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Retaliation under the Illinois Human Rights Act

By Hon. William J. Borah

Under the Illinois Human Rights Act (Act), 775 ILCS 5/6-101(A), it is a civil rights violation for a "person, or for two or more persons to conspire," to retaliate against a person because he or she has "opposed" that which he or she "reasonably and in good faith believes" to be "unlawful discrimination, sexual harassment in employment or sexual harassment in elementary, secondary, and higher education, discrimination based on citizenship status in employment, or because her or she has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding or hearing under the Illinois Human Rights Act."

The two retaliatory clauses in the statute are commonly divided and referred to as the "oppo-

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Medical marijuana comes to Illinois—What it means for Illinois employers

By E. Jason Tremblay

Illinois recently became one of almost two dozen other states who will allow the use of marijuana for medicinal purposes. On August 1, 2013, Governor Pat Quinn signed into effect the "Compassionate Use of Medical Cannibas Pilot Program Act" (the "Act"). While the Act is set to take effect on January 1, 2014, it may take many months thereafter to be implemented due to the complex rules and regulations, as well as the multiple state agencies that will have oversight over, and input into, the Pilot Program. The Pilot Program is set to expire in four years, meaning that it will automatically end unless the Illinois legislature votes to extend the Pilot Program beyond that initial 4-year time period.

As this article will explore, the use of medical marijuana has presented, and will continue to present, a workplace policy conundrum for human resource professionals and their legal counsel. Illinois employers must consider the new law in drafting and administering their personnel policies with respect to applicants and employees, and they should take steps now to understand the new law and to prepare for its consequences.

What Does the Act Generally Provide?

The Act allows registered marijuana users age 18 and older to purchase up to 2.5 ounces of marijuana every 14 days from a registered, licensed dispensary. Such dispensaries will, in turn, only be able to obtain medical marijuana from a licensed, intrastate cultivation center. The Act provides physicians, registered users and caregivers, registered cultivation centers and licensed dispensing organizations immunity from arrest, prosecution or penalty. Significantly, it also prohibits discrimination against employees and applicants unless such discrimination is necessary to comply with federal law or unless it will cause the employer to lose a federal contract or funding.

To qualify, a user must have been diagnosed with a debilitating medical condition, such as

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sition" clause and the "participation" clause.

A claim can be brought against a "person" or two or more persons who "conspire" to retaliate. "Person" is defined by Section 1-103(L) of the Act, inter alia and inter alios, as a corporation or individual. However, if the individual was acting in his or her official capacity, then the charge should filed against the employer. *Anderson v. Modern Metal Products*, 305 Ill.App.3d 91, 711 N.E.2d 464 (2nd Dist. 1999).

To establish a prima facie case of retaliation, a complainant must prove that: 1) he or she engaged in a protected activity (i.e. either by opposing practices forbidden or by participating in the proceedings under the Act) that was known by the alleged retaliator; 2) Respondent subsequently took an "adverse action" against Complainant; and 3) the circumstances indicate a causal connection between the protected activity and the adverse act. *Carter Coal Co. v. Human Rights Commission*, 261 Ill.App.3d 1, 633 N.E.2d 202 (5th Dist. 1994).

"Reasonable and Good Faith" Opposition

Under the plain language of the Act, to prevail on an "opposition" retaliation claim, complainant does not need to show provable illegal discrimination existed. Instead, complainant needs to show only that he or she had a "reasonable, good faith" belief that a violation existed. *Sessler and CF Motor Freight*, IHRC, ALS No. 10737, May 31, 2002.

The "reasonable" and "good faith" standard means that "The plaintiff must not only have a subjective (sincere and honest) belief that he opposed an unlawful practice, his belief must also be objectively reasonable..." *Hamner v. St. Vincent Hospital and Health Care Center, Inc.*, 224 F.3d 701 (7th Cir. 2000).[1]

Notice

"Complainant must make it clear to her alleged retaliator that she is opposing a discriminatory practice either by calling it discrimination or some similar name, or by describing a situation in a way that indicates that the complainant believes that the situation is discriminatory." *Pregent and Pat's Pizza*, IHRC, ALS No. 12115, December 14, 2004.

