

Labor & Employment Law UPDATE

*Practical and preventive information for managing
your workplace*

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Employers Beware: ICE Crackdown Targets 652 Businesses Nationwide

U.S. Immigration and Customs Enforcement (ICE) recently announced that it issued 652 Notices of Inspection (NOIs) to businesses suspected of employing illegal workers. In one day, ICE issued more notices than were issued during all of the prior fiscal year. The Form I-9 records of each of the businesses receiving an NOI will be audited by ICE to assure compliance with national employment eligibility verification laws and regulations. The notices come as part of a new ICE initiative to hold employers accountable for maintaining a legal labor force. While the businesses under ICE's microscope are being targeted as the result of investigative leads developed from disgruntled employees, employer filings of government labor certification applications, consumer complaints relating to identity theft, and (possibly) from patterns of suspicious activity on a government-run employee verification program, this step-up in enforcement is a signal all businesses should heed. The Obama administration has clearly stated that its enforcement activities will be focused on employers, rather than the raid-focused enforcement endorsed by the prior administration.

Businesses are required to complete and keep on file a Form I-9 for each individual employed within the United States. To properly complete a Form I-9, the employer must review and record identity documents—such as social security cards, passports, and visas—and determine whether the documents reasonably appear to be genuine and related to the individual. To assist in this process, many businesses use E-Verify, a voluntary program run by the Department of Homeland Security (DHS), to verify the documents of new hires. However, employers are warned not to rely blindly on the accuracy of E-Verify. Illegal workers sometimes submit valid documents that pass through the system unflagged. Often, these documents are either borrowed from someone else or are acquired by identity theft. If the government discerns patterns of misuse and fraudulent documentation from an employer's E-Verify use, it may refer the employer to ICE for further investigation. The consequences for offending businesses are high—penalties range from \$375 to \$16,000 per incident and can include up to 6 months in prison. If ICE can show that supervisors or HR personnel know

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employees are working with fraudulent documents, this knowledge may be imputed to management with resulting corporate liability, including seizure of assets and criminal liability for top executives.

Consequently, businesses are well advised to maintain accurate employment records. If audited, ICE requires that a business' Form I-9s be submitted within 72 hours of notice, leaving little time to remedy deficiencies. Best practice, then, suggests that businesses maintain comprehensive immigration compliance policies with the overarching goal of avoiding the knowing hire and continued employment of illegal workers. At the core, these policies should require that Form I-9s be completed and regularly updated and audited for each employee hired after November 6, 1986. Each form must be signed by both the employee and employer. Corrections discovered during self-audits need to be initialed and dated—not backdated. Simple but consistent measures can be effective in reducing potential liability.

In addition, the Senate recently gave employers a reason to consider adding E-Verify use into their long-term compliance policies. The Senate opted against a three-year extension of the program and voted instead to make E-Verify a permanent fixture of the DHS, mandatory for all federal contracts and available to check the eligibility of current employees. While this measure will have to be reconciled with the House version, which calls for a two-year extension, it nonetheless signals a growing federal focus on enforcing employer compliance with immigration laws.

In addition, based on recent comments by administration officials, the regulation requiring all government contractors to use E-Verify beginning September 8, 2009, is now highly likely to go into effect on that date. Further, many states are requiring employers to use E-Verify, including Nebraska, which, effective October 1, 2009, will require all state agencies and political subdivisions, and their contractors

and subcontractors, to use E-Verify for new hires.

Employers would do well to note the increased scrutiny and make adjustments accordingly. If your business will be subject to the new Nebraska law, or is considering use of E-Verify or a Form I-9 audit, contact an attorney with experience in such matters.

Amy Erlbacher-Anderson

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U.S. Supreme Court's Age Discrimination Decision is Good News for Employers

On June 18, 2009, the United States Supreme Court handed down a 5-4 decision which is considered a “win” for employers in age discrimination cases. In *Gross v. FBL Financial Services, Inc.*, the Court clarified that plaintiffs in ADEA lawsuits carry a higher burden of proof than many courts had previously applied.

