The College of Labor & Employment Lawyers

Winter/Spring 2006 Newsletter
Vol. 8 No. 1

INSIDE THIS ISSUE:

Newest Board Members 2

President's Perspective – Hope Eastman 3

SUTA Dumping Update 4

I-9 Jeopardy: Documentation and Employer Dilemmas 5

Immigration Reform and U.S. Workplace Standards: Guestworker Programs are No Solution to Illegal Immigration 8

NAA: Dispute Resolution in the Workplace available online 12

United We Stand: Immigrant Labor and the Law 13

Independent Contractors and the Immigration Laws 16

Spotlight on Fellows 19
Walt Auvil
Margery Gootnick
Leonard Court

Deaths –
Robert Kopp
James Tobin
Michael Warner

BOARD OF GOVERNORS WELCOMES A NEW PRESIDENT AND FOUR NEW MEMBERS

For the first time since the inception of the College, all members of the Board of Governors are second generation members. As we celebrate ten years of organizational development, we also welcome a president and four new members of the Board of Governors. Hope Eastman from Bethesda, MD has taken the reigns of the College from John Higgins and four exceptional Fellows have been selected to replace those departing members: Margie Harris, from Houston, will serve as the plaintiff representative, Spencer Lewis (EEOC) from New York City, Adele Rapport (EEOC) from Detroit and John Sands (arbitrator/mediator) from West Orange, New Jersey will be the Neutral representatives to the Board. We would like to take this opportunity to express our sincere gratitude to retiring Board members George Nicolau, Bill Robinson and Mary Ann Sedey for their service as members of the Board of Governors for the past several years. All three worked quite hard on many different College endeavors. John Higgins has finished his time on the Board as well, but as past president, he will continue to be invited to Board meeting, and will continue to participate in all facets of the College, including taking the helm of the Video History Project.

The Slate of Officers for 2006 is:
Hope B. Eastman – President
Joel C. Glanstein – Vice President
Lonny H. Dolin – Secretary
Barry J. Kearney - Treasurer

Short biographies and pictures of our newest Board members follow.

About our New President – Hope B. Eastman

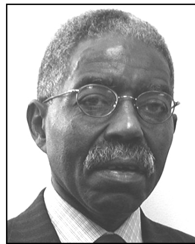
Hope Eastman

Hope is Chair of the Employment Law Group of Paley, Rothman, Goldstein, Rosenberg, Eig & Cooper, Chtd. in Bethesda, Maryland with more than thirty years experience representing a variety of businesses, trade associations, and non-profit organizations in all areas of employment law, including age, gender, race, and disability discrimination; sexual and other harassment; wage and hour matters; and non-competition disputes. Inducted as a Fellow of the College in 1996, her practice focuses on helping employers develop regulatory-sensitive employment policies for recruitment, selection, promotion, discipline, and termination of employees, and on evaluating and advising them with regard to major changes planned for their workforces. She is a member of the Governing Council of the American Bar Association's Labor and Employment Law Section and is a former Co-Chair of the Section's Committee on Equal Opportunity in the Profession. She has held various jobs in the Section's Equal Opportunity Committee, most recently as Management Co-Chair of the National Liaison Division, working with the EEOC, The Department of Labor, and The Department of Justice on employment law issues. She continues to serve as a chapter editor for the supplements to BNA's Employment Discrimination Law and is a frequent speaker and trainer on employment law and litigation topics. A cum laude graduate of Harvard Law School, Hope has appeared on many ABA programs, including an ALI-ABA/PLI national satellite teleconference on sexual harassment litigation, and is a regular speaker at the annual conferences of the AELC.

About our New Board Members

Margaret Harris

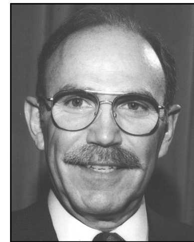
Margaret A. Harris – Ms. Harris is a partner with Butler & Harris in Houston, Texas, which was founded in 1988. The firm has an active litigation and appellate practice focusing on employment law and representing primarily employees with claims of, for example, sexual harassment, discrimination, and wrongful termination. Margie served on the Board of the National Employment Lawyers Association from 1994 to 2005, and was an officer during her final six years. She is the founder and immediate past president of the Texas Employment Lawyers Association, where she continues to serve on its Board. With other NELA members, Margie co-authored several NELA amicus briefs to the U.S. Supreme Court in sexual harassment cases. She earned her B.B.A. from the University of Texas and her J.D. magna cum laude from the University of Houston and has been named among the Top 50 Women Lawyers in the State of Texas for three years.


Spencer Lewis, Jr.

Spencer Lewis, Jr. – Mr. Lewis joined the EEOC as a law clerk in 1973. Thirty-three years later, he is still with the EEOC, and since 1989 he has served as the Director of the New York District, responsible for the enforcement of federal employment discrimination laws in New York, the New England states and north New Jersey. He has served on numerous agency-wide committees and task forces which review the agency's goals, mission and structure. Mr. Lewis is also a member on the Steering Committee of the New York Federal Executive Board and has served as its Chair. Mr. Lewis formerly served as Chairman of the New York City Combined Federal Campaign and has been the Chairman of Division 9 of the New York City Combined Federal Campaign for six years. He is a graduate of Lincoln University, and received his Master of Arts in Labor Economics and his law degree from the University of Illinois.

Adele Rapport

Adele Rapport – Ms. Rapport, a University of Michigan Law School graduate, is the Regional Attorney for the U.S. Equal Employment Opportunity Commission in Detroit. Ms. Rapport is a former member of the Labor Counsel of the State Bar of Michigan and the Former Public Chair of the Employment Rights Sub-Committee of the ABA Labor and Employment Law Section. She is currently a Public Co-chair of the ABA Labor and Employment Law Section CLE Committee and the Vice Chair for the Executive Board of ATLA's Employment Rights section. Ms. Rapport is also an Adjunct Professor of Law at the University of Detroit Mercy School of Law where she teaches employment discrimination and disability rights courses.


John Sands

John E. Sands – Since 1972 John Sands has arbitrated and mediated over 3,500 employment law, labor-management, and employee benefit disputes. A graduate of Princeton University and Yale Law School, he has chaired the Labor and Employment Law Sections of three organizations: New York State Bar Association, Association of the Bar of the City of New York, and Association of American Law Schools. He was honored as the AAA's J. Noble Braden Arbitrator and is a Fellow of the American College of Employee Benefit Counsel. He is also a Mediator for the International Court of Arbitration for Sport. For ten years prior to becoming a full-time arbitrator and mediator, John was Professor of Law at the Albany Law School, and, before that, he represented unions as a partner of Schulman, Abarbanel, Perkel & McEvoy and then represented management as General Counsel of New York City's Office of Labor Relations. He has been a Fellow of the College since 2001 and has been coordinating the New York-New Jersey Region's twice-a-year dinner programs since 2003.

PRESIDENT'S PERSPECTIVE - 2006

by Hope B. Eastman

I am honored and privileged to be serving as the President of this College during 2006. The year is underway with lots of enthusiasm among the Board and Credentials Committee members. The highlight of our year, of course, will be the Annual Induction dinner for new Fellows inducted as the Class of 2006. The dinner will be held on August 6 in Hawaii as part of the ABA's Annual Meeting. As always, the dinner will be a wonderful evening, this year to be held at the Waialae Country Club near Diamond Head in Honolulu. We know the dinner will be smaller this year because of the location, but we expect it to a very special event. I want to encourage everyone to attend.

We hope you enjoy this issue of the newsletter which focuses on legal issues raised by the influx of illegal immigrants into the United States. The very interesting articles cover both political and legal issues on this very hot topic, including documentation dilemmas for employers, immigration reform, workplace standards and the guest work program; and issues presented by independent contractors. We want to express special thanks to our authors who, like all of our Fellows, lead very busy lives and yet have taken time to write.

The Board held a successful retreat in early February in Florida. I want to thank everyone who was there for their hard work, involvement and creativity. I especially want to thank Board members Lonny Dolin and Kathy Krieger who, in my absence due to family illness, stepped in and ran the retreat spectacularly.

The Board members spent two days reviewing the past accomplishments and activities of the College and started to plan ahead for a strong future. Over the months, you will be hearing more and more about the plans for expanded regional meetings, other enhanced communications with and among our members, an informational clearing house for members, and other initiatives. We hope to use many methods of outreach to identify College members who wish to be active in the leadership of the College. I want to encourage anyone who is interested in getting more involved to contact me by email. I promise you will get a response.

Past President, John Higgins, has agreed to take responsibility for the College's Video History Project, which will capture the history of the labor and employment law movement in a permanent library of videos for law schools, bar associations and other scholarly endeavors. At the retreat, the Board members explored the possibility of creating two committees to support this Project: one that captures the subjects, obtains archival footage, and edits the footage, and another which would find the audience, market the project and fundraise.