Complainant's protests must relate to the Act. Thus, "violations of ERISA, Medicare fraud, income tax statutes, have no legal significance here, since complaints about these matters could never constitute, under any factual scenario, a protest concerning 'unlawful discrimination,' which, under section 1-102(Q) of the Act is limited to allegations of discrimination based on 'race, color, religion national origin' etc." *Patel and Central Illinois Associates LTD. F/K/A Central Illinois Anesthesia*, IHRC, ALS No. S-11473, May 21, 2008.

In line with the reasoning in *Patel*, a claimant citing in his or her opposition a title of a federal discrimination statute that encompasses a particular protected class in the Act, has adequately related and notified the person of the perceived violation despite the jurisdictional mix-up. Thus, a "good faith" protest citing the "ADA" is equivalent to the state's protected class of "disability," likewise, "ADEA," for age, and "Title VII," for race, sex, etc.

An internal complaint opposing statutory discrimination is protected. *Hoffelt v. The Illinois Department of Human Rights*, 367 Ill. App.3d 628, 867 N.E.2d 14 (5th Dist. 2006).

Where the employer does not have any knowledge of the opposition to illegal discrimination by the Complainant prior to the adverse action, nexus does not exist. *Everett Erlandson and City of Evanston Police Department*, IHRC, ALS No.10373, June 14, 2000.

Participating in the Process

In the "participatory" claim of retaliation, the "reasonable/good faith" statutory language found in the "opposition" claim is absent. Under the Act, "There is no requirement that the charge be meritorious or otherwise be able to survive a motion to dismiss for lack of subject matter jurisdiction. Once a person has filed a charge under the Act, regardless of the ultimate disposition of that charge, he is protected from retaliation therefor." *Dana Tank Container, Inc. v. The Human Rights Commission and Melvin Wesley*, 292 Ill.App.3d 1022, 687 N.E.2d 102 (1st Dist. 1997).

In *Dana Tank Container*, complainant's first charge was dismissed because the respondent did not have the requisite 15 employees. Afterwards, complainant was discharged from his employment, and he subsequently filed a retaliation charge. The court held that the Commission had jurisdiction over the retaliation complaint, despite the dismissal of the prior underlying case.

In *Hatch and Illinois Department of Corrections, et al.*, IHRC, ALS No. 7765(S), November 20, 1998, the full Commission addressed the question, "whether there would be jurisdiction over a claim of retaliation for having filed a charge if there was not jurisdiction over the charge of discrimination which allegedly triggers the retaliation." The Commission clearly explained that "The first clause [opposition] contains modifiers which are absent in the second [participatory] clause." "If every word in the section is to have meaning, then the addition of the words 'reasonably and in good faith' in the opposition clause must imply that the filing of a charge need not be reasonable or in good faith in order to be protected under the anti-retaliation provision of the Human Rights Act."

In other words, the respondent could be successful with the underlying discrimination charge and lose on the claim of retaliation, facing the same damages.

Direct and Indirect Method

There are two main methods to prove a retaliation case, direct and indirect. Either one or both may be used. *Sola v. Illinois Human Rights Commission,* 316 Ill.App.3d 528, 736 N.E.2d 1150 (1st Dist. 2000). Under the direct method approach, a complainant may present either direct or circumstantial evidence that the adverse action was motivated by an impermissible purpose. *Board of Education of City of Chicago v. Cady*, 369 Ill.App.3d 486, 860 N.E. 2d 526 (1st Dist. 2006).

In addition, a complainant may proceed under the indirect method with circumstantial evidence only. The evidence must present a convincing mosaic of evidence regarding the decision-makers retaliatory motive. *Bonita Welch and Appellate Court of Illinois, Third District et al*, IHRC, ALS No. S-10644, September 30, 2004, rev'd on other grounds, 322 Ill.App.3d 345, 751 N.E. 2d 1187 (3rd Dist. 2001).

Standard

Complainant must show that her opposition was the "determining factor," in the

"sense that she would not have been discharged 'but for' her employer's motive to discriminate against her." *Wellman and Schaumburg Transportation Company,* IHRC, ALS No. 2956, February 1, 1991, quoting *Loeb v.Texron, Inc.,* 600 Fed 2d 1003 (1st Cir. 1979).

