#NELA16
National Employment Lawyers Association
2016 Annual Convention
Los Angeles, California
June 22-25, 2016

Successfully Representing Undocumented Workers
In Employment Litigation

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Representing Undocumented/Non-Resident Employees in Settlements

Taxation Issues:

An employee's immigration status or lack of a Social Security Number does not mean the employee cannot participate in a settlement or collect settlement proceeds.

However, the same tax reporting requirements do apply to both employer and employee, and that does raise some issues. Employers will sometimes use their tax reporting obligations as an excuse to delay settlement payments or to avoid having to pay out employees altogether.

Very often the same employers, who were unconcerned about properly classifying workers for tax purposes years before a lawsuit was pending, become extremely concerned about their duty to comply with their tax obligations when it comes to disbursement of settlement funds. However, there are ways to deal with this issue.

One option is to include settlement language that taxes and withholdings will be made in settlement as they were made during employment. For example, if an employee filled out an I-9 and/or a W-4 form when hired, the employer should simply use that information when calculating tax obligations.

If an employee was paid in cash or for some other reason has not previously provided a SSN, there are other options available. An employee can request an Individual Tax Identification Number ("ITIN"), which is a nine-digit number issued to an individual by the IRS for tax reporting/processing. Applying for and/or receiving an ITIN enables an undocumented worker to file tax returns, claim exemptions, and receive tax refunds. It is also documentation of presence and employment in the United States for immigration purposes. To request an ITIN an employee fills out a form W-7 (available at the IRS website). Technically an ITIN application is only accepted if accompanied by a U.S. income tax return. However, once the application is sent, with or without the tax return, an employee can fill out a W-9 form and write "applied for"

in the space requesting the Taxpayer Identification Number. This provides the employee 60 days to provide an ITIN number to the employer/requestor. However, once the W-9 is completed, the employer is able to comply with its tax obligations and can remit a settlement payout.

Participating in a settlement is protected activity. See e.g. *Sprott v. Franco*, 1997 U.S. Dist. LEXIS 1935, 40, 1997 WL 79813 (S.D.N.Y. Feb. 24, 1997). Therefore, it may be useful to remind employers that any attempt to run an "immigration audit" or demand additional documentation could be viewed as retaliation. See for e.g. *EEOC v. City of Joliet*, 239 F.R.D. 490, 491, 2006 U.S. Dist. LEXIS 88979, 3 (N.D. Ill. 2006).

Logistics of Cashing Settlement Checks when Class Member(s) don't have a bank account:

There are a number of options available in this scenario. Obviously a check-cashing agency will likely do the deed, but will also charge your client exorbitant fees for the service. It is best to try and avoid this scenario if possible.

In some cases the issuing bank will honor and cash the check even if the holder of the check does not have an account. Sometimes the bank will require the holder of the check to go to the same branch from which the check was issued, but not always.

Another option is to ask the Defendant to deposit the funds into your trust account and then you can issue checks to your clients and direct them to cash the checks at the bank that manages the trust account.

Undocumented workers can open bank accounts so long as they can provide the requisite identification. Most banks require two forms of identification, one of which should be a photo I.D. Undocumented workers can generally apply for and receive a passport or a consular identification from their native country's local consular office.

Logistics of Sending Settlement Funds outside the United States:

Generally speaking, it is not a good idea to send a check, money order or even a prepaid credit/debit card outside the United States. It may never reach the intended recipient and banks are suspicious of foreign instruments, particularly if the payee does not hold an account with the institution.

Luckily there is a very active community of attorneys and legal services dedicated to recovering damages for undocumented workers, who have many suggestions for getting settlement or damages awards to workers living outside the United States.

What is makes the most sense logistically will depend on whether your client has government issued identification, a bank account, the amount of money to be sent and the number of times you will need to make disbursements.

Wiring Funds

Western Union – There are fees and require you to provide your client with a code in order to pick up the transfer. You must also be sure the name associated with the transfer exactly matches the name on the client's identification. There is a limit to how much you can wire in a single transfer. You can transfer up to $3,000 directly from your trust account.

Travelex – is a subsidiary of Western Union. It is a bit more economical than Western Union and offers a better rate of exchange. However the client must have an account with Travelex (a balance of only approximately $6 is required to maintain a Travelex account). You can make transfers directly from your trust account. This service is very popular among U.S. tourists and expats in Latin America.

Other options include Xoom, MoneyGram, DineroSeguro. Each has its own requirements and limitations. You should determine which of these services is available in the city or town where the class member resides –not all of these services are available in smaller or more rural areas.

Wiring to a Bank Account

You can generally wire directly to a client's bank account, if they have one. If they do not have an account, they might want to consider opening one though they will need at least one government-issued identification and are generally required to make a minimum initial deposit and maintain a minimum balance or pay a monthly fee – much like U.S. banks.

If your client does not have a bank account, you can get a signed release from your client to wire the money into a relative's bank account

Settlement Administrator

A third party administrator can be particularly useful if you have a class case where numerous class members are located outside the U.S. The fees associated with the transfers and administration of the fund can be built into the settlement agreement itself.

Experts who you can turn to in your time of need: NELP, Southern Poverty Law Center, Centro de los Derechos del Migrante, Global Workers

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INTRODUCTION

Although many plaintiff counsel have encountered over-the-top machinations by defense counsel in employment and civil rights cases in general, defense counsel seem to use such tactics with greater frequency and intensity when the plaintiffs immigrant employees. In that sense, immigrant plaintiffs are like the proverbial canaries in the coal mine about which civil rights scholar Lani Guinier so eloquently wrote in LIFT EVERY VOICE: TURNING A CIVIL RIGHTS SETBACK INTO A NEW VISION OF SOCIAL JUSTICE (1998).

Under these circumstances, plaintiff counsel face a dilemma between taking an affirmative or a reactive approach. The affirmative approach offers the benefit of potentially stopping litigation abuse and costly sideshows before they start; however this path also risks appearing "premature" or to be "whining" before an increasingly skeptical judiciary. The reactive approach offers the benefit of accumulating further evidence of defendant misdeeds that will support motions for protective orders as well as additional retaliation, emotional distress, and punitive damages claims; however this path also risks exposing often vulnerable people to more abuse and related adverse consequences for their cases.

Regardless of the approach chosen, there are a number of legal strategies and litigation tactics that plaintiff counsel should be ready to pursue – not only to minimize and respond effectively to litigation abuse, but also to turn any such defendant overreach into further evidence of liability and a larger damages recovery. The discussion below highlights some of those strategies and tactics.

I. COUNSEL SHOULD HIGHLIGHT THAT PLAINTIFFS SERVE AS PRIVATE ATTORNEYS GENERAL IN EMPLOYMENT AND CIVIL RIGHTS CASES

Given how aggressively employers defend cases brought by immigrant plaintiffs, especially in the multi-plaintiff and class context, plaintiff counsel would be wise to remind the presiding courts about the essential role of these plaintiffs in advancing the compelling public policy codified by Congress and ratified by the Supreme Court. In short, people who prosecute claims under employment and civil rights statutes play a pivotal role in protecting fundamental rights and promoting the rule of law.

The Supreme Court has long recognized that "Congress has cast the [employment and civil rights] plaintiff in the role of a 'private attorney general,' vindicating a policy 'of the highest priority.'" N.Y. Gaslight Club, Inc. v. Carey, 447 U.S. 54, 63 (1980) (quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 416-17 (1978)); see also Minn. Stat. § 363A.02, Subd. 1(a)-(b) ("[D]iscrimination threatens the rights and privileges of the inhabitants of this state and menaces the institutions and foundations of democracy.").

Therefore, a plaintiff "not only redresses his own injury but also vindicate[s] the important congressional policy against discriminatory employment practices." Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); see also McKennon v. Nashville Banner Publishing Co., 513 U.S. 352, 358 (1995) (citing Alexander with approval). Federal courts have recognized the same principle in wage cases as well. See, e.g., Does I thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1073 (9th Cir. 2000) (citation omitted) ("An employee, exercising his rights under [wage-and-hour laws], exercises them, not only for his own benefit, but also for the benefit of the general public.").

II. COUNSEL SHOULD CAREFULLY PLEAD THE IDENTITY OF THE EMPLOYER(S) AND USE DISCOVERY TO ENSURE THAT THE POTENTIALLY SHIFTING EMPLOYER IDENTITY DOES NOT THWART PROOF OF LIABILITY OR RECOVERY UPON PREVAILING

Predatory employers disproportionately employ immigrant employees, so plaintiff counsel should research carefully and analyze precisely who the employer is for purposes of establishing liability and collection of plaintiff judgments and verdicts. These unscrupulous employers may manipulate the corporate form in an effort to evade the consequences of their legal violations.

Put simply, a growing number of companies essentially attempt to outsource liability while retaining meaningful control and, thus, profits. Businesses pursue this tactic through a variety of constructs, including the creation of a parent-subsidiary, prime contractor-subcontractor, franchisor-franchisee, or other affiliated relationship. Accordingly, the joint employer doctrine, also known as the single employer doctrine or the integrated enterprise doctrine, as well as the successor liability doctrine provide vital tools to plaintiffs for establishing liability and recovering damages.

In a high profile ruling on employer identity under Title VII, the extremely pro-employer

Eighth Circuit reaffirmed that "a ***liberal construction is*** . . . to be ***given to the definition of 'employer.'"*** Sandoval v. Am. Bldg. Maint. Indus., Inc., 578 F.3d 787, 793, rhrg. and rhrg. en banc denied 578 F.3d 787 (8th Cir. 2009) (quoting Baker v. Stuart Broad. Co., 560 F.2d 389, 392 (8th Cir. 1977)) (emphasis added).

Toward that end, Sandoval reinvigorated the applicability of the broad four-factor standard as to what constitutes an integrated enterprise (also known as a joint employer or single employer) and which should guide the approach to discovery in this regard:

(1) Interrelation of operations;
(2) Common management;
(3) Centralized control of labor relations; and
(4) Common ownership or financial control.

578 F.3d at 793. Significantly, all four factors need not be present for one company to be liable for another company's conduct. Id.

Virtually every other Circuit and the Equal Employment Opportunity Commission ("EEOC") have followed the liberal four-factor integrated enterprise standard set forth in Sandoval to determine whether separate companies can be jointly liable under Federal law. Burton v. Freescale Semiconductor, Inc., 798 F.3d 222, 227 (5th Cir. 2015); Brown v. Daikin Am. Inc., 756 F.3d 219, 226 (2d Cir. 2014); Torres-Negron v. Merck & Co., Inc., 488 F.3d 34, 42 (1st Cir. 2007); Kang v. U. Lim Am., Inc., 296 F.3d 810, 815 (9th Cir. 2002); Knowlton v. Teltrust Phones, Inc., 189 F.3d 1177, 1184 (10th Cir. 1999); Johnson v. Flowers Indus., Inc., 814 F.2d 978, 981-82, n. 1 (4th Cir. 1987); Armbruster v. Quinn, 711 F.2d 1332, 1338 (6th Cir. 1983), abrogated on other grounds 546 U.S. 500 (2006); EEOC COMPLIANCE MANUAL, SECTION 2-III, 2009 WL 2966755, n. 107; see also Lyes v. City of Riviera Beach, 166 F.3d 1332, 1342 (11th Cir. 1999); EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 625-26 (D.C. Cir. 1997). For its part, Congress has codified the broad four-factor standard set forth in Sandoval. See, e.g., 42 U.S.C. § 2000e-1(c)(1), (3) (reiterating that the liberal four-factor standard governs whether a domestic company is liable for alleged Title VII violations by a foreign subsidiary).

