its Contractor's Failure to Comply with Immigration Law, *Mendoza v. Zirkle Fruit Company Case***

Until now, the Second Circuit was the only appellate court to have considered allegations of illegal immigrant hiring as a predicate offense for standing to sue under RICO. In June of 2002, as part of a CLE presentation for the Kansas City Metropolitan Bar Association, I predicted that *Commercial Cleaning* was a ticking bomb, and that we would hear about this case soon. The *Mendoza v. Zirkle Fruit Co.* decision was released for publication on September 3, 2002.<sup>33</sup> In that case, the Ninth Circuit, citing *Commercial Cleaning*, predictably held that allegations of illegal immigrant hiring may serve as a predicate offense for a RICO claim, under a set of facts that must serve as a wake-up call to all employers.

Washington State's apple growing industry generates over \$1 billion a year. There are more than 30,000 orchard pickers and 15,000 fruit packers who work in the apple orchards every year.

The Immigration and Naturalization Service conducted investigations finding that as much as half the growers' workforce is employed illegally.<sup>34</sup> The *Mendoza v. Zirkle Fruit Co.* complaint alleged that fruit growers, Zirkle Fruit Company and Matson Fruit Company, had knowledge of illegal harboring and/or smuggling of undocumented workers. According to the complaint, the illegal scheme was facilitated by Selective Employment Agency, Inc., a separate company that employed the illegal workers. It is important to note that the U.S. workers did not sue the employment agency, but went directly after their own employers. The court held that knowledge of illegal employment alone was sufficient to allege the predicate act of knowingly hiring undocumented workers, as required to state a claim under RICO. This point cannot be emphasized enough: a company may be found liable not only for hiring or continuing to employ unauthorized workers, but under *Mendoza*, may be found liable if the company knowingly uses somebody else's unauthorized workers.

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<sup>32</sup> Frederick D. Braid, *United States: Second Circuit Allows RICO Claim Against Competitor Using Illegal Aliens* (April 2002), [www.mondaq.com](http://www.mondaq.com) (providing a detailed summary and analysis of the court's decision in *Commercial Cleaning*).

<sup>33</sup> *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (2002).

<sup>34</sup> *Id.*

## Immigration Issues for Employers

By: Mira Mdivani

www.uslegalimmigration.com

June 4, 2004

Note on whether the private use of RICO to sue businesses for alleged violations of immigration law will stand: on February 4, 2004, the Court of Appeals for the Seventh Circuit in *Baker v. IBP*<sup>35</sup> held that a RICO claim will not be allowed where plaintiff U.S. legal workers alleged that the company should pay them treble damages under RICO. Plaintiffs in that case alleged that their wages were depressed because their employer hired undocumented workers.<sup>36</sup>

### **D. Further Use of RICO - Recent Case Law**

On April 12, 2004, the U.S. District Court for the Northern District of Georgia handed down its decision on a motion to dismiss a RICO-based class action in *Williams v. Mahawk Industries*.<sup>37</sup> Based on allegations by current and former employees of Mahawk Industries that the company knowingly hired illegal workers and violated federal and state RICO laws, the court followed the *Commercial Cleaning* and *Mendoza* cases discussed above and allowed yet another class action of this kind to go forward, despite a positive ruling in the *IPB* case, which came down just a month earlier.

### **E. Note on Employment/Labor Rights and Unfair Immigration-Related Employment Practices**

The law in this area is rapidly changing, mostly toward limiting unauthorized aliens' employment/labor rights previously available to them under federal law. See *Hoffman Plastics, supra*. However, the statute prohibiting immigration-related discriminatory employment practices,<sup>38</sup> which protects citizens and nationals of the United States, legal permanent residents, and refugees and asylees,<sup>39</sup> is still a powerful tool in the hands of aggrieved employees and job applicants who are authorized to work in the United States. The statute prohibits discrimination

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<sup>35</sup> *Deborah Baker and Richard Eneyart v. IBP, Inc.*, Nos 02-3967 & 02-4065 (7<sup>th</sup> Cir. Feb 4, 2004).

<sup>36</sup> *Id.*

<sup>37</sup> 2004 U.S. Dist. LEXIS 7374.

<sup>38</sup> INA § 274B, 8 USC § 1324b.

<sup>39</sup> Legal permanent residents, asylees, temporary residents are covered only if they apply for naturalization within six months of eligibility and become naturalized within two years, or are actively pursuing citizenship. INA § 274B(a)(3).