"Causal Nexus"

Complainant must show that there was a "causal nexus" between the protected activity and respondent's adverse action. *Carter Coal Co. v. Illinois Human Rights Commission*, 261 Ill.App.3d 1, 633 N.E.2d 202 (5th Dist. 1994).

There are three ways Complainant can establish the necessary "causal nexus." Those methods are: 1) showing direct evidence of retaliation; or 2) showing evidence of unequal treatment of similarly situated persons who did not engage in the protected activity; or 3) establishing that the time period between the protected activity and the adverse action is short enough to create an inference of "connectedness." *Maye v. Human Rights Commission*, 224 Ill.App.3d 353, 586 N.E.2d 550 (1st Dist.1991); *Mitchell and Local Union 146 International Brotherhood of Electrical Engineers*, IHRC, ALS No. 947, September 16, 1985.

Time

Although the nexus can be formed by a short period of time, an intervening act may have eroded the working relationship to a point where the causally link is broken. "Issuance of appropriate discipline in the employment setting cannot be retaliation." *McFarland and State of Illinois, Department of Revenue*, IHRC, ALS No. S-7931, July 15, 1996.[2]

Mays and Chicago Sun-Times and Graphic Communications Union, Chicago Paper Handlers and Electrotypers' Local Union No. 2, AFL-CIO, IHRC, ALS No. 2614, February 1, 1991, cited a one year lapse in time, between the filing of his charge and the alleged retaliatory act. *Mays* held, "The Complainant is correct in asserting that the one-year lapse in time...does not automatically preclude him from prevailing on the merits of his claim. However, because over one year had elapsed between these two events, he has the burden of alleging *additional facts* to prove the necessary nexus between the protected activity and the retaliatory action." (Emphasis added.)

Thus, the time period between a complainant's protected act and alleged adverse action is a factor in considering if a causal nexus exists, but it is not the only factor.

Acts of Retaliation

In *Hoffelt v. The Illinois Department of Human Rights*, 367 Ill.App.3d 628, 867 N.E.2d 14 (1st Dist. 2006), the court discusses the range of retaliatory acts. For example, retaliation could include removal of flex time schedule so a parent could not pick up her child. A worker who has a "nervous condition" and is miserable when exposed to music for extended periods, is then moved from a quiet office to one "where Muzak plays constantly…[i.e.]could be a material change if not, indeed, a constructive discharge." Id. Also, name calling, undesirable assignments, etc. are all examples of actions that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Id.

Damages

The retaliated complainant is entitled to the same range and type of damages as with any other successful claim for illegal discrimination. Section 8A-104 of the Act. ■

Hon. William J. Borah has been a judge with the Illinois Human Rights Commission since 2009. Prior to his appointment, he spent 26 years in private practice, concentrating in employment law. During this period, he litigated before both state and federal courts, and most employment agencies. Among the many bar leadership positions held, Judge Borah was the Chair of the ISBA Labor & Employment Law Section Council in 2006, where he is currently a member and returned to the position of vice-chair. Judge Borah is also a speaker, author, and recipient of numerous awards and recognitions. His article on workplace sexual harassment, published in the Illinois Bar Journal (IBJ) in 2008, was rated as of "national significance" by West Publishing. A second article on the First Amendment and church employment, published in the July 2010, IBJ issue, received the same national recognition.

1. Federal cases which decide analogous questions under Federal law are helpful but not binding on the Commission in making decisions under the Illinois Human Rights Act. *City of Cairo v. FEPC*, 21 Ill.App.3d 358 (1974).

2. However, when a respondent contends a non-discriminatory reason for the alleged adverse action (e.g. discharge), then the question becomes whether the reason articulated by the respondent was true, or merely a pretext for discrimination. *Bush and The Wackenhut Corporation*, IHRC, ALS No. 1673, July 30, 1987, quoting, *U.S. Postal Service v. Aikens*, 460 U.S. 711, 103 S. Ct. 1478 (1983).

