

April 7, 2011



Professional Development

Employment Law Update

Presented By:

SEYFARTH SHAW LLP

Daniel Klein

Michael Fleischer

Dana Fleming

Jessica Schauer

John Quill

Roadmap for Today

- Discrimination Law Update
- USERRA Developments
- Whistleblower Developments & Dodd-Frank Act
- Legal Developments Re: Independent Contractors
- Hot Topics in Immigration Law



Discrimination Law Update

Presented By:
Daniel Klein, Esq.
Seyfarth Shaw LLP

Discrimination Law Update

- Overview of recent State and Federal court decisions

Thompson v. North American Stainless, LP (S. Ct.)

- Employee brought Title VII claim against employer for retaliation
- Employee alleged that he was terminated after his fiancé, who worked for the same employer, filed gender discrimination claim with the EEOC
- The District Court dismissed the case and the Sixth Circuit reversed
- Did the Supreme Court affirm or reverse?

Thompson v. North American Stainless, LP (continued)

- Take away for Employers:
 - ▶ Title VII's anti-retaliation provision covers any employer action that “might have dissuaded a reasonable worker from making or supporting a charge of discrimination”
 - ▶ This definition now includes reprisals against third parties, such as the employee's fiancé
 - ▶ Remains unclear when the relationship is significant enough to constitute retaliation – family member v. close friend. Decision makes it even easier for employees to demonstrate retaliation

Tayag v. Lahey Clinic Hospital (1st Circuit)

- Tayag's husband suffered from liver, kidney and heart diseases. Tayag requested FMLA leave to assist him while he traveled for 7 weeks (administering medications, helping him walk, carrying luggage and being present if his illnesses incapacitated him).
- While in the Philippines, the Tayags went to Mass, prayed, met with a priest at the Pilgrimage of Healing Ministry and visited with friends and family. Tayag's husband received no conventional medical treatment and saw no doctors or health care providers.
- Based on information received from Tayag's husband's medical providers, Lahey denied the FMLA leave request. After two letters to Tayag went unanswered, Lahey terminated her employment.
- Tayag claimed her termination violated FMLA. The District Court dismissed her case. Did the 1st Circuit affirm or reverse?

Tayag v. Lahey Clinic Hospital, Inc. (continued)

- Take Away for Employers:
 - ▶ A “healing pilgrimage” does not qualify as “medical care” within the meaning of the FMLA
 - ▶ Medical certification must justify intermittent FMLA leave
 - ▶ It is not retaliation to terminate an employee after a 7-week absence that was not protected under FMLA

Manganella v. Evanston Insurance Co. (D. Mass)

- Manganella (the Founder and President of Jasmine, a women's clothing store) sold Jasmine to Lerner New York.
- After sale, Jasmine purchased an EPLI Insurance Policy which excluded any conduct committed with a "willful disregard towards applicable law."
- Jasmine's HR Manager filed an internal sexual harassment complaint against Manganella. Based on results of investigation, Jasmine fired Manganella.
- During subsequent arbitration over Manganella's refusal to forfeit his share of the stock ownership agreement, arbitrator concluded that Manganella willfully engaged in sexual harassment
- Did the District Court conclude that Manganella's defense in a related MCAD proceeding was covered by his Company's EPLI Insurance Policy?

Manganella v. Evanston Insurance Co. (continued)

- Take Away for Employers:
 - ▶ Make sure to review EPLI Insurance Policies and determine what, if any, exclusions apply
 - ▶ Review of the Policy is particularly crucial if the conduct at issue is willful and deliberate

Vera v. McHugh (1st Circuit)

- Employee makes informal complaints of sexual harassment against co-worker and supervisor
- Employee claims supervisor invaded her personal space, blocked the doorway when she tried to leave, persistently stared at her and called her “baby” on one occasion
- Employee eventually suffered “breakdown” at work and was terminated for insubordination and excessive absences
- District Court dismissed sexual harassment claim
- Did the First Circuit affirm or reverse?

Vera v. McHugh (continued)

- Take Away for Employers:
 - ▶ Conduct that is not overtly sexual may still constitute “harassment” if it is constant and causes the employee emotional distress
 - ▶ Subjective feelings of employee may be taken into account

MCAD, et al. v. Verizon New England, Inc.

- Employee began leave of absence and sought short-term disability benefits through Verizon's carrier, MetLife
- MetLife approved leave; however, employee did not return as directed and sought additional leave for "debilitating headaches" that had begun after she became pregnant
- Employee remained out of work for an additional month, rejecting numerous accommodations. Employee's FMLA leave lapsed and she still did not return. Employee continued to seek extended medical leave and MetLife ultimately denied the claim, finding that the doctors' reports did not support finding of disability
- Verizon sent a final return-to-work letter and employee did not report to work as directed. Verizon terminated her employment.
- Did the MCAD conclude Verizon discriminated against her because of her disability?