The process for selection of Class of 2006 Fellows is underway. The Circuit Committees are presently reviewing the applications of more than 90 applicants for admission to the College. You will be hearing more about this. If you have questions about the process or an applicant, you can contact the chair of the Board Credentials Committee, Joel Glanstein, one of the following Board liaisons (contact information can be found in your College directory) or Susan Wan:

Joel Glanstein - 1st and 2nd Circuits
John Higgins - DC and 4th Circuits
Maurice Wexler - 3rd, 5th and 6th Circuits
Adele Rapport - 7th and 8th Circuits
Mark Rudy - 9th Circuits, North and South
Don MacDonald - 10th and 11th Circuit

The regional meetings continue to grow in popularity. From their inception in early 2003, the meetings have fostered a local level of interaction between the Fellows and provided a forum for the exchange of ideas and interesting and stimulating discussions. These gatherings have been very well received by the Fellows who have attended. More than eight regional areas have organized receptions of some kind, whether a purely social dinner gathering, a panel discussion on "the interplay and impact of bankruptcy on labor law and collective bargaining", or a sitting judge sharing his views on conducting an effective trial.

The Board of Governors strongly supports these meetings and continues to urge Fellows who are interested in organizing an event in their region to contact our talented Executive Director, Susan Wan, for information and help. At our recent retreat, the Board decided to expand the regional meeting idea and pursue regional committees. These committees would initially be designed along the lines of the federal circuits and would foster meetings in areas where none have taken place. In addition, these committees would be used to develop other College programs from mentoring, outreach and possibly area-specific events. Further information on this idea will be forthcoming in the next few months as the Board works to develop this concept.

I want to thank John Higgins, our immediate past President and all the other Presidents for their tireless efforts which have made the College into a well-respected organization that honors accomplished practitioners and leaders of our profession. I am committed to continuing this tradition.

I also want to express my gratitude to Susan Wan who makes all of us look good. She has been integral to the growth and development of the College and we all look forward to her continued guidance. Lastly, I wish to thank Gibson Dunn & Crutcher, for continuing to support the College by providing us with space, services, and supplies. We so appreciate their generosity.

In closing, I wish again to urge you to contact me with your ideas, thoughts, criticisms, and suggestions. In that way, we will together continue to build and strengthen the College. I thank all of you for your trust.

SUTA DUMPING – UPDATE

Our system of unemployment insurance (UI) and taxation is experience-based, i.e., the more benefits that are paid to employees and former employees of an employer, the higher that employer's future tax rate will be. The Federal Unemployment Tax Act ("FUTA") applies to employers in all states and coordinates with the various State Unemployment Tax Acts ("SUTA"s). FUTA was amended in 2004 to assist states with employers who seek to avoid the tax impact of their actual benefit experience via schemes known as "SUTA Dumping."

The SUTA Dumping Protection Act of 2004, Pub. L. 108-295 (amending 42 USCA 503 and 653) requires that all state unemployment laws must provide for *no* transfer of an employer's unemployment experience and tax rate in any transfer of business where the acquiring party: a) is not otherwise an employer at the time of acquisition; and b) is found by the state agency to have acquired the business *solely or primarily* for the purpose of obtaining a lower rate of contributions (*emphasis* added).

State laws must also provide that unemployment experience shall (or shall not) be transferred in accordance with regulations prescribed by the Secretary of Labor to ensure that higher tax rates are not avoided through business transfers. Finally, state laws must provide meaningful civil and criminal penalties for those who knowingly violate these requirements, as well as those who "knowingly advise another person" to violate the requirements. State law compliance with these requirements must be achieved by January 1, 2006.

Historically, SUTA Dumping has involved manipulation of an employer's business structure and/or unemployment insurance experience for the purpose of achieving a lower UI tax rate. The state statutory keys to any SUTA Dumping analysis are typically those provisions defining "employer," "transfer of business," "transferee" and "successor employer." Three basic types of SUTA Dumping have been noted:

Historically, SUTA Dumping has involved manipulation of an employer's business structure and/or unemployment insurance experience for the purpose of achieving a lower UI tax rate.

1. Vertical Types, such as establishment of a new employer account into which a large amount of payroll from an existing business is transferred, creation of captive employee leasing companies, and use of different employee leasing companies for consecutive two year periods enabling the employer to continually achieve a new employer tax rate;

2. Horizontal Types, such as creation of an affiliated shell or holding company into which large amounts of payroll from a related entity are transferred after the new entity has established a lower tax rate, maintenance of several subsidiaries with nominal payrolls into which payroll may be transferred from other subsidiaries with higher tax rates, and avoidance of the impact of large layoffs through subsequent transfer of payroll from an employer experiencing the layoff to another entity with a lower rate and no significant layoff history; and

3. Acquisition Types, such as purchase of a corporate shell with a low tax rate into which the acquirer may then transfer payroll from an existing employer with a higher rate, purchase and asset liquidation of a small business with a low tax rate, "parking" all or part of a higher tax-rated employer's payroll in another employer's account (usually for a fee), and use of a client's rating account and lower tax rate by an employee leasing company.

Essentially, each type of SUTA dumping can work to defeat an experience-based tax system and damage to the overall health and sufficiency of a state's UI Trust Fund.

Some variation from state-to-state in the statutes enacted to comply with this federal mandate is inevitable, so caution is advised. The chief "baby with the bathwater" challenge will involve the innumerable business mergers and acquisitions in which the unemployment history, rating account and tax rate of the acquired entity may be a factor in not only the acquirer's due diligence, but the ultimate sale price, as well. In other words, when does business valuation, good deal structuring and sound tax advice become SUTA dumping?

Update provided by Richard A. Hooker

I-9 JEOPARDY: DOCUMENTATION AND EMPLOYER DILEMMAS

By Donna Galchus

Ms. Galchus, a management attorney, is a Member of the law firm of Cross Gunter Witherspoon & Galchus, PC in Little Rock, Arkansas. She was inducted as a Fellow of College in 2004. *The author wishes to acknowledge Melissa McJunkins Duke, Director, and Frances L. Stuettgen, Immigration Legal Assistant at Cross, Gunter, Witherspoon & Galchus, for all their assistance in preparation of this article.*

IRCA makes it unlawful for any person to hire, recruit, or refer for a fee any alien not authorized to work, and establishes phased penalties for non-compliance.

A small business owner with operations in two cities of a small mid-south state recently received information from a source other than the government that several of the Social Security numbers that some of his employees have provided to him are invalid. These particular employees are vital to the employer, whose business supports the growing construction industry in its area of the state. The employer has had difficulty in hiring and retaining workers, and these employees have proven themselves to be hard workers with good attendance records. One employee who started with the business as an unskilled worker has risen to a managerial position. Losing these employees would have a devastating effect on the business.

IRCA The Immigration Reform and Control Act of 1986 (IRCA) made it illegal for a U.S. employer to knowingly hire or to continue to employ anyone who could not provide documentation showing that he is authorized to work in the U.S.[1] The Act provides for employer sanctions for violations of its provisions, as well as an anti-discrimination component that can leave the employer scratching his head in puzzlement.

IRCA makes it unlawful for any person to hire, recruit, or refer for a fee any alien not authorized to work, and establishes phased penalties for non-compliance. It requires employers to verify all newly hired employees by examining documents presented by them showing identity and authorization to work, and it requires each employer to attest to the documentation before hiring any employee. It further requires the employee to attest that he is authorized to work in the U.S. The Act also establishes civil and criminal penalties for hiring illegal aliens and requires employers, recruiters, and those who refer for employment to keep various records.

I-9 FORMS The employer must complete an I-9 form for any employee hired after November 7, 1986. IRCA requires that the employer keep these completed I-9 forms on current employees indefinitely and to keep the I-9 forms on terminated employees for a period of three years or one year past the termination date, whichever is longer. Through the years, there have been a number of revisions of the forms. The latest form, revised in May 2005, may be found on the United States Citizenship and Immigration Services (USCIS) website, www.uscis.gov.

Donna Galchus

Included with the I-9 form is a list of documents that the employee must use to verify his authorization to work. The employer may not request that the employee submit particular documents and must accept the documents presented by the employee, as long as the documents appear to be reasonably legitimate on their face and relate to the individual presenting the document. The employer may not require more or different documents than are required per the document list. There have been changes made over the years that have affected the document list.[2] The current List of Acceptable Documents attached to the current I-9 form and which must be shown to the new employee does not reflect any of these changes.

There are three sections to the form. The first section must be completed by the employee and signed. The second section must be completed and signed by the employer, and the third section is for re-verification or updating when the employee lists an expiration date for his authorization in section 1 or the employee provides the employer with information about his personal status, such as a name change. This section may also be used when an employee is re-hired within three years of his initial hire date.