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Medical marijuana comes to Illinois—What it means for Illinois employers

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cancer, glaucoma, HIV/AIDS, Parkinson's disease, multiple sclerosis, Crohn's disease, traumatic brain injury or post-concussion syndrome. The patient must also obtain written certification from a physician with whom the patient has a bona fide doctor-patient relationship, indicating that the patient has a specific debilitating medical condition and likely would benefit from the use of marijuana. Individuals with felony convictions or who work in certain positions, such as law enforcement personnel, fire fighters and commercial drivers, are not allowed to participate in the Pilot Program. Also, only patients registered with the Illinois Department of Public Health will qualify; the Pilot Program does not recognize registered users from other states that allow the use of marijuana for medical reasons.

Three separate state agencies will be responsible for implementing the Pilot Program. The Illinois Department of Public Health is responsible for drafting rules for registered users, the Illinois Department of Agriculture is responsible for drafting rules with respect to the registered cultivation centers, and the Illinois Department of Financial and Professional Regulation will draft rules for the licensed dispensaries. Once the rules are drafted and approved by the designated Legislative Committee, the intrastate cultivation centers where the marijuana will be grown will be issued permits which will, in turn, commence providing the marijuana to the dispensaries throughout the state for distribution to registered users.

The law prohibits the use or possession of marijuana on a school bus, on school grounds, in a correctional facility, or in public places. Marijuana possession and use is also prohibited in a private residence that is used to provide child care or day care services. Further, marijuana cannot be used in a vehicle but may be possessed by a registered user in a vehicle provided it is secured in a sealed, tamper-evident container that is inaccessible while the vehicle is moving.

Conflict Between Federal and State Law

Initially, it is important to note the conflict between federal drug enforcement laws and state medical marijuana laws. For example, the Controlled Substances Act, 21 U.S.C. §801, *et seq*. ("CSA"), is a federal law that makes it unlawful to manufacture, distribute, dispense or possess any controlled substance (which includes marijuana) except in a manner authorized by the CSA. Many employers must also comply with other federal requirements, such as those subject to U.S. Department of Transportation ("DOT") regulations, which provide for comprehensive drug and alcohol testing guidelines for employees in safety sensitive positions. According to DOT guidelines, an employer is also required to conduct random drug testing, as well as incident testing based on reasonable suspicion. Finally, federal contractors and recipients of federal funding are generally required to comply with the Drug-Free Workplace Act of 1988, which mandates that employers maintain a "drug-free workplace." An employer that tolerates the use of medical marijuana in the workplace under state law would clearly be in violation of its legal obligations under these federal laws and regulations.

This conflict has been highlighted by the U.S. Supreme Court's decision in *Alberto R. Gonzales, Attorney General, et al. v. Angel McClary Raich, et al.*, 545 U.S. 1 (2005). In that case, the U.S Supreme Court held that, in most states with medical marijuana laws, an employer may safely refuse to accept medical marijuana as a reasonable medical explanation for a positive drug test result where hiring that employee would violate federal law. In so holding, and relying upon the principle of federalism, the Supreme Court ruled that the federal government may enforce the CSA's prohibition on the use of marijuana for medical reasons against persons who use marijuana under state medical marijuana laws. By affirming that the use of medical marijuana is illegal under federal law, employers can refuse to consider accommodations that would acknowledge or support the illegal activity of possessing and using marijuana.

Throwing a slight wrench into this argument, however, is the U.S. Department of Justice's announcement in 2009 to federal prosecutors throughout the county to back away from pursuing cases against medical marijuana patients and, instead, to direct their efforts to prosecute drug traffickers, money launderers or people who use state law as a cover. While this directive from the DOJ does not directly impact employers, it tends to indicate an implicit acknowledgement and acceptance of legitimate marijuana use under state medicinal marijuana laws.

Pre-Employment Drug Testing for Applicants

Except in limited circumstances, the Illinois law explicitly prohibits an employer from discriminating against an individual who is a registered user. The fact that there will be individuals applying for jobs who are registered marijuana users raises a number of questions for Illinois employers, especially those employers that utilize pre-employment drug testing where an applicant is provided a conditional offer of employment, contingent on passage of a drug screening test. Under this scenario, what if an applicant presents the employer with a medical marijuana registration card and/or tests positive for marijuana - is the employer permitted to revoke the conditional offer of employment?