In *Gross*, the plaintiff claimed that his reassignment to a different position was a demotion constituting age discrimination. The jury agreed, returning a verdict for the plaintiff for \$46,945 in lost compensation. The employer appealed to the Eighth Circuit, challenging the “mixed motive” jury instructions given at trial. The court had instructed the jury that it must find for the plaintiff if he had proved by a preponderance of the evidence that his age was “a motivating factor” in the decision,

but that the burden then shifted and if the employer proved that it would have demoted the plaintiff regardless of age, then the jury must find in favor of the employer. The Eighth Circuit reversed, holding that the jury had been improperly instructed under the *Price Waterhouse* decision. The Eighth Circuit explained that the plaintiff could not shift the burden to the employer until the plaintiff first presented direct evidence that age was a substantial factor in the employment decision. Here, the plaintiff conceded that he had no such direct evidence.

The parties then asked the Supreme Court to decide whether the Eighth Circuit's interpretation was correct regarding when to shift the burden to the employer. In a very pro-employer decision, the Supreme Court noted that before even reaching that question, "we must first determine whether the burden of persuasion *ever* shifts to the party defending an alleged mixed motives discrimination claim brought under the ADEA. *We hold that it does not.*"

The Supreme Court explained that Title VII and the ADEA are materially different in their relative burdens of persuasion. Congress amended Title VII to specifically allow discrimination claims where the protected status was "a motivating factor" in an adverse employment action, while Congress did not make any similar amendment to the ADEA. Therefore, the ADEA is not governed by Title VII's burden shifting framework or decisions such as *Price Waterhouse*.

Rather, the ADEA's plain language governs the analysis. This language requires an employee to show that an adverse action was taken "because of such individual's age." The Court explained that "to establish a disparate treatment claim under the plain language of the ADEA, therefore, *a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision.*" Based on this language, the Court also clarified that "the plaintiff retains the burden of persuasion to establish that age was the 'but-for' cause of the employer's

adverse action." This burden of persuasion stays the same for *all* disparate treatment claims under the ADEA, mixed motive or not. "A plaintiff must prove by a preponderance of the evidence (which may be direct or circumstantial), that age was the 'but-for' cause of the challenged employer decision." This burden does *not* shift to the employer to show that it would have made the decision regardless of age, even if the plaintiff produced evidence showing that age was at least one motivating factor.

This decision is a big win for employers in ADEA cases. It leaves no question that a plaintiff retains the heavier "but-for" burden of proving that the alleged adverse employment action was taken because of the plaintiff's age, and that the burden of persuasion cannot be shifted to the employer. The Supreme Court's clear holding will benefit employers in ADEA lawsuits and increase an employer's chance for success on summary judgment motions in such cases.

Heidi Guttau-Fox

Employer References and Reviews on LinkedIn

In our [April Labor & Employment Law Update](#), we published an article outlining issues associated with blogging, "tweeting," and the use of social networking sites in the workplace. While that article specifically discussed the best ways to regulate *employee* use of such tools, social media sites are not just for employees. Indeed, many companies have joined business-oriented social networking sites such as LinkedIn as a way to connect with

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other professionals, make new contacts, discover job opportunities, and get expert business advice. Not only can individuals connect with others, but LinkedIn enables employers to write reviews or recommendations for current, as well as former, employees. Employers, however, should be cautious when contributing to a current or former employee's profile.

Current Employees

For current employees, a LinkedIn review, like any performance appraisal, should accurately reflect the individual's performance. Specifically, an inflated assessment of one's performance is not only unfair to the employee, but it could be used as evidence of discrimination should the individual later be fired for performance reasons. For instance, suppose Company gives Sales Employee a positive review for her LinkedIn profile in an effort to increase business. A month later, Company fires Sales Employee for poor performance. Sales Employee later files a discrimination charge alleging Company terminated her not because of her performance, but because of her race, and points to the positive LinkedIn review as evidence she was meeting Company's legitimate expectations. In this scenario, Company could have avoided the problem by giving her an accurate assessment or by not providing a review at all.