PENALTIES IRCA provides potentially severe civil and criminal penalties against an employer who knowingly hires or continues to employ aliens not authorized to work in the U.S. These penalties range from $250 to $2000 per

(cont'd. on pg. 6)

(cont'd. from pg. 5)

unauthorized worker for a first offense involving any number of unauthorized workers. The fine increases with the second offense to $2000 to $5,000 for each unauthorized worker. For every offense after the second, the fine is $3,000 to $10,000 for each unauthorized worker.[3] An employer who is found to have a "pattern or practice" of knowingly hiring or continuing to employ unauthorized workers is subject to a fine of up to $3,000 per unauthorized worker and up to six months' imprisonment in addition to any civil penalties assessed.[4]

Penalties for "paperwork violations" against employers who have not maintained I-9 records for some or all of their employees or because of errors made in the completion of the form are the same, a fine of $100 to $1,000 for each paperwork violation, regardless of the number of prior offenses for which the employer has been cited. "Document fraud" committed by an employer who falsely makes a document for immigration purposes such as completing an I-9 form knowing that the employee is not authorized to work or knowingly accepting a forged or counterfeit document for I-9 verification purposes can result in a civil fine for $250 to $2,000 for the first offense for each document and $2,000 to $5,000 for each document for every offense after the first.[5]

ANTI-DISCRIMINATION PROVISIONS

The employer must balance the requirements of IRCA provisions in not knowingly employing or continuing to employ unauthorized aliens and maintaining proper documentation of each employee with the anti-discrimination provisions of the Act. Although all employers, including those with only one employee, must comply with the verification procedures and the prohibition against knowingly hiring unauthorized alien workers, IRCA's anti-discrimination provisions apply only to employers with four or more employees. Title VII of the 1964 Civil Rights Act bars employers of fifteen or more employees from engaging in discrimination on the basis of national original, among other prohibited bases. Employers with four or more employees are prohibited from discriminating on the basis of citizenship status. Such discrimination occurs when adverse employment decisions are made on the basis of an individual's real or perceived citizenship or immigration status. Examples of citizenship status discrimination include an employer who hires only U.S. citizens or permanent resident card holders; employers who refuse to hire aliens with employment authorization documents with expiration dates; and employers who employ unauthorized workers or temporary visa holders rather than U.S. citizens who have employment authorization. Employers should also consider those aliens with legalization applications pending to be protected by the provision because should the application be approved, the alien will be accorded protection back to the date the application was first filed.

Although all employers, including those with only one employee, must comply with the verification procedures and the prohibition against knowingly hiring unauthorized alien workers, IRCA's anti-discrimination provisions apply only to employers with four or more employees.

In many respects, citizenship status discrimination and national origin discrimination are the same. In both cases the employer might refuse to hire an individual because of his "foreign" appearance or accent. Generally, citizenship status discrimination arises when a employer relies on an IRCA requirement as an excuse for not hiring or for discharging a protected individual. Usually an employer is barred from refusing to hire individuals who are not citizens. However, there are limited circumstances where such a policy is permitted, e.g., where U.S. citizenship is required for a position by federal, state, or local law, or by government contract.

Additionally, employers with four or more employees are prohibited from committing document abuse. When an employer requests an employee or an employment application requests a specific documents or more or different documents than are required for employment verification or when an employer rejects valid documents proffered by an alien that appear to be genuine on their face, the employer is committing document fraud. The employer must accept any of the documents or a combination of documents that are listed on the I-9 form to establish identity and employment eligibility.

Discrimination on the part of the employer must be "knowing and intentional" in order to be prohibited under IRCA. It is not enough for the government to show disparate impact on a protected class.[6]

Penalties for discrimination range from between $275 to $2,200 for each victim for a first offense, $2,200 to $5,500 for the second offense, and $3,000 to $11,000 for additional offenses. Fines for document abuse range from $110 to $1,100 for each victim. In addition, back pay for lost wages, instatement, or reinstatement may be awarded to a successful plaintiff in a discrimination action.[7]

The U.S. employer can be faced with quite a dilemma with regard to IRCA. On one hand, it is precluded from knowingly hiring or continuing to employ unauthorized workers and must

(cont'd. on pg. 7)

One such bill, HR 4437, passed by the House of Representatives in December 2005, would expand the employment eligibility verification system to require employers to verify the identity and employment eligibility of previously hired employees.

(cont'd. from pg. 6)

carefully complete and maintain employment eligibility records for each and every employee. Yet, the employer must rely on a document list that is not updated, listing documents that are not acceptable under the Act, and other documents for which there are a number of different, acceptable versions. Contrast this with the anti-discrimination provisions that require the employer to accept any and all documents proffered by the alien that look genuine on their face and also prohibit the employer from discriminating in its employment practices. Not complying with the employment eligibility verification and/or the anti-discrimination provisions could result in civil penalties, or even criminal penalties.

LEGISLATION In the current anti-immigration atmosphere, there have been a number of bills introduced in Congress whose purpose is to "fix" the "broken" U.S. immigration laws. One such bill, HR 4437, passed by the House of Representatives in December 2005, would expand the employment eligibility verification system to require employers to verify the identity and employment eligibility of previously hired employees. Employers would be authorized to use the system on a voluntary basis for two years after the enactment of the legislation. Federal, state, and local government entities and private employers would be required to verify all previous hires within three years of the enactment of this legislation. All other employers would be required to use the system to verify the identity and employment eligibility of individuals not previously verified within six years of the enactment.

Further, this bill would significantly increase the civil penalties for hiring, recruiting, and referral violations. A minimum penalty of $5,000 for each unauthorized alien would be levied for a first violation. Entities previously subject to cease and desist orders under the Act would be assessed penalties ranging from $5,000 to $10,000 for each offense. Those entities that have been previously subject to more than one order could face a penalty of $25,000.

Additionally, civil penalty levels for paperwork violations would be increased significantly under this bill. Paperwork offenses, including failure to use the new verification system, would be subject to a minimum $1,000 penalty and a maximum $25,000 penalty. Criminal penalties for entities engaged in a pattern and practice of hiring and employing unauthorized workers would be increased as well. The maximum fine for each unauthorized workers increases from $3,000 to $50,000. The bill establishes a minimum period of imprisonment of one year, whereas the current law has a maximum of six months.

What about our fictitious small business owner at the beginning of this article? What does he do about his valued, long term workers whose Social Security numbers are not valid? Does he risk penalties imposed by the government by continuing to employ unauthorized workers, or does he terminate all of them and lose all of that accumulated experience and skill? What if he did not have independent verification of their invalidity? Many U.S. employers find themselves in such dilemmas each day. There are no easy answers for these employers. Some do terminate the employee whose employment eligibility documents have proven to be false while others choose to run the risk of continuing to employ such individuals. In the environment we now operate in, one in which employer fines for employing undocumented workers and conciliation agreements make front-page news, employers can no longer be passive in their approach to I-9 compliance.

1 INA §274A.

2 In 1997, 62 Fed. Reg. 51001-51006 removed several documents from the list. These documents are the Certificate of U.S. Citizenship, Certificate of Naturalization, Un-Expired Reentry Permit and Un-Expired Refugee Travel Document. The I-151 document has been withdrawn from circulation and is no longer valid, and Form I-766 was introduced in early 1997 as an Employment Authorization Document. There have been as well several revisions of the I-551 Resident Alien Card that are acceptable for I-9 purposes.

3 INA §274A(e)(4)(A).

4 INA §274A(f).

5 INA 274C(d)(3).

6 Contrast this requirement with Title VII of the 1964 Civil Rights Act where "disparate impact" may be used to establish national origin discrimination.

7 INA §274B(g)(B)(C).

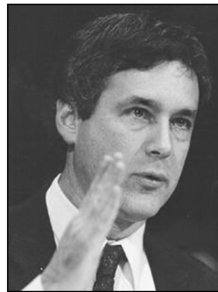
IMMIGRATION REFORM AND U.S. WORKPLACE STANDARDS: GUESTWORKER PROGRAMS ARE NO SOLUTION TO ILLEGAL IMMIGRATION

By Jonathan P. Hiatt

Admitted a Fellow in 1996, Mr. Hiatt is General Counsel for the AFL-CIO in Washington, DC.
The author wishes to acknowledge Ana Avendano, Associate General Counsel of the AFL-CIO, for all her assistance in the preparation of this article.

The business community, with the support of some immigration advocates, is strongly advocating a large, new guestworker program that would allow employers to bring in hundreds of thousands of temporary workers annually to fill jobs in all sectors of the economy.

Reforming our nation's immigration policies emerged as a priority in the first session of the 109th Congress and remains at the top of the 2006 legislative and political agendas of Congressional Democrats and Republicans, as well as the White House. There is general agreement among labor unions, the business community, and civil rights advocates that the current immigration system is broken and has resulted in crisis conditions at the U.S.-Mexico border, the point of entry for 80 to 90 percent of the nearly half million undocumented workers who enter the U.S. annually, as well as in workplaces and communities across America. The consensus is that any serious reform must meet two distinct challenges: it must provide a mechanism for the 10-12 million people who are currently living in the U.S. without authorization to adjust their status, and it must reduce future undocumented migration, while at the same time allowing sufficient legal migration to fill real long-term labor shortages in the U.S. How to accomplish that important second challenge has been the topic of an intense debate that has become even more heated recently, with the introduction of four major immigration reform bills in the 109th Congress.[1]



Jonathan Hiatt

The business community, with the support of some immigration advocates, is strongly advocating a large, new guestworker program that would allow employers to bring in hundreds of thousands of temporary workers annually to fill jobs in all sectors of the economy. If adopted, this new approach, which seeks to address the country's long-term labor needs by using non-U.S. workers admitted for only a limited period of time to perform full-time, year-round jobs, would be a radical departure from our traditional guestworker policy, under which temporary workers can be used only to satisfy short-term or seasonal labor needs. The agricultural guestworker program, for example, the best known of these programs, is designed to satisfy the seasonal needs of employers who need to temporarily hire large numbers of workers during the growing season, which may be as short as 6 weeks. Similarly, the H2B program allows non-agricultural employers in industries such as landscaping, hospitality and crabbing, to hire non-U.S. workers on a temporary basis to fill their seasonal needs.