Unlike some other states with similar medical marijuana laws, a plain reading of the Act seems to suggest that the answer is "no." In fact, the law specifically provides that an employer cannot refuse to hire a job applicant solely because he or she is a registered medical marijuana user who tests positive on a pre-employment drug screening. The principal exception to this rule, however, is if employing the employee with the positive drug test would put the employer in violation of federal law or cause it to lose a federal contract or funding. Therefore, federal contractors and recipients of federal funding who are obligated to comply with the Drug-Free Workplace Act of 1988, the Controlled Substances Act, the Department of Transportation regulations or similar federal laws or regulations would likely not violate the Act for refusing to hire a registered medical marijuana user who tests positive for marijuana. In other words, since it is still illegal to use marijuana under federal law, a strong argument could be made by Illinois employers who have federal contracts or funding or who are governed by any number of federal statutes and regulations, that they can refuse to hire an applicant who is a registered marijuana user and tests positive for marijuana on a pre-employment drug screening test.

On the other hand, where the Illinois employer is not governed by federal law or where they are not recipients of federal funding or contracts, it is likely unlawful under the

Act to revoke an offer of employment to an applicant solely on the basis that they are a registered marijuana user and test positive for marijuana in their system. Under this scenario, Illinois employers should take care and must be able to identify other legitimate reasons not to employ the employee if they are going to revoke a conditional offer. Of course, this can be very difficult to justify when a conditional offer has already been extended to the applicant.

Drug Testing for Current Employees

Similar to pre-employment drug testing, the Act prohibits employers from disciplining or terminating registered medical marijuana users unless failing to do so would cause it to be in violation of federal law. In effect, the Act prohibits discrimination against employees based solely on their status as a registered medical marijuana user.

Notwithstanding the foregoing, the Act is clear on what Illinois employers are allowed to do with respect to registered medical marijuana users in the workplace. By way of example, the Act specifically allows employers to:

(1) adopt reasonable rules concerning the consumption or storage of marijuana by registered users;

(2) enforce policies concerning drug testing, zero-tolerance, or a drug-free workplace provided the policy is applied in a nondiscriminatory manner;

(3) discipline registered users for violating a workplace drug policy;

(4) discipline registered users for failing a drug test if failing to do so would put the employer in violation of federal law or cause it to lose a federal contract or funding;

(5) discipline registered users who manifest specific, articulable symptoms while working that decrease or lessen the employee's performance; and

(6) prohibit registered users' possession or use of marijuana while at work or on company business.

In other words, an employer is still permitted to discipline a registered user to the same extent it would discipline other employees who use controlled substances or alcohol while at work, or who are otherwise impaired at work. The Act therefore doesn't significantly deviate from how Illinois employers are used to dealing with use of drugs in the workplace or drugs that effect employee work performance.

The Act expressly provides than an employer may consider an employee "impaired" when the employee manifests specific, articulable symptoms, defined as speech, dexterity, agility, demeanor, coordination, unusual behavior, etc. But, if an employer disciplines a registered user due to being impaired, it must provide the employee with a reasonable opportunity to contest the basis of the determination.

In light of the foregoing, a registered medical marijuana user in Illinois who tests positive for marijuana during a random drug screen during his or her employment (without any cause or reason to believe that his or her performance has been impaired), and whose positive test would not violate federal law or compromise federal funding or contracts for the employer, would likely not be allowed to be disciplined or terminated. Conversely, if an employee who is a registered user exhibits signs of impairment or whose positive drug test otherwise violates federal law, the employer is likely on sound legal footing to discipline and/or terminate the employee provided the employer provides the employee a reasonable opportunity to contest the basis of the determination.

Disability Accommodation Obligations

Even thornier issues arise for Illinois employers when a registered marijuana user requests an accommodation to use marijuana in order to accommodate a known or perceived disability. The Americans with Disabilities Act ("ADA") and the Illinois Human Rights Act ("IHRA") require that employers provide reasonable accommodations for qualified individuals with a disability. So, for example, if a diabetic employee requires an accommodation for the administration of insulin, the employer must provide that accommodation if it is reasonable and does not impose an undue hardship on the employer. However, as discussed above, whether the issue is analyzed under federal or state law could have a dramatic impact on employers.