MCAD v. Verizon (continued)

- Take Away for Employers

- ▶ When reviewing disability-related leave requests, focus on medical records / certification from employees' treating physicians
- ▶ Even if employee was found to be disabled, Verizon did not fail to reasonably accommodate her
- ▶ Open-ended and indefinite leave requests are unreasonable as accommodations under Chapter 151B

Joule, Inc. v. Simmons (SJC)

- Employer sued ex-employee (Simmons) after she filed discrimination / retaliation claims with MCAD, alleging she was fired for being pregnant
- Simmons signed an employment agreement requiring all discrimination claims to go to arbitration and employer wanted to enforce agreement
- MCAD intervened in the case, arguing it had authority under c. 151B to pursue an independent investigation of employee's complaint
- Superior Court held arbitration agreement did not bar MCAD claim. Did SJC affirm?

Joule, Inc. v. Simmons (continued)

- Take Away for Employers:
 - ▶ A valid arbitration agreement will bar employee from being a litigant or party to the MCAD proceeding, but he/she could still participate in the process
 - ▶ Still unclear whether a settlement or arbitration judgment would affect the validity or outcome of an EEOC claim

Grzych v. American Reclamation Corp., (MDLR)

- Caucasian employee was engaged to a black woman of Jamaican national origin
- Employee was subjected to racial slurs and epithets referring to his relationship with his fiancée on a daily basis
- After complaining of workplace harassment, he was terminated
- Employee filed charge of discrimination against employer and supervisor at MCAD
- Did the Caucasian employee have standing to sue employer by virtue of his “association” with Jamaican fiancée?

Grzych v. American Reclamation Corp., (continued)

- Take Away for Employers:
 - ▶ MCAD recognizes associational discrimination claims and employees may have standing to bring such claims as a result of their relationships with people outside of office
 - ▶ Managers must be trained / educated about these types of claims

Questions





From the War on Terror to the Workplace: USERRA Developments

**Presented By:
Michael Fleischer, Esq.
Seyfarth Shaw LLP**

OVERVIEW

- Uniformed Services Employment and Reemployment Rights Act (1994)
- Applies to:
 - ▶ Members,
 - ▶ Those Who Apply To, Or
 - ▶ Those Obligated to Serve In:
 - Army
 - Navy
 - Marine Corps
 - Air Force
 - National Guard and Reserves
 - Anything else?



What An Employer Cannot Do

- Discriminate or retaliate because of past or present service or persons who apply to serve
 - ▶ Hiring
 - ▶ Promotion
 - ▶ Reemployment
 - ▶ Termination
 - ▶ Benefits
- Retaliate against anyone assisting in the enforcement of an employee's USERRA rights.

Why Is This Important?

- 1,300 - 1,400 Complaints a Year
- No Statute Of Limitations
- Large Damage Awards
 - ▶ \$780,000
 - ▶ \$505,000
 - ▶ \$345,000



Enforcement of USERRA

- US DOL
 - ▶ VETS (Veterans' Employment and Training Service)
 - ▶ Office of Solicitor
- US DOJ
- Private Right of Action

Notice of Rights

- Provide employees notice of their USERRA rights and responsibilities
 - ▶ DOL USERRA Poster



Is Your Employee Eligible for USERRA?

- Employees Must Give Advance Notice
- Have a Cumulative Absence of 5 Years or Less
 - ▶ Exemptions for Global War on Terror (Afghanistan/Iraq)
- Must Apply For Reemployment Within USERRA Timeframes
- Not Receive Dishonorable Discharge

Advance Notice of Military Service

- Written or Verbal
- Return to Work Date
- Q: Does an employee have to receive formal military orders before he informs his employer?

Recent Decisions

Vega-Colon (1st Cir. 2010)

- NO. Formal Military Orders **Not Required**

- ▶ *Vega-Colon v. Wyeth Pharmaceuticals*, 2010 U.S. App. LEXIS 22277 (1st Cir. Oct. 28, 2010).



After Employee Gives Notice




- Send Individualized Notice
- Health Plan Coverage
 - ▶ Employee Rights
 - ▶ Employer Rights



Returning to Civilian Life

- **Timeline to Reapply for Job**

- ▶ If the Employee has served:

- **> 180 Days**  **90 days to apply**
 - **31- 180 Days**  **14 days to apply**
 - **30 Days or less**  **1st work day after discharge***

- **Failure to Reapply**

Employee Has Reapplied....Now What?

