September 2014 Immigration Alert

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I. Sixth Circuit Expands the Liability of Health Care Employers for Sponsorship Costs

On August 20, 2014, the U.S. Court of Appeals for the Sixth Circuit issued its decision in *Kutty v. U.S. Department of Labor*, No. 11-6120 (6th Cir. 2014) ("*Kutty*"). In *Kutty*, several foreign physicians sued the clinics and clinics' owner who sponsored them, claiming that the clinics should be financially responsible for paying all the legal fees, filing fees, and disbursements associated with the H-1B petitions and J-1 waiver applications that they had submitted on the physicians' behalf. Based on its review of Department of Labor ("DOL") regulations, the Sixth Circuit affirmed a DOL administrative law judge's decision that had imposed these immigration fees and costs on both the clinics and their owner. The award totaled $1,044,294, plus $108,800 in civil penalties and a two-year H-1B debarment.

While the award of H-1B fees and expenses is consistent with prior DOL determinations, the extension of that liability to include the costs of J-1 waiver applications represents a radical expansion of the manner in which both the DOL and the courts historically have construed the applicable DOL regulations. Based on the *Kutty* decision, health care employers can expect more aggressive enforcement activity in connection with their employment of foreign nationals ("FNs") generally and foreign medical professionals sponsored

for H-1B classification and J-1 waivers of the two-year foreign residence requirement that many J-1 residents face.

We have commented in past Alerts on the competitive pressures that the Affordable Care Act ("ACA") imposes on health care employers under the immigration laws. Given the lack of qualified U.S. workers available for many of the health care professions that must be staffed to satisfy ACA requirements, there is increased pressure to recruit abroad, or to recruit FNs training in the United States to fill these positions. Those who seek to tap into this labor market, however, must define and address the challenging compliance issues that surround these workers. *Kutty* is another example of the complications that health care employers face in this area.

II. USCIS Expands H-1B Eligibility for Nurses

The U.S. Citizenship and Immigration Services ("USCIS") recently released a new memorandum defining which nursing positions may satisfy the H-1B requirements for a "specialty occupation." The USCIS historically has found that most professional nursing positions do not satisfy the H-1B requirements because they normally do not require at least a bachelor's degree in nursing as the minimum entry-level requirement. In its recent memo, however, the USCIS acknowledged that changes in the nursing profession in the 12 years since the agency last released guidance in this area have shown an increased preference for more highly educated nurses.

The USCIS noted that a nurse is not H-1B eligible just because he or she has a bachelor's degree in nursing. The agency will look to the duties that the nurse will perform, the type of patients with whom they will work, and the normal degree requirements in both the industry and at the sponsoring employer to assess whether the position constitutes a professional "specialty occupation" for H-1B purposes. Already, the USCIS has noted that many "advanced practice" nursing positions satisfy the H-1B requirements. These now also may include Certified Nurse-Midwives, Certified Clinical Nurse Specialists, Certified Nurse Practitioners, and Certified Registered Nurse Anesthetists. The agency also indicated that Addiction nurses, Cardiovascular nurses, Critical Care nurses, Emergency Room nurses, Genetics nurses, Neonatology nurses, Nephrology nurses, Oncology nurses, Pediatric nurses, Peri-Operative nurses, and Rehabilitation nurses also tend to have the type of advanced responsibilities that may satisfy H-1B requirements. Finally, the nursing position will generally be considered an H-1B eligible occupation whenever state law requires a bachelor's degree in nursing to obtain a license to perform the responsibilities.

III. Obama Administration Warns ACA Sign-Ups to Supply Proof of Legal Status

On August 12, 2014, the Obama administration announced that it would cut off health insurance for up to 310,000 people who signed up for health insurance benefits through online exchanges under the ACA but have not provided documentation demonstrating that they are American citizens or lawful permanent residents. The ACA bars unauthorized immigrants from using the online exchanges to shop for health insurance coverage and from receiving tax credits to offset the cost of health insurance premiums. Immigration advocates have been active in the immigrant communities trying to enroll eligible immigrants, but many have failed to submit the required documentation. The U.S. Department of Health and Human Services, the federal agency responsible for administering the enrollment process, has complicated the issue, however, because it has been unable, in many cases, to confirm that proper documentation has been provided and, thus, has been sending letters warning of cancellation to many who already have satisfied the ACA's requirements.

IV. California Supreme Court Expands Rights of Immigrants Working in that State

The California Supreme Court's recent decision in *Salas v. Sierra Chemical Company*, 327 P. 3d 797, 59 Cal. 4th 407, 173 Cal Rptr. 3d 689 (2014) ("*Salas*") has expanded the rights of immigrants working in that state. In *Salas*, the plaintiff sued his former employer under the California Fair Employment and Housing Act ("FEHA"), claiming that the defendant had failed to accommodate his physical disability and then refused to rehire him in retaliation for his filing a worker's compensation claim. After the complaint was filed, the defendant employer learned that the plaintiff may have secured employment by using another person's Social Security number and sought dismissal of the claims on that basis. The trial court granted

the defendant employer's motion for summary judgment and the Court of Appeals affirmed.

The California Supreme Court, however, reversed on the basis of California Senate Bill No. 1818, which provides, in pertinent part, that "[a]ll protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state." See Stats. 2002, ch. 1071, §1, p. 6913 ("Bill 1818").