On the one hand, it well settled that a registered user is not a person with a "qualified" disability under the ADA because the ADA does not recognize illegal drug use as a disability under federal law. However, employers must understand that the underlying medical condition requiring the medical use of marijuana would probably still constitute a disability requiring the employer to engage in the interactive process in an effort to secure some reasonable accommodation for the disability.

On the other hand, the IHRA (which is much broader and, in the context of a disability, applies to Illinois employers with one or more employees) does not have the limitations of the ADA. While a "disability" under the IHRA does not include illegal drugs, it would not be surprising that the IHRA is modified, clarified or administered consistent with the guidelines of the Act and, specifically, the Act's prohibition on discriminating against registered medical marijuana users. In other words, allowing registered users to smoke pot outside working hours and offsite may constitute a reasonable accommodation to a disabled employee under the IHRA and Illinois law, provided it doesn't negatively impact their work performance. Time and future case law will tell whether or not registered medical marijuana use in Illinois will constitute a reasonable accommodation under the IHRA.

What Should Illinois Employers Do?

While the "Compassionate Use of Medical Cannabis Pilot Program Act" may not end up leading to a seismic shift in the work environment as many had feared before the Act's passage, it is easy to see how precarious a position employers could be in by hiring and employing employees who are registered marijuana users. At a minimum, Illinois employers should revisit their employee handbooks and drug testing policies. Specifically, employers should make those policies consistent with the mandates of the Act and clearly state the position on medical marijuana in their Drug Fee Workplace Policy, providing processes to accomplish a reasonable accommodation review. Moreover, Illinois employers should train their supervisors and managers on the requirements of the new law in determining if employees (whether or not they are registered medical marijuana users) are impaired as defined by the Act. Finally, any dispute over an adverse action based on an impairment will hinge on the employer being able to articulate a good faith basis for its conclusion and ultimate employment decision. Illinois employers must therefore be more diligent than ever in properly documenting these situations while at the same time allowing employees to contest the basis of the determination. ■

Employers sanctioned for failure to correctly complete I-9 forms

By Michael R. Lied; Howard & Howard Attorneys PLLC; Peoria, IL

As a couple of recent cases make clear, I-9 Form errors can prove costly. Form I-9 is completed and retained by employers to assure new employees are legally authorized to work in the United States.

In the first case, the United States Department of Homeland Security, Immigration and Customs Enforcement ("ICE") filed a complaint alleging that Anodizing Industries, Inc. violated 8 U.S.C. § 1324a(a)(1)(B) by hiring 26 employees for whom it failed to timely prepare and/or present I-9 forms.

ICE asserted that visual inspection of the company's I-9s reflected that they were not timely completed. The government pointed out that the 26 employees named in the complaint had hire dates ranging from October 10, 1988 to July 26, 2010, and that the 21 I-9s that actually did have a completion date entered in section 2 reflected a date of August 12, 2010, 13 days after service of the Notice of Inspection and one day before the forms were delivered to ICE.

The Chief Administrative Hearing Officer's ("CAHO") visual examination of Anodizing's I-9 forms confirmed, with one exception, the accuracy of the government's contention that the timeliness violations were apparent on the face of the forms. Each form was completed more than three days after the employee was hired.

Anodizing Industries implicitly acknowledged that it did not complete the forms promptly but sought to minimize the significance by insisting that preparing the I-9 paperwork was merely a technicality. The CAHO disagreed. Timely and proper completion of I-9 forms is precisely what the law and regulations require: the form must be completed for each new employee within three business days of the individual's commencement of employment, and each failure to properly prepare, retain, or produce the form upon request constitutes a separate violation.

Failure to prepare an I-9 in a timely fashion is not only a substantive violation but also a serious one, because an employee could potentially be unauthorized for employment during the entire time his or her eligibility remains unverified. The longer an employer delays in preparing an I-9 form, the more serious is the violation.

The government has the burden of proof with respect to liability and the penalty, and must prove the existence of any aggravating factor by a preponderance of the evidence. The CAHO found most of the statutory factors were favorable to Anodizing Industries in that the company was a small business with no unauthorized workers or history of previous violations.

The CAHO observed that a general public policy of leniency to small entities is set out in the Regulatory Flexibility Act, 5 U.S.C. 601 et seq. (2006) as amended.

