

# Labor & Employment Law UPDATE

*Practical and preventive information for managing  
your workplace*

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## *IMAGE Program with ICE Provides Assurance to Employers*

U.S. Immigration and Customs Enforcement (ICE) has developed a program that protects employers and helps ICE combat unlawful employment. The program is called the ICE Mutual Agreement between Government and Employers (IMAGE) program. The goal is to assist employers in targeted sectors to develop a more secure and stable workforce and to enhance awareness of fraudulent documents through education and training.

By voluntarily participating in the IMAGE program, companies can reduce unauthorized employment and the use of fraudulent identity documents. As part of IMAGE, ICE and U.S. Citizenship and Immigration Services (USCIS) will provide education and training on proper hiring procedures, fraudulent document detection, use of the E-Verify employment eligibility verification program, and anti-

discrimination procedures. Employers seeking to participate in IMAGE must agree to:

- Complete a self-assessment questionnaire;
- Enroll in E-Verify;
- Enroll in the Social Security Number Verification Service;
- Adhere to IMAGE Best Employment Practices;
- Undergo an I-9 audit conducted by ICE; and
- Review and sign an official IMAGE partnership agreement with ICE.

Upon enrollment and commitment to the Department of Homeland Security's (DHS) best hiring practices, program participants will be deemed "IMAGE Certified"—a

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distinction DHS believes will become an industry standard.

IMAGE members also participate in DHS's E-Verify employment eligibility verification program, administered by USCIS. Through this program, employers can verify that newly-hired employees are eligible to work in the United States. This Internet-based system is available in all 50 states and is free to employers. It provides an automated link to the Social Security Administration database and DHS immigration records. To sign up for participation, visit the registration Web site: <https://www.vis-dhs.com/EmployerRegistration/>.

In June 2008, ICE initiated an "associate member" category in the IMAGE program for employers seeking to join the program but who prefer a two-year period of time to complete all requirements for full IMAGE membership. Under associate IMAGE membership, employers can implement the best practices and begin to take advantage of the benefits of membership while deferring the I-9 audit and annual report requirement for up to two years.

**Scott S. Moore**

## *Post-Roseland & PTO*

In a June 2008 decision in *Gallentine v. B & R Stores, Inc.*, the District Court of Lancaster County, Lincoln, Nebraska, held that while paid time off (PTO) constitutes

wages under the Nebraska Wage Payment and Collection Act ("Act"), it does not represent vacation leave, and therefore, PTO is not includable in wages due and payable to employees at the time of separation, unless otherwise agreed upon.

In *Gallentine*, the employer hired the plaintiff as a meat cutter in July 2004. In July 2006, the employer promoted the plaintiff to Meat Department Manager. However, on April 11, 2007, the employer informed the plaintiff of several problem areas in his meat department and provided him with a "Decision Day" document with the option of either resigning or agreeing to make improvements in his work performance. The plaintiff agreed to make improvements in his work performance. The following day, the plaintiff resigned his employment, effective immediately. At the time of his resignation, the plaintiff had accrued 45 hours of PTO, equaling \$765.00. The employer's Associates' Manual provided in part that "no accrued and unused paid time off will be paid to any associate who (1) fails to give two weeks['] notice upon resignation. . . ." Because of the plaintiff's failure to give two weeks' notice, the employer refused to pay him his 45 hours of accrued PTO. As a result, plaintiff filed a lawsuit against his employer.

The county court held that regardless of whether an employee does or does not give notice prior to his or her resignation, the employer's PTO policy constituted earned but unused vacation time that was due and payable to an employee as wages upon separation from employment. Accordingly, the county court entered judgment for the plaintiff and ordered the employer to

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pay \$765 in unpaid wages and \$191.25 in attorneys' fees plus post-judgment interest and court costs. The employer then appealed to the district court.

First, the district court held that PTO was a fringe benefit and constituted wages under the Act; however, that determination did not end the court's inquiry. Even though the court concluded that PTO constituted wages under the Act, the second issue that the court addressed was whether PTO was unused vacation leave and, as such, would be included in wages due and payable at the time of termination.