It is also important to ensure that reviews are consistent. While an employer would not want unsatisfactory reviews posted on an employee's LinkedIn profile due to the potential negative effect on its reputation, it nevertheless may feel uncomfortable providing a positive review for one employee, but refusing to provide a review for another. For example, suppose Company provides a review for Employee A, who happens to be male, but refuses to do so for Employee B, who is female, because Employee B's performance does not meet Company's expectations. Even though Company's reason for not providing the review is performance-related, Employee B may view the inconsistency in

providing reviews as a reflection of some unlawful gender-based discriminatory bias. Consequently, we advise employers to first decide whether it will give LinkedIn reviews at all, and in the event it will, employers should establish a procedure for doing so that would be applicable to *all* employees.

Former Employees

Similarly, an employer who posts comments about a *former* employee exposes itself to liability, just as it would for more traditional job references. In particular, a former employee may make allegations of unlawful discrimination, retaliation, or defamation based upon a negative job reference. Some states, however, provide employers with qualified immunity from claims related to job references. As each state treats references differently, it is helpful to review the relevant state law in your area to ensure your company does not run afoul of the law when providing references on former employees, whether on LinkedIn or in response to a prospective employer's direct request. We will look briefly at the relevant law in Iowa and Nebraska.

Iowa

Iowa's job reference statute grants employers, who give information about current or former employees, qualified immunity from claims related to that reference, but only under certain conditions. Specifically, an employer (or its representative) who provides work-related information upon a request by, or authorization of, a current or former employee is immune from civil liability unless that employer acted unreasonably in providing the information. An employer acts unreasonably in the following circumstances:

- The work-related information violates a civil right of the current or former employee.
- The work-related information knowingly is provided to a person who has no legitimate and common

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interest in receiving the work-related information.

- The work-related information is not relevant to the inquiry being made, is provided with malice, or is provided with no good faith belief that it is true.

The second element may be problematic for employers who comment on former employees on LinkedIn because it is difficult to ensure that the information will be received by someone with a legitimate business interest, as LinkedIn profiles can be accessed by so many people. Nevertheless, if employers get the individual's informed consent before giving the review, the risk is minimized.

Nebraska

Unlike Iowa law, the Nebraska statutes do not *explicitly* provide an overriding protection for employers who provide job references on behalf of former employees. Nevertheless, so long as Nebraska employers avoid making defamatory, discriminatory, or malicious comments to prospective employers, a former employee would have difficulty proving a violation of state and/or federal law.

The only provision granting Nebraska employers immunity with regard to reporting employee-related information arises under the New Hire Reporting Act, which requires employers to report the hiring of all employees to the Department of Health and Human Services. Notably, however, this law only immunizes employers when disclosing *current* employee names, addresses, and social security numbers, as well as the date of hire or rehire.

What Should the Employer Do If Asked to Provide A Reference/Review?

Regardless of whether or not the relevant state has a statute immunizing employers for giving references or reviews, we generally advise clients not to give out any substantive information other than

an individual's dates of employment, job title, and salary. By following this procedure for *all* employees and former employees, employers minimize the risk of discrimination, retaliation, and defamation claims, and at the very least, diminish the arguments an employee may make when making such claims.

Should a company decide to provide more information to prospective employers, or on an individual's LinkedIn profile, we advise the company to first seek the individual's informed consent. Secondly, the company should ensure that any information given does not violate the civil rights of an employee, such as making impermissible statements regarding that individual's sex, race, color, national origin, disability, or membership in any other protected class. Finally, regardless of the current/former employer's personal feelings toward the employee, any reference provided should be relevant to the request made and not include false or malicious information.

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