Federal courts have adopted a similar standard for recognizing joint employer liability in wage-and-hour cases:

> (1) authority to hire and fire employees; (2) authority to promulgate work rules and assignments, and set conditions of employment, including compensation, benefits, and hours; (3) day-to-day supervision, including employee discipline; and (4) control of employee records, including payroll, insurance, taxes, and the like.

In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation, 683 F.3d 462, 469 (3rd Cir. 2012) ("These factors are not materially different than those used by our sister circuits, and reflect the facts that will generally be most relevant in a joint employment context."); see also Thompson v. Real Estate Mortgage Network, 748 F.3d 142, 149 (3rd Cir. 2014).

The Department of Labor ("DOL") recently provided extremely helpful guidance for establishing the existence of a joint employment relationship between defendants. See U.S. DEP'T OF LABOR, ADMINISTRATOR INTERPRETATION NO. 2016-1 (January 20, 2016), pp. 3-15. In particular, the DOL Administrator's Interpretation discusses both vertical and horizontal joint employment relationships in detailed and concrete terms, construing the concept of joint employment expansively. Id.

Given that culpable employers may fold up the proverbial tent when their liability becomes apparent, plaintiff counsel should also conduct discovery and otherwise plead and prosecute cases with successor liability in mind. Indeed, the doctrine of successor liability "was settled law even in the time of Blackstone." U.S. v. Mexico Feed and Seed Co., Inc., 980 F.2d 478, 486 (8th Cir. 1992) (citation omitted). The doctrine has been applied when, for example, a company becomes effectively insolvent due to tactical asset transfers: "[t]he purpose of corporate successor liability, as indicated, is to prevent corporations from evading their liabilities through changes of ownership when there is a buy out or merger." Mexico Feed and Seed, 980 F.2d at 487 (citation omitted).

Importantly, Federal courts have invoked the doctrine in an array of employment cases out of concern for equity and to maintain the rule of law:

> In the case where the predecessor company no longer had any assets, monetary relief would be precluded. Such a result could encourage evasion in the guise of corporate transfers of ownership.

EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1091-92 (6th Cir. 1974) (citation omitted). Consequently, Federal courts have applied the successor liability doctrine under numerous employment statutes. See, e.g., Hollowell v. Orleans Reg. Hosp., LLC, 217 F.3d 379, 391 rhrg. and rhrg. en banc denied 232 F.3d 212 (5th Cir. 2000) (affirming the plaintiff verdict even in the absence of fraud).

Successor liability exits when any one of the following applies:

(1) The purchasing company explicitly or implicitly assumed liability;
(2) The transfer of assets amounts to a de facto consolidation;
(3) The purchasing company is a continuation of the purchased company; or
(4) The transfer of assets occurred to escape liability.

Mexico Feed and Seed, 980 F.2d at 487. Courts have outlined considerations relevant to whether a company has successor liability as follows:

(1) Whether the successor company had notice of the claims;
(2) Whether the predecessor company can provide relief;
(3) Whether the successor company has continued business operations;
(4) Whether the successor company uses the same plant;
(5) Whether the successor company uses substantially the same work force;
(6) Whether the successor company uses substantially the same supervisory personnel;

(7) Whether the same jobs exist under substantially the same working conditions with the successor company;
(8) Whether the successor company uses the same machinery, equipment, and methods of production; and
(9) Whether the successor company produces the same product.

Prince v. Kids Ark Learning Ctr., 622 F.3d 992, 995 (8th Cir. 2010).

In short, "[t]he ultimate inquiry always remains whether the imposition of the particular legal obligation at issue would be equitable and in keeping with federal policy." Prince, 622 F.3d at 995 (citation omitted).

III. COUNSEL SHOULD AGGRESSIVELY PURSUE THE OTHER SIDE OF THE EMPLOYER IDENTITY QUESTION: EMPLOYEE MISSCLASSIFICATION

Another expanding business model, which is often the flip side of the joint employer problem, involves the misclassification of employees as somehow independent contractors. Particularly with the explosion of the "sharing" or "gig" economy, increasing numbers of people find that they are no longer employees with work-related protections long considered sacrosanct. Legitimate independent contractors certainly exist, but the approach of an increasing number of companies has been to claim that they have no or almost no employees. Employment and civil rights law provide powerful vehicles to establish employee identity despite such classification games.

The wage-and-hour statutory regime specifically defines the employer-employee relationship in broader terms than under common law. See 29 U.S.C. § 203(d), (e)(1). Indeed, the statutory definition of "employ" includes the expansive concept of "suffer or permit to work." See 29 U.S.C. § 203(g). The Supreme Court has repeatedly recognized that this standard goes far beyond ordinary agency principles. See, e.g., Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 296 (1985) (affirming the Eighth Circuit's liberal interpretation of employee and employer).

In short, the governing standard of whether a hired party is an employee or an independent contractor turns on the "economic realities" test. Although worded differently by different courts, the crux of the "economic realities" test includes consideration of the following general factors:

(1) The extent to which the work performed is an integral part of the employer's business;
(2) A hired party's opportunity for profit or loss depending on his or her managerial skill;
(3) The extent of the relative investments of the employer and a hired party;
(4) Whether the work performed requires special skills and initiative;
(5) The permanency of the relationship; and
(6) The degree of control exercised or retained by the employer.

See U.S. DEP'T OF LABOR, ADMINISTRATOR INTERPRETATION NO. 2015-1 (July 15, 2015), p. 4.

As to the first factor, work is integral to the employer's business if it is a part of the employer's production process or service provided; regarding the second factor, the analysis focuses on the extent to which the exercise of managerial skills affects a hired party's opportunity to make and lose money; for the third factor, the central inquiry is whether a hired party's investment is so great that he or she is actually sharing the risk of loss with the employer; as to the fourth factor, the key is whether a hired party exercises independent business judgment and competes in the open market for business; the fifth factor is similarly context sensitive because an impermanent relationship could be due to industry-specific factors or the employer's use of staffing agencies rather than an independent contractor relationship; the sixth factor, although perhaps the most complex, does not hold any greater weight than the other factors, and the essence of consideration is whether a hired party lacks overall control of the working relationship even if a hired party has significant day-to-day autonomy. See generally id., pp. 5-15 (surveying applicable precedent and providing illustrative examples); U.S. DEP'T OF LABOR, FACT SHEET NO. 13: AM I AN EMPLOYEE?: EMPLOYMENT RELATIONSHIP UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (May 2014).

To determine whether a plaintiff in other types of employment or civil rights cases is an employee or an independent contractor, the courts generally follow a blending of common law agency principles with the concept of "economic realities" akin to what has been established under wage-and-hour law. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992). As to the agency principles portion of this analysis, courts have long recognized that "[a] primary consideration is the hiring party's right to control the manner and means by which a task is accomplished." Schwieger v. Farm Bureau Ins. Co. of NE, 207 F.3d 480, 484 (8th Cir. 2000) (citing Supreme Court precedent).

Under the fact-intensive approach summarized in Nationwide Mut. Ins. Co. v. Darden, the Supreme Court has provided an illustrative list of factors to be considered as to whether someone is an employee or an independent contractor:

(1) The skill required for the work performed;
(2) The source of the instrumentalities and tools to do the work;
(3) The location of the work;
(4) The duration of the relationship between the parties;
(5) Whether the hiring party has the right to assign additional work to a hired party;
(6) The extent of a hired party's discretion over when and how long to work;
(7) The method of payment for work performed;
(8) A hired party's role in hiring and paying assistants;
(9) Whether the work is part of the regular business of the hiring party;
(10) Whether the hiring party is in business himself or herself;
(11) The provision of employee benefits; and
(12) The tax treatment of a hired party.

Darden, 503 U.S. at 323-24.

Importantly, the list of factors set forth in Darden "is ***nonexhaustive***, and [courts] also weigh the 'economic realities' of the worker's situation, including factors such as how the work

relationship may be terminated and whether the worker receives yearly leave." Schwieger, 207 F.3d at 484 (citing Eighth Circuit precedent) (emphasis added).

IV. COUNSEL SHOULD CONSIDER PROSECUTING EMPLOYMENT AND CIVIL RIGHTS CLAIMS USING PSEUDONYMS FOR PLAINTIFFS TO REDUCE THE LIKELIHOOD OF RETALIATION AND OTHER CONDUCT THAT COULD HAVE A CHILLING EFFECT ON SUCCESSFUL ENFORCEMENT ACTIVITY

The majority of Circuits considering the denial of pseudonym usage have held that the district courts abused their discretion when doing so. Roe II v. Aware Woman Center for Choice, 253 F.3d 678, 685-87 (11th Cir. 2001), cert. denied 534 U.S. 1129 (2002) (reversing the district court and granting anonymity due to threats of violence and harassment directed at the plaintiff); Does I thru XXIII, 214 F.3d at 1069-73 (reversing the district court and granting anonymity because of threatened economic and physical harm to the immigrant plaintiffs); James v. Jacobson, 6 F.3d 233, 239-42 (4th Cir. 1993) (reversing the district court and granting anonymity because the district court did not make "a particularized assessment of the equities involved"); see also Doe v. Stegall, 653 F.2d 180, 184 (5th Cir. 1981) (reversing the district court and granting anonymity because the "[e]vidence on the record indicates that the Does may expect extensive harassment and even violent reprisals if their identities are disclosed").

As the doctrine has developed, Federal courts have adopted a totality-of-the-circumstances analysis to determine whether plaintiffs can proceed with pseudonyms:

> [The three initial factors were] not intended as a "rigid, three-step test for the propriety of party anonymity." The mere presence of one factor was not meant to be dispositive, but rather, these factors were "highlighted merely as factors deserving consideration." Instead, a court must "carefully ***review all the circumstances of a given case*** and then decide whether the customary practice of disclosing the plaintiff's identity should yield to the plaintiff's privacy concerns."

Heather K. by Anita K. v. City of Mallard, 887 F. Supp. 1249, 1256 (N.D. Iowa 1995) (citations omitted) (emphasis added) (ruling that the plaintiff can pursue litigation under a pseudonym).

The leading case in the nation on the ability of immigrant plaintiffs to prosecute employment and civil rights claims under pseudonyms concisely states the proper inquiry into whether the fear of plaintiffs warrants the use of pseudonyms:

> [P]laintiffs are not required to prove that the defendants intend to carry out the threatened retaliation. What is relevant is that plaintiffs were threatened, and that a reasonable person would believe that the threat ***might*** actually be carried out.

Does I thru XXIII, 214 F.3d at 1071 (emphasis added); see also John Does I-V v. Rodriguez, 2007 WL 684114, *2-*3 (D. Colo. 2007) (ruling that the plaintiffs, who are immigrants, can pursue their employment claims against their employer while using pseudonyms).