## Immigration Issues for Employers

By: Mira Mdivani

www.uslegalimmigration.com

June 4, 2004

against an employee because of national origin or citizenship in hiring, recruitment, referral or discharge. Those who file charges or assert rights under the Act are given protection from intimidation. The Act also covers “document abuse” where the employer in seeking to comply with I-9 requirements, asks for more or different documents than required, or refuses to accept documents which appear genuine on their face.<sup>40</sup>

### **III. Social Security Mismatch Letters - “Constructive Knowledge”?**

Is the employer on “constructive notice” if a mismatch letter arrives from the Social Security Administration? If the employer chooses to do nothing about the letter, “constructive” knowledge may be implied, which may lead to civil and criminal liability described above. Obviously, the employer must do something about each mismatch letter it receives. May the employer presume upon receiving the SSN mismatch letter that the worker is not authorized to work in the United States? Absolutely not. However, the employer must act on it in order to avoid the “constructive notice” situation. The employer’s action should be reasonable, such as letting the employee in question know that there may be an error in the Social Security Administration’s records and allowing sufficient time for the worker to contact the agency to correct the mistake. If the worker brings back information or documents which appear to satisfy I-9 document requirements, the I-9 needs to be properly updated with new information and signed and initialed by the worker and the employer’s representative. Each company should have on file procedures on how to handle mismatch letters bearing in mind both compliance with immigration law and prohibition to discriminate based on ethnicity or national origin. Often, it is the SSN mismatch letters that cause businesses to create and implement their immigration compliance plans.

### **IV. Tax Reporting Mismatch Letters - “Constructive Knowledge”?**

If a business receives a mismatch letter from the Internal Revenue Service (IRS), the INS-imposed penalty is relatively minimal. However, the mismatch letters, if not acted upon, may serve as evidence that the company is on “constructive notice” of possible violations of the immigration law, thereby triggering civil and criminal immigration-based liability.

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<sup>40</sup> INA § 274B(a)(6), see also, *U.S. v. Strano*, 5 OCAHO 748 (Mar 28, 1995) (fine in excess of \$100,000), and *U.S. v. Lasa Marketing Firms*, 1 OCAHO 106 (Nov. 27, 1989) (finding that knowing discrimination includes failure to exercise reasonable care to acquire knowledge of legal significance of immigration-related employment documents and to conduct employment practices in a fair and consistent manner).

## V. Solutions: Company Immigration Compliance Plans

If a business wants to protect itself from immigration-based liability, it must have a comprehensive immigration law compliance plan. Depending on the specific issues facing the company, such a plan should incorporate a minimum of four elements:

### A. A Four-Part Immigration Compliance Plan Example

#### 1. Recurrent I-9 Audits

We usually begin with a representative sample of randomly selected I-9s. The I-9 audit helps address several issues:

##### a. Penalties for Paperwork Violations

If I-9 paperwork violations are found, 100% of such violations may be addressed through appropriately recorded corrections or execution of new I-9s. This addresses the issue of the company's exposure to penalties of up to \$1,100 per I-9 Form;

##### b. Civil and Criminal Liability

The I-9 audit also shows whether the company follows appropriate procedures to record whether its workers are in fact authorized to work in the U.S. The purpose of I-9 audits goes to the heart of protecting the business from civil and criminal liability under IRCA and RICO. In addition, the mere fact that the I-9 audit targeted at immigration law compliance takes place, is significant if the company is attacked for alleged immigration law violations as proof of its good faith effort to comply with immigration law. Timing (before and not after the company is attacked) and the recurrent nature of the I-9 audits makes them successful risk management tools.

##### c. Discrimination Concerns

In its urge to comply with immigration law, a company begins an I-9 audit. The company appears to ask for more documents and keeps copies of documents presented only for employees with certain names, e.g. Hispanic-sounding ones. Employment discrimination issue? Yes - and another obvious benefit of an I-9 audit, making sure I-9 policies are applied uniformly to all employees, in order to reduce liability based on ethnic and national origin discrimination.

## Immigration Issues for Employers

By: Mira Mdivani

www.uslegalimmigration.com

June 4, 2004

### 2.Executive, Management and HR Immigration Law Training

#### a.How to fill and update I-9s

The “rocket science” of filling, updating, and keeping I-9s should be the subject of, at least, annual training sessions involving everyone within the company who signs them on behalf of the company, as well as those who may be ultimately responsible if paperwork or substantive violations occur, i.e. executives and management. The best timing for such training is right after an I-9 audit.

