February 2012 Immigration Alert

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I. OSC Targets Health Care, Hospitality, Retail, and Other Industries

The U.S. Department of Justice's Office of Special Counsel ("OSC") was established by Immigration Reform and Control Act of 1986 ("IRCA"). The OSC investigates and prosecutes employers for discriminating against workers based on national origin, citizenship status, and

document abuse. Liability can attach when an employer acts too zealously in satisfying its Form I-9 obligations, such as asking foreign-looking applicants for more or different documents than it seeks from "American" workers or instructing employment applicants on which documents to provide for Form I-9 verification. Given the recent increase in Form I-9 audits by U.S. Immigration and Customs Enforcement ("ICE"), employers understandably have been too eager to satisfy their legal obligations and inadvertently crossed the line into prohibited discrimination under the IRCA.

Recently, the OSC published a pamphlet entitled *Immigration Status and National Origin Discrimination in Employment*, which is designed to assist employers navigate this difficult discrimination minefield. The pamphlet addresses the most common forms of unlawful discrimination, including demanding specific documents during the Form I-9 process, asking workers for more documents than the Form I-9 process requires, requesting different documentation from foreign and U.S. worker applicants, refusing to hire foreign-looking workers, hiring only U.S. citizens absent a legal justification, preferring undocumented workers, and firing those workers who lie about their immigration status but not other workers who misrepresent comparable aspects of their background. Also, the pamphlet serves as a poignant reminder of the dangers that employers face if they fail to assiduously follow all Form I-9 requirements. The pamphlet is available on the OSC website at: http://www.justice.gov/crt/about/osc/.

II. DOJ Settles with California Medical Center Regarding Claims of Discrimination Against Foreign Nationals

The OSC recently reached a settlement with the University of California ("UC"), San Diego Medical Center ("SDMC"), regarding allegations that the SDMC required excess documentation from foreign nationals ("FNs") who sought employment. Under the terms of the settlement, the SDMC agreed to a consent judgment that required it to: (i) pay a civil penalty of $115,000 to the United States; (ii) provide relevant training to all human resource personnel at its 10 UC campuses, five medical centers, and research laboratory; and (iii) avoid future discrimination and retaliation.

In its complaint, the OSC alleged that the SDMC violated the provisions of the immigration laws that prohibit employers from requiring FN applicants for employment to provide more or different documents than citizens are required to provide during the recruitment, hiring, and employment verification process. The SDMC settlement provides another warning to employers that they must follow all legal requirements despite the current worksite enforcement environment.

III. Massachusetts Supreme Judicial Court Finds That Health Coverage Exclusion of Immigrants Violates State Constitution

On January 5, 2012, the Massachusetts Supreme Judicial Court, the state's highest court, held unconstitutional a state law that excluded certain immigrants from eligibility for subsidized health coverage under that state's "Commonwealth Care" program. *Finch v. Commonwealth Health Insurance Connector Authority*, 459 Mass. 655, 946 NE 2d 1262, *aff'd*, SJC-11025 (MA Jan. 5, 2012). At issue in *Finch* was a legislative appropriation that denied state subsidies for the purchase of health insurance to noncitizen immigrants residing lawfully in Massachusetts. The appropriation financed the Commonwealth Care Health Insurance Program, otherwise known as "Commonwealth Care." Commonwealth Care was established in 2006 to provide premium assistance for health insurance to low-income Massachusetts residents. This program was supported equally by state and federal funds. The challenged appropriation required Commonwealth Care to limit subsidies only to individuals eligible for federally funded public benefit programs as set forth in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), 8 USC ¶¶1601-46. PRWORA essentially excludes from eligibility for federal benefits anyone who

has resided in the country for less than five years.

The plaintiffs in *Finch* were FNs who had either been denied eligibility for assistance under Commonwealth Care or had been terminated from that program. They asserted various equal protection claims under the federal and state constitutions. Relying exclusively on the Massachusetts constitution, the *Finch* court found that the challenged appropriation could not withstand the strict scrutiny analysis that Massachusetts requires to uphold laws that make distinctions based on alienage. As a result of this decision, Massachusetts now must pay the full amount for those FNs who are not eligible for Commonwealth Care under PRWORA because the federal government is not legally permitted to match these funds.