V. COUNSEL SHOULD PLEAD A RETALIATION CLAIM WHENEVER POSSIBLE IN THE ORIGINAL COMPLAINT AND/OR IN THE AMENDED COMPLAINT TO MINIMIZE LITIGATION ABUSE AND MAXIMIZE RECOVERIES

In the landmark ruling Burlington North and Santa Fe Ry. Co. v. White, the Supreme Court famously lowered the bar for what constitutes adverse action to support a retaliation claim as anything that "***might*** have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" 548 U.S. 53, 68 (2006) (emphasis added). In so ruling, the Supreme Court signaled a remarkable receptiveness to retaliation claims that plaintiff counsel should bear in mind when prosecuting employment and civil rights claims.

Following White, the Supreme Court – including in opinions announced or authored by Justices Antonin Scalia and Samuel Alito – has expanded the scope of anti-retaliation protection and viable retaliation claims while simultaneously restricting the scope of protection and viable claims in other areas of employment law. Dep't of Homeland Security v. McClean, 135 S.Ct. 913, 920-24 (2015) (in an opinion authored by Chief Justice Roberts, ruling that the whistleblowing at issue was protected activity even though it violated a federal regulation); Kasten v. Saint-Gobain Perform. Plastics Corp., 563 U.S. 1, 4-5 (2011) (holding that the anti-retaliation provision of the Fair Labor Standards Act protects employees who only make an oral complaint, rejecting the trend under state law that increasingly requires formal and/or written reports to trigger protection); Thompson v. North Amer. Stainless, LP, 562 U.S. 170, 173-75 (2011) (in a unanimous opinion announced by Justice Antonin Scalia, concluding that adverse action against a third party can support a retaliation claim); Crawford v. Metropolitan Government of Nashville, 555 U.S. 271, 273-74 (2009) (ruling that Title VII's anti-retaliation provision protects employees from retaliation when employees merely participate in an employer's internal investigation of a potential violation); Gomez-Perez v. Potter, 553 U.S. 474, 478-79 (2008) (in an opinion authored by Justice Samuel Alito, basically reading an anti-retaliation provision into the Age Discrimination in Employment Act); CBOCS West, Inc. v. Humphries, 553 U.S. 442, 445 (2008) (holding that Section 1981 protects individuals who have complained about potential violations concerning a third party).

Nonetheless, some defense counsel are now arguing that the Supreme Court's decision in Univ. of Tex. Southwestern Med. Ctr. v. Nassar, 133 S.Ct. 2517 (2013) somehow means that courts will no longer interpret and enforce anti-retaliation protections liberally. To support their position, defense counsel typically rely on Nassar's requirement that a plaintiff show retaliation was the "but for" cause of the employer's adverse action.

In light of a more recent Supreme Court case, Burrage v. United States, 134 S.Ct. 881 (2014), defense counsel's argument about the trajectory of anti-retaliation law should not gain significant traction. Although a criminal case, Burrage discussed in detail the meaning of "but for" causation and used Nassar as the starting point. 134 S.Ct. at 887-88. The Supreme Court then quoted legal authority describing "but for" causation as "the ***minimum concept of cause***." Id. at 888 (emphasis added). The Supreme Court's unanimous opinion in Burrage – which Justice Antonin Scalia authored – ultimately framed the analysis of "but for" causation through a number of metaphorical examples. Id.

Notably, one of Justice Scalia's metaphors actually reiterated the precise point made by NELA's own Alice Ballard following Gross v. FBL Financial Servs., Inc., 557 U.S. 167 (2009), wherein the Supreme Court adopted "but-for" causation under the Age Discrimination in Employment Act:

> [The predicate act is the "but for" cause if] the predicate act combines with other factors to produce the result, so long as the other factors alone would not have done so – if, so to speak, ***it was the straw that broke the camel's back***.

Burrage, 134 S.Ct. at 888 (emphasis added). As reflected by post-Gross precedent, this "new" standard should not be more difficult to satisfy than the "old" standard.

Consequently, plaintiffs should not be shy about asserting retaliation claims in the first instance and, as appropriate, adding such claims in a given case. Considering the greater legal exposure created by viable retaliation claims, defendants may be less inclined to employ scorched-earth litigation tactics because such conduct could be further evidence of retaliation and, thus, the basis for larger damages and attorney's fees awards.

VI. COUNSEL SHOULD PLEAD AND SEEK BACK PAY FOR WORK ACTUALLY PERFORMED AND "GARDEN VARIETY" EMOTIONAL DISTRESS TO MINIMIZE THE RISK OF OPENING THE DOOR TO DISCOVERY OF PLAINTIFFS' IMMIGRATION STATUS

To limit the ability of defense counsel to make a plaintiff's immigration status an issue in litigation, plaintiff counsel should be clear in pleadings and otherwise that an immigrant plaintiff's back pay claim concerns only compensation for work actually performed and, moreover, that a given plaintiff does not seek front pay. This approach should ensure that the rationale of Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002), adopted only under the National Labor Relations Act, will not come into play. Madeira v. Affordable Housing Foundation, Inc., 469 F.3d 219, 243 (2nd Cir. 2006) ("[A]n order requiring an employer to pay his undocumented workers the minimum wages prescribed by the [FLSA] for labor actually and already performed . . . does not . . . condone that violation or continue it. It merely ensures that the employer does not take advantage of the violation by availing himself of the benefit of undocumented workers' past labor without paying for it in accordance with minimum FLSA standards."); Rosas v. Alice's Tea Cup, LLC, 127 F. Supp. 3d 4, 9 (S.D.N.Y. 2015) ("[D]denying undocumented workers the protection of the FLSA would permit abusive exploitation of workers and create an unacceptable economic incentive to hire undocumented workers by permitting employers to underpay them."); Solis v. SCA Restaurant Corp., 938 F. Supp. 2d 380, 401 (E.D.N.Y. 2013) (holding that "Hoffman does not preclude an award of backpay to undocumented workers."); Villareal v. El Chile, Inc., 266 F.R.D. 207, 214 (N.D. Ill. 2010) (same); Chellen v. John Pickle Co., 446 F. Supp. 2d 1247, 1278 (N.D. Okla. 2006) ("Hoffman does not purport to preclude a backpay award for work that was actually performed by undocumented workers."); Galaviz-Zamora v. Brady Farms, 230 F.R.D. 499, 501 (W.D. Mich. 2005) (citing Flores v. Amigon, 233 F. Supp. 2d 462, 463 (E.D.N.Y. 2002)) (reiterating that Federal courts only allow discovery into immigration status of the plaintiffs "where claims of back pay are made for work 'not performed.'").

Plaintiff counsel can also sharply limit, if not preclude outright, the production of medical records – which may include social history and other components that disclose the immigration status of plaintiffs – by pleading and seeking emotional distress damages that are "garden variety" in nature. Jaffee v. Redmond, 518 U.S. 1, 15-18 (1996) (holding that, pursuant to Fed. R. Evid. 501, the disclosure of medical data could not be compelled because "[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege."); In re Sims, 534 F.3d 117, 120, 141-142 (2nd Cir. 2008) (holding that the district court abused its discretion in ruling that the plaintiff waived the privilege applicable to medical records when seeking "garden variety" emotional distress damages); Newton v. Kemna, 354 F.3d 776, 785 (8th Cir. 2004) (agreeing that the district court properly prohibited discovery of medical records); EEOC v. Peters' Bakery, 301 F.R.D. 482, 486 (N.D. Cal. 2014) (ruling that medical records were not discoverable because the case involved "garden variety" emotional distress claims); Stallworth v. Brollini, 288 F.R.D. 439, 444 (N.D. Cal. 2012) (same); EEOC v. Wal-Mart Stores, Inc., 276 F.R.D. 637, 641 (E.D. Wash. 2011) (same); Womack v. Wells Fargo Bank, N.A., 275 F.R.D. 571, 572 (D. Minn. 2011) (same); EEOC v. Serramonte, 237 F.R.D. 220, 224-25 (N.D. Cal. 2006) (same); Fritsch v. City of Chula Vista, 187 F.R.D. 614, 632 (C.D. Cal. 1999) (same); Hucko v. City of Oak Forest, 185 F.R.D. 526, 530 (N.D. Ill. 1999) (same); Burrell v. Crown Cent. Petroleum, Inc., 177 F.R.D. 376, 384 (E.D. Tex. 1997) (same); Vanderbilt v. Town of Chilmark, 174 F.R.D. 225, 230 (D. Mass. 1997) (same).

VII. COUNSEL SHOULD REINFORCE THAT COURTS BAR DISCOVERY INTO, AND THE USE OF, PLAINTIFFS' IMMIGRATION STATUS IN EMPLOYMENT AND CIVIL RIGHTS CASES

Settled precedent holds that the immigration status of employment and civil rights plaintiffs is irrelevant as a matter of law. Lucas v. Jerusalem Cafe, LLC, 721 F.3d 927 (8th Cir. 2013) (holding that the district court reasonably concluded that any reference to the plaintiffs' immigration status would be substantially more prejudicial than probative); Rivera v. NIBCO, Inc., 364 F.3d 1057, 1072 (9th Cir. 2004), cert. denied 544 U.S. 905 (2005) (affirming that the immigration status of the plaintiffs is irrelevant); Colon v. Major Perry Street Corp., 987 F. Supp. 2d 451, 464 (S.D.N.Y. 2013) ("Discovery into a FLSA plaintiff's immigration status is irrelevant and impermissible.") (citations omitted); Nieves v. OPA, Inc., 948 F. Supp. 2d 887, 892 (N.D. Ill. 2013) ("[A]llowing this discovery [into immigration status] could have a pronounced chilling effect with respect to parties filing FLSA claims because aggrieved parties would not file otherwise valid claims due to the fear of potential deportation. . . ."); EEOC v. Glob. Horizons, Inc., 287 F.R.D. 644, 650 (E.D. Wash. 2012) ("As recognized by a number of other courts, a litigant's immigration status is typically undiscoverable simply for the purpose of challenging the litigant's credibility."); Cazorla v. Koch Foods of Mississippi, LLC, 287 F.R.D. 388, 390 (S.D. Miss. 2012) ("Any relevant of immigration status is clearly outweighed by the in terrorem effect disclosure of this information would have in discouraging the individual plaintiffs and claimants from asserting their rights in this lawsuit."); Reyes v. Snowcap Creamery, Inc., 898 F. Supp. 2d 1233, 1235 (D. Colo. 2012) ("[T]he weight of authority clearly holds that a plaintiff's immigration status is irrelevant in an FLSA action "[I]t is well established that the protections of the Fair Labor Standards Act are applicable to citizens and aliens alike and whether the alien is

documented or undocumented is irrelevant.") (citation omitted)); Villareal, 266 F.R.D. at 212 (reiterating that immigration status is not relevant to employment claims); David v. Signal Int'l, LLC, 257 F.R.D. 114, 122 (E.D. La. 2009) ("Even if current immigration status were relevant to plaintiffs' race/national origin discrimination, contract and tort claims, discovery of such information would have an intimidating effect on an employee's willingness to assert his workplace rights."); Montoya v. S.C.C.P. Painting Contractors, Inc., 530 F. Supp. 2d 746, 750 (D. Md. 2008) ("To allow the immigration status of a class representative to be investigated-indeed to require a representative to enjoy legal immigration status-would seriously undermine the effectiveness of the [employment statute]."); EEOC v. The Restaurant Company, 448 F. Supp. 2d 1085, 1087 (D. Minn. 2006) (citation omitted) (reversing the order compelling discovery of the plaintiff's immigration status because it "would have an unacceptable chilling effect on the bringing of civil rights actions, which would result in 'countless acts of illegal and reprehensible conduct' going unreported."); EEOC v. Bice of Chicago, 229 F.R.D. 581, 583 (N.D. Ill. 2005) ("We find that the immigration status of the Charging Parties is not relevant to the [employment] claims or defenses. . . ."); EEOC v. Tortilleria "La Mejor," 758 F. Supp. 585, 590 (E.D. Cal. 1991) ("[T]he protections of Title VII were intended by Congress to run to aliens, whether documented or not. . . .").