#### b.Training re. Who is Authorized to Work in the United States

Under current policy (which may change tomorrow, that is why recurrent training of the company personnel on this issue is important), the following categories of workers are authorized to be employed in the United States: US citizens and legal permanent residents (“green card holders”) are authorized to work in the United States automatically. All other workers must either have an employment authorization document (EAD) or must be in a valid nonimmigrant status authorizing their work. Several types of aliens are eligible to apply for an EAD, including applicants for adjustment of status,<sup>41</sup> college graduates working under optional practical training, applicants for asylum, asylees, those eligible for Temporary Protected Status, applicants for withholding of deportation, fiancé(e)s of U.S. citizens, spouses of L-1s, Es, and A-1s. Employment authorization issued to applicants in these categories may be used for employment without restriction. A separate work authorization is not needed for the following visa holders: A-3, E-1, E-2, G-5, H-1, H-2, H-3 (training only), I, J-1, L-1, O-1, O-2, P-1, P-2, P-3, R, TNs. Holders of these visas are authorized to work until the date of expiration of their I-94 and in some cases, even after the I-94 expiration as long as application to extend the same work status is pending. In most cases, they are authorized to work only for the employer who filed their non-immigrant visa petition.<sup>42</sup> If

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<sup>41</sup>Applicants for adjustment of status who are in H-1B or L-1 status at the time of application may continue to work without employment authorization documents as long as H-1 or L status are valid.

<sup>42</sup>An exception to this rule has been introduced by the American Competitiveness in the 21<sup>st</sup> Century Act. H-1B workers are authorized to work for a new employer without having to wait for the decision from the INS as soon as the new employer files a non-frivolous petition for H-1B classification and extension of status for a worker who has previously held an H-1B visa and is in a valid non-immigrant status at the time of filing.

## Immigration Issues for Employers

By: Mira Mdivani

www.uslegalimmigration.com

June 4, 2004

the application to extend status is filed in a timely fashion, and is requested in order to work for the same employer, the employee's permission to work is extended for at least 240 days.<sup>43</sup>

Employment authorization eligibility is subject to constant tinkering by Congress and the USCIS. While it is difficult to keep up with all the changes, it is important to understand the law in order to avoid liability under RICO and IRCA, while at the same ensuring that anti-discrimination laws are not violated.

### c. Training re. How to Use Existing Visas to Address Labor Shortages

Companies should be aware of existing temporary work visas such as H-1B, H-2B, H-2A, L-1 and employment-based green cards. While these categories are restrictive, with enough planning they can address labor shortages in certain fields, and executives, management and HR professionals should do their best to use existing legal options for the employment of foreign workers. In many cases, no temporary work visa category is available, and the employer's only option is to sponsor a green card for an intended worker, which many employers are reluctant to do without first having the worker demonstrate whether he or she is qualified and a good fit for the company. President Bush's guest worker program was unveiled on January 7, 2004, if it becomes law, it may provide a solution to this and many other immigration-related problems for employers and foreign workers.

Training of HR personnel and other executives and management is essential in one other respect.

I know of a company which would not hire anyone who is not a U.S. citizen or a permanent resident ("green card" holder). That is, it does not mind having work visa holders work on their premises as long as the company does not have to deal with sponsoring their visas or green cards. That sounds like a good solution, right? Well, that certainly makes the lives of HR professionals at that company somewhat easier, but it also translates into the company unnecessarily wasting money. The company has approximately 300 computer programmers who are employed by contractors. Most of them are in H-1B professional work status. The company pays the contractor employer \$65.00 per billable hour for those contractors. The prevailing wage for such workers is approximately \$35.00 per hour. If the company hired these workers directly in H-1B status, it would have saved ***\$18,720,000.00 per year.*** The company says, "We do not want to get involved in sponsoring H-1Bs, but we will hire these workers as soon as they get their green cards sponsored by our contractor, their employer." The company is unaware of a recent law which allows workers to switch to a new employer within six months of filing for their green card, under certain conditions. Had the company's immigration compliance plan included annual training on

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<sup>43</sup> 8 CFR § 274a.12.(b)(20).

## Immigration Issues for Employers

By: Mira Mdivani

www.uslegalimmigration.com

June 4, 2004

such issues, the company could have transferred the workers on their payroll with an USCIS work authorization card much sooner. But because they “do not have any immigration problems” and they feel that they do not need a lawyer advising them on immigration issues, they continue to contract for the three hundred H-1B workers, for the six year statutorily allowable period of their visas. Losses? They have lost *\$112,320,000 (One Hundred Twelve Million Three Hundred Twenty Thousand U.S. Dollars) over the past six years due to lack on knowledge of how the non-immigrant visas work.*