Two of the immigration reform bills now before the Senate adopt this new notion of filling long-term, year round jobs with temporary foreign workers. The program that has garnered the most attention is that in the Secure America and Orderly Immigration Act (the "McCain/ Kennedy" bill). Under that program, employers would be able to import hundreds of thousands of new temporary workers from around the world each year to fill jobs not requiring a college degree. The program would allow employers to bring in 400,000 workers in the first year of the program, with a potential for a 20 percent expansion in each succeeding year. By year six of that program, as many as three million new temporary workers from around the world could join a growing pool of contingent workers in the U.S.[2]

There are no wage standards associated with this program. An employer is simply required to post the job on the U.S. Department of Labor's computerized job bank for 30 days, at no particular wage, and is then free to import temporary workers from abroad. A milder version of a guestworker program, in Senator Hagel's bill, limits the number of new temporary workers to 250,000 per year, and requires that an employer test the U.S. labor market by offering the job to a worker within the U.S. at a prevailing wage.

What these and other guestworker programs have in common is that they provide only temporary employment to workers who lack any real mobility – and for that reason any bargaining power – in the labor market. Under the McCain/ Kennedy bill, a foreign worker must

(cont'd. on pg. 9)

Adopting any such guestworker construct as the method for reducing illegal immigration and filling future labor shortages is the wrong approach.

(cont'd. from pg. 8)

obtain a job offer from a U.S. employer or recruiter before obtaining a temporary work visa. Unskilled workers seeking employment from outside the U.S. will have little choice but to accept whatever terms are offered. And once in the U.S., their ability to obtain better wages and working conditions is unlikely to substantially improve. Under McCain/Kennedy, the worker would not be legally required to continue to work for the employer who made the job offer, but experience has shown that workers hired through guestworker programs typically arrive here in debt to their employers for travel and other expenses. Even if they may legally leave a job, the workers are still required to pay off the debt, such that they have no meaningful option of leaving the sponsoring employer and therefore no leverage to bargain for better wages. Under the bill, moreover, any guestworker who left his or her job and was employed for more than 45 days would forfeit legal status and leave the country. Thus, guestworkers would have to accept substandard wages and other working conditions or risk being deported.

Finally, although the McCain/Kennedy and Hagel bills would allow guestworkers to eventually apply for citizenship, President Bush has made clear that his administration will insist on a guestworker program that requires all participants to return to their home countries after their visas expire.

Adopting any such guestworker construct as the method for reducing illegal immigration and filling future labor shortages is the wrong approach. An alternative model, supported by the AFL-CIO, would, by contrast, allow employers who can demonstrate an actual labor shortage in a particular job to fill that job with a worker who comes into the country with a permanent visa, and thus with full labor and employment rights.

In our view, there is no good reason why any immigrant who comes to this country prepared to work, to pay taxes, and to abide by our laws and rules should be denied what has been offered to immigrants throughout our country's history, a path to legal citizenship. To embrace instead the creation of a permanent two-tier workforce, with non-U.S. workers relegated to second-class "guestworker" status, would be repugnant to our traditions and our ideals and disastrous for the living standards of working families.

Guestworker Programs Have Always Operated to the Detriment of Workers

The United States has spent years studying and experimenting with guestworker programs, and the resounding conclusion is that guestworker programs are bad public policy. The "Jordan Commission," for example, which was created by the 1986 Immigration Reform and Control Act to study the nation's immigration system squarely rejected the notion that guestworker programs should be expanded. In its 1997 final report, that Commission specifically warned that such an expansion would be a "grievous mistake," because such programs have depressed wages, because the guestworkers "often are more exploitable than a lawful U.S. worker, particularly when an employer threatens deportation if workers complain about wages or working conditions," and because "guestworker programs also fail to reduce unauthorized migration" [in that] "they tend to encourage and exacerbate illegal movements that persist long after the guest programs end."[3]

The nation's practical experience with guestworker programs also shows that relying on those programs to fill future labor needs is bad public policy. The most notable of such programs, the Bracero program, began in 1942 as an agreement between the United States and Mexico to address the labor shortages in agriculture and in the railroad industry. More than four and a half million Mexican workers toiled in the United States under the program between 1942 and 1964. Once the contract period ended, however, they were required to turn in their labor permits and leave the U.S. with no right to long-term or permanent residence. Between 1942 and 1945, ten percent of the U.S. wages earned by 300,000 Braceros was deducted and placed in a "savings fund" in Mexico; Braceros were to recover this ten percent when they returned to Mexico. The workers never received those funds, which some estimate today could be worth over $150 million.[4]

Proponents of the new breed of guestworker program have distanced themselves from the discredited Bracero program by labeling the new program as a "break-the-mold" program. Yet, the new proposed programs offer even fewer protections to workers than those provided in the Bracero program. Braceros, for example, were entitled to free housing, medical treatment, transportation, pre-set wages that were at least equal to those of U.S. citizen farmworkers and a

(cont'd. on pg. 10)

(cont'd. from pg. 9)

contract in Spanish. Despite these protections, Braceros experienced numerous abuses, including racial oppression, economic hardship, and mistreatment by employers, and the program also had a well-documented downward effect on the wages of U.S. citizen farm workers. The new guestworkers, who would not even have the promise of such protections, can fare no better.

The H1B program, which Congress created in 1990 to ease the claimed temporary shortage of skilled workers in the high technology field, also shows why this new approach is flawed. In 1998, as a temporary remedy for a claimed desperate labor shortage in the high technology field, Congress nearly doubled the number of H1B visas available for the following three years, and imposed a fee on employers that was meant to fund training programs to improve the skills of U.S. workers. More than fifteen years after the inception of the H1B program, employers continue to call for more H1B visas, while little effective training of U.S. workers has been accomplished, and wages and other conditions in the industry have deteriorated.[5]

Our experience with the H2B program is also instructive, particularly because the new guestworker programs are aimed at much the same population of workers. In practice, the H2B program is rife with abuses. Workers on H2B visas are particularly vulnerable because they tend to be isolated, transient, non-English-speakers unfamiliar with U.S. laws. Like the workers who would come into the U.S. under the proposed new programs, H2B workers have little access to legal services because the Legal Services Corporation (LSC)-funded attorneys are generally not permitted to represent H2B workers, and very few states have unrestricted legal services offices that represent H2B workers. *See* 45 C.F.R. § 1626.1 *et seq.*

According to the U.S. Citizenship and Immigration Services (U.S.CIS), the majority of H2B workers travel to the U.S. from Mexico. Worker advocates report that most H2B workers do not have the funds to obtain visas and travel to the United States—a process which can cost $500 or more, an enormous sum to an indigent Mexican worker. In addition, many workers are required to pay recruitment fees to local recruiters in their home countries in order to be selected as H2B workers. Workers traveling from Latin American countries may pay as much as $2,500 for their visa, travel and recruitment fees. Because most H2B workers are indigent, they must take out loans at high interest rates in their home countries in order to obtain the funds to secure the position in the U.S. Although U.S. law requires that the employer reimburse the workers these costs in the first week of work to the extent that they cut into the federal minimum wage, in practice this is almost never done. *See, e.g., Arriaga v. Florida-Pacific Farms*, 305 F.3d 1228 (11th Cir. 2002). This high level of debt leaves workers extremely vulnerable, giving workers little choice but to tolerate abusive wages and working conditions.

Proponents of the McCain/Kennedy guestworker program argue that those workers will not suffer the abuses that current H2B workers do because they have the right to quit their employment at any time, and, provided that they find a new job within 45 days, they will not lose their authorized immigration status. That argument ignores the reality that workers who are indebted to their employers or recruiters are not able to simply leave employment. The same conditions of poverty and indebtedness that currently force H2B workers to tolerate abusive working conditions would no doubt prevent the new McCain/Kennedy guestworkers from exercising whatever "right" to quit their employment the legislation provides them.

The problems that H2B workers face are not simply the result of a few unscrupulous employers, but are widespread in virtually every industry in which they work.

The problems that H2B workers face are not simply the result of a few unscrupulous employers, but are widespread in virtually every industry in which they work.

In the seafood industry, for example, workers in Virginia and North Carolina have filed at least 12 lawsuits against ten separate companies since 1998. Each of the lawsuits contained virtually identical allegations: that workers were paid on a piece rate; that they did not earn the minimum wage; that there were unlawful deductions for tools, travel and uninhabitable housing taken from their pay; and that they were not paid overtime wages for hours worked over 40 in a week.[6]

Virtually all of these cases settled without going to trial. While a few settled on confidential terms, many are known to have settled upon payment of substantial sums of money for the workers. In the *Zamora* case, for example, workers sued an employer who had been twice cited by the U.S. Department of Labor (DOL) for failing to pay minimum wage and overtime wages to its workers. Both times it was fined by DOL, yet the company continued to receive approval to import more H2B workers while still continuing its unlawful practices of failing to pay minimum wage and overtime.[7]

In the tree-planting industry, large timber

(cont'd. on pg. 11)

(cont'd. from pg. 10)

companies rely on contractors to import H2B workers to plant pines, particularly in the southeastern United States. The contractors bid on contracts each season, and are paid by the timber companies on a per-acre basis to plant the land, encouraging the contractors to reduce labor costs to as little as possible. The contractors vary in size – from small ones who bring in 50 workers to others who receive authorization to import over 2,000 workers per season. Advocates have found that this industry systematically underpays its H2B workers, who are routinely paid by the piece (1,000 trees planted) rate. The violations of law, documented in cases decided and settled, routinely include failure to pay the minimum wage; failure to pay the (higher) prevailing wage; failure to pay overtime wage; and deductions for tools, travel, and visa.[8]

Landscaping workers who come to the U.S. on H2B visas have also routinely been subject to underpayment and exploitation. In a class action suit brought by H2B landscapers in Michigan, the workers alleged minimum wage and overtime violations. They were also housed in substandard housing and unlawfully charged for that housing. In addition, workers were illegally charged fees for setup, sheets, mattresses, uniforms, boots, tools, furniture, hats and utilities.[9]

The lesson of the H2B and other guestworker programs is clear: workers who are imported into our country only for their labor, and whose immigration status depends on an employment relationship, are not able to exercise whatever rights the law provides them.

