
## October 2010



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### I. Large Health Care Organization Pays $257,000 in Civil Penalties to Settle Citizenship Discrimination Claims

On October 19, 2010, the U.S. Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC") announced that Catholic Healthcare West ("CHW"), the eighth largest hospital provider in the nation, agreed to pay $257,000 in civil penalties to settle claims that it engaged in citizenship status discrimination. This is the largest monetary civil penalty ever to be paid by an employer to settle such a discrimination claim.

In addition, CHW has agreed to pay $1,000 in back wages to the employee who filed the claim and to conduct a comprehensive review of past I-9 practices at each of its 41 facilities, in an effort to identify and compensate any other employees who were forced to over-document their work authorization and, as a result, lost wages. CHW also will train its recruitment staff not to discriminate based on citizenship and will review and update its current hiring policies and procedures to ensure they are in compliance with relevant U.S. immigration and other laws. To ensure compliance, CHW must provide periodic reports to

the OSC for the next three years.

Employers seeking to comply with their legal obligations under the Immigration Reform and Control Act of 1986 ("IRCA") face increasingly difficult challenges in the current worksite enforcement climate. They must be careful to satisfy all Form I-9 requirements or risk substantial civil fines, and even criminal prosecution, for noncompliance. However, the IRCA also contains anti-discrimination provisions that, among other things, make it illegal to impose different or more stringent employment eligibility verification standards based on an individual's citizenship status. According to the Department of Justice, CHW required non-citizen and naturalized U.S. citizen (non-native born) new hires to provide more work authorization documents than required by the IRCA, while allowing native-born U.S. citizens to provide only those documents that the IRCA actually requires for the Form I-9 employment verification process.

This case is another poignant reminder of how important it is for all employers to train their human resources personnel on how to properly implement their Form I-9 process so that it secures the documentation that the IRCA requires, without running afoul of the IRCA's anti-discrimination provisions.

## II. U.S. Department of Labor Issues Proposed Rule on H-2B Wage Rates

On October 4, 2010, the Employment and Training Administration, U.S. Department of Labor ("DOL"), issued a proposed rule that would require employers to pay H-2B and American workers recruited in connection with an H-2B job application a "wage that meets or exceeds the highest of: the prevailing wage, the federal minimum wage, the state minimum wage or the local minimum wage." The proposed rule was published on October 5, 2010, in the *Federal Register*. Interested parties have 30 days to comment.

The H-2B program allows for the admission of 66,000 skilled or unskilled temporary guest workers annually when qualified American workers are not available and the employment of foreign workers will not adversely affect the wages and working conditions of similarly employed Americans. The proposed rule was promulgated in response to the federal district court decision in *Comite de Apoyo a los Trabajadores Agricolas v. Solis*, Civil Action No. 09-240 (E.D. Pa. Aug. 31, 2010), which held that the 2008 H-2B wage regulations issued by the DOL violated the Administrative Procedure Act.

In its preamble to this proposed regulation, the DOL indicated that it has grown increasingly concerned that the current method for calculating permissible H-2B wages does not adequately reflect the wages necessary to ensure that American workers are not adversely affected by the employment of H-2B workers. Under the DOL's proposed rule, the prevailing wage for H-2B workers would be based on the highest of three measures:

1) Wages established under a collective bargaining agreement;

2) A wage rate established under the Davis-Bacon Act or the Service Contract Act for the occupation in the area of intended employment; or

3) The mean wage rate established by the Occupational Employment Statistics

wage survey for that occupation in the area of intended employment.

The DOL added that the inclusion of Davis-Bacon Act or Service Contract Act wages would protect U.S. worker wages by ensuring the prevailing wage determinations reflect the "highest wage from the most accurate and diverse pool of government wage data available with respect to a job classification and the area of intended employment." Additionally, the DOL indicated that the proposed rule would eliminate the current four-tier wage structure and the use of private wage surveys, which the DOL feels often are "not relevant to the unskilled positions generally involved in the H-2B program."

## III. Fifth Circuit Rules that Hotel Workers on H-2B Visas Are Not Entitled to Recoup Visa Expenses Under FLSA

On October 1, 2010, the U.S. Court of Appeals for the Fifth Circuit decided *Castellanos-Contreras v. Decatur Hotels LLC*, No. 07-30942 (5th Cir. Oct. 1, 2010)(en banc). In an 8-6 decision, the Fifth Circuit held that foreigners working as temporary guestworkers at New Orleans hotels under the H-2B program are covered by the Fair Labor Standards Act ("FLSA"), but that the FLSA does not require these employers to reimburse the workers for recruitment, visa, and travel expenses in determining whether the employee is receiving the FLSA-mandated minimum wage.

In reaching this conclusion, the Fifth Circuit declined to enforce retroactively a 2009 DOL interpretive bulletin that indicated that the FLSA covers visa and travel expenses. The Fifth Circuit noted that the DOL bulletin was issued in 2009, long after the events in question occurred in 2005-2006, and found that it had to follow the general rule not to apply changes in the law retroactively. In the Fifth Circuit's decision, Judge Catharina Hayes wrote, "Whatever deference may be due to the [DOL]'s informally promulgated bulletin in the future, it does not itself in any way purport to apply retroactively. Accordingly, we decline to apply it to the situation here."