VIII. COUNSEL SHOULD UNDERSCORE THAT COURTS BAR DISCOVERY OF PLAINTIFFS' TAX RECORDS – EVEN WHETHER PLAINTIFFS FILED TAX RETURNS – TO PRECLUDE A BACKDOOR WAY OF PURSUING DISCOVERY INTO IMMIGRATION STATUS

Federal courts have repeatedly rejected defendants' efforts to compel tax records as, among other things, improperly seeking immigration-status-related data. See, e.g., Nieves v. OPA, Inc., 948 F. Supp. 2d 887, 893 (N.D. Ill. 2013) ("The Defendants are also not permitted to inquire into whether the Plaintiffs filed tax returns with either the Internal Revenue Service or the Illinois Department of Revenue because such inquiries are generally just an alternative method to discover a plaintiff's immigration status."); Melendez v. Primavera Meats, Inc., 270 F.R.D. 143, 145 (E.D.N.Y. 2010) (barring discovery of tax records because the defendants could ascertain the plaintiffs' employment history using less intrusive discovery tools); Galaviz-Zamora, 230 F.R.D. at 502-03 (barring discovery into the plaintiffs' tax returns and tax forms).

IX. COUNSEL SHOULD ARGUE THAT CLEARLY ESTABLISHED PRECEDENT BARS PRE-CERTIFICATION CONTACT WITH PUTATIVE CLASS MEMBERS

To guard against witness tampering and other intimidation tactics by defendants, plaintiff counsel should not hesitate to invoke the precedent barring direct communication by defendants with putative class members – that is, with material witnesses even before a class has been certified. Giles v. St. Charles Health Sys., Inc., 980 F. Supp. 2d 1223, 1226 (D. Or. 2013) ("[W]hile defendant provided evidence evincing that the purpose behind its contact with putative class members was not improper, the Court finds clear countervailing evidence demonstrating that the challenged communications were improper and misleading."); In re Currency Conversion Fee Antitrust Litigation, 361 F. Supp. 2d 237, 253 (S.D.N.Y. 2005) (ruling that the defendants' pre-certification communications with potential class members about the subject matter of litigation were improper); Dondore v. NGK Metals, 152 F. Supp. 2d 662, 666 (E.D. Pa.

2001) (prohibiting the defendant's agents from interviewing potential class members before the case had been certified as a class action); Bublitz v. E.I. du Pont de Nemours & Co., 196 F.R.D. 545, 549 (S.D. Iowa 2000) (denying the defendant's motion for leave to pursue direct contacts with potential class members about the substance of the pending case); Abdallah v. Coca Cola Co., 186 F.R.D. 672, 679 (N.D. Ga. 1999) (granting the plaintiffs' pre-certification motion to restrict the defendants' ability to have direct communication with potential class members); Loatman v. Summit Bank, 174 F.R.D. 592, 602 (D. N.J. 1997) (sanctioning the defendant for pre-certification contacts with potential class members regarding the litigation); Hampton Hardware, Inc. v. Cotter & Co., Inc., 156 F.R.D. 630, 634 (N.D. Tex. 1994) (barring direct contacts by the defendant despite the absence of actual harm to the potential plaintiff class); see also Kleiner v. First National Bank, 751 F.2d 1193, 1207 (11th Cir. 1985) (reiterating that the defendants' agents "have an ethical duty to refrain from discussing the litigation with members of the class as of the date of class certification, if not sooner. . . . ."); Mevorah v. Wells Fargo Home Mortg., Inc., 2005 WL 4813532, *5-*6 (N.D. Cal. 2005) (precluding pre-certification contacts with potential plaintiff class members about the case).

In prohibiting pre-certification communication between a defendant's agents and potential class members, one Federal court explained the rationale adopted by courts across jurisdictions:

> As a practical matter, a court cannot decide the issue of class certification immediately upon the filing of the complaint. Discovery is often required and the preparation and study of briefs is necessary. Thus, certain benefits must be afforded the putative class members in the interim. ***As the tolling of the statute of limitations is needed to further the salutary purposes of class actions, restraints are likewise needed against communications with putative class members until the issue of class certification can be determined.*** If defense counsel or counsel otherwise adverse to their interests is allowed to interview and take statements from often unsophisticated putative class members without the approval of counsel who initiated the action, the benefits of class action litigation could be seriously undermined.

Dondore, 152 F. Supp. 2d at 666; see also Kahan v. Rosensteil, 424 F.2d 161, 169 (3rd Cir. 1970), cert. denied 398 U.S. 950 (1970) (citations omitted) (reaffirming that "a suit brought as a class action should be treated as such for purposes of dismissal or compromise, until there is a full determination that the class action is not proper."); AM. B. ASS'N. MODEL RULE 4.2.

X. COUNSEL SHOULD CONSIDER DEPOSING THEIR OWN CLIENTS

Nothing in the applicable rules prohibits plaintiff counsel from deposing plaintiff. Given that most cases are resolved through trial by paper (dispositive motions), it is logical to conduct the deposition examination like a trial examination. In the trial context, plaintiff counsel examines plaintiff first, followed by defense counsel. Replicating this sequence of questioning in the deposition setting, then, is more procedurally sound and promotes a clearer record. Beginning depositions with direction examination is especially important for immigrant plaintiffs because they are more likely to have difficulty telling their story due to language and/or cultural barriers. To the extent that plaintiff counsel use interpreters/translators to mitigate linguistic and

cultural differences, only Federally certified interpreters/translators should be used whenever possible given the widely varying quality of State certified interpreters/translators.

CONCLUSION

Cases involving immigrant plaintiffs can be exceedingly compelling because those groups are among the most exploited in our economy. From both a justice and practice standpoint, then, NELA attorneys should help satisfy the unmet need by pursuing such cases. Drawing on the litigation tools and strategies discussed above will help with both establishing liability and maximizing recoveries for immigrant plaintiffs.

#NELA16
National Employment Lawyers Association
2016 Annual Convention
Los Angeles, California
June 22-25, 2016

Successfully Representing Undocumented Workers
In Employment Litigation

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Using Protective Orders When Representing Undocumented Workers

Starting point: Assume that immigrant and limited-English proficient clients will face discovery about their immigration status.

Rights and Remedies Available to Undocumented Workers

With few exceptions, undocumented employees are covered by the same laws as authorized workers.

- Federal statutes: e.g., Title VII, ADA, FLSA, NLRA
- Workers' compensation: most states recognize eligibility
- Tort claims: same

Primary exception: unemployment benefits.
-No coverage because conditioned on future ability to seek employment

Distinctions arise primarily as to scope of available remedies.

Backpay: Unavailable under NLRA (*Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002). Arguably available under other statutes, including Title VII.

-

Front pay and reinstatement: Problematic because generally conditioned on legal authorization to work.

Wages for work already performed: Available.
Compensatory and punitive damages: Availability not in serious question.

BUT: The possible relevance of immigration status to remedies does *not* make status discoverable, at least at liability stage.

Pre-filing preparation:

Client counseling
Consultation with immigration counsel
Decisions regarding claims and relief sought
Client counseling

It is essential to ascertain client's immigration status early on.

Requires establishing trust
Preliminary discussion of how lack of status may affect the case
Candor about possible risks, notably including retaliatory use of ICE

Consultation with immigration counsel

<u>This is absolutely essential</u>:

- to competently advise client about: (a) possible adverse consequences of status disclosure, and (b) alternatives to proceeding
- to avoid malpractice concerns (*Padilla v. Kentucky*, 130 S.Ct. 1473 (2010))

Decisions regarding claims and relief sought

Choices of legal claims and remedies may affect likelihood of having to deal with immigration-related discovery.

Notably, not seeking backpay may decrease chances of having to respond to status inquiries.

These tradeoffs must ultimately be decided upon by the client.

Responding to written discovery regarding immigration status

Typically the first place immigration questions will be propounded.

Threshold objections:

Lack of relevance to statutory coverage
Any conceivable benefits of the discovery outweighed by its burdens
Avoidance of "annoyance, embarrassment, oppression"

Basis for protective orders:

Fed.R.Civ.P. 26

FRCP 26(b)(2)(c)(iii) requires the district court to limit discovery where "the burden or expense of the proposed discovery outweighs its likely benefit"

FRCP 26(c) allows the district court to limit discovery upon a showing of "annoyance, embarrassment, oppression"

[

California analogues: CCP §§ 2017.020(a), 2019.020(b), 2019.030(a)

Leading case:

***Rivera v. Nibco, Inc.*, 364 F.3d 1057 (9th Cir. 2004)**

Followed by the majority of federal district courts
Upheld a protective order that:

- barred all questions going directly to immigration status
- barred disclosure to third parties of responses to secondary questions (e.g., place of birth, place of marriage)

Rivera's holding:
Plaintiffs' immigration status irrelevant to coverage under Title VII

- Discovery into status creates fear of employer retaliation and exerts chilling effect on plaintiffs
- Such discovery if permitted would frustrate federal policy encouraging private enforcement of Title VII
- Therefore, Rule 26 balancing tips sharply against allowing discovery.
- Even assuming relevance of status to remedies, any necessary inquiries can be handled in post-trial *in camera* proceeding.

Rivera also rejected defense argument that under *McKennon*, employer was entitled to conduct fishing expedition for after-acquired evidence concerning immigration status.

- District court adopted bifurcation procedure, 2006 WL 845925 (E.D. Cal. 2006)

Additional authority for protective orders in California:

Labor Code § 1171.5(b) (also codified at Cal. Gov't Code § 7285, Cal. Civ. Code § 3339, and Cal. Health & Safety Code § 24000) provides:"For purposes of enforcing state labor and employment laws, a person's immigration status is irrelevant to the issue of liability, *and in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person's immigration status*" except upon a clear and convincing showing that inquiry is necessary to comply with federal immigration law. (emphasis added)

Responding to deposition questions re immigration status:

Same bases for objections, but different procedural considerations.

- Prepare client for possibility of status questions.
- Have a proposed stipulation and order ready.

Questions to watch out for:

- Prior dealings with INS/ICE, USCIS
- Place of birth; "where are you/your family from?" [creates inference of citizenship, thus presumptive deportability to]
- How/when did you enter this country?
- Travel outside the United States
- Place of marriage
- Spouse/family members' immigration status
- Length of residence in the U.S.
- Social Security number or (ITIN)
- Use of false documents
- Whether ever filled out an I-9 form; documents presented for I-9 purposes

Adjourning the deposition

Fed.R.Civ.P. 30(d)(3): Deposition may be suspended if witness seeks a protective order; can also proceed with remainder of depo not implicated by the dispute.