The lesson of the H2B and other guestworker programs is clear: workers who are imported into our country only for their labor, and whose immigration status depends on an employment relationship, are not able to exercise whatever rights the law provides them. Creating this secondary class of workers is not a sound public policy response to illegal immigration.

In addition to their impact on the labor force, the effect of the proposed new guestworker programs on our communities and on our notion of a democratic society threatens to be extremely detrimental. Under this approach, we will be creating a class of residents (numbering in the millions) who live in our communities, but by definition, as "guests," have no incentive to invest in these communities — to establish roots, buy homes, or save for the future. Most importantly for working people, this new class of "guests" will have little incentive to engage in the long-term fight for good jobs, for pensions, or for health care.

An Alternative Model That Both Addresses Employment Shortages And Ensures Workplace Rights Is Needed

Instead of relying on a construct that guarantees the deterioration of working conditions in the U.S., we should focus on a meaningful solution that guarantees full workplace rights for all workers, both foreign-born and native, and also permits employers to hire foreign workers to fill proven labor shortages. The solution is simple: Congress should revise the permanent employment-based visas system and devote more resources to removing processing delays.

Employment-based admissions for permanent visas (commonly known as "green cards") are subject to labor certification provisions: the employer must show that there are not sufficient workers in the U.S. who are able, willing, qualified and available at the time and at the place where the foreign worker is to perform the job. To demonstrate this adequately, the employer must offer the job at a prevailing wage, and must attest that the employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed workers in the U.S. Congress has arbitrarily set the number of these visas at 140,000 annually. That approach should be changed so that the number of visas available responds to actual, demonstrated labor shortages, which will satisfy employers' needs for workers, and will prevent the creation of a secondary class of workers and residents, because the new foreign workers will have full employment rights and the promise of a permanent future in our democracy.

1 These bills are: The "Secure America and Orderly Immigration Act," (S. 1033), introduced by Senators John McCain and Edward Kennedy, the "Comprehensive Enforcement and Immigration Reform Act of 2005," (S. 1438), introduced by Senators John Cornyn and Jon Kyl, the "Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005," (H.R. 4437) introduced by Congressman James Sensenbrenner, and a four-part legislative package introduced by Senator Chuck Hagel (S. 1916, 1917, 1918, 1919.)

2 This program is essentially a broad expansion of the current H2B program, which provides 66,000 visas annually for seasonal, non-agricultural, non-degreed employment. The McCain/ Kennedy program eliminates the seasonality component and substantially increases the number of annual visas.

3 *See* U.S. Commission on Immigration Reform, *Becoming an American: Immigration and Immigration Policy,* U.S. Commission on Immigration Reform, 1997. An earlier well known Commission—the Select Commission on Immigration and Refugee Policy (SCIRP)—chaired by Rev. Theodore Hesburgh had

(cont'd. on pg. 12)

NATIONAL ACADEMY OF ARBITRATORS PUBLICATION – DISPUTE RESOLUTION IN THE WORKPLACE AVAILABLE ON-LINE AS A PUBLIC SERVICE

Since 1948, the annual publication of the National Academy of Arbitrators – *The Proceedings* – has presented cogent articles on workplace dispute resolution, written by the most authoritative sources – the members of the National Academy. Starting November 1, 2005, the contents of those volumes became available, free of charge, as a public service of the National Academy and BNA, Inc., under the publication name *Dispute Resolution in the Workplace*. The volumes are searchable by author, subject matter, and/or case name (Court, FMCS, and other administrative decisions) through a user-friendly and intuitive interface. The following is a sampling of the topics covered:

absenteeism
addiction
arbitrability
award finality
back pay
burden of proof
cease & desist order
collateral estoppel
Collyer
burden of proof
confidentiality
criminal misconduct
damages
depositions
discharge
discipline
discrimination
due process
employment arb'n
evidence
FLRA
implied conditions
interest
job assignment
judicial review
jurisdiction
just cause
mistake
mitigation
monetary awards
negligence
pensions
physical exam
plant closing
polygraph
privacy
proof
race
reinstatement
remedy
residual rights
scope of bargaining
strikes
subpoenae
testimony
tripartite panels
wages
witnesses

Dispute Resolution in the Workplace can be found at the website for the National Academy of Arbitrators: www.naarb.org.

(cont'd. from pg. 11)

reached the same conclusions. *See,* National Commission on Immigration and Refugee Policy, *U.S. Immigration Policy and the National Interest: Final Report.* National Commission on Immigration and Refugee Policy, 1981.

4 Plaintiffs' efforts to recover those funds have been unsuccessful. *See e.g. Cruz v. United States of America, et al.*, 2005 US DIST LEXIS 21290 (Sept 9, 2005)(dismissing as time barred all claims against the United States, Mexico, Wells Fargo Bank and three Mexican-owned banks).

5 *See* "H1-B Foreign Workers, Better Controls Needed to Help Employers and Protect Workers," HEHS-00-157 (September 2000); "High Skill Training Grants from H1B Visa Fees Meet Specific Workforce Needs, but at Varying Degrees," GAO-02-881 (September 2002); "The State of Asian Pacific America," Paul Ong (ed.), LEAP Asian Pacific American Public Policy Institute and UCLA Asian American Studies Center, 1994, pp. 179-180. The amendment provides that the minimum wage can only be increased. Therefore, if the rate of inflation is negative, the minimum wage will not be reduced accordingly.

6 *See Zamora v. Shores and Ruark Seafood, Inc.,* U.S. District Court for the Eastern District of Virginia C98CV501; *Maria Demesia Aboyte v. Shores and Ruark Seafood, Inc.,* U.S. District Court for the Eastern District of Virginia; *Alcaraz-Garcia v. Gloucester Seafood, Inc.,* U.S. District Court for the Eastern District of Virginia, 4:00CV69; *Soto-Lopez v. J& W Seafood of Virginia, Inc.,* U.S. District Court for the Eastern District of Virginia, 3:98CV792*; Perez-Sandoval v. International Seafood Distributors, Inc.,* U.S. District Court for the Eastern District of Virginia, 3:99CV00691; *Perez-Segura v. Bay Water Seafood, Inc.,* U.S. District Court for the Eastern District of Virginia; *Quiroz Losoya v. Shores And Shores, Inc. t/a Virginia Packing,* U.S. District Court for the Eastern District of Virginia, 99CV133; *Rosa Isabel Miranda Garcia v. Gloucester Seafood, Inc.,* United States District Court for The Eastern District Of Virginia, 4:03CV39; *Beltran Benitez, et al. v. Sea Safari, et al.,* U.S. District Court for the Eastern District of North Carolina, 2001; *Fonseca Aguilar, et al. v. Carolina Seafood Ventures, et al.*, U.S. District Court for the Eastern District of North Carolina, August 2002*; In re Stephenson* U.S. Bankruptcy Court for the Eastern District of Northern Carolina, October 2002.

7 *See* Lawrence Latane III, *Fifty-One Workers Will be Paid Back Wages*, Richmond Times Dispatch, July 10, 1999.

8 *See Perez-Perez, et al, v. Progressive Forestry Services, Inc., et al,* Civ. No 98-1474-KI (D. Or.); *Moreno-Leon v. Franklin Stanley*, U.S. District Court for the Western District of Arkansas, El Dorado Division, Case No. 99-1002; *Vicente Vera-Martinez v. Grano Reforestation, Inc.*, U.S. District Court for the Western District of Arkansas, Case No. 03-6002; *Gonzalez-Sanchez v. International Paper Co.*, 346 F.3d 1017, *Martinez-Mendoza v. Champion International Corporation*, 330 F.3d 1200 (11th Cir. 2003); *Lizarraga-Ruiz v. Georgia-Pacific Corp.*, 88 Fed.Appx. 382 (11th Cir. 2003).

9 *Nolasco Saldana v. Torre & Bruglio, Inc.*, E.D. Michigan, Case No. 02-73496. See also report on Virginia landscaping case, Pamela Stallsmith, *Lawsuits Allege Shoddy Treatment, Work Conditions*, Richmond Times Dispatch, May 11, 2003.

UNITED WE STAND: IMMIGRANT LABOR AND THE LAW

By James H. Kaster

Inducted as a Fellow of the College in 2002, Mr. Kaster is a partner in the Minneapolis, Minnesota law firm of Nichols Kaster & Anderson PLLP. The author wishes to thank Amy York, of Nichols Kaster & Anderson, as well as Minneapolis-based Miller-O'Brien, PLLP's Brendan Cummins, Esq., for providing guidance regarding the rights of undocumented workers under Holiday Inn Express and Rivera v. Nibco.

