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The Employment Verification Circus Continues

A circus act featuring a performer displaying her balancing ability is akin to the employment verification process where an employer must attempt to cope with several often-conflicting factors and activities.[1] In this delicate employment verification balancing act, the U.S. Department of Homeland Security (DHS) will fine an employer that does not ask enough of its employees, but simultaneously, an employer that asks too much of its employees will be fined by the U.S. Department of Justice (DOJ), preceded by lengthy and costly agency investigations, some of which have been multiple-year affairs.

Do not be so distracted by all the news coverage of immigration law issues that the basics go by the wayside. The DOJ and DHS are continuing to investigate and fine employers, even those innocently incorrectly completing the employment verification Form I-9 or E-Verify process.

For example, we have been engaged to handle four new such investigations, all initiated by the U.S. government in February and March 2017. The Trump Administration has increased its focus on these investigations.

As a recent case in point, in March 2017, the tribunal charged with hearing these matters, the DOJ's Office of the Chief Administrative Hearing Officer (OCAHO), issued a summary judgment decision that a poultry company had engaged in a pattern or practice of intentional discrimination based on citizenship status via "document abuse." The evidence indicated that all applicants were hired, and there was no evidence of any worker's employment being delayed or obstructed. The company had people assigned to the HR function. In order to do what it believed the law required – to fulfill its responsibility under the penalty of perjury for ensuring all information recorded in Section 1 of Form I-9 was accurate, to see DHS documents for E-Verify, and in some cases to help noncitizens in the process – the company "specified" certain documents be presented from certain employees. The administrative law judge assigned to the case said, in spite of the reasons for doing them, such acts were illegal and were evidence of intentional discrimination. Had the HR

[1] The right to employment is not a laughing matter; even the UN Universal Declaration of Human Rights recognizes it, but without restriction. The U.S. employment verification system is a restrictive system that by design discriminates on the basis of citizenship, national origin, etc.

staff thought that they needed to see certain documents of U.S. citizens and asked for them, there would have been no intentional discrimination.

The government argued and the court agreed that one can commit intentional citizenship discrimination by mistake if it treats people differently. The many reasons the employer presented for its behavior – including trying to help noncitizens in the process, having a mistaken belief that it was required to see such DHS documents for E-Verify, and having a responsibility under penalty of perjury for ensuring all information recorded in Section 1 was accurate – were of no consequence and, in the eyes of the tribunal, were further confirmation that the company had the intent to discriminate. OCAHO concluded that because the documentary requests were made because of the employee's citizenship status, the company had engaged in per se document abuse, hinging its decision on the word "intent." Citing Title VII cases, the court reasoned that "a person has the intent to discriminate if he or she would have acted differently but for the protected characteristic" (i.e., citizenship status). The fact that the non-U.S. citizens were hired and suffered no economic harm or injury was inconsequential. OCAHO stated that no animus, ill will, or malevolent motive are required for a finding of document abuse.

In addition, in March 2017, the DOJ announced the completion of its investigation and settlement terms with two janitorial companies for what the DOJ concluded was the companies'"immigration discrimination" by:

- "Demanding" unnecessary documents from immigrants authorized to work in the U.S. The companies asked lawful permanent residents (LPRs) to present their permanent resident cards (a/k/a "green cards") to prove they were authorized to work in the U.S., but the companies did not request specific documents from U.S. citizens. According to the DOJ, the company did not allow LPRs to present, instead of the green card, a driver's license and unrestricted social security card, or any other applicable documents from the Form I-9 List of Acceptable Documents.
- Because of the expiration date on the USCIS-issued green cards, the companies mistakenly reverified the employment authorization of the LPRs by updating their Form I-9 at Section 3, an error commonly seen, even according to the DOJ.

So, as is very common in this situation, the companies, while denying culpability and denying that they intentionally discriminated against any worker, but instead were intent on complying with the employment verification rules, took the DOJ's settlement offer to avoid multiyear litigation and to end the investigation. The companies agreed to shell out a civil penalty of $115,000, set up a fund of $30,000 to compensate any workers who can be identified who lost pay because of these practices, and follow a series of other settlement terms.

Similar recent settlements include an event arena for reverifying the work eligibility of two workers whose immigration status it questioned, a food service company that failed to accept documents establishing employment eligibility at face value, and a San Diego based skilled nursing facility to resolve claims that the center discriminated against work-authorized non-U.S. citizens.

Numerous employers have settled with the DOJ for job advertisements, postings, or interview questions that restrict (or appear to) the position to applicants who are U.S. citizens or applicants who are permanently

authorized to work in the U.S. While the law says that any discrimination must be "intentional discrimination," understanding and balancing the language is important.

Those who do not settle face protracted and expensive litigation, as the poultry company case demonstrates (the investigation and subsequent litigation arose out of activities occurring in 2010). Under the administrative rules of litigation for these matters, the government may plead with vagueness, yet the defendant is required to plead its affirmative defenses with specificity. The investigation will continue even though the litigation is proceeding before the court. Moreover, there is no interlocutory appeal for these immigration discrimination cases before the tribunal.

Whether you are an employer or employee, or potential employee, contact us if you have any questions about the employment verification process, best practices, proper self-audit protocols, employment verification policies, employment discrimination allegations/issues, or related training. In addition, we suggest that you contact us if any agency, state or federal, contacts you about your hiring, Form I-9, or E-Verify practices. Finally, importantly, if there is any confusion about who is authorized to work in the U.S. or the acceptable documentation required, or not, contact us immediately. We want all authorized employees to be properly hired and the records properly maintained.

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