Risk of losing motion (also applies to unsuccessful opposition to motions to compel written discovery): payment of fees and costs under Fed.R.Civ.P. 37(a)(5).

However, "substantial justification" arguably shown by proffer of *Rivera* as authority supporting nondisclosure.

SAMPLE EMPLOYEE LETTER TO EMPLOYER REFUSING TO UPDATE SOCIAL SECURITY NUMBER (CALIFORNIA)

[UPDATE TO ENSURE CONFORMITY WITH CURRENT LAW]

[DATE]

[EMPLOYER'S NAME]
[EMPLOYER'S ADDRESS]

Dear [Employer]:

I write to renew my request that you update my Social Security Number ("SSN") for payroll purposes. On [date], I asked that you update my Form W-4, and showed you my new Social Security card reflecting my new number, but you declined to follow through on my request.

Federal immigration law allows employees to update their SSNs with their employers. The United States Citizenship and Immigration Services' Employer Handbook states that in such situations, an employer should complete a new I-9 form with the original hire date and attach it to the previous I-9 with a written explanation. *See* USCIS Employer Handbook at p. 24, *available at* http://www.uscis.gov/files/form/m-274.pdf. Under federal immigration law, an employer may continue to employ a worker who attempts to make such changes. *Id.* *See also* U.S. Dep't of Justice, Civil Rights Division Office of Special Counsel for Immigration-Related Unfair Employment Practices 1/8/15 Technical Assistance Letter to A. Fela ("OSC 1/8/15 Letter") at p. 2 *available at* http://www.justice.gov/crt/about/osc/pdf/publications/TAletters/FY2015/183.pdf. Further, the Form W-4 itself indicates that an employee should "[c]onsider completing a new Form W-4 each year and when [her] personal or financial situation changes." Thus, it is within my prerogative to amend a Form W-4 to reflect my updated SSN.

Finally, please be advised that the U.S. Department of Justice states that an employer's rejection of valid work-authorization documentation or termination of an employee under these circumstances could violate federal immigration law, possibly constituting an unfair documentary practice or "document abuse." *See* OSC 1/8/15 Letter at p. 3. Moreover, California Labor Code § 1024.6 makes it unlawful for an employer to fire, discriminate, retaliate, or take any adverse action against an employee who updates his or her personal information, unless the changes are directly related to the job's skills, qualifications, or knowledge required for the job. Because updating my Social Security Number has no relationship to my ability to perform my job, I trust that you will allow me to update my information without suffering any adverse employment action.

Enclosed please find my executed I-9 and IRS Form W-4. Please let me know in writing when you have updated my personal information.

Sincerely yours,

SAMPLE LETTER TO EMPLOYER THREATENING REPORTING TO ICE

[UPDATE TO ENSURE CONFORMITY WITH CURRENT LAW]

Dear :

This office represents Jane Doe, who has informed us that one of her supervisors, Joe Blow, has indicated he intends to contact Immigration and Customs Enforcement ("ICE") if Ms. Doe pursues her claim of [issue] against XYZ Company.

You should be aware that under California law, making a threat to report a person to immigration authorities because she has expressed concerns about her working conditions, or otherwise invoked her workplace rights, is itself unlawful under Cal. Labor Code § 244(b). In other words, because Mr. Blow responded to Ms. Doe's complaint about [issue] by stating he would contact ICE about her if she took any steps to protect her legal rights in that regard, XYZ Company has broken the law. The penalties for making such a threat include loss of a business license as well as exposure to civil suit for damages, penalties, and attorneys' fees. Cal. Labor Code § 1019; Cal. Bus. & Prof. Code § 494.6. You may also be criminally liable for extortion, Cal. Penal Code § 519, the punishment for which may be imprisonment for up to one year and/or a fine of up to $10,000. Cal. Penal Code § 524.

Moreover, if XYZ Company or its agents proceed to contact ICE with respect to Ms. Doe, it will be violating both Federal and California state law. Reporting an employee to ICE because she has made internal complaints about her working conditions, including about the payment of wages or discriminatory practices, violates Federal employment protections such as the Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, and the National Labor Relations Act. *See, e.g., Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984); *Burlington Northern and Santa Fe Ry. Co. v. White*, 546 U.S. 53 (2006); *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 25 F.Supp.2d 1053 (N.D. Cal. 1998); *Singh v. Jutla*, 214 F.Supp.2d 1056 (N.D. Cal. 2002); *EEOC v. Signal Int'l, LLC*, 2013 WL 4854136 (E.D. La. Sept. 10, 2013). Those statutes provide for full remedies, including without limitation back pay, compensatory and punitive damages, injunctive relief, and attorneys' fees. In addition, California law makes such retaliation unlawful. Cal. Labor Code § 98.6(a).

Finally, under California law, to the extent that any attorney representing XYZ Company is involved in making the threats against Ms. Doe, or in making contact with immigration authorities concerning her, he or she is separately liable and may be disciplined, suspended, or disbarred altogether. Cal. Bus. § Prof. Code § 6103.7.

For these reasons, we request that you take all steps necessary to ensure that neither Mr. Blow, nor anyone else acting in your interest, makes any contact with ICE regarding Ms. Doe, and that she be able to pursue her rights in this matter through the judicial process without

interference. As noted above, your failure to do may subject XYZ Company to the most severe civil and criminal liability, and Ms. Doe is prepared to respond accordingly if required to do so.

Please do not hesitate to contact me if you have any questions in this regard.

Very truly yours,

SAMPLE LETTER TO EMPLOYER RE SSA "NO-MATCH" LETTER

[UPDATE TO ENSURE CONFORMITY WITH CURRENT LAW]

[redacted]

[redacted]

Re: [redacted]'s Termination

Dear Mr. [redacted]:

[redacted] recently contacted this office to discuss his termination from [redacted] on or about [redacted].

We understand that on or about [redacted], after [redacted] years of employment with [redacted], Mr. [redacted] was notified by phone that [redacted] had received a "no match" letter and that he was terminated. This "no match" letter has not been provided for Mr. [redacted] review. Most egregiously, Mr. [redacted] was provided no opportunity to correct any inconsistencies in your records prior to termination.

Our purpose in writing is to clarify the significance of a "no match" letter from either the Internal Revenue Service (IRS) or the Social Security Administration (SSA) regarding an employee and the proper procedures employers should take when receiving a "no match" letter. We believe this letter is necessary because there is no indication whatsoever that Mr. [redacted] termination was consistent with the strict limitations on the re-verification of employees' work authorization set forth in the regulations implementing the Immigration Reform and Control Act (IRCA). *See, e.g.*, 8 C.F.R. § 274a.2(b)(1)(vii).

Under IRCA, an employer is only permitted to verify an employee's employment authorization during the first three days of hire and when the employer has constructive knowledge of an employee's undocumented status. "No match" letters from the IRS or SSA do not constitute constructive knowledge of an employee's authorization and do not provide a legal basis for terminating an employee. *See Aramark Facility Services v. SEIU*, 530 F.3d 817 (9th Cir. 2008).

Indeed, the SSA has incorporated language in the letter warning employers that if they take adverse action against employees based on these letters they could face legal liability. The letter states:

> You should not use this letter to take any adverse action against an employee just because his or her social security number appears on the list, such as laying-off, suspending, firing, or discriminating against

that individual. Doing so could, in fact, violate state or federal laws and subject you to legal consequences.

An SSA no-match letter does not, by itself, put an employer on notice that the employee is not authorized to work, since there are a number of reasons why there might be such a discrepancy that does not relate to a lack of work authorization.

Upon receipt of an IRS or SSA "no match" letter, an employer should first contact the employee in question and provide 90 days for the employee to resolve any administrative problems that may have resulted in the "no match" letter. Failure to provide notice, information, or an opportunity to resolve the problem may constitute an adverse employment action for which an employer may be held liable under Title VII of the Civil Rights Act of 1964, the National Labor Relations Act, and similar state statutes. [redacted]. Adherence to best termination practices protects employers from liability and maintains positive employee relations. We hope that, in the future, you will change your practices and provide your employees, especially those who have worked for you for over [redacted], the common courtesy to properly consider the necessity for their termination.

If you have any questions about this letter, please do not hesitate to contact me.

Sincerely,

SAMPLE EMPLOYEE LETTER TO EMPLOYER ENGAGING IN UNLAWFUL REVERIFICATION/DOCUMENT ABUSE (CALIFORNIA)

[UPDATE TO ENSURE CONFORMITY WITH CURRENT LAW]

Dear Mr. [redacted],

I have been a [redacted] for [redacted] since [redacted]. I was injured on the job in [redacted]. I filed for Workers' Compensation and took leave until around [redacted] when I was cleared for light duty. In [redacted], I look leave again due to my workplace injury. On [redacted] my doctor said I could go back to work if I was placed on light duty. On [redacted] I attempted to return to work and requested light duty as a reasonable accommodation. You told me that I needed to provide my Social Security number in order to continue working.

I am writing to let you know that the Immigration Reform and Control Act ("IRCA") protects workers from "unfair immigration practices." 8 U.S.C. § 1324b. Asking an employee to provide her Social Security number is only permitted if the worker's employment authorization has expired, if the Department of Homeland Security ("DHS") or one of its agencies has told the company there is a problem with a worker's documents, or you have *"constructive knowledge"* that a worker is undocumented. None of the circumstances in the law apply to my case.

In fact, California law prohibits employers from retaliating against workers who exercise their rights by asking for their Social Security numbers. Cal. Lab. Code § 1019. Employers who engage in such an "unfair immigration related practice" risk having their business licenses suspended. Likewise, it is illegal for an employer to retaliate against an employee, regardless of their immigration status, for filing for Workers' Compensation. Cal. Lab. Code § 132a. Asking for my Social Security number after I requested a reasonable accommodation and filed for Workers' Compensation appears to be an unfair immigration practice and could constitute retaliation.

Finally, there are also laws that protect me as a disabled worker. The day after asking for a reasonable accommodation, you asked me to provide my Social Security number. The circumstances of your request strongly suggest that this is retaliation. Under the Americans with Disabilities Act, I have the right to ask for a reasonable accommodation and [redacted] is required to reasonably accommodate me if I can do my job with a reasonable accommodation. 2 U.S.C.A. § 12112. It is illegal to retaliate against me for asking for a reasonable accommodation. 42 U.S.C.A. § 12203(a).

In sum, [redacted] cannot ask me for my Social Security number or ask me to provide employment authorization again. I am qualified to work and eager to continue working, with a reasonable accommodation. Please confirm that you no longer require me to provide a Social Security number in order to continue working at [redacted]. I hope I can continue working and that this matter will be resolved. I look forward to scheduling my first day back as soon as possible.