IV. DOL Finds That the University of Miami, Miller School of Medicine, Violated H-1B Requirements

On December 20, 2011, the Administrative Review Board ("ARB"), U.S. Labor Department ("DOL"), issued a decision that found the University of Miami ("UM"), Miller School of Medicine ("MSM"), in violation of the laws relating to the employment of H-1B nonimmigrants. *In re: University of Miami, Miller School of Medicine*, ARB Case No. 10-090, 10-093, ALJU Case No. 2009-LCA-026 (Dec. 20, 2011). The H-1B provisions of the immigration laws allow employers to hire nonimmigrant workers in H-1B classification if they will work in specialty occupations. To secure H-1B classification for these workers, sponsoring employers must first file a Labor Condition Application ("LCA") in which they agree, among other things, to pay the higher of the prevailing wage or actual wage for the job classification and to offer the H-1B employee the same working conditions that apply to similarly employed U.S. workers. The terms of the LCA, including the wage requirements, remain in effect until the employer effectuates a "bona fide" termination of the employee's H-1B status.

This administrative proceeding involved an H-1B employee originally sponsored by MSM in 2006 to work as clinical anesthesiologist in teaching hospitals associated with UM at an annual salary of $48,000. Subsequently, in May 2007, MSM filed a second LCA changing the employment to assistant professor and raising her wage to $96,000. However, the UM ultimately never approved the employee for this position. In July 2007, the UM relieved the employee of all work-related duties and advised her that her employment would be terminated effective August 31, 2007. At that time, the UM also offered the employee $5,000 in relocation expenses, plus payment of return transportation costs home. The employee rejected this offer, and it was never paid. In December 2007, the UM notified the U.S. Citizenship and Immigration Services ("USCIS") that it had terminated the H-1B employee's employment.

There were essentially two issues in the UM/MSM proceeding. First, when did MSM effectuate a "bona fide" termination? Second, what was the prevailing wage due the employee? The ARB found that the "bona fide" termination occurred in December 2007, when UM finally notified the USCIS of the termination, not on August 31, 2007, when the employee was actually terminated. To effect a "bona fide" termination of an H-1B employee, the employer must: (1) properly terminate the employee under state law; (2) offer the employee return transportation costs home; and (3) notify the USCIS of the H-1B termination. The employee argued that she was entitled to full pay under the LCA because she had not received her return transportation costs and, thus, there had never been a bona fide termination. The employer claimed that a bona fide termination occurred in August 2007, when the employee was properly terminated. The ARB rejected both positions and found that a bona fide termination occurred in December 2007, when the employer took the last of the three required steps.

As far as back pay goes, the ARB found that UM/MSM was obligated to pay the higher wage of $96,000, when the second LCA was approved and the employee actually assumed additional responsibilities. In this regard, the ARB rejected MSM's argument that it was never

required to pay this wage because the UM didn't approve the employee for the new position. The H-1B rules require the sponsoring employer to pay the actual or prevailing wage, whichever is higher. These same rules require employers to pay the mandated wage starting 30 days after the employee arrives in the United States and presents herself for employment. Here, the second LCA was filed in May 2007 and the employees not only presented herself for employment but actually assumed additional responsibilities until the UM refused the appointment. Under these circumstances, the ARB found that the employer had to pay $96,000 from August 31, 2007, through December 2007, when the "bona fide" termination was effectuated.

This decision serves as a reminder to all employers about the steps that they must take to effectuate a "bona fide" termination of an H-1B employee and to cancel their wage obligations under the LCA.

V. BALCA Expands DOL Eligibility Requirements for Hospitals Seeking ACWIA Wage Determinations

Employers seeking to sponsor FNs for permanent residence in the United States must offer to pay them what the DOL considers the prevailing wage for the occupation in the geographic area in which the job is located. Under the American Competitiveness and Worksite Improvement Act ("ACWIA"), an employer that is a nonprofit affiliate of an institution of higher education can offer to pay a prevailing wage specific to its industry and location. 8 U.S.C.§1182(p)(1). In most cases, the ACWIA wage is considerably less, so employers that can establish the requisite affiliation can secure a significant advantage. In recent years, however, both the DOL and USCIS have adopted increasingly narrow definitions of an "affiliate" and, thus, foreclosed ACWIA wage eligibility for many organizations that otherwise should have been eligible. On November 15, 2011, the Board of Alien Labor Certification Appeals ("BALCA") issued its decision in *In re: Children's Hospital Corporation*, 2011-PER-01338 (BALCA Nov. 15, 2011), and this may reverse the trend.