- General Rule



- Escalator Principle (If Service > 90 days)

- Convalescing from Service-Related Injury

Determining An Employee's Compensation

- Length of Service
 - ▶ “Along the Scale”
- Performance Based
 - ▶ “Reasonable Certainty”



Employer's Retirement Plan Contributions

- Employer Required to Resume Contributions
 - ▶ Within 90 Days
 - ▶ Matching Contributions

- Allow Employee To Make-Up Missed Contributions

Employer Exemptions

- “Unreasonable or Impossible”
- Undue Hardship
- Dishonorable Discharge



Recent Decisions

Staub v. Proctor Hospital

- Army reservist sued Proctor under USERRA on the theory that an HR executive who fired him was merely the “cat’s paw” of his direct supervisors, who had openly expressed an anti-military sentiment
- “Cat’s paw” theory applies when a decision-maker is influenced by a subordinate’s bias when terminating an employee or taking other adverse action, rendering the employer potentially liable for discrimination
- Does the decision-maker’s independent investigation negate the effect of prior discrimination?

Recent Decisions (*cont.*)

Carder v. Continental Airlines Inc. (5th Cir.)

- Pilots who were also members of the Air National Guard and Reserves alleged that the airline had subjected them to a hostile work environment because managers made derisive comments such as:
 - ▶ “If you guys take more than 3 or 4 days a month in military leave, you’re just taking advantage of the system.”
 - ▶ “I used to be a guard guy, so I know the scams you guys are running.”
 - ▶ “You need to choose between CAL (Continental) and the Navy”.
- Do these statements provide the pilots with a cause of action against Continental?

Best Practices—Part I

- Delivering Bad News
- Successor Interests
 - ▶ Six Factor Test--Veterans Benefits Act of 2010
- 2 or More Employees Entitled to the Same Position—
What to Do?

Best Practices—Part II

- Scheduling
- Vacation Time/Holiday Benefits
- Waiver
- Training Employees

Employer Checklist- Part I

1. Did the service member give advance notice of military service?
2. Did the employer allow the service member a leave of absence?
3. Upon timely application for reinstatement, did the employer promptly reinstate the service member to his/her escalator position
4. Did the employer grant accrued seniority as if the returning service member had been continuously employed?

Employer Checklist- Part II

5. Did the employer provide training or retraining and other accommodations to persons with service-connected disabilities?
6. Did the employer make reasonable efforts to train or otherwise qualify a returning service member for a position within the organization/company?
7. Did the employer grant the reemployed person pension plan benefits that accrued during military service?
8. Did the employer offer COBRA-like health coverage upon request of a service member whose leave was more than 30 days?

Questions





Whistleblower Developments and The Dodd-Frank Act

**Presented By:
Dana Fleming, Esq.
Seyfarth Shaw LLP**

The Dodd-Frank Act of 2010

- The Dodd-Frank Wall Street Reform and Consumer Protection Act



“To promote the financial stability of the United States by improving accountability and transparency in the financial system, to end “too big to fail”, to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.”

Dodd-Frank's Whistleblower Provisions

- What does the Act do?
 - ▶ Encourage whistleblowing
 - ▶ Provide more robust protection against retaliation
 - ▶ Offer monetary awards for whistleblowers; and
 - ▶ Create new private rights of action for whistleblower retaliation claims

Sarbanes-Oxley Act

- The Public Company Accounting Reform and Investor Protection Act of 2002



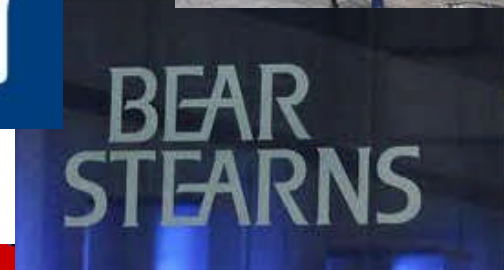
Legislative Purpose – SOX

- SOX was enacted on July 30, 2002 in response to accounting and other corporate scandals



Mission Accomplished?

- Corporate scandals since passage of SOX in 2002



HALLIBURTON



Coverage and Statute of Limitations

- SOX Legislation

- Only covered publicly traded companies.
- Had a 90-day statute of limitations.
- Unclear about right to jury trial in actions filed in federal court.

- After Dodd-Frank

- Covers private subsidiaries of public companies and their affiliates.
- 180-day statute of limitations.
- Confirms right to a jury trial.

Burden of Proof Under SOX

- SOX protects whistleblowers who report various types of fraud- and securities-related violations from retaliation.
 - ▶ Employee engages in “protected activity” by providing information he reasonably believes constitutes a violation of federal mail, wire, bank or securities fraud; federal law relating to fraud against shareholders; or any rule or regulation of the SEC.
 - ▶ Employee must show by a *preponderance of the evidence*: (1) protected activity; (2) employer knew or suspected (actually or constructively) that the employee engaged in protected activity; (3) unfavorable personnel action; and (4) circumstances sufficient to raise inference that protected activity was a *contributing factor* in the adverse action.
 - ▶ Employer must show by *clear and convincing evidence* that it would have taken the same unfavorable personnel action even in the absence of the protected activity.

