Client ALERT

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Immigration Newsflash
Key decisions highlight importance of employer compliance with immigration laws

A number of recent immigration-related decisions illustrate how important it is for employers to develop stringent internal immigration compliance programs. These programs should include periodic compliance audits, including audits of labor condition application files, I-9 forms, and other immigration files and procedures.

DOL finds H-1B employer liable for back wages and civil money penalties for labor condition application (LCA) violations; Decision also has consequences for employers who permit or require employees to pay legal fees associated with immigration filings.

The Department of Labor (DOL) recently issued an administrative decision finding an employer liable for over $1,000,000 in back wages and over $100,000 in civil money penalties for failing to comply with the attestations made on the labor condition applications filed in connection with the employment of H-1B employees.

An employer seeking to hire an H-1B employee must first obtain certification from the DOL by filing an LCA. The LCA sets forth the wage rate and working conditions for the H-1B employee. Failure to comply with the terms of the certified LCA may subject an employer to fines, back wage awards, and debarment from using the immigration petition system. In addition, employers found to be "willful violators" become subject to the same stringent additional conditions imposed on H-1B dependent employers.

In *Wage and Hour v. Mohan Kutty*, the employer failed to pay H-1B employees the required wage and failed to maintain the required documentation in support of the LCA. The Administrative Law Judge (ALJ) found that civil penalties of $4,000 per violation for willfully failing to pay the required wage, and $800 per violation for failing to maintain public access files, were "eminently reasonable." In addition, the employer was ordered debarred from filing immigration petitions for two years. The ALJ also upheld DOL's determination that the costs of preparing and filing the LCA and H-1B, and even the costs of obtaining a waiver of the J-1 two-year home residence requirement for certain employees, were "employer business expenses." Therefore, since the employees paid these expenses, such expenses must be deducted from the employees' wages for the purpose of determining whether the employer paid the legally required wage. The ALJ also "pierced the corporate veil" to regard numerous allegedly distinct entities as a single employer for the purpose of determining liability.

This decision is an important reminder that, in certain circumstances, employers risk significant exposure to liability if they require employees to pay for immigration expenses without careful thought and analysis. The ALJ's decision to pierce the corporate veil for the purpose of assessing liability could also have significant ramifications for employers having multiple entities. In summary, the *Kutty* decision again illustrates that strict compliance with DOL's H-1B regulations is extremely important.

Supreme Court Prohibits Back Pay Awards to Undocumented Workers

In *Hoffman Plastic Compounds, Inc. v. NLRB*, ____U.S. ____ , 122 S. Ct. 1275 (2002), the U.S. Supreme Court held that the back pay awards under the National Labor Relations Act ("NLRA") to undocumented workers, even though they might be victims of unfair labor practices, are precluded because the workers were never legally authorized to work in the United States. The Court found that Congress clearly expressed its intent to sanction unauthorized employment when it passed the Immigration Reform and Control Act of 1986 ("IRCA"). Employers, however, should consult with counsel before relying on *Hoffman* to limit liability or damage awards where it is determined that an employee is not authorized to work since, to date, the Labor Department and at least one state, California, have expressed their intent to continue to limit the impact of the Court's ruling in *Hoffman* to the extent legally permissible.

Cases Highlight Potential Exposure Under RICO for Hiring Undocumented Aliens

In what may signal a disturbing trend, the U.S. Court of Appeals for the

Second and Ninth Circuits have recently ruled that plaintiffs may proceed with civil actions under the Racketeering Influenced and Corrupt Organizations Act ("RICO") against employers alleged to have engaged in a pattern of unlawful racketeering activity by hiring undocumented aliens for profit in violation of immigration laws. In addition, two Federal District Courts have recently been presented with similar issues, and two criminal actions, both of which are still pending, were filed under RICO late last year in which the U.S. Government has alleged that employers engaged in a pattern of unlawful racketeering activity in similar circumstances.

Under RICO's civil provisions, a person who is injured in his or her business or property by a pattern of racketeering activity, including certain immigration offenses, may sue for civil damages. A plaintiff may recover treble damages from a defendant found liable under RICO's civil provisions.

In *Commercial Cleaning Services., L.L.C. v. Colin Service Systems, Inc.*, 271 F.3d 374 (2d Cir. 2001), Commercial Cleaning filed a class action under RICO on behalf of itself and other competitors of Colin Service Systems alleging that Colin engaged in a pattern of racketeering activity by hiring undocumented aliens for profit in violation of immigration laws. According to Commercial Cleaning, Colin's illegal hiring practices enabled Colin to lower its costs and to underbid Commercial and other competing firms, which, as a result, lost contracts and customers to Colin. Colin countered that its alleged hiring of undocumented workers (for which it separately agreed to pay a $1,000,000 fine to the Immigration and Naturalization Service ("INS")), was not the cause of its competitor's alleged injuries, including a former client of Commercial's decision to award cleaning contracts to Colin. The Second Circuit ruled that Commercial's allegations were sufficient to permit the case to go forward, and that Commercial's injury would be compensable under RICO if it could show at trial that Colin's unlawful hiring practices caused it harm.

In *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002), the plaintiffs, all legally documented agricultural laborers, sued fruit growers in a class action filed under RICO alleging that the growers leveraged hiring of undocumented immigrants in order to depress wages of legally documented employees. Zirkle responded by arguing that the complaint should be dismissed because the damages alleged were too speculative and difficult to ascertain. Looking to the Second Circuit's decision in *Commercial Cleaning Services*, as well as to analogous antitrust cases, the Ninth Circuit held that the documented laborers' complaint sufficiently demonstrated that the growers' alleged illegal hiring scheme caused the laborers' injuries. Accordingly, the court found that the documented laborers could proceed with their complaint against the growers.

In the two recent District Court cases, *Trollinger v. Tyson Foods, Inc.*, 214 F.Supp.2d 840 (E.D. Tenn. 2002) and *Baker v. IBP Inc.*, No. 02-4019 (C.D. Ill. 10/21/2002), the courts dismissed civil RICO actions brought by employees. The plaintiffs in both cases alleged that the defendants' alleged hiring of illegal aliens artificially depressed their wages. In *Trollinger*, the court held that the plaintiffs failed to show a sufficient causal connection between Tyson's alleged immigration violations and the alleged depression of the employees' wages. In *Baker*, the court found that the plaintiffs' claim of damages under RICO could not be proven "without attacking the collective bargaining process." As a result, the court dismissed the plaintiffs' suit, ruling that the plaintiffs' claim was "preempted by the NLRA."

The information in this Alert is not intended to be legal advice. However, if you require legal assistance or would like additional information about immigration matters, please contact your local Paul Hastings representative or ***Daryl Buffenstein*** *at 404-815-2232 or via email at darylbuffenstein@paulhastings.com.*