Bill 1818 was enacted in California in 2002 in reaction to the U.S. Supreme Court's decision in *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 169 (2002). In *Hoffman*, the U.S. Supreme Court determined that the Immigration Reform and Control Act ("IRCA") established a federal immigration policy that prohibited the National Labor Relations Board from awarding back pay to an undocumented worker. The California Supreme Court found that the application of Bill 1818 was not preempted by IRCA because it established the California state policy in defining the remedies available under California's anti-discrimination laws. Thus, the California Supreme Court reversed the lower court's conclusions that the plaintiff's immigration status foreclosed his invocation of the doctrines of after-acquired evidence and unclean hands

The California Supreme Court's decision in *Salas* also rejected the employer's claims that the plaintiff could not recover damages because of his undocumented status and, even if damages could be recovered, he could not claim damages after the employer learned of his illegal status. In this regard, the California Supreme Court found that the purpose for Bill 1818 was to foreclose the type of absolute bar that the employer sought to raise in this case. The California Supreme Court also noted there was evidence in the sparse record that might indicate that the employer continued the plaintiff's employment after it learned about his status. If this was proved, the California Supreme Court found that it would allow the plaintiff to recover damages until the employer terminated his employment due to his status.

The California Supreme Court's decision in *Salas* gives employers in that state one more challenge as they seek to manage their workforce. At its core, the *Salas* decision underscores the importance of complying with the Form I-9 process established by IRCA so that undocumented workers are not hired or are terminated on that basis as soon as their undocumented status is discovered. The decision, however, also raises complications on how the policy announced in *Salas* will be applied in connection with the application of other California Labor Code provisions to employees who may be undocumented aliens.

V. OSC Issues Technical Assistance Regarding Employer's Receipt of Excess Documentation During the Form I-9 Process

The Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC"), within the U.S. Department of Justice, is responsible for enforcing IRCA's antidiscrimination provisions. Recently, the OSC issued a Technical Assistance Letter ("TAL") to guide employers that receive too many documents during the Form I-9 process. In this regard, the OSC noted that it is an Unfair Immigration-Related Employment practice under IRCA for an employer to ask an employee for more or different documents than the Form I-9 process allows. Thus, any employer that discovers that it may have received too many or different documents as part of the Form I-9 process should assess its practices to make sure that this did not result in a request by the employer that could violate federal law.

The OSC's TAL serves as yet another reminder to employers about the delicate legal tightrope that they must walk in balancing Form I-9 compliance against IRCA's anti-discrimination provisions.

VI. OSC Settles Immigration-Related Discrimination Claims Against Staffing Agency

On August 15, 2014, the OSC announced that it had settled claims alleging that Real Time Staffing Service LLC ("Real Time"), a national staffing company with more than 400 offices throughout the United States, had violated the anti-discrimination provisions of IRCA. According to the OSC, Real Time had required non-U.S. citizens, but not similarly situated U.S. citizens, to present specific documents during the Form I-9 process. Under the settlement, Real Time will pay $230,000 in civil penalties, and $35,000 in back pay, to those who may have lost wages due to the company's unlawful practices. Also, Real Time

will be subject to OSC monitoring and reporting for three years.

VII. Colorado Employers Must Use New Affirmation Form Starting October 1, 2014

Employers in Colorado have been required to supplement the federal Form I-9 verification process since January 1, 2007, when the Colorado Employment Verification law became effective. See C.R.S. §8-2-122. As a result, for each new employee, a Colorado employer must complete a separate affirmation form and retain a copy of the document(s) that the employee presented to establish identity and work authorization, as required by federal law. Employers that fail to comply are subject to a $5,000 fine for the first offense and a $25,000 fine for subsequent offenses.

Recently, Colorado released a new version of its "Affirmation of Legal Work Status" form that employers must use to satisfy Colorado law. This form has a revision date of 9/1/14, and must be used by all Colorado employers for employees hired on or after October 1, 2014. A copy of the form is available at the following website: www.colorado.gov/cdle/evr.

VIII. Silicon Valley Man Receives 10-Month Sentence for H-1B Fraud

On August 18, 2014, Balarkishan Patwardhan of Cupertino, California, was sentenced to 10 months in prison for filing false H-1B petitions. The defendant in these petitions asserted that the beneficiaries had secured full-time employment as systems analysts, software engineers, and computer programmers with Gilead Sciences in Foster City, California, when they had not.

IX. DOS Issues October 2014 Visa Bulletin

The Department of State ("DOS") has issued its Visa Bulletin for October 2014. This 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. On the employment-based side, the October 2014 Visa Bulletin showed that the Second Preference ("EB-2") for China has reached November 15, 2009, and India has reached May 1, 2009. The EB-2 cutoff date for the rest of the world remains current. In the October 2014 Visa Bulletin, the cutoff dates for the Employment-Based Third Preference ("EB-3") category are as follows: October 1, 2011, for all chargeability, including Mexico and the Philippines. The EB-3 cutoff date for China is April 1, 2009, and for India it is November 15, 2003. *However, the Visa Bulletin also indicated that increased demand for EB-2 visas for India and China may require the DOS to hold or regress these categories in November 2014 or thereafter to ensure that usage remains within the fiscal year 2015 quota limits*.

The DOS's monthly Visa Bulletin is available at travel.state.gov/visa/bulletin/bulletin_1360.html.

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