Procedure Under Dodd-Frank

- Employee must file complaint with OSHA within 180 days of violation
- Employee can “kick out” claim to federal district court (*de novo*) if DOL does not issue a final order within 180 days
- Or, employee can pursue claim through DOL’s regime and then proceed in federal court of appeals: OSHA → ALJ → ARB → Federal Appellate Court

OSHA Has Stepped Up Enforcement

- OSHA's recent willingness to issue substantial monetary rewards and order reinstatement
 - ▶ Tennessee Commerce Bank ordered to pay \$1M to and reinstate a CFO
 - DOL is seeking enforcement of that order in federal court
 - ▶ e-Smart Technologies ordered to pay ~ \$600K and reinstate employee
 - ▶ Lockheed Martin ordered to pay \$75,000 and reinstate Communications Dir.
 - ▶ U.S. Bank in Seattle ordered to pay back wages and reinstate manager
 - ▶ Employee who filed in wrong forum allowed to re-file her claim, long after the statute of limitations lapsed

Damages, Penalties & Other “Teeth”

Civil	Criminal	Reputation
Reinstatement	<p>“Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any federal offense, shall be fined ... imprisoned not more than 10 years, or both. (§ 1107)</p> <p>Enforced by DOJ</p>	<p>Cases garner significant publicity, adversely impacting reputation and goodwill</p>
Back-pay with interest		
Emotional distress and loss of reputation		
Attorneys’ fees and costs		
Other “affirmative relief” (e.g., letter of apology, formal posting of decision)		

SOX also provides for *INDIVIDUAL LIABILITY*

Reinstatement as Remedy



Key Defenses

- ▶ Statute of Limitations
- ▶ No Adverse Employment Action
- ▶ Failure to Exhaust Administrative Remedies
- ▶ Not Covered
- ▶ Lack of Reasonable Belief
 - subjective and objective components
- ▶ Complaint Does Not “Definitively and Specifically” Relate to Prohibited Conduct Identified in Section 806
 - Present vs. Possible Future Violation
- ▶ Materiality
- ▶ Internal Guidelines/Procedures
- ▶ Adverse employment action would have been taken regardless of the protected activity / no “contribution”

Impact on SOX

- Dodd-Frank breathes new life into whistleblower complaints. It sharpens SOX's teeth by:
 - ▶ Expanding it to cover private subsidiaries or affiliates of publicly traded companies;
 - ▶ Increasing the 90-day statute of limitations to 180 days
 - Retroactive? ARB currently is focusing on this issue in *Johnson v. Siemens Building Technologies*, et al., ARB Case No. 08-032
 - ▶ Providing a right to a jury trial in SOX actions removed to federal district courts; and
 - ▶ Prohibiting pre-dispute arbitration agreements and any other “agreement, policy, form, or condition of employment” that requires a waiver of rights under SOX
 - Applied retroactively in district court case of first impression. *Pezza v. Investors Capital Corp.*, Case No. 10-CV-10113 (D. Mass. Mar. 1, 2011)

Bounties!!!

- Dodd-Frank also amends the Securities Exchange Act of 1934 (SEA) by including a provision requiring the SEC to provide a monetary award to individuals who provide “original information” to the SEC that results in sanctions exceeding \$1,000,000.
- The SEC has discretion to award between 10% and 30% of the total amount of the sanctions.
- The award may be appealed to the federal Circuit Court of Appeals within 30 days of the SEC’s determination.

Bounties (cont'd)

- Such bounties are not available to:
 - ▶ Individuals who are convicted of criminal violations related to the action for which the whistleblower provided information, or who obtain the information through audits of financial statements required by securities laws and for whom submission would be contrary to the requirements of section 10A of the SEA.
 - ▶ Employees of an appropriate regulatory agency, the DOJ, a self-regulatory agency, the Public Company Accounting Oversight Board, or a law enforcement organization are ineligible.
- These new "bounty" rules allow whistleblowers to remain anonymous until the bounty is paid.

Bounties (cont'd)

- About half of the investigations by the SEC's enforcement division since the agency's founding in 1934 that have resulted in corporations being prosecuted and/or sanctioned for violating federal laws started from whistleblower accusations.
 - ▶ That was long before the availability of these new bounties.
- Just one day after Dodd-Frank became law, the SEC awarded a \$1 million bounty to the whistleblower in a Connecticut case.
 - ▶ Contrast: in the 20 years before this case, the SEC had given out a grand total of \$160,000 to whistleblowers.