In *Children's Hospital,* the Children's Hospital Corporation ("Hospital") sought to sponsor a systems manager for permanent residence and filed a request with the DOL for a prevailing wage. The Hospital had been a teaching affiliate of the Harvard Medical School ("HMS") since 2009 and requested an ACWIA wage for the position. The DOL rejected the Hospital's request and its decision was affirmed on reconsideration. Essentially, the DOL adjudicators found under the relevant regulations that the Hospital could not be an HMS affiliate because the Hospital and HMS were distinct institutions and had no clear legal relationship, and neither entity had the legal authority to control the other's operations. The Hospital appealed the administrator's denial to BALCA, which granted the Hospital's request for an ACWIA wage and rejected the rationale for the decision.

At the outset, BALCA noted that the Hospital had an agreement that governed its relationship with HMS, and that both entities held themselves out as affiliates to the public. BALCA then reviewed the legislative and regulatory history for ACWIA's prevailing wage provisions and concluded that Congress never intended the term "affiliation" to include only organizations tied together through a clear relationship. Where, as in the Hospital's situation, an agreement between an employer and the institution of higher learning showed a close relationship, there was a record of consistent collaboration, and they historically had held themselves out as affiliates, BALCA would find that they had satisfied ACWIA's requirements and were entitled to an ACWIA wage.

VI. Third Circuit Rejects Doctor's Employment Contract Claim Based on H-1B Status

On January 23, 2012, the U.S. Court of Appeals for the Third Circuit issued its unpublished decision in *Edwards v. Geisinger Clinic*, No. 11-1528 (3d Cir. Jan. 23, 2012). In *Edwards*, the plaintiff was a British citizen whom the Geisinger Clinic ("Clinic") recruited to work as an

interventional radiologist. During his interviews, the plaintiff expressed his desire to obtain board certification from the American Board of Radiology ("ABR"), which the Clinic requires new physicians in the field to secure. This normally takes four to six years due to the certification requirements. The Clinic subsequently provided the plaintiff with an offer letter that allowed him four to six years to obtain ABR certification but conditioned his employment upon execution of a practice agreement that contained an employment-at-will provision. To facilitate his employment in the United States, the Clinic sponsored the plaintiff for an H-1B visa, which was good for three years. When he arrived, the Clinic required the plaintiff to execute a practice agreement that indicated that his employment was at will, and that he could be terminated at any time for any or no reason.

The plaintiff received his H-1B visa and moved to the United States in 2007, where he executed the required practice agreement and began work for the Clinic. In May 2008, however, the Clinic terminated his employment, and the plaintiff sued, claiming, among other things, that the three-year H-1B approval constituted a contract of employment that was breached by the Clinic. The Third Circuit unanimously rejected this argument, noting that the H-1B approval permitted him to work for up to three years but did not "guarantee employment for the visa's maximum duration." Indeed, the Third Circuit added that immigration laws expressly contemplate that an employer may terminate an H-1B employee before the end of the visa's duration so there was no legal basis for the claim.

VII. NLRB Rejects Employer's "Unauthorized Work" Defense Without Factual Basis

On December 30, 2011, the National Labor Relations Board ("NLRB" or "Board") issued a 2-1 decision that found that employers defending back-pay claims must articulate a factual basis supporting any claim that employees were ineligible to work before such a defense could be raised. *Flaum Appetizing Corp.*, 357 N.L.R.B. No. 162 (Dec. 30, 2011). In *Flaum*, the NLRB found that the firm had violated the National Labor Relations Act ("NLRA") by terminating 17 employees after they engaged in a concerted protest at work. The NLRB directed the firm to reinstate the fired workers and give them back pay.