Sincerely,

SAMPLE LETTER TO EMPLOYER ENGAGING IN UNLAWFUL REVERIFICATION/DOCUMENT ABUSE (CALIFORNIA)

[UPDATE TO ENSURE CONFORMITY WITH CURRENT LAW]

Via U.S. Mail
[redacted]

[redacted]

Re: [redacted] ***Re-Verification***

Dear Mr. ____:

We write to you regarding Mr. [redacted], an employee of [redacted] since [redacted]. Mr. [redacted] was injured on the job in [redacted] and was receiving Workers' Compensation and unable to work until [redacted] We understand that Mr. [redacted] has been cleared for modified duty by his doctor. After attempting to return to work and communicating his need for modified duty as a reasonable accommodation of his disability on or around [redacted], Mr. [redacted] was told that he needed to provide his Social Security number again in order to continue working. Throughout his time working at [redacted], Mr. [redacted] has never been asked to re-verify his employment authorization.
We would like to inform you of several federal and state laws which prohibit employers from asking their employees to re-verify their employment authorization after already becoming an employee. This kind of request is permissible only in very narrow circumstances.

Document Abuse Under the Immigration Reform and Control Act

Under federal law, asking an employee to "re-verify" their employment eligibility absent certain specific conditions is considered unlawful document abuse. 8 U.S.C. § 1324b. Under the Immigration Reform and Control Act, requiring an employee to "re-verify" a worker's employment eligibility is only permissible where 1) an employee's employment authorization has expired, 2) Immigration and Customs Enforcement informs the employer of problems with its workers' documents or 3) where the employer has constructive knowledge that the worker is not authorized. *Id.* "Constructive knowledge" means that the employer has *clear* evidence that someone is in fact undocumented. *Aramark v. SEIU Local 1877*, 530 F.3d 817, 825 (9th Cir. 2008). The receipt of a Social Security Administration "no-match" letter does not constitute "constructive knowledge." *Id.* Therefore, none of the permissible circumstances above exist in this case and [redacted] could be liable for unlawful document abuse.

Document Abuse Under California Law

Similarly, under a newly enacted state law, California Labor Code § 1019, a business can have their business license suspended if the business is found to have engaged in unfair immigration related practices against workers exercising their rights protected under the Labor Code. Under this new law, employers may ask for re-verification to update an I-9 Form only if 1) the employee's work authorization has expired, 2) the employee has been rehired within three years or 3) the employee changed his or her name. Absent these circumstances, such a request may constitute retaliatory action.

A presumption that the employer has retaliated against an employee exists where an adverse action occurs within 90 days of an employee exercising his or her rights. Because Mr. [redacted] was asked for his Social Security number the day after attempting to return from a Workers' Compensation leave and requesting a reasonable accommodation, there is a strong presumption that the action was an unfair immigration related practice. Employees subject to these actions may bring a civil suit for equitable relief, damages, penalties and attorney's fees and costs.

Conclusion

As Mr. [redacted] remains qualified to work and is eager to continue working, with a reasonable accommodation, no action is necessary at this point provided all document abuse, retaliation and discrimination related to his status as a disabled person and receipt of Workers' Compensation benefits ceases. We hope that this letter resolves this matter promptly and that Mr. [redacted] is allowed to continue working.

Thank you.

Sincerely,

SAMPLE LETTER TO EMPLOYER ENGAGING IN UNLAWFUL REVERIFICATION/DOCUMENT ABUSE

[UPDATE TO ENSURE CONFORMITY WITH CURRENT LAW]

[redacted]

BY FACSIMILE TRANSMISSION
(original to follow by mail)

[redacted]

Re: Reverification of Work Eligibility

Dear [redacted]:

It has come to my attention that in a letter distributed today, you have asked all of your employees to reverify their eligibility to work in the United States. In this letter, you inform your employees that they must complete an I-9 form by next Monday, [redacted]. You also inform them that in addition to that form, they must also bring in a Social Security card, a driver's license, and "if you are not a citizen of the United States, a valid green card."

Please be advised that based on the circumstances as I understand them, you have no legal right to demand that your employees reverify their employment authorization in the manner you suggest. Should you in fact proceed in your current course of action, you may be in violation of various sections of the Immigration Reform and Control Act ("IRCA"), including those that impose penalties upon employers that engage in unlawful reverification or other forms of "document abuse."

Employers may not reverify the work eligibility of their employees unless the documents that they have already furnished in conjunction with their I-9 form have expired, 8 C.F.R. § 274a.2(b)(1)(vii), or if the employer has constructive knowledge that the employees in question are undocumented, *see, e.g., Aramark Facility Services v. SEIU*, 530 F.3d 817 (9th Cir. 2008) (holding that Social Security Administration 'no-match" letters do not form basis for "constructive knowledge" allowing for reverification of employees' work authorization). Employers who do so face the possibility of investigation and prosecution by the Civil Rights Division of the U.S. Department of Justice pursuant to 8 U.S.C. § 1324b(a)(6). Since it is highly unlikely that all of your employees' supporting documentation expired on or around [redacted] (the purported date of this letter), or that you have suddenly come into knowledge that your entire workforce is undocumented, your demand that all employees reverify their status is legally unsupported and may expose you to liability under IRCA.

Furthermore, your letter incorrectly states that your demand is based on "a change in format with the Department of Homeland Security." This statement is incorrect; DHS has not imposed any new verification requirements upon employers. In addition, your demand that employees bring in particular documents along with their I-9 forms facially amounts to document abuse, since employers are expressly prohibited from specifying which of the many possible combinations of documents they may present to satisfy their I-9 obligations. 8 U.S.C. § 1324a(b)(1)(A). Therefore, your demand that your employees comply with the directions set forth in today's letter is in facial violation of immigration law.

Finally, it is clear that employers may not use immigration law or the I-9 process as a means for retaliating against employees who have come forward to assert their workplace rights. *Contreras v. Corinthian Vigor Insurance Brokerage, Inc.*, 25 F.Supp.2d 1053 (N.D. Cal. 1998); *Singh v. Jutla*, 214 F.Supp.2d 1056 (N.D. Cal. 2002). As you know, on [redacted], I mailed you a request for personnel and pay records on behalf of [redacted], your former employee. Following your receipt of my letter, on [redacted] you [redacted] questioned [redacted], Ms. [redacted] husband, about the request and expressed your displeasure with the fact that Ms. [redacted] had consulted an attorney. I wrote you that same day advising you to refrain from taking any retaliatory actions against Ms. [redacted] or Mr. [redacted]. Your demand that your employees reverify their status comes just days after Ms. [redacted] records request and Ms. [redacted] and Mr. [redacted] assertion of their right to be free from unlawful retaliation. This close proximity in time strongly suggests that your demand is in retaliation for these employees' assertion of their workplace rights, and is therefore unlawful.

<u>For the above reasons, I strongly urge you to (1) cease and desist from demanding that your employees reverify their status, and (2) immediately inform your employees that they may return to work on Monday without complying with these legally unsupportable demands</u>.

Very truly yours,

SAMPLE LETTER TO EMPLOYER ENGAGING IN UNLAWFUL REVERIFICATION/DOCUMENT ABUSE

[UPDATE TO ENSURE CONFORMITY WITH CURRENT LAW]

[redacted]

Re: *Actions Taken Against* [redacted]

Dear Ms. [redacted]:

We are contacting you on behalf of [redacted], a current employee of [redacted]. We believe that Ms. [redacted] may have been subjected to unlawful [redacted] discrimination and document abuse at your workplace. Our purpose in writing is to pursue a reasonable resolution of Ms. [redacted] concerns so as to avoid the need for further steps in this matter.

Ms. [redacted] was hired on [redacted] as part of the staff at [redacted]. At that time, for I-9 employment authorization purposes, Ms. [redacted] presented her social security card, her work permit, and a copy of her California driver's license to you, whom we understand own and operate the facility. Your [redacted], made copies of these documents. You then told Ms. [redacted] that all of the paperwork looked fine. Ms. [redacted] also presented proof of a TB test, CPR certification, and livescan fingerprinting. Ms. [redacted] was instructed to start working on [redacted].

Ms. [redacted] reported for work on [redacted]5. When she arrived, [redacted] an administrator, yelled at Ms. [redacted], told her she needed to leave the premises because her paperwork was not in place, and told her that her TB test and fingerprints were expired. Ms. [redacted] is Ms. [redacted] supervisor. Ms. [redacted] left the premises and upon arriving home, [redacted] called her. He told her to come in to work the next day, and to re-submit her expired paperwork later. Ms. [redacted] re-submitted new, unexpired TB test and fingerprints the week of [redacted].

> After Ms. [redacted] fingerprint and livescan documents were submitted, Ms. [redacted] called Ms. [redacted], accusing her of using a false social security number. Ms. [redacted] demanded proof that the number Ms. [redacted] had provided was hers. She specifically required that Ms. [redacted] obtain a letter from the Social Security Administration ("SSA") stating that the number belonged to her.
>
> Ms. [redacted] attempted to comply with these instructions, notwithstanding their illegality. She was informed by SSA that it did not provide letters like the one Ms. [redacted] was requesting, but provided her with a "background check letter," which provided detailed work information concerning Ms. [redacted], including her salary information and past employment. Ms. [redacted] faxed this background check letter from the SSA to Ms. [redacted] on or about [redacted].

Ms. [redacted], however, refused to accept the letter. She called Ms. [redacted] a total of seven times the same day, insisting that the document was not acceptable as proof. [redacted]. Ms. [redacted] went on to state, "Just because you're using a social security it doesn't mean it's you. Maybe it's a fake social security." She threatened to not pay Ms. [redacted] because the social security number she had presented might not be hers. Ms. [redacted] made this accusation without any evidence that the number did not belong to Ms. [redacted], and after you had already accepted the documents as valid. In their conversations, Ms. Chapman continually threatened and harassed Ms. Cruz, insinuating that she was a liar, and [redacted] ñeta," a word that has a similar meaning to "whore."

Although Ms. Cruz reported Ms. Chapman's illegal actions and harassment to you on October 22, 2015, you told Ms. Cruz that Ms. Chapman knew what she was doing, and recommended she seek legal advice.

Ms. [redacted] has continued to harass Ms. [redacted]. Most recently, on or around [redacted], Ms. [redacted] again demanded a letter from "immigration" or from the SSA.

Immigration Reform and Control Act Violations

The Immigration Reform and Control Act of 1986 ("IRCA") prohibits employers from requesting more or different employment authorization documents than those required under Section 1324a(b) of IRCA or refusing to honor documents tendered that on their face reasonably appear to be genuine. 8 U.S.C. § 1324(b). An employer's insistence on such additional documentation constitutes actionable and unlawful document abuse. Employers who are found to have violated IRCA are subject to monetary civil penalties. 8 U.S.C. § 1324b(g). *Id.*

Additionally, an employer may *not* re-verify an employee's I-9 information except under narrowly specified circumstances. 8 C.F.R. § 274a.2(b)(viii)(A). An employer may re-verify an employee's work authorization status when an employment authorization document has expired or is about to expire; when the employer has been informed by Immigration and Customs Enforcement that there are problems with the workers' documents; or when the employer has "constructive knowledge" that the worker is not work authorized. *Id.* Constructive knowledge exists where an employer has *clear* evidence that someone is in fact unauthorized to work. *See Aramark v. SEIU Local* 1877, 530 F.3d 817, 825 (9th Cir. 2008) (concluding that even a no-match letter from the SSA did not amount to constructive knowledge that any particular employee was undocumented worker). Re-verifying an employee's authorization outside of these circumstances may give rise to an inference of discriminatory intent.