The court began its analysis by explaining that in 2006 the Nebraska Supreme Court decided *Roseland v. Strategic Staff Mgmt.* In *Roseland*, the Court held that the full-time employees who had accrued paid vacation time based upon their length of employment were entitled to the payment of the vacation pay as an agreed to benefit between the employee and employer after the employee's termination. The district court then explained that the 2007 Nebraska Legislature responded to *Roseland* by passing LB 255, which included the following language: "Paid leave, other than earned but unused vacation leave, provided as a fringe benefit by the employer shall not be included in wages due and payable at the time of separation, unless the employee and employee. . . have specifically agreed otherwise."

The district court then addressed whether PTO was unused vacation. The district court noted that the Act did not define "paid leave" or "vacation leave," unpaid or otherwise. The court analyzed the following comments made by a Senator

during the floor debate of LB 255 regarding what kind of paid leave needed to be paid out at the time of separation: "[T]here are numerous other types of paid leave, such as bereavement and. . . PTO. By using the generic term 'paid leave,' it is our intention that any type of paid leave other than vacation leave does not have to be paid out at the time of separation unless otherwise bargained."

The court then returned to the Associates' Manual at issue and noted that it did not refer to vacation or sick leave but provided that the amount of PTO received by full-time associates increased with his or her employment. The court noted that, as such, PTO "is strikingly similar to the paid vacation time discussed in *Roseland*." Nevertheless, the court held that PTO is a "hybrid benefit program" and that "PTO is not vacation leave." The court held that while PTO constitutes wages under the Act, it does not represent vacation leave and is not includable in wages due and payable to the plaintiff at the time of his separation. Because the plaintiff did not give two weeks' notice at the time of his resignation, he failed to adhere to the agreement and was not entitled to be paid for his accrued and unused PTO. It is possible that the plaintiff will appeal the decision finding that PTO is not includable in wages due and payable at the time of separation.

While not controlling precedent, this Lancaster County District Court decision demonstrates a Nebraska court's recognition that *Roseland* and LB 255 should have a narrow scope. Notwithstanding this decision, employers should review the language of their PTO plans in their employee handbooks/manuals, ensure that

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the language and terms to paying out PTO at the time of separation are clear, and then adhere to the terms and language with respect to paying out PTO at the time of separation.

**Quinn H. Vandenberg**

## Recent Immigration Developments

There have been a number of developments in federal immigration law that may be of interest to most, if not all, employers. The following is a brief update of several of these developments.

### **USCIS Posts Revised Form I-9**

On June 27, 2008, the United States Citizenship and Immigration Service (USCIS) posted an updated Form I-9, Employment Eligibility Verification Form, on its Web site, with little or no notice to employers. We recommend that you begin using the new form immediately, which can be located on the USCIS Web site at [www.uscis.gov](http://www.uscis.gov). If you are not yet using the new form, you should begin to do so as soon as possible.

Fortunately, unlike the form published formally last November, failure to use the updated form does not appear to carry with it any penalties. Under federal law, all approved forms must have a current

expiration date. Since the Form I-9 issued in November of 2007 was set to expire on June 30, 2008, the USCIS was required to re-issue the form with an adjusted expiration date of June 30, 2009.

It is our understanding that the USCIS continues to work on revisions to Form I-9, which could be announced later this year. However, required use of any revised forms generally may not be mandated before such form has appeared in the Federal Register and been granted a 30-day transition period.

In addition to the new Form I-9, employers should be aware that fines for violating the immigration laws with respect to Form I-9s increase significantly in March—an approximately 25% increase. Further, the U.S. Immigration and Customs Enforcement continues to pursue its Form I-9 inspection campaign in all parts of the country and has greatly increased its prosecutions of employers who fail to meet these requirements.