The *Castellanos-Contreras* case arose from an FLSA collective action filed by H-2B workers hired by Decatur Hotels in New Orleans in 2005 after Hurricane Katrina. The H-2B workers' hourly pay rates exceeded the federal minimum wage. The workers argued, however, that the money they paid to obtain employment in the United States, including visa, transportation, and recruitment costs, must be reduced from their pay when calculating whether Decatur was actually paying them the minimum wage required by the FLSA. If this were not done, the workers argued, it would have the effect of cutting their wages to less than the FLSA-mandated minimum wage for the relevant pay periods.

The DOL's proposed rule on calculating wages for the H-2B guest worker program, coupled with the Fifth Circuit's decision in *Castellanos-Contreras*, should serve to remind employers in industries that use temporary or seasonal H-2B guest workers, such as the recreational, construction, and hospitality industries, that they must be careful about the wages they pay to avoid what are clearly renewed efforts by the DOL to regulate wages and working conditions in this area.

## IV. Court Strikes New York State Bar to Nonimmigrants Seeking Pharmacist

**License**

On September 29, 2010, a federal district court in Manhattan declared unconstitutional a New York State law that bars nonimmigrants authorized to work from obtaining a pharmacist license. *Adusumelli v. Steiner*, No. 1:08-cv-06932 (S.D.N.Y Sept. 29, 2010). The law at issue is New York Education Law §6805(1)(6). It requires all applicants for a pharmacist license to be either an American citizen or a lawful U.S. permanent resident. New York argued that the law protected the public because nonimmigrants on temporary work visas only have a "tenuous connection" with the state and, thus, would not be available to answer for disciplinary infractions or malpractice claims. The state also contended that the law protected the jobs of New York residents against those having less contacts with the state.

The court rejected these arguments on equal protection and preemption grounds. The court found an equal protection violation because the New York law did not serve a compelling state interest and was not narrowly tailored to serve an important governmental objective. Thus, the law could not survive under the Equal Protection Clause of the 14th Amendment of the U.S. Constitution. The court also held that the New York law was preempted by federal immigration law. Relying on *Toll v. Moreno*, 458 U.S. 1 (1982), the court found that the law imposed additional conditions on nonimmigrants than those authorized by Congress and, therefore, unconstitutionally interfered with the federal government's exclusive power to regulate immigration and naturalization.

The court's decision in *Adusumelli* follows a similar decision in *Kirk v. New York State Department of Education*, 562 F. Supp. 2d 405 (W.D.N.Y. June 23, 2008). *Kirk* found Section 6704 of the New York State Education Law unconstitutional because it contained a similar restriction on applicants for veterinary licenses.

Two federal courts of appeals have upheld comparable state laws that distinguish between permanent residents and nonimmigrants in granting applications for a state benefit. However, the U.S. Court of Appeals for the Second Circuit, the circuit where the *Adusumelli* decision arose, has not yet addressed the issue. *See League of United Latin American Citizens ("LULAC") v. Bredesen*, 500 F.3d 523 (6th Cir. 2007) (Tennessee law barring nonimmigrants from securing driver's licenses), and *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005) (Louisiana law barring nonimmigrants from taking the state bar exam). If *Adusumelli* is affirmed on appeal, this would sound the death knell for all similar restrictions in the New York State Education Law, at least, until a possible review by the U.S. Supreme Court.

## V. October 15, 2010, H-1B Cap Count

As of October 15, 2010, U.S. Citizenship and Immigration Services ("USCIS") has confirmed the filing of approximately 42,800 H-1B cap-subject petitions for fiscal year 2011. USCIS also reported the filing of approximately 15,700 of the additional 20,000 H-1B cases reserved for holders of advanced U.S. degrees. This leaves room for approximately 22,200 new H-1B approvals under the 2011 "Regular" Cap quota, and 4,300 H-1B approvals under the 2011 "Masters" Cap quota. USCIS will continue to accept all eligible H-1B cases until a sufficient number of H-1B and H-1B1 petitions have been received to reach the statutory

limits.

## VI. Reminder: 2012 Diversity Visa Lottery Ends on November 3, 2010

On September 23, 2010, the U.S. Department of State ("DOS") announced the registration period for the DV-2012 Diversity Visa lottery. Entries for the DV-2012 lottery must be submitted electronically between 12:00 p.m. EDT (GMT-4) on Tuesday, October 5, 2010, and 12:00 p.m. EST (GMT-5) on Wednesday, November 3, 2010. It is strongly recommended that applicants not wait until the last week of this registration period to enter because heavy demands could result in website delays. No entries will be accepted after 12:00 p.m. EST on November 3, 2010. During the registration period, information, instructions and the Electronic Diversity Visa Entry Form for the DV-2012 lottery will appear at www.dvlottery.state.gov.

Foreign nationals considering filling out a DV-2012 application should carefully review the eligibility requirements, and instructions on the DOS website. Each eligible applicant can submit only one application to the DV-2012 lottery. However, to maximize this opportunity, each eligible family member (child or spouse) is considered a separate applicant and can submit his or her own application.

## VII. DOS Issues November 2010 Visa Bulletin

The DOS recently issued its Visa Bulletin for November 2010. The Bulletin determines who can apply for permanent residence and when. The cutoff dates for the Employment-Based Third Preference are as follows: January 22, 2005, for all chargeability, including the Philippines; November 22, 2003, for China; May 1, 2001, for Mexico; and January 22, 2002, for India. The cut-off dates for the Employment–Based Second Preference are as follows: Current for all chargeability, including Mexico and the Philippines; May 8, 2006, for India, and June 1, 2006, for China. The monthly Visa Bulletin is available at: http://travel.state.gov/visa/bulletin/bulletin_1360.html.

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