Ms. [redacted] provided employment authorization documents that complied with Section 1324a(b) of IRCA, which were accepted by you when she was initially hired. None of the narrow circumstances that allow for re-verification applied when Ms. [redacted] demanded additional and different documents (a letter from the SSA and now, immigration) from Ms. [redacted] to verify her employment authorization, and Ms. [redacted] continues to demand such documentation. [redacted] may therefore have violated federal law under IRCA.

Prohibition of Retaliatory Action

Federal and state laws prohibit employers from taking any retaliatory action against individuals who pursue their workplace rights. Ms. [redacted] is engaging in protected activity by asserting her workplace rights to be free from discrimination and her rights under IRCA. The law prohibits [redacted] and any of its employees, agents, or contractors from retaliating against Ms. [redacted] in any way as a result of this letter. *See* Cal. Labor Code § 98.6; 8 U.S.C. § 1324b(a)(5) (prohibiting such practices, as well as threats, intimidation, coercion and retaliation against individuals who attempt to exercise their rights under IRCA). If [redacted] retaliates against Ms. [redacted], it is liable for civil penalties up to $10,000. *See* Cal. Labor Code § 98.6(b)(3).

Ms. [redacted] is currently considering all of her legal options but may be open to an early resolution of her claims. Please contact me to discuss this important matter. I can be reached via email at [redacted] or by mail at the above address.

Sincerely,

SAMPLE LETTER TO EMPLOYER ENGAGING IN UNLAWFUL REVERIFICATION

[UPDATE TO ENSURE CONFORMITY WITH CURRENT LAW]

[redacted]

Dear [redacted]:

I write on behalf of your employee [XXXXXXX]. Last month, [Company] sent Mr. [XXXXXXX] the enclosed "SSN No-Match Team Member Notification." The Notification states that Mr. [XXXXXXX] is required to present a Social Security card to his manager and that if the data on the card matches [Company]'s records, he will then be required to obtain a "Statement of Verification" from the Social Security Administration ("SSA"). The Notification further indicates that if the SSA does not verify the Social Security number ("SSN"), [Company] will only continue to schedule Mr. [XXXXXXX] for 30 days, but that thereafter, he will no longer be scheduled to work, and, because of [Company]'s 30-day no clock-in rule, he will subsequently be terminated. I understand that the last day that Mr. [XXXXXXX] was scheduled to [redacted], and that as of the date of this letter, Mr. [XXXXXXX] is no longer being scheduled to work.

The purpose of SSA's no-match letter is merely to notify an employer when an employee's name or Social Security number does not match the SSA's records, and does not provide employers with the basis to take any adverse action against employees. *See Aramark Facility Services v. SEIU*, 530 F.3d 817 (9th Cir. 2008) (concluding that SSA no-match letters do not provide a legal basis for terminating an employee). Indeed, the SSA has incorporated language in the letter warning employers that if they take adverse action against employees based on these letters they could face legal liability. The letter states:

> You should not use this letter to take any adverse action against an employee just because his or her social security number appears on the list, such as laying-off, suspending, firing, or discriminating against that individual. Doing so could, in fact, violate state or federal laws and subject you to legal consequences.

The letter is in no way intended to suggest that an employee is not authorized to work. Indeed, the position of the general counsel of Immigration and Customs Enforcement ("ICE") is that a SSA no-match letter does not, by itself, put an employer on notice that the employee is not authorized to work, since there are a number of reasons why there might be such a discrepancy that does not relate to a lack of work authorization. For example, the discrepancy may simply be the result of a typographical error. In essence, the no-match letter by itself does not constitute actual or constructive notice of a worker's authorization to work, and therefore would not subject an employer to ICE penalties.

Receiving a SSA no-match letter by itself does not warrant an employer's demand that an employee show additional documentation to prove that they are work-authorized. In fact, the SSA itself advises employers that they should not use no-match letters as a basis for requiring the presentation of documents related to work authorization. Employers who require employees to show additional documents (including requiring an employee to bring in an actual Social Security card) could be subjecting themselves to document abuse charges under IRCA's anti-discrimination provisions.

Once an employee submits documentation to satisfy the I-9 requirements when she is first hired, future inquiries into her eligibility to work constitute an unfair employment practice under IRCA's antidiscrimination provisions. *See* 8 U.S.C. § 1324b(a)(6). Employers found to have violated this provision may be fined civil penalties of up to $1,100 per violation under 8 U.S.C. §1324b(g)(2)(B)(iv)(IV). Moreover, taking adverse action can also subject employers to liability under Title VII of the Civil Rights Act of 1964, the National Labor Relations Act, and similar state statutes.

[Company] complied with IRCA's I-9 requirements when Mr. [XXXXXXX] was hired, and consequently is not subject to any liability under IRCA. By contrast, it faces potential liability stemming from the recent request that Mr. [redacted] present his Social Security card anew, as well as from the threat that he will be terminated unless he does so. As such, we urge you to instead update his employee profile to reflect the SSN he presented when he was hired and that you return to regularly scheduling him to work, without requiring him to present his Social Security card.

If you have any questions about this letter or our proposed resolution, please do not hesitate to contact me.

Sincerely,

SAMPLE LETTER TO EMPLOYER REFUSING TO ACCEPT UPDATED SOCIAL SECURITY NUMBER

[UPDATE TO ENSURE CONFORMITY WITH CURRENT LAW]

Dear [redacted]:

I write on behalf of your former employee, [redacted]. After working at [redacted] for [redacted] years, Mr. [redacted] was terminated on [redacted]. Upon his termination, a person from your Human Resources Department informed Mr. [redacted] that he could no longer work at [redacted] because he provided an incorrect social security number when he initially began his employment. [redacted] first brought this to your store's attention in [redacted] when he asked his then manager, [redacted], to update his social security number in [redacted]e's records. On [redacted], Mr. [redacted] spoke to [redacted] about his termination and Mr. [redacted] informed Mr. [redacted] that [redacted] terminated him because they believed they had a legal obligation to do so based on his past use of an incorrect social security number.

Under relevant federal law, [redacted] had no legal obligation to terminate Mr. [redacted] employment because of his past use of an incorrect social security number since the employment of currently work-authorized individuals is permissible, even if these individuals were previously unauthorized to work. *See NLRB v. A.P.R.A. Fuel Oil Buyers Group*, 134 F.3d 50, 57 (2d Cir. 1997). Instead, Mr. [redacted] termination might violate the anti-discrimination provisions of the Immigration Reform and Control Act of 1986 ("IRCA"), which prohibits employers from treating employees differently on the basis of immigration status, citizenship status, or national origin. 8 U.S.C. § 1324b(a)(1). A company policy that on its face or in practice results in the termination of employees for providing false information as part of the I-9 process, but does not terminate employees for providing false information on other parts of an employment application (e.g., false information on resumes, W-4 forms, etc.) might violate the INA anti-discrimination provision. *See* Letter from Katherine A. Baldwin, Deputy Special Counsel, Office of Special Counsel for Immigration Related Unfair Emp't Practices, U.S. Dep't of Justice Civil Rights Div., to Nicole Gardner, Esq., Gardner and Hughes (April 29, 2010) (attached). Employers found by the Office of Special Counsel to have violated this provision may be fined civil penalties of up to $2,000 per person discriminated against for first-time offenses, and of up to $10,000 per person discriminated against for repeat violations. 8 U.S.C. § 1324b(g)(2)(B)(iv)(I) – (III).

While [redacted] continued employment of Mr. [redacted] after receiving his new social security number would not subject [redacted] to any liability, *see A.P.R.A.*, 134 F.3d at 57, terminating him on this basis might subject it to liability. As such, we urge you to reinstate Mr. [redacted] employment and discontinue any practice that might be in violation of the INA's anti-discrimination provisions. We believe that this resolution, as opposed to Mr. [redacted] filing a complaint with the Office of Special Counsel, would be preferable to all parties involved.

Please contact me as soon as possible, and no later than [redacted], so that we may discuss the matter of Mr. [redacted] employment with [redacted].

Sincerely,

U.S. Department of Justice
Civil Rights Division

Office of Special Counsel for Immigration Related
Unfair Employment Practices - NYA
950 Pennsylvania Avenue, NW
Washington, DC 20530

April 29, 2010

Nicole Gardner, Esq.
Gardner and Hughes
1701 South Boulevard
Charlotte, NC 28203

Dear Ms. Gardner,

This letter is in response to your e-mail of February 12, 2010, seeking guidance on how an employer should, consistent with the anti-discrimination provision of the Immigration and Nationality Act ("INA"), 8 U.S.C. §1324b, deal with various situations involving the transition of an employee from undocumented work status to legally authorized work status. We apologize for the delay of our response.

The Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC") cannot provide an advisory opinion on any particular instance of alleged discrimination or on any set of facts involving a particular individual or entity. However, we can provide some general guidelines regarding employer compliance with the INA's anti-discrimination provision. The anti-discrimination provision prohibits discrimination on the basis of national origin, citizenship status, or immigration status, including document abuse during the employment eligibility verification process, and retaliation.

In your e-mail, you ask three questions. First, you ask about an employer's obligations when the employer discovers that an employee, though having previously provided false work authorization documents, is now authorized to work. The INA prohibits an employer from hiring an individual "knowing the alien is an unauthorized alien . . . with respect to such employment." 8 U.S.C. § 1324a(a)(1)(A). However, if there is no actual or constructive knowledge by the employer that the employee is an unauthorized alien, then § 1324a(a)(1)(A) is not violated. *See Mester Mfg. Co. v. INS*, 879 F.2d 561, 566–67 (9th Cir. 1989) (holding that a violation of § 1324a(a)(1)(A) requires a showing that the employer had actual or constructive knowledge that the employee is an unauthorized alien). Note also that an employer's good faith compliance with the requirements of the Form I-9 is a defense to an alleged violation of § 1324a(a)(1)(A). *Id.* § 1324a(a)(3). Thus, if an employer seeks appropriate documents for the Form I-9 and the documents reasonably appear to be genuine on their face and to relate to the person, then the employer is presumed not to have violated § 1324a(a)(1)(A). *See Collins Foods Int'l, Inc. v. INS*, 948 F.2d 549, 553 n.9 (9th Cir. 1991) (explaining that an affirmative defense to § 1324a(a)(1)(A) can be shown by an employer "who has complied in good faith with the verification requirements" of the Form I-9, as long as the documents presented "reasonably appear on their face to be genuine").

With respect to continuing employment, the INA provides that "[i]t is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment." *Id.* § 1324a(a)(2). However, the courts have held that the employment of currently authorized employees is permissible, even if the employees were previously unauthorized to work. *NLRB v. A.P.R.A. Fuel Oil Buyers Group*, 134 F.3d 50, 57 (2d Cir. 1997).