Not all United States immigrant populations are treated consistently fairly in the workplace. Congress and the courts have stepped in to increase the rights of documented and undocumented workers.

The United States Supreme Court has articulated the public policy against the formation or continuation of a sub-class of workers. While a cynic may only see the additional rights "illegal aliens" receive, the true benefits of such a policy are spread among all workers.

Giving all workers equal rights maintains a level playing field where all workers can compete – rather than providing employers an economic incentive to preferentially hire those workers they believe cannot, or will not, exercise their rights to a safe workplace and equal pay.

This article provides an overview of the situation faced by immigrant workers and the progress the law has made to meet their particular needs – the needs of the few as well as the needs of the many.

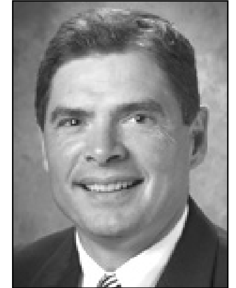
United we stand.

A Sub-Class of Workers

In 2004, nearly one million people legally immigrated to the United States.[1] The Pew Hispanic Center estimates that approximately ten million more people immigrated illegally. They further report that Hispanics comprise the largest segment of the immigrant population at fifty-seven percent. Refugees and those seeking asylum, such as Somalis and Ethiopians, have immigrated to Minnesota in the past few years.[2]

<u>Citizenship Status Awareness</u> Immigrants, often unaware of their rights or afraid to assert them, are vulnerable to employment-based abuse. Employers may determine or infer an employee's citizenship status through a variety of methods including targeted advertising and hiring, Social Security Administration No-Match letter lists, or general stereotypes or assumptions.

Some employers may actively recruit illegal immigrants for its workforce. In *Zavala v. Wal-Mart Stores, Inc.,* 393 F. Supp. 2d 295, 301 (D.N.J. 2005), plaintiffs claimed that Wal-Mart "systematically employed, harbored, and trafficked in the labor of immigrants, aided and abetted violation of the immigration laws,…and overtime and benefits as required, and concealed their profits and practices from detection." The plaintiffs claimed that Wal-Mart targeted undocumented workers for employment "specifically because they were a vulnerable population." Other undocumented workers have made similar claims. In *Singh v. Jutla & C.D.&R.'s Oil, Inc.,* 214 F. Supp. 2d 1056 (N.D. Cal. 2002), the plaintiff claimed that the employer had recruited him from outside the United States with full knowledge of his undocumented status and promised, but failed, to provide promised benefits.



James Kaster

Employers may also infer immigration status by monitoring employees listed in Social Security No-Match letters. This inference, however, is not reliable.

Employers may also infer immigration status by monitoring employees listed in Social Security No-Match letters. This inference, however, is not reliable. "Immigrants are more likely to be identified in no-match letters because they often use compound, maternal or paternal last names; have commonly misspelled names; and often inconsistently spell their names on various legal documents."[3]

An employer may make judgments concerning an employee's citizenship status from characteristics such as race, color, religion, or English fluency. Most of these are characteristics of protected classes and employment decisions based on such characteristics are illegal and ill-advised.

<u>Adverse Employment Actions</u> Once an employer believes an individual is an undocumented worker, it may place or keep the individual in lower paying or more dangerous jobs. Alternatively, it may insist the employee work as an independent contractor with fewer rights under federal statutes. For instance, independent contractors are not protected by Title VII of the Civil Rights Act. Immigrant workers, both documented and undocumented, may hesitate to exercise their rights due to fear of adverse employment actions such as demotion, discharge, constructive discharge, or retaliation. Unfortunately, these fears are justified, as many immigrants have been subjected to just such adverse treatment.

Applicable Law

The United States Supreme Court, in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), sought

(cont'd. on pg. 14)

Based on the public policy considerations of Sure-Tan, Inc., even anti-discrimination statutes that have not yet been litigated with respect to undocumented workers likely offer them protection and remedies.

(cont'd. from pg. 13)

to protect not only immigrant workers, but all workers. The Court allowed undocumented workers to exercise the same rights under the National Labor Relations Act ("NLRA") as documented workers to minimize, if not eliminate, the formation of a sub-class of workers. If a sub-class was allowed to form, employers would have an economic incentive to hire workers who the employer believed would not, or could not, exercise the full panoply of rights available under United States law. This, in turn, would reduce the employment opportunities of other United States denizens, an affront to the public policy espoused in *Sure-Tan, Inc*.

Anti-Discrimination Statute Undocumented workers may benefit from numerous federal statutes including Title VII, Fair Labor Standards Act, Immigration Reform and Control Act, Occupational Safety and Health Act ("OSHA"), NLRA, Racketeer Influenced and Corrupt Organizations Act, and 42 U.S.C. § 1985.

Applicability of statutes such as the FLSA and NLRA to undocumented workers has been tried in the court systems. In *Sure-Tan, Inc.*, the United States Supreme Court held that the NLRA applied to undocumented workers. The employer took adverse action against employees who supported the union. The Court held this to be an NLRA violation even with respect to those workers who were undocumented. Although the Court, in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), reaffirmed this finding, it limited the remedies available to such workers. Undocumented workers are not entitled to back pay for work not actually performed. The remaining remedies are available, however. Although defendants have attempted to expand the *Hoffman Plastic Compounds, Inc.* rule, courts have refused the invitation. *See, e.g., Singh*.

Undocumented workers are protected from other various forms of discrimination. For instance, under the Immigration Reform and Control Act, workers are protected from discrimination based on national origin and citizenship status.

Based on the public policy considerations of *Sure-Tan, Inc.*, even anti-discrimination statutes that have not yet been litigated with respect to undocumented workers likely offer them protection and remedies. Employers, therefore, should treat all workers with individual respect, regardless of their individual characteristics or the appearance of their names on a Social Security No-Match letter list.

Knowingly recruiting or enticing illegal aliens to work in the United States is prohibited by 8 U.S.C. § 1324. The statute provides criminal penalties for such action.

Recent court decisions provide further guidance to employers.

Discoverability of Citizenship Status In *Rivera v. Nibco, Inc.,* 364 F.3d 1057 (9th Cir. 2004), the appellate court considered whether to uphold a trial court's decision not to allow the defendant to use discovery tools to uncover plaintiffs' citizenship status. Regarding questions concerning plaintiff's place of birth, the trial court concluded that "there appears to be no dispute that each plaintiff is a member of a protected class, and [thus that] further questions regarding where each plaintiff was born has no further relevance to this action." The trial court did allow the employer to question plaintiffs' educational backgrounds, places of marriage, and other information, but limited the distribution of that information to the parties and their attorneys.

In reviewing the trial court's decision, the Ninth Circuit Court discussed the chilling effect that such discovery, if permitted, would have on documented and undocumented workers' exercise of legal rights. The court cited examples in which employers retaliated against immigrants for asserting their legal rights, including at least one case where plaintiffs were allowed to proceed anonymously due to the fear of deportation. The court stated that even documented workers may be hesitant to bring suit for fear that their immigration status may be changed or that their suit may adversely affect their family or friends' status. Finding this chilling effect against public policy, the court upheld the protective order limiting discovery.

English-Only Rules "English-only" rules require that employees speak only English at the workplace. Employers are permitted to institute these rules without a business justification only in the Ninth Circuit according to *Garcia v. Spun Steak Co.,* 13 F.3d 296 (9th Cir. 1993) (Reinhardt, J., dissenting). Referencing 29 C.F.R. § 1606.7, Judge Reinhardt further noted that the EEOC has stated such rules create a presumption of discrimination. The regulation permits an employer to impose an English-only rule during certain times if the employer can show a supporting business reason. If an employer requires that employees speak only English at all times, the regulation establishes a presumption of violation of Title VII that will be closely scrutinized by the EEOC.

Anti-Retaliation Provisions In addition to the anti-discrimination provisions of federal statutes, several of these also contain anti-retaliation provisions. In *Singh*, an undocumented worker brought charges against his employer under the FLSA. As already established in *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir.

(cont'd. on pg. 15)

The threat of deportation significantly chills the undocumented worker's likelihood of asserting his rights. Minimization of the threat of deportation should also further the interests of all workers.

(cont'd. from pg. 14)

1988), FLSA provisions apply to undocumented as well as documented workers. The court held that the employer had violated the anti-retaliation provision by reporting the employee to the Immigration and Naturalization Service. Several other statutes, including Title VII and OSHA, also include anti-retaliation provisions that may benefit undocumented workers.

Deportation Protection In 1999, Holiday Inn Express housekeeping employees in Minneapolis, Minnesota, selected the Hotel Employees and Restaurant Employees' Union as their representative in a union election. The hotel subsequently "ambushed" several workers by inviting immigration officials to seize workers believed to be illegal immigrants.[4] Immigration officials took eight of these workers into custody.

The union filed unfair labor practices charges against the employer. Although the suit eventually settled, the undocumented workers still faced possible deportation.

