EMPLOYMENT SERVICES ALERT

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Office of the Chief Administrative Hearing Officer Chastises Immigration and Customs Enforcement for Overreaching in Form I-9 Penalties

By Klodiana Tedesco

Very recently, the Office of the Chief Administrative Hearing Officer (OCAHO) issued a decision admonishing Immigration and Customs Enforcement (ICE) for assessing excessive penalties against a small employer for Form I-9 violations.

ICE filed a complaint alleging that Crescent City Meat Company, Inc. (Crescent) had failed to prepare, retain, and/or present I-9 forms for 15 of its current and past employees. ICE considered all the violations to be serious because Crescent had filled out the required forms after it was served with a Notice of Inspection, the step that initiates a compliance audit by ICE, and because it was unable to produce Form I-9s for terminated employees. The total penalty sought was $14,025, or $935 per violation out of a maximum penalty of $1,100. Crescent is a small family business, a "mom and pop" shop. There was no evidence of bad faith on the company's part, no unauthorized employees, and no history of previous violations. Apart from the seriousness of the violations, all other statutory factors were in the company's favor. Still, ICE assessed high penalties against it.

OCAHO strongly disagreed with ICE's approach and even chastised it for some obvious overreach. While not minimizing the fact that failing to complete the forms was a violation of the law, OCAHO painted the picture of a small business without the benefit of a sophisticated human resources department, who had financial struggles, and who was not aware of the requirement to complete Form I-9 for its employees. However, the opinion pointed out "some troubling questions that arise from a review of the record." Employers are only required to present Form I-9s for employees hired after November 6, 1986. Any employees hired prior to that date are considered "grandfathered." ICE's complaint specifically alleged that the employees "named in Count I" were hired after November 6, 1986. At the same time, ICE's later filings revealed that Crescent had expressly told the investigators that two of its nine current employees had worked there since before the effective date of the statute. Those employees were not identified by name, but were nonetheless included in the number of violations. OCAHO stated that "a citizen has the right to expect fair dealing from the government" and that ICE overreached when it issued penalties and filed a complaint containing allegations that it actually knew to be false.

Typically, grandfathered status is a matter of affirmative defense and it is waived when not included in an answer. However, OCAHO found that as a *pro se* party Crescent would not know that. Finally, while holding Crescent to its admissions of liability, OCAHO reduced the penalties to $1650, the minimum permissible, in light of ICE's overreach.

This is yet another example of the balance and fairness exhibited by OCAHO in recent years in its decisions related to Form I-9 compliance, while upholding the fines assessed by ICE or reducing them. It is therefore important that employers ensure continued compliance with all laws and regulations related to the employment eligibility verification of their workers. Failure to comply with them can lead to significant fines and costs, and even criminal convictions.

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