### d. Training re. Immigration Compliance in Mergers & Acquisitions

Let us look at a simple business reorganization case. Let us imagine that two companies agree to merge. All appropriate executives and their mergers and acquisition lawyers are busy working on this exciting deal, those responsible for due diligence are checking on whether there are any “loose ends” in terms of professional visa compliance or any unauthorized employment, and they are happy with what they find - all workers are authorized to be employed, including all 240 H-1B professionals (computer programmers, engineers and others employed in H-1B status). I-9s look perfect because the company’s immigration lawyers, in accordance with its business compliance plan, conducted an I-9 audit recently. Even H-1B public access files are appropriately maintained, with all appropriate public access information collected and available for public review. The deal is signed, and then the HR manager casually mentions the merger to an immigration lawyer who represents the company with respect to an H-1B visa the company wants to renew for one of its employees. The immigration lawyer congratulates the HR manager and asks, “How many H-1Bs are coming with the merging company?” “About 240,” answers the HR manager. “Well,” says the immigration lawyer, “I hope that the company’s public access file now contains a sworn statement by a responsible official of the new employing entity stating that it accepts all obligations, liabilities, and undertakings under the LCAs filed by the predecessor employing entity, together with a list of each affected LCA and its date of certification, a description of the actual wage system, and the employment identification number of the new employing entity.” “ And,” says the immigration attorney, “I hope that the sworn statement was placed in the company’s public access file before the merger took place.”<sup>44</sup> “ Huh?” says the HR

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<sup>44</sup>American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), as interpreted by the Department of Labor’s regulations. 65 Fed. Reg. 80232 (December 20, 2000). Under the regulation, which provided some relief from the a heavy burden of re-filing all H-1B in merger cases, the new employing entity must maintain a list of the H-1B non-immigrants transferred to each, and each public access file must maintain (1) a list of effected LCAs and dates of certification; (2) a description of the new employer’s actual wage system applicable to affected H-1B non-immigrants; (3) the EIN of the new employer; (4) a sworn statement by the

## Immigration Issues for Employers

By: Mira Mdivani

[www.uslegalimmigration.com](http://www.uslegalimmigration.com)

June 4, 2004

manager. “No, nobody told me that this should have been done. Why?” “Because,” says the immigration lawyer, “if this was not properly done before the merger took place, the company may have to file new H-1B petitions for all its 240 professional foreign workers. Oh, by the way, because this was not done, they are probably all currently out of status and, consequently, employed illegally. For all practical purposes, this means, the company will have to cut 240 checks for the INS filing fees of \$1,130 each, and will have to bear the additional legal expense for the immigration attorney’s work on 240 new H-1B petitions. The company could easily end up spending \$500,000 to fix what could have been addressed in a one-hour consultation with a knowledgeable immigration lawyer before the merger went through. If spending about \$500,000 will be all it will take, you will be lucky,” says the immigration attorney. “Because, what if the INS decides to go ahead and enforce its current zero-tolerance policy in our case, and deny all the extensions due to the fact that all our H-1B employees are out of status. In that case, all your H-1B workers will have to stop working and take a trip to their respective countries to apply for visas at U.S. Consulates abroad. In some cases, the consulates will refuse their new visas because, depending on how long ago the merger, which triggered the unlawful employment, happened, a three or ten year bar may apply to the workers.”

### 3.A “Tickler” System

A third element of every immigration compliance plan is a “tickler” system. Remember that liability for immigration law violations may arise not only for new employment, but for failure to re-verify employment eligibility when employment authorization expires. A “tickler” system reminding HR personnel to re-verify employment eligibility and record the same on the worker’s I-9 is as important as the initial effort to properly execute and maintain I-9s, and to protect the company from immigration-based liability.

### 4. Revision of Agreements with Contractors

Faced with *Commercial Cleaning* or *Mendoza*-like potential liability for contractors’ failure to comply with immigration law - businesses are strongly advised to revise their contracts to address such liability. It is prudent to include language in contractor agreements where the contractor

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authorized representative of the new employing entity expressly acknowledging such entity’s assumption of all obligations, liabilities and undertakings arising from or made in each certified and still effective LCA filed by the predecessor entity. The new employer must explicitly agree to (1) abide by the DOL H-1B regulations applicable to the LCAs; (2) maintain a copy of the statement in the public access file; and (3) make the document available to any member of the public or the government upon request.

## **Immigration Issues for Employers**

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**June 4, 2004**

certifies that all its workers are authorized to work in the United States, that the contractor has an immigration compliance program, and that if it fails to comply with immigration law, it will indemnify its client for losses caused by such failure.

### **VI. Conclusion**

Immigration law may be a threat for the unwary or a useful business tool for the enlightened. As long as it remains terra incognita for employers, it will continue to loom over their heads, unexpectedly wreaking havoc in the form of civil damages, sanctions and criminal indictments. The bottom line is that the ostrich approach will not work. Businesses are well advised to either educate themselves in all intricacies of business immigration law or seek legal advice regarding vigorous immigration law compliance programs - and ask Congress to change our immigration law to reflect the economic needs of this country.