Following the NLRB's order, the firm contested the right of the employees to back pay because they were undocumented workers and, relying on *Mezonos Maven Bakery, Inc.*, 357 N.L.R.B. No. 47 (Aug. 9, 2011), claimed that this precluded them from receiving a back-pay award. In *Mezonos*, the NLRB found that the U.S. Supreme Court's decision in *Hoffman* precluded an award of back pay regardless of whether the employer knew the employees were undocumented and violated the IRCA.

The NLRB held that the employer could not assert a *Mezonos* defense unless it first provided a factual basis supporting the asserted defense. The two majority Board members found that an employer had to articulate some basis for asserting a *Mezonos* defense before an inquiry into an employee's immigration status could be permitted. The dissenting Board member opined that the Board lacked jurisdiction under *Mezonos* to award back pay to undocumented workers so the inquiry into immigration status necessarily was relevant to the proceeding. It remains to be seen whether this procedural decision will end up pulling the rug out from under the general rule that *Mezonos* announced.

VIII. San Francisco Foundry Forced to Fire 200 Workers After ICE Worksite Enforcement Audit

On December 19, 2011, Pacific Steel Casting Co. ("Pacific Steel"), a specialty casting manufacturer in the San Francisco Bay area, announced that it had been forced to fire over 200 workers during the past three months. This amounted to nearly one-third of its workforce! Pacific Steel's actions followed a "routine" audit of its Forms I-9 by ICE. During the audit, ICE found that these 200 workers did not appear to provide the evidence of identity and work authorization required to satisfy the Form I-9 requirements. As a result, ICE instructed Pacific Steel that it had to let these workers go if they could not provide the

necessary documentation or else the manufacturer and its management would face civil and possibly criminal liability.

Pacific Steel is a family-owned business and many of the workers had been with the manufacturer for decades. Many were highly skilled and not easy to replace due to the small number of foundries left in the United States. A Pacific Steel spokesman called it a "difficult and wrenching situation not only for the families but for the company." The Hobson's choice that Pacific Steel faced is a grim reminder to employers that they need to make Form I-9 compliance an important component of their overall risk management policies so that they can withstand the type of worksite enforcement action that confronted Pacific Steel.

IX. DOS Notes Increasing Visa Demand from China and Brazil

On January 12, 2012, the U.S. Department of State ("DOS") announced that visa processing in Brazil and China had jumped more than 50 percent during the first quarter of fiscal year 2102. The increased demand reflects increasing interest in the United States by businesses and travelers from these countries. To accommodate this demand, the DOS is expanding the visa sections in these countries and developing and deploying new systems and technologies to facilitate legitimate travel without compromising national security.

This extraordinary growth is good news for the U.S. economy but not surprising to Epstein Becker Green. Several years ago, as part of our China Initiative, we formed a group dedicated to providing comprehensive legal services to Chinese businesses that are expanding to this country. Additional information about this group can be found on our website at: http://www.ebglaw.com/about.aspx?Show=12352.

X. DOS Issues February 2012 Visa Bulletin

The DOS recently issued its Visa Bulletin for February 2012. The Visa Bulletin determines who can apply for U.S. permanent residence and when. The cutoff dates for family-based immigration continue to show backlogs and regressions due to the heavy demand for these visas. The cutoff dates for employment-based visas, however, reflect a sluggish demand and, thus, the third and second preference categories have advanced significantly. The cutoff dates for the Employment-Based Third Preference category are as follows: February 22, 2006 (advanced from November 22, 2005), for all chargeability, including the Philippines and Mexico; December 1, 2004 (advanced from April 22, 2003), for China; and August 15, 2002 (advanced from July 8, 2002), for India. The cutoff dates for the Employment-Based Second Preference category are as follows: Current for all chargeability, including Mexico, the Dominican Republic, and the Philippines; and January 1, 2010 (advanced from April 15, 2007), for China and India. The DOS predicts that employment-based priority dates will continue to advance for at least the next few months but slow down in the summer so that the DOS can assess where they are in relation to the quotas established by law. The DOS's monthly Visa Bulletin is available at: http://travel.state.gov/visa/bulletin/bulletin_1360.html.

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