Your second question asks whether it is proper to have a company policy that any employee who provides false information to the employer as part of the I-9 process will be terminated. As noted above, the INA prohibits employers from treating employees differently in, *inter alia*, firing based on their citizenship status, immigration status, or national origin. *Id.* § 1324b(a)(1). A policy that on its face or in application distinguishes between a certain form of dishonesty (i.e., false information on the Form I-9) from every other form of dishonesty (e.g., false information on W-4 forms, employment applications, resumes, etc.) may violate the anti-discrimination provision of the INA, if based on an intent to discriminate on the basis of citizenship status, immigration status, or national origin.

Finally, your third question asks whether it is proper to allow continued employment for work authorized employees who previously provided false information on the Form I-9, while terminating employees for other dishonesty. As noted above, § 1324b requires that employees be treated the same regardless of citizenship status, immigration status, or national origin.

I hope this information is helpful to you. Should you have any further questions, please contact OSC's employer hotline at (800) 255-7688. If you have any questions regarding worksite enforcement, please contact the Department of Homeland Security, Immigration and Customs Enforcement at (866) 347-2423.

Sincerely,

Katherine A. Baldwin
Deputy Special Counsel

SAMPLE LETTER TO EMPLOYER RETALIATORILY REQUIRING COMPLETION OF I-9 FORM

[UPDATE TO ENSURE CONFORMITY WITH CURRENT LAW]

Dear Mr. [redacted],

This office represents Ms. [redacted] in her claims against [redacted] and its owner, [redacted], for [redacted] violations and illegal retaliation. My purpose in writing is to propose a reasonable resolution of my client's legal claims so as to avoid the need for additional proceedings in this matter.

[redacted] Ms. [redacted] also has a claim against [redacted] for retaliation that she suffered as a result of asserting her workplace rights. She sought legal assistance from [redacted] in [redacted]. Three days after a demand letter was sent to [redacted], Ms. [redacted], illegally retaliated against Ms. [redacted]. Following receipt of the demand letter, Ms. [redacted] attempted to force Ms. [redacted] to fill out an employment application and an I-9 Employment Eligibility Authorization Form, and suspended Ms. [redacted] from her position when she refused to sign any papers. Ms. [redacted] is entitled to recover both compensatory and punitive damages for this illegal retaliation, as well as attorneys' fees and costs.

Ms. [redacted] and [redacted] violated both California Labor Code § 98.6 and Fair Labor Standards Act ("FLSA") § 215(a)(3) by retaliating against Ms. [redacted] after she asserted her workplace rights. Three days after LAS-ELC sent [redacted] a letter stating that we were assisting Ms. [redacted] in "assessing possible [redacted] claims regarding [redacted]," Ms. [redacted] attempted to force Ms. [redacted] to fill out an employment application and an I-9 form. Ms. [redacted] suspended Ms. [redacted] from her position when she refused to sign the papers. It is clear that employers may not use immigration law or the I-9 process as a means for retaliating against employees who have come forward to assert their workplace rights. *EEOC v. City of Joliet*, 239 F.R.D 490 (N.D. Ill. 2006) (holding that requests for work authorization after the initiation of a lawsuit were retaliatory under Title VII); *see also Contreras v. Corinthian Vigor Insurance Brokerage, Inc.*, 25 F.Supp.2d 1053 (N.D. Cal. 1998) (finding employer's call to report a former employee to then-INS after she had filed a wage claim was actionable retaliation violating FLSA); *Singh v. Jutla*, 214 F.Supp.2d 1056 (N.D. Cal. 2002) (same). Ms. [redacted] is entitled to recover both compensatory and punitive damages on her potential retaliation claim. *See Contreras v. Corinthian Vigor Insurance Brokerage, Inc.*, 2000 U.S. Dist. Lexis 15169 (N.D. Cal. 2000) (awarding an employee $40,000 in compensatory and punitive damages after the employer contacted then-INS to retaliate against her because she had filed state claim for unpaid wages).

I trust you will agree that, from your client's standpoint, a settlement of this matter would be far preferable to the time and expense of proceeding to trial. I encourage you to contact me if you would like to discuss the above proposal at greater length. In any event, I look forward to receiving a written response thereto by no later than [redacted].

NELP

National Employment Law Project

FACT SHEET

CALIFORNIA'S NEW WORKER PROTECTIONS AGAINST RETALIATION

OCTOBER 2013

In October 2013, California passed three bills, AB 263, AB 524, and SB 666, into law.[1] *These new laws provide California workers who seek to exercise their workplace rights with strengthened protections against employer retaliation, including specific protections for immigrant workers. The laws will take effect on January 1, 2014.*

STRENGTHENED LABOR CODE PROTECTIONS AGAINST RETALIATION FOR *ALL* WORKERS

AB 263 and SB 666 strengthen the California Labor Code's protections for all workers, by expanding the grounds for a finding of retaliation, increasing penalties for retaliation, and broadening protections for whistleblowers:

Broadened grounds for a finding of employer retaliation. California Labor Code Section 98.6 prohibits employers from retaliating, discriminating, or taking adverse action against an employee or a prospective employee for exercising any right under the Labor Code, filing or participating in a complaint with the California Division of Labor Standards Enforcement (DLSE), whistleblowing, or participating in political activity or a civil suit against an employer, among other activities. The new law now also bars employers from retaliation because a worker has made an oral or written complaint that he or she is owed unpaid wages. Cal. Lab. Code § 98.6(a) (AB 263, SB 666).

Broadened protections for whistleblowers. The new laws expand employee whistleblower protections to prohibit retaliation by any person acting on behalf of the employer. In addition, the new laws broaden whistleblower protections to prohibit retaliation based on a worker's testimony or provision of information to a public body regarding the employer's violation of a local, state, or federal statute or regulation, to any person with authority over the employee, or to another employee who has the authority to investigate the claim. Cal. Lab. Code § 1102.5 (AB 263, SB 666).

[1] A.B 263, 2012-2013 Leg. Session (Ca. 2013); A.B 524, 2012-2013 Leg. Session (Ca. 2013); S.B. 666, 2012-2013 Leg. Session (Ca. 2013).

Ability to update personal information without fear of retaliation. Employers may no longer discharge, discriminate, retaliate, or take any adverse action against an employee because s/he updates or attempts to update personal information with an employer, unless the changes are related to skills, qualifications, or knowledge related to the job. Cal. Lab. Code § 1024.6 (AB 263).

Increased penalties for employer retaliation. Under the new law, employers may now face a penalty of up to $10,000 per employee for each instance of retaliation. Cal. Lab. Code § 98.6(b)(3) (AB 263, SB 666).

STREAMLINED PROCESS FOR CIVIL SUITS UNDER THE CALIFORNIA LABOR CODE

Clarification That Workers May Bring a Civil Suit under the California Labor Code without Administrative Exhaustion. The new laws clarify that employees do not need to exhaust administrative remedies before the DLSE before bringing claims in court, unless the claim expressly requires exhaustion. Cal. Labor Code § 244(a) (SB 666). No administrative exhaustion is required for claims of unlawful discharge or discrimination. Cal. Labor Code § 98.7(g) (AB 263).

NEW PROTECTIONS AGAINST IMMIGRATION-RELATED THREATS BY EMPLOYERS

AB 263, AB 524, and SB 666 include new protections for workers against employers who retaliate by threatening to report immigration status.

Suspension of business licenses for employers who retaliate against workers who exercise their rights by threatening to report immigration status.

- The report or a threat to report an employee's citizenship or immigration status or that of a family member because the employee has exercised a right under the California Labor Code is prohibited. Cal. Labor Code § 244(b) (SB 666).
- An employer's business license may be suspended or revoked if the DLSE or a court finds that an employer has retaliated against a complaining worker by making a report or threatening to report the citizenship or immigration status of a worker or the worker's family member. The DLSE must consider the harm of suspension or revocation on other workers, and any good faith efforts to resolve violations of the Labor Code. This does not apply to employers who are requesting current or prospective employees to submit an I-9 Employment Eligibility Verification form within the first three days of employment. Cal. Bus. & Prof. Code § 494.6 (SB 666).

- A court may order the suspension of an employer's business license if it is found to have engaged in a retaliatory "unfair immigration-related practice" against a person exercising a right protected under the California Labor Code or a local workplace ordinance. Cal. Labor Code § 1019 (AB 263).
    - Protected rights may include: filing a complaint, informing another person about workplace rights, or seeking information to see if an employer is in compliance with state or local workplace laws.
    - An "unfair immigration-related practice," when undertaken for a retaliatory purpose, may include:
        - Requesting more or different documents than those required under 8 U.S.C. § 1324a(b) to show work authorization, or refusing to honor documents that on their face appear to be genuine;
        - Using the federal E-Verify system to check employment status in a manner not required under 8 U.S.C. § 1324a(b), or any memorandum governing use of the E-Verify system;
        - Threatening to file or filing a false police report;
        - Threatening to contact or contacting immigration authorities.
        - An unfair immigration-related practice does not include any conduct undertaken at the express and specific direction or request of the federal government.
    - There is a presumption that an employer has engaged in the retaliatory use of an unfair immigration-related practice within 90 days of a worker's exercise of rights protected under the California Labor Code or a local ordinance.
    - An employee or other person subject to an unfair immigration-related practice may bring a civil action for equitable relief and any damages and penalties, and may recover attorneys' fees and costs. Cal. Labor Code § 1019 (AB 263).

Discipline, suspension, or disbarment of attorneys who threaten to report immigrant workers involved in an administrative or civil employment suit. An attorney may be disciplined, suspended, or disbarred by the California State Bar if s/he reports or threatens to report the suspected immigration status of an individual (or family member) or a witness in an administrative or a civil proceeding because the individual has exercised a right related to employment. Cal. Bus. & Prof. Code § 6103.7 (SB 666).

Threats to report immigration status may constitute criminal extortion. Extortion is the obtaining of property from another person, with his or her consent, through the use of wrongful force or fear. Cal. Penal Code § 518. The new law clarifies that a threat to report any individual's immigration

status or suspected immigration status in order to obtain his or her property may constitute criminal extortion. Cal. Penal Code § 519 (AB 524). The penalty for criminal extortion is imprisonment of up to one year and/or a fine of up to $10,000. Cal. Penal Code § 524.[2]

Additional resources on retaliation against workers in California:

- National Employment Law Project, *Workers' Rights on ICE: How Immigration Reform Can Stop Retaliation and Advance Labor Rights—California Report* (2013), available at: http://nelp.3cdn.net/79a636339c0c2dcf72_l7m6b8j1i.pdf.
- State of California, Department of Industrial Relations, Labor Commissioner's Office, *How to File a Retaliation Complaint*, available at: http://www.dir.ca.gov/dlse/howtofilediscriminationcomplaint.htm.
    - The California Labor Federation and the National Employment Law Project are available for training on the new bills. Please contact Caitlin Vega, cvega@calaborfed.org and Eunice Cho, echo@nelp.org.
    - Michael Marsh, California Rural Legal Aid, at mmarsh@crla.org is tracking cases of administrative exhaustion and attorney discipline.

For more information on retaliation against workers in California, please contact:

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[2] Extortion constitutes a valid qualifying criminal activity for a U visa under 8 U.S.C. § 1101(a)(15)(U)(iii). See National Employment Law Sheet, Fact Sheet: The U Visa: A Potential Immigration Remedy for Immigrant Workers Facing Abuse (2011), available at: http://www.nelp.org/page/-/Justice/2011/UVisa.pdf.