Bounties (cont'd)

SEC's proposed regulations

- ▶ In exercising its discretion to determine size of bounty, SEC will consider if an internal complaint was made
- ▶ 90-day “grace period” following internal report to SEC if company “failed to report the information to the SEC in a reasonable time” or “acted in bad faith”
 - Report to SEC within 90 days means that the date of the internal report is considered the date of the complaint to the SEC for determining whether the employee gave the SEC “original information” (employee keeps his or her “place in line”)

Bounties (cont'd)

SEC's proposed regulations (cont'd)

- ▶ “Whistleblower” defined: Must be an individual, not an entity, who, alone or jointly with others, provides "original information" to the SEC relating to a potential violation of the securities laws.
 - Anonymous submissions: Anonymous whistleblower must be represented by an attorney and the attorney's contact information must be provided to the SEC upon the whistleblower's initial submission.
- ▶ Whistleblower's misconduct: Whistleblower shall not receive any amount he or she is ordered to pay or that is assessed against an entity attributable to "conduct that the whistleblower directed, planned, or initiated."

Bounties (cont'd)

SEC's proposed regulations (cont'd)

- ▶ Broad protection against retaliation: protect any individual who provides information to the SEC regarding potential violations of the securities laws, "regardless of whether the whistleblower fails to satisfy all of the requirements for award consideration set forth in the Commission's rules."
- ▶ "Voluntary" submission: whistleblower must submit information before he/she or his/her employer receives a request from the SEC

Bounties (cont'd)

SEC's proposed regulations (cont'd)

▶ “Original information”:

- “Original information” must be derived from either “independent knowledge” or “independent analysis.” Contrast information obtained from publicly available sources. But first-hand knowledge is not required.

New Private Rights of Action

- Dodd-Frank also affords a private right of action to employees retaliated against for complaining to the SEC or CFTC, which they may pursue directly in federal court.
 - ▶ Contrast SOX actions, which require an employee to exhaust administrative remedies by first filing a claim with OSHA.
- Successful employees may obtain substantial remedies, including: reinstatement without loss of seniority; *double* back-pay (note: SOX only provides regular back-pay); reasonable attorneys' fees; and costs and expert witness fees.

New Private Rights of Action for Financial Services Employees

- Covers employees who perform tasks related to the offering or providing a consumer financial product or service. Covered entities include those that extend credit or service or broker loans, provide real estate and financial advisory services, or provide consumer report information in connection with any decision regarding the offering or provision of a consumer financial product or service.

New Private Rights of Action for Financial Services Employees

- The protections shield employees who engage in the following conduct:
 - ▶ providing information to an employer, the Bureau of Consumer Financial Protection (“Bureau”) or any state, local or federal government authority or law enforcement agency relating to the violation of consumer financial protection laws at issue in this statute or that are subject to the Bureau’s jurisdiction;
 - ▶ testifying in a proceeding against an employer resulting from the enforcement of consumer protection laws at issue in this statute or law that are subject to the Bureau’s jurisdiction;
 - ▶ helping to initiate any proceeding of consumer financial protection laws at issue in this statute; and
 - ▶ objecting or refusing to participate in any activity that the employee reasonably believes to violate any law subject to the Bureau’s jurisdiction.

Understanding the Whistleblower

- Know your plaintiff's motive
 - ▶ “Private Attorney General” (the “good-faith complainant”):
 - ▶ Skeptic's view (the “bad-faith complainant”)

Practical Concerns and Tips

- Create an overall culture of accountability and ethics.
- Craft and disseminate appropriate codes of conduct and anti-retaliation policies.
- Train managers to be appropriately receptive to whistleblowing.
- Institute telephonic and/or Web-based help-lines.
- Consider developing methods of competing with bounties.
 - ▶ Employees now have a unique financial incentive to report suspected fraud to the SEC rather than through the designated channels companies have created (e.g., HR, other supervisors, and other supervisors). Employers thus need to consider whether to offer competing incentives, such as: rewards based on the size of the savings to the company; performance bonuses rewarding meritorious whistleblowing; and/or adding criteria to performance evaluations accounting for efforts to protect the company.

Questions





Legal Developments Regarding Independent Contractors

Presented By:
Jessica Schauer, Esq.
Seyfarth Shaw LLP

Identifying Your Company's Employees: Its Tougher Than You Think!