After months of social and legal debate, the workers were granted a reprieve. The Immigration Rights Update reported:

Seven of eight undocumented Mexican immigrants fired in October 1999 by the Minneapolis Holiday Inn Express after they participated in a successful union organizing campaign will be allowed to stay in the U.S. for two years instead of being deported. The Immigration and Naturalization Service granted the seven deferred action status, a form of relief that will permit them to apply for temporary work authorization in the U.S. and be considered lawfully present for Social Security purposes. (The INS decided that the eighth worker did not qualify for the status because he had previously been deported.) Deferred action status is granted to noncitizens when the INS uses its prosecutorial discretion and decides, for humanitarian reasons, not to seek their removal from the U.S.

Before this decision was made, many groups, including the AFL-CIO, publicly called for protected immigration status for undocumented workers who assert their legal rights. This policy appears to conform to the views expressed by the United States Supreme Court in opinions such as *Sure-Tan, Inc.* in which the Court explained that providing workplace protections for undocumented workers benefited all workers. The threat of deportation significantly chills the undocumented worker's likelihood of asserting his rights. Minimization of the threat of deportation should also further the interests of all workers.

Regardless, no uniform policy has been established to prevent or delay deportation of undocumented workers. Following the *Holiday Inn Express* case, according to Brendan Cummins, Esquire, of Minneapolis-based Miller O'Brien, PLLP, the local Bloomington, Minnesota, immigration office avoids involvement in labor disputes. This is not necessarily the policy at all immigration enforcement offices, but presents a promising beginning and may offer some assurance to immigrants and immigrants' rights attorneys.

Conclusion

The United States population is impressive in its diversity. From the earliest European immigrants to those more recent additions, the United States demographic is constantly changing. Federal laws race to keep pace with the needs and concerns of the changing population.

The United States Supreme Court promotes equality in the workforce by providing all workers, not just those with the proper "papers," equal access to the courts and equal standing rights under federal anti-discrimination statutes.

Circuit courts continually provide immigrant workers heightened protection from vindictive employers through decisions such as Rivera. Employers can expect immigrant workers' rights to continue to expand; they can learn from others' mistakes. By treating their own workers fairly and with respect, employers can avoid repeating mistakes of predecessors and avoid becoming an example for future employers to avoid.

1 Department of Homeland Security, Office of Immigration Statistics, Yearbook of Immigration Statistics: 2004, at tbl. 1, http://uscis.gov/graphics/shared/statistics/yearbook/ 2004/table1.xls (last visited Dec. 5, 2005).

2 Minnesota Department of Administration, Immigrants to Minnesota by Region and Selected Country of Birth, http://www.demography.state.mn.us/Download Files/immighist8203.csv (last visited Dec. 5, 2005).

3 Center for Urban Economic Development, University of Illinois at Chicago, Social Security Administration's No-Match Letter Program: Implications for Immigration Enforcement and Workers' Rights, Nov. 2003, at 6-7, http://www.uic.edu/cuppa/uicued/npublications/recent/ SSAnomatchreport.pdf.

4 See INS Grants Deportation Relief to Minneapolis Immigrant Workers Fired for Union Activities, 14 Immigrant Rights Update, June 6, 2000, http://www.nilc.org/immsemplymnt/wkplce_enfrcmnt/wkplcenfrc012.htm; Sarah Horstmann, The Agony of Victory, Resource Center of the Americas.org, Jan. 6, 2000, http://www.americas.org/item_131; Erica Lepp, 'We Wanted a Half Hour to Clean a Room,' Resource Center of the Americas.org, Jan. 6, 2000, http://www.americas.org/item_131.

INDEPENDENT CONTRACTORS AND THE IMMIGRATION LAWS

By Steven W. Suflas

A management attorney, Mr. Suflas is a Member of the law firm of Ballard Spahr Andrews & Ingersoll LLP and practices in Voorhees, New Jersey. He was inducted as a Fellow of College in 1996.
The author wishes to acknowledge Shereen C. Chen and Jennifer L. Sova for all their assistance in preparation of this article.

While an employer is only required to complete I-9 Forms for its employees, and not for its independent contractors, this in no way means that an employer does not have to be concerned with the immigration laws while outsourcing.

In the aftermath of September 11, immigration issues and, more specifically, the more aggressive enforcement of immigration laws by federal authorities, have become an increasing concern for employers in the United States. Well publicized investigations of national employers for immigration violations by federal authorities, and the increasing use of the Racketeering Influenced and Corrupt Organization ("RICO") Act in lawsuits against employers by labor unions and others claiming that wages of United States citizens are being deflated by the use of illegal workers, have resulted in additional pressure on employers to be sure they are in full compliance with the immigration laws.

Unfortunately, it is not enough for employers to be concerned solely with whether their own employees are authorized to work in the United States. More and more employers today are using independent contractors, which provide their own workers. For the unwary employer, these workers, if not authorized to work in the United States, can be an additional source of potential liability under the federal immigration laws.

By now, all employers should be familiar with the Immigration Reform and Control Act ("IRCA"). Enacted in 1986, IRCA prohibits every American employer from: (1) hiring, recruiting, or referring for a fee a foreign national whom the employer knows is not authorized to work in the United States; (2) hiring any individual, whether an American citizen or foreign national, without following IRCA's recordkeeping requirements ; or (3) continuing to employ a foreign national with the knowledge that he or she has become ineligible to work in the United States.

In an attempt to compel employers to ensure that their employees may legally work in the United States, IRCA requires employers to have every employee hired after November 6, 1986 complete an employment verification form, commonly known as the "I-9 Form". An employee must present specified documentation to prove both his identify and his eligibility to work in the United States, which the employer is required to inspect to make sure that it appears valid. If the employee cannot provide the necessary documentation to complete the I-9 Form (in other words, the employee cannot establish either his identity or his eligibility to work in the United States), the employer cannot hire that individual without violating IRCA.

Steven Suflas

While an employer is only required to complete I-9 Forms for its employees, and not for its independent contractors, this in no way means that an employer does not have to be concerned with the immigration laws while outsourcing.

First, the employer must make sure that any worker labeled as an independent contractor (rather than an employee) truly is one under IRCA's test. Otherwise, the employer violates IRCA and becomes subject to civil penalties for failure to complete the I-9 Form. In determining who is an independent contractor pursuant to IRCA, the regulations state:

> The term independent contractor includes individuals or entities who carry on independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results. Whether an individual or entity is an independent contractor, regardless of what the individual or entity calls itself, will be determined on a case-by-case basis.

8 C.F.R. § 274a.1(j). The regulations list the various factors which should be considered in the determination, including whether the alleged contractor:

- Supplies the tools or materials;
- Makes his services available to the general public;

(cont'd. on pg. 17)

(cont'd. from pg. 16)

- Works for a number of clients at the same time;
- Has an opportunity for profit or loss as a result of labor or services provided;
- Invests in the facilities for work;
- Directs the order or sequence in which the work is to be done; or
- Determines the hours during which the work is to be done.

Id. As with most of the many different statutory and regulatory tests analyzing independent contractor status, this list is not exclusive and other factors may be considered for IRCA purposes.

Even if an employer determines it is contracting with an individual or entity properly classified as an independent contractor under IRCA, the employer must still be concerned with additional statutory compliance issues. IRCA prohibits any person or entity from contracting or subcontracting to obtain the labor or services of an alien who is unauthorized to work in the United States. 8 C.F.R. § 274a.5. In other words, it is illegal for an employer to contract with an independent contractor whom it knows in turn uses illegal workers for labor.

In fact, if it can be established that the employer knew that the workers of a contractor or subcontractor were not authorized to work in this country, by operation of law, IRCA deems that the employer "hired" the aliens in violation of the immigration laws. *Id.* This form of potential liability is a real threat to employers. There has been a marked increase of enforcement actions by federal agencies, as well as lawsuits against those who are alleged to have knowingly retained independent contractors which use illegal aliens for labor. In fact, one national retailer recently agreed to pay $11 million to settle allegations that it knowingly hired contractors who used illegal labor to clean its facilities, while the contractors involved pled guilty to criminal offenses and were required to pay an additional $4 million in fines.

There has been a marked increase of enforcement actions by federal agencies, as well as lawsuits against those who are alleged to have knowingly retained independent contractors which use illegal aliens for labor.

Violations of IRCA's independent contractor rules come with stiff penalties. The failure to properly complete or maintain I-9 Forms subjects an employer to penalties of $110 to $1,100 for *each* violation. An employer which knowingly hires or continues to employ aliens who are not authorized to work in the United States is subject to a first offense civil fine of $250 to $2,200 for *each* unauthorized worker. There are fines of up to $11,000 for subsequent violations. For an employer with hundreds or thousands of workers, these violations can quickly add up to significant amounts. Additionally, an employer which violates IRCA or uses independent contractors which do the same may be barred from obtaining federal and state contracts, as an entity bidding on a government contract often must disclose any immigration violations. Violations of IRCA can also lead to increased governmental scrutiny, as the employer may find itself subject to more frequent random audits of its immigration records, as well as other areas, such as wage and hour or safety and health compliance.

In order to protect against immigration violations caused by the actions of independent contractors, there are several steps employers should take:

- Make sure the workers used meet the independent contractor tests under 8 C.F.R. § 274a.1(j). Otherwise, an I-9 Form must be completed and retained.
- Monitor the staff of independent contractors who are coming into the facility. Require the contractors to furnish copies of their I-9 Forms and supporting documentation for their workers.
- Consider including a verification clause covering immigration issues in independent contractor agreements. These clauses typically provide that the independent contractor has verified the employment eligibility of all workers, that verification documentation has been completed, and that its workers are all eligible to be employed in the United States. A verification clause should also include an indemnification agreement, whereby the contractor agrees to hold the employer harmless from all liability it may incur from the contractor's failure to comply with any IRCA provision.