### **2008 H-1B Quota**

For each fiscal year, federal law imposes a cap on the number of H-1B visas available to U.S. employers. Under current law, the available quota is limited to 65,000, with a number of those visas set aside for individuals from Chile and Singapore. A separate quota of 20,000 visas applies to certain “advanced degree” situations. Similar to last year, the available H-1B visas for employers and individuals subject to the annual quota were exhausted within the first few days of the filing period for the 2009 fiscal year. In other words, unless either the employer or the individual has

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an exemption available, *there are no H-1B visas available for employment start dates before October 1, 2009.*

Federal law exempts a number of categories of employers and employees, or potential employees, from the federal cap. The CIS will continue to process H-1B petitions that are cap-exempt under these categories, which are fairly narrow in application. The broader exemptions include: an extension of stay for current H-1B holders; a change of terms of employment for current H-1B holders; a transfer between employers for current H-1B holders, unless the transfer involves a switch from a cap-exempt to a cap-subject employer; current H-1B holders seeking concurrent employment authorization with another employer; and H-1B visas for workers who are recipients of certain J-1 waivers of the two-year home residency requirement. Cap-exempt employers include: institutions of higher education, nonprofit entities who are affiliated with an institution of higher education, nonprofit research organizations, and governmental research organizations.

Beginning on April 1, 2009, H-1B petitions for new employment can be filed with employment start dates of October 1, 2009, or later. These cases will count against the numerical cap for Fiscal Year 2010, which without immigration reform legislation will also be limited to 65,000 visas.

### **Permanent Residence Process Backlogs**

For employers who wish to retain their foreign national employees for longer than the few years most nonimmigrant visas allow, federal law provides a process for obtaining legal permanent resident status for such

employees. Unfortunately, the permanent residence process is often greatly delayed due to backlogs in the system. These backlogs can develop at a number of points in the process; and, presently, several of these critical points have developed delays in the past months.

There are three separate filings involved in the permanent residence process: labor certification, the immigrant visa petition, and the adjustment application. Beginning last year, the processing times for immigrant visa petitions have failed to progress in any significant manner. As a result, processing backlogs of 12 to 18 months have developed at the USCIS service centers. Second, since there are only a limited number of immigrant visas available on an annual basis and more employers apply for such visas than there are visas available, even if the petition is approved, many visa categories have had their annual quota exhausted for the current fiscal year. For example, all of the immigrant visas available for positions that require a “skilled” worker (one holding a position that requires a Bachelor’s degree) have been assigned at this time. This means that no immigrant visas will again be available for such individuals until October 1, 2008. At that time, it is predicted that, for many individuals, the category will re-open, but only to those who began the permanent residence process in 2003.

Other visa categories, such as the category applicable to individuals with advance degrees, remain open at this time for most individuals. However, if the employees come from either India or China, even these visa categories presently have backlogs of over two and one-half years.

*... unless either the employer or the individual has an exemption available, there are no H-1B visas available for employment start dates before October 1, 2009.*

## Conrad Waiver Program for J Visa Physicians

All international medical graduates who enter the U.S. on a J visa to complete medical training are subject to a two-year foreign country residence requirement, which must be completed in the individual's home country before the physician is eligible to be granted an H-1B visa for employment in the U.S. For many years, a program (the State Conrad 30 J-1 Visa Waiver Program) has been available to the states to act as an Interested Government Agency (IGA) and recommend a waiver to the U.S. Department of State of this requirement. This waiver option is called the State Conrad 30 Program, because each state is limited to 30 foreign medical graduate waivers per state, per year.

The Program requires that the physician have an employment offer that is important to the state's department of health, and he or she must be willing to practice either primary care or specialty medicine, full-time for three years, in an area of the state designated by the U.S. Secretary of Health and Human Services as Health Professional Shortage Areas (HPSA) or Medically Underserved Area or Population (MUA/P). The waiver process works differently in each state, and the waivers are often exhausted very soon after each fiscal year's quota becomes available on October 1st.

In the past, Congress has extended this Program shortly before (or, sometimes, soon after) it was set to expire. Unfortunately, this has not yet happened for the Program's most recent expiration date of June 1, 2008. As a result, while any foreign physician who commenced a medical training program

in the United States prior to June 1, 2008, will be eligible to apply for a waiver of the foreign country residence requirement, no waivers are presently available for any physician entering the Program after this date.

Bills have been introduced in Congress to remedy this situation—some would extend the Program for several more years, while others would make it permanent. However, in the current political climate, it is unclear what success these bills will have, especially prior to the upcoming Presidential election.

### Amy Erlbacher-Anderson

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