- Independent Contractors
- Joint Employers



Independent Contractors

Massachusetts' Three-Prong Test:

- ▶ Freedom from control
- ▶ Performs services outside usual course of business
- ▶ Customarily engages in independently established trade, occupation, profession, or business

M.G.L. ch. 149 § 148B

Litigation Trends

- Oil delivery services
- Courier/delivery services
- Cable installers
- Exotic dancers
- Franchise cleaning businesses

Independent Contractors

- Individuals have a private right of action for misclassification
 - ▶ M.G.L. ch. 149, § 148B(d)
- Attorney General may also enforce if a business violates other law(s) because it misclassified an employee as an independent contractor
 - ▶ M.G.L. ch. 149 or 151, §§ 1A, 1B, or 19 (minimum wage & overtime)
 - ▶ M.G. L. ch. 62B (tax withholding)
 - ▶ M.G.L. ch. 152, § 14 (workers' compensation)

Guidance from the Attorney General

Factors that “strongly” suggest misclassification of employees as independent contractors

- ▶ Absence of business records reflecting that the contractor is providing services
- ▶ Cash payments or no reporting of payments
- ▶ Contracting entity provides all the tools/supplies or requires the purchase from the contracting entity
- ▶ The contractor does not pay income tax or employer contributions to DUA

The AG wants to be sure that some entity is treating the worker as an employee (paying taxes, providing workers' comp insurance, etc.)



Case Law Developments

- Somers v. Converged Access, Inc. (SJC) – What if the plaintiff earned more as an independent contractor?
- Awuah v. Coverall North America, Inc. (D. Mass.) – What are “damages incurred” as a result of misclassification?

Independent Contractors Under the FLSA

- The “Economic Reality” Test

- ▶ Degree of control exercised by the “employer” over the workers
- ▶ Workers’ opportunity for profit or loss and their investment in the business
- ▶ Degree of skill and independent initiative required to perform the work
- ▶ Permanence or duration of the working relationship
- ▶ Extent to which the work is an integral part of the employer's business.

IRS “Twenty-Factor” Test

- Is the worker required to comply with the “employer’s” instructions?
- Is the worker required to complete special training?
- Must the worker render the services personally?
- Is the worker hired, supervised, and paid by the “employer”?
- Is there a continuing relationship between the parties?
- Does the worker have set work hours?
- Does the worker do the work on the “employer’s” premises?
- Is the worker required to do the work in a particular sequence or on a particular schedule?
- Must the worker give oral or written reports?
- Is the worker paid by the hour, week, or month?
- Does the “employer” pay the worker’s business expenses?
- Does the worker provide his own tools and materials?
- Does the worker realize profit and loss?
- Does the worker work for more than one firm at a time?
- Does the worker regularly make his/her services available to the public?
- Can the “employer” discharge the worker?
- Can the worker terminate the relationship at any time without incurring liability?

Joint Employers

- No case law under Massachusetts wage laws
 - ▶ “Employer. An individual, corporation, partnership or other entity, including any agent thereof, that engages the services of an employee or employees for wages, remuneration or other compensation.”
455 C.M.R. § 2.01
- Federal courts use different tests for joint employers under the FLSA
 - ▶ First Circuit: 4-Factor *Bonnette* Test
 - ▶ Second Circuit: rejected *Bonnette* in favor of a more complex test

Joint Employer Factors

- Does the putative employer:
 - ▶ Have authority to hire and fire?
 - ▶ Supervise work schedules and conditions of employment?
 - ▶ Determine the rate and method of payment?
 - ▶ Maintain employment records?

Additional Joint Employer Factors

- Non-exhaustive list used by courts outside the First Circuit:
 - ▶ Is the putative employer's premises or equipment used?
 - ▶ Does the contractor company have an independent business that can shift as a unit to another account?
 - ▶ Is the job performed by the contractor company integral to the putative employer's business?
 - ▶ Could the job pass from one contractor to another without change?
 - ▶ Does the putative employer supervise the contractor's employees' work?
 - ▶ Do the contractor's employees work predominantly or exclusively for the putative employer?

Tips to Avoid Liability

- **Independent Contractor Liability:**
 - ▶ Conduct audit of independent contractor classifications
 - ▶ Review independent contractor agreements and/or job descriptions
 - ▶ Stop using certain independent contractors, or change status of these workers to employees
 - ▶ Review handbooks, policies, and benefit plans to ensure no unintended extension of employee benefits from reclassification
- **Joint Employer Liability:**
 - ▶ Where using a third party to provide services, be cognizant of joint employment issues and avoid indicia of control
 - ▶ Consider indemnification provision in contracts

Questions





Hot Topics in Immigration Law

I-9 Compliance

E-Verify Compliance

Trends in USCIS Adjudications

Presented By:

John Quill, Esq.

Seyfarth Shaw LLP

Introduction

- Changes in the Immigration Landscape
Four primary components:
 - Current political landscape
 - I-9 / Worksite enforcement trends
 - eVerify issues
 - Issues with USCIS adjudications

I-9 issues: Identifying Foreign Nationals Early in the Game

- The two questions you should ask **all applicants** when recruiting / interviewing:
 1. “Are you currently authorized to work in the U.S.?”
 2. “Do you now or will you in the future require sponsorship for a work visa?”