An employer must be attentive to protect immigration law violations and must be especially vigilant when using independent contractors which provide their own labor. With the recent well-publicized raids by federal authorities and the increasing emphasis that unions and plaintiffs' attorneys are placing on this issue, employers are likely to see a surge in litigation and administrative enforcement.

FELLOW RALLIES LEGAL TEAM TO FIGHT FOR INDIGENT CLIENTS FACING EVICTION FROM PUBLIC HOUSING

Since his retirement from King & Spalding in 2003, Fellow Lane Dennard has volunteered at the Georgia Justice Project (GJP), a non-profit group of lawyers, social workers and job staff that represents indigent clients accused of crime. In order to receive legal representation by GJP, clients must commit to counseling and other services provided to help them live crime-free and productive lives. As a result of this "restorative" approach to representation, the recidivism rate for GJP clients is 18.8%, as compared to the nationwide rate of almost 60%.

Dennard has observed first hand that this organization makes a difference in the lives of these clients and their families. His work on the McDaniel Glenn project in South Atlanta is a good example.

In late 2004, the Annie E. Casey Foundation (which was started by UPS founder, Jim Casey) and GJP entered into an agreement, providing that GJP would provide legal representation for residents of the McDaniel Glenn subsidized housing complex who were at risk of becoming homeless because of the termination of their leases. This particular complex, which was administered by the Atlanta Housing Authority (AHA), had been identified for demolition and reconstruction as a "mixed use" complex under a Hope Six Grant. Most of the 295 current residents of McDaniel Glenn were given the opportunity to move to other federally assisted housing but approximately 45 residents were identified for lease terminations based on arrest records that had been retrieved by AHA. After notification of their pending lease terminations, 41 of these individuals chose to be represented by GJP.

In November, 2004, GJP started work on the McDaniel Glenn relocation with 2 lawyers (including Dennard) and 3 legal interns who were law school students. Although this initial team was prepared to proceed with the project by the end of the year, only limited work could be accomplished prior to the receipt of names of the individuals whose lease would be terminated. GJP did not receive this information from AHA until the first week in February, 2005 which was after the legal interns had returned to class and could no longer devote substantial time to the project. At this point it was time to call up the reserves. Dennard contacted his former law firm for help and King & Spalding provided 4 attorneys, 6 paralegals and numerous other support staff as volunteers. The 41 clients were divided into approximately equal numbers between GJP and K&S. In addition, paralegals and project assistants from the law firm checked and copied records for all clients from numerous courts and other agencies such as the Atlanta Police Department. In several situations, the Assistant Solicitors handling the cases were also contacted.

This was certainly a worthwhile endeavor with outstanding results that were made possible by the hard work of a team of volunteer lawyers and legal staff. The work prevented many people, including families, with small children, from becoming homeless.

Administrative hearings for all 41 clients were conducted in March, 2005, with GJP and King & Spalding lawyers representing their clients in these proceedings. Documents that had been retrieved from courts and agencies were presented to the Hearing Officer and arguments were made regarding the seriousness and timeliness of the clients' offenses. For example, some clients had arrest records but the related court cases had been dismissed. In other cases, the conduct was not as serious as characterized in the arrest record. In April 2005, the Hearing Officer issued her decision, rescinding 28 of the lease terminations and upholding 13. Subsequently, GJP and K&S presented a 50 page joint appeal brief to AHA on the behalf of the 13 clients whose lease terminations had been upheld. In general, the appeal brief argued that AHA should not terminate leases based on arrest records unless the residents had been convicted of serious crimes that occurred a reasonable time before the decision to terminate. Some of the clients had been identified for eviction based on relatively minor charges (like shoplifting) that dated back 5, 10 or even 20 years prior to the current decision to terminate. After considering the arguments in the appeal brief and those made in the warrant proceedings, additional terminations were rescinded with only 6 clients remaining in lease termination proceedings.

This was certainly a worthwhile endeavor with outstanding results that were made possible by the hard work of a team of volunteer lawyers and legal staff. The work prevented many people, including families, with small children, from becoming homeless. In her letter of thanks to the legal team, Casey Foundation representative, Susan Lampley provided a good summary: "This is an outstanding job and a tremendous achievement. We could not have realized such incredible results without your assistance. Thank you very much for your hard work. Please feel good about what you have done in the community and more importantly, the lives you have touched." Based in part on the McDaniel Glenn work, GJP was one of three organizations in the country to receive the Casey Foundation's prestigious "Families Count" award. In addition to the plaque, GJP will receive a grant of $500,000 over five years.

Dennard encourages other Fellows to get involved in similar pro bono work. "Different people may have different ways of giving. We are lawyers and one way we can give back to our communities is to help provide legal representation to indigent clients who otherwise would have no representation."

SPOTLIGHT ON FELLOWS

The College would like to acknowledge the passing of these Fellows:

▶ ***Robert Kopp***, a founding member of the Board of Governors, passed away January 24, 2006, at his home in Estero, Florida. Mr. Kopp spent the majority of his career at Bond Schoeneck & King in Syracuse, New York, retiring in 1999. He was an active member of the Labor and Employment Law Sections of both the New York State Bar Association and the ABA, where he served and chaired many committees. He also served as a delegate to the ABA House of Delegates.

▶ Fellow Emeritus ***James Tobin*** passed away November 30, 2005. Mr. Tobin contributed significantly to the spirit and the body of knowledge of labor law for over fifty years, practicing his entire career at Miller Canfield Paddock and Stone in Detroit, Michigan. In 2002, he received the Distinguished Service Award from the State of Michigan's Labor and Employment Law Section. A frequent speaker at labor law seminars in the private and public sector, he was a past contributor to the ABA Labor Law Section publication, *The Developing Labor Law.*

▶ Fellow ***Michael Warner***, who died November 3, 2005, at the age 64 of complications from lung cancer. Considered a renowned employment discrimination lawyer, Mr. Warner was a mentor to countless attorneys. He practiced at Seyfarth Shaw's Chicago office and was inducted at Fellow in 1997.

* * * * *

▶ Fellow ***Walt Auvil*** was again named 2006 Chairman of the Employment Law Committee for the West Virginia State Bar. Mr. Auvil also received a BV Peer Review Rating Martindale-Hubbell which is an indication of an exemplary reputation and well-established practice.

▶ Fellow ***Leonard Court*** was been selected to the Oklahoma State University Alumni Hall of Fame. Induction into the Hall is the highest honor bestowed by the Oklahoma State University Alumni Association. This recognition is extended to alumni who bring honor to the University, distinguish themselves professionally in their chosen field or profession, and make significant contributions to society. The Hall of Fame induction ceremonies were held on February 17, 2006.

▶ Fellow ***Margery Gootnick*** is currently serving as the President of the National Academy of Arbitrators for the 2005-2006 year. She has also been re-appointed to the Foreign Service Grievance Board by Secretary of State Condalezza Rice.

Fellows have inquired about contacting Fellow Emeritus ***Ed Miller****. We have been in touch with his daughter, Ellen Gerkens, and she has provided the following information: Mr. Miller is currently residing at Sunrise Assisted Living of Wilmette, 615 Ridge Road, Wilmette, Illinois 60091-2441. Cards and visits are most welcome. As much as he loves receiving mail, envelopes are frustrating for him to open. Postcards are the best to send or envelopes which are only lightly sealed.*

Regional meetings of Fellows in various parts of the country continue. Recent meetings were held for Fellows in the Washington/Baltimore area, Boston, Ohio, New York/New Jersey and the Southern California/Arizona region. If you are interested in organizing a gathering in your region, please contact Susan Wan.

The Newsletter Committee continues to strongly encourage all Fellows to submit for publication any honors, accomplishments or other notable relative information.

Newsletter Staff	*Board of Governors*
Don MacDonald, Editor	*Hope B. Eastman, Bethesda, MD – President*
Lane Dennard, Contributor	*Joel C. Glanstein, New York, NY – Vice President*
Donna S. Galchus, Contributor	*Lonny H. Dolin, Rochester, NY – Secretary*
Jonathan P. Hiatt, Contributor	*Barry J. Kearney, Washington, DC – Treasurer*
Richard A. Hooker, Contributor	
James H. Kaster, Contributor	*Donald J. Capuano, Washington, DC*
Steven W. Suflas, Contributor	*Margaret A. Harris, Houston, TX*
	William J. Kilberg, Washington, DC
Susan Wan, Executive Director	*Spencer H. Lewis, Jr., New York, NY*
	Nora L. Macey, Indianapolis, IN
	Adele Rapport, Detroit, MI
	Mark S. Rudy, San Francisco, CA
	John E. Sands, West Orange, NJ
	Robert A. Siegel, Los Angeles, CA
	Paul H. Tobias, Cincinnati, OH
	Maurice Wexler, Memphis, TN

The College of Labor & Employment Lawyers
1050 Connecticut Ave., NW
Suite 300
Washington, D.C. 20036
(202) 955-8225 Telephone
(202) 467-0539 Facsimile
www.laborandemploymentcollege.org

The views expressed herein are not necessarily those of The College of Labor and Employment Lawyers, Inc.