I-9 overview: Who needs to complete I-9s?

- Employees:
 - ▶ temporary and permanent
 - ▶ short-term and long-term
 - ▶ part-time and full- time
- Hired on or after November 6, 1986

Not: Contractors, Casual Employees

I-9 Basics

- When must the I-9 be completed?

Section 1: By employee on Day #1

Section 2: By employer within 3 business days of hire

- Retention of documents – to copy or not to copy?
- Where do you store the I-9 form?
 - Centralize, if possible
 - Do not “commingle”
- I-9 Employer Handbook:
<http://www.uscis.gov/files/nativedocuments/m-274.pdf>

I-9: Remote Employees

What to do about “remote” employees?

- Centralize orientation.
- Deputize a person in each location.
- Use an agent.

Current I-9 “Best Practices”

- Review only original documents – mandatory
- Make copy of documents for I-9 file
- SSA/DHS verification
- Periodic internal audits
- Knowledgeable internal staff members
- Pay attention to whether document appears to be genuine

Common mistakes

- SSN is not a “clean” card
- Employee checked wrong box in Section 1
- Signatures missing and/or not dated
- Failure to examine original documents
- Employer representative who examined original documents is not same individual who signed the form
- Failure to re-verify

Common Mistakes (continued)

- Do not tell the employee which documents to show you!
(= Document Abuse)
- Make sure employee has completed and signed his or her portion of the form
- Keep in mind: The fact that employment authorization documents bear a future expiration date cannot be a cause not to hire.

Section 3: Reverification

- Employer must complete a reverification in Section 3 whenever:
 - ▶ Employee is re-hired within 3 years of date of I-9 execution.
 - ▶ Employee changes name due to marriage, divorce, or personal decision.
 - ▶ Employee switches to another type of work authorization (ex: Practical Training F-1 EAD card to H-1B Notice of Approval).

For Employees with Work Authorization Ending on a Specific Date

- Enter the date in HR/payroll computer database.
- Create a “tickler” or “docketing” system so you are reminded of the upcoming expiration date.
- Contact your employee 4 to 6 months in advance of expiration date regarding need to re-verify I-9.
- Withhold payroll after end date unless certain exceptions apply:
 - ▶ The 240 day rule. Timely filed petition to extend H-1B, L-1, O-1 or TN receives a “grace period.”

So What's the Danger? → Penalties for Violations

For “Knowingly Hire” and “Constructive Knowledge”:

First Offense:	\$375-3,200 per employee
Second Offense:	\$3,200-6,500 per employee
Thereafter:	\$4,300-11,000 per employee

If the DHS or DOL sees a pattern of violations, they can also assess an additional \$3,000 per employee AND, IN ADDITION,

\$110-1,100 per employee

For Document Abuse: \$110-1,100 per employee

Order for civil monetary penalty for paperwork violations

I-9 Resources from DHS

- **The I-9 Handbook for Employers**

<http://www.uscis.gov/files/nativedocuments/m-274.pdf>

- **The I-9 Process in a Nutshell**

<http://www.uscis.gov/files/article/EIB102.pdf>

SSN Mismatch Letters: What Should Employers Do?

- Background behind Mismatch letters
- Mismatch letter alone is not a basis to take adverse action against the employee, such as laying off, suspending, or firing
- Company may demand presentation of a valid Social Security Number as a condition of hire
- Employer cannot ignore mismatch letter and is required to take follow-up action
- Risk that employer will react by discharging employee in violation

What is Appropriate Action?

- When employer receives a Social Security mismatch letter, give the employee 3 options:
 - (1) Bring in their SS card voluntarily to compare against the SSA's info.
 - (2) Allow the employee to compare it on their own and confirm that the info is correct.
 - (3) Have the employee go to the SSA, straighten it out, and bring proof.
- In any event, employee must complete a new W-4. There is a \$50 fine for each unresolved mismatch.

Verifying Social Security Numbers

- This is not required, but strongly recommended. Please note distinction between asking for a statement of the SS# and asking for the card itself.
- On-line verification system accessed through SSA website: <http://www.ssa.gov/employer/ssnv.htm>
- Employer can verify SS Numbers even if a Social Security card is not being presented as evidence for the I-9.

What is E-Verify?

- Currently voluntary, except: (1) State Laws (2) Government Contractors
- Access to SSA and Immigration databases (400 million records)
- Changes to I-9 process
- Movement to make E-Verify mandatory for all employers

E-Verify Overview

- Pros - Why Employers Use It:
 - STEM Extensions
 - “Good Faith”/Best Practices
 - Limit SSN no-matches
 - Improve I-9 practices
 - Rebuttable presumption that employer did not knowingly hire an unauthorized worker (if that employee was “E-Verified”)



Breadth. Depth. **Results.**

E-Verify Overview

- Cons – Why You Should Think Twice
 - False hits and TNC tie-ups
 - “Volunteer” I-9 info to the government
 - online (by submitting queries)
 - for inspection (without 72 hours notice)
 - Data mining
 - Administrative burden of registering/training
 - Potential loss of employees



Breadth. Depth. **Results.**

E-Verify Updates for Federal Contractors

- Effective September 8, 2009.
- Contract requirement, not a regulatory requirement (if it is not in your contract, you are not required to use it).



E-Verify Federal Contractor Rule Delayed Until September 8, 2009

The federal government has extended, for a fourth time, the effective date of the E-Verify requirement for federal government contractors. The regulation is now set to take effect on September 8, 2009. The effective date is being delayed to give the Obama administration additional time to review the regulation, which was originally scheduled to be implemented on January 15, 2009. According to the U.S. Chamber of Commerce, an official announcement of the delay is expected to be published in the *Federal Register* this week.

History

For a history of the relevant regulation and its delays, see our alerts: [E-Verify Federal Contractor Rule Delayed Until June 30](#); [E-Verify Rule for Federal Contractors Suspended Until May 21, 2009](#); [E-Verify Rule for Federal Contractors On Hold Until February 20, 2009](#); [Federal Contractors Required to Use E-Verify Beginning in January 2009](#); and [Federal Contractors to be Required to Use E-Verify](#).

Breadth. Depth. **Results.**

E-Verify Requirement for Federal Contractors

- Requires federal contractors/subs to use E-Verify
 - All new hires (nationwide)
 - Existing employees “assigned to the contract”
- Exceptions (Prime Contractors):
 - Less than \$100,000
 - Fewer than 120 days
 - Outside of the U.S.
 - COTS Exemption
- Flow-Down to Subcontracts
 - Valued at more than \$3,000
 - Services or Construction
- Opportunity to E-Verify the entire work force.
- E-Verify Supplemental Guide:
www.uscis.gov

Timing

- Contracts entered into or modified on or after September 8th, 2009 will include the E-Verify clause if the government finds the contract subject to the requirement.
- Employers must register for E-Verify within 30 days of the award or modification of the contract.

For new hires

- Employers must begin using E-Verify for all new hires within 90 days of registration.
- Once the employer begins E-Verify, queries must be submitted within 3 business days of the date of hire.

For existing employees

- Employers must initiate queries for all existing employees assigned to the contract within 90 days after **registration** or within 30 days of an employee's assignment to the contract, whichever is later.

Shifts in USCIS Practice

- Economic climate has created a “Culture of No” at USCIS and Ports of Entry
- Fraud detection: FDNS site visits / VIBE program
- Creative paths to victory

FDNS Site Visits

- Relating to “Fraud Fees” charged in connection with H-1B and L-1 petitions
- Typical FDNS visit
- How to prepare your organization for an FDNS visit

VIBE Program

- New USCIS system to verify validity of Petitioner information
- USCIS uses Dunn & Bradstreet data to compare with information in petition.
- Employers should check D&B information and note any discrepancies in filings

Best Practices to Meet Your Goals

- Status of H-1B Quota
- Potential for enjoyment of additional F-1 OPT when employee qualifies for STEM extension
- Issues with Contract employees in H-1B status – January 2010 Neufeld memo.

TN Visa (NAFTA)

- For nationals of Canada and México
- Previous maximum duration was one year – now can be issued for up to 3 years, but not on all cases.
- Best Practice: Know the climate of POEs
- Best Practice: Extend through the USCIS Service Center

L-1 Visas – Intracompany Transferees

- For “intra-company transferees” who have already worked for an employer’s parent/subsidiary abroad for at least one year
- L-1 spouses may work with USCIS authorization
- Difficulties at USCIS with “Specialized Knowledge” and “Functional Manager” positions
- Helpful Solution: L-1 Blanket petition

Conclusion

- Lessons learned
 - ▶ Complex issue – no simple answers
 - ▶ Serious compliance issues that require programmatic response
 - ▶ Shifting landscape
 - ▶ Workplace enforcement is here to stay
 - ▶ Advance planning is essential

Questions



THANK YOU!

Daniel Klein, dklein@seyfarth.com

Michael Fleischer, mfleischer@seyfarth.com

Sarah Turner, sturner@seyfarth.com

Dana Fleming, dfleming@seyfarth.com

Jessica Schauer, jschauer@seyfarth.com

John Quill, jquill@seyfarth.com

SEYFARTH SHAW LLP

617-946-4800

www.seyfarth.com