The potential penalties for the 26 violations shown in the case ranged from $2860 to $28,600. The government sought a total of $25,525.50. The CAHO adjusted the penalties downward as a matter of discretion to an amount closer to the upper mid-range, at the rate of $600 for each I-9 violation, for a total penalty of $15,600.

United States v. Anodizing Industries, Inc., 10 OCAHO No. 1184.

(UNITED STATES DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER 2013).

In the second case, Ketchikan Drywall Services, Inc. ("KDS") petitioned a U.S. Court of Appeals for review of a decision of an Administrative Law Judge ("ALJ") in favor of U.S. Immigration and Customs Enforcement ("ICE") on 225 out of 271 alleged Form I-9 and a resulting civil penalty of $173,250.

KDS is a drywall installation company, and employs four full-time employees and approximately 20 part-time employees. It hires additional employees as needed on a project-by-project basis. KDS does not hire workers "in the field," but requires them to go to its main office first to fill out I-9 Forms.

In 2000, KDS received a Warning Notice from the Immigration and Naturalization Service ("INS") following an audit of its I-9 Forms. In 2006, KDS hired a new Controller with I-9 training who initiated efforts to improve compliance.

In March 2008, ICE served a Notice of Inspection on KDS. After the inspection, ICE served a Notice of Intent to Fine ("NIF"), which ordered KDS to pay a civil penalty of $286,624.25.

KDS requested a hearing before an ALJ. The ALJ adopted ICE's proposed base penalty, but adjusted it downwards to reflect the fact that fewer violations had been proven than alleged. The ALJ rejected both parties' arguments regarding aggravating or mitigating factors, and ordered KDS to pay a civil penalty of $173,250.

In its petition for review, KDS contended that many of the violations that the ALJ found were not violations at all, on the ground that it had copied and retained documentation for these employees and that any omissions from the I-9 Forms themselves were either minor or could be filled in by reference to the copied documents.

The court disagreed. Requiring that the parties take the time to copy information onto the I-9 Form helps to ensure that they actually review the verification documents closely enough to ascertain that they are facially valid and authorize the individual to work in the United States.

KDS argued in the alternative that even if it had not complied with all of its verification and documentation obligations under § 1324a(b), its noncompliance should nevertheless be treated as good faith compliance because any deficiencies were merely "technical or procedural," made in spite of a "good faith attempt to comply."

This was not a winning position. KDS argued first that it was not responsible for errors or omissions made by employees in Section 1 of its I-9 Forms, but the statute clearly makes employers responsible for documenting employee work authorization.

KDS also argued that it sufficed for an employee to attest that he or she was authorized to work generally, and that there was no requirement for the employee to check a specific box in Section 1 of the I-9 Form. Again, the language of the statute compelled a contrary conclusion.

Next, KDS maintained that its retention of copies of certain of its employees' documents excused deficiencies on the I-9 Forms, where the copied documents provided the necessary information.

Again, the court disagreed. Where the employee has not attested to the specific category of eligibility into which he or she fits, the statutory requirement is unfulfilled, regardless of whether other documentation

might allow ICE to deduce the specific category to which the employee would have attested.

KDS argued that the ALJ erred in both the choice and application of the penalty calculation, but the court dismissed this argument.

Finally, KDS argued that the ALJ's findings with regards to the seriousness of the violations were arbitrary and capricious. The ALJ had declined to mitigate the penalty, noting that KDS had provided no "reasonable basis" for finding that any of the violations were not serious.

According to the court, KDS misconstrued the nature of the violations for which penalties were imposed when it argued that for many cases "the only violation was the failure to attach the copies [of the relevant verification documents] to the I-9 form." Instead, the penalties were imposed for substantive deficiencies on the I-9 Forms themselves. KDS' petition for review was denied. *Ketchikan Drywall Servs., Inc. v. Immigration & Customs Enforcement*, ____ F.3d ___, 2013 WL 3988679 (9th Cir. 2013).

The lesson from these cases is that the seemingly mundane task of verifying identity and work authorization on Form I-9 is serious business. ■

Some safety incentive programs may be unlawful

By Michael R. Lied; Howard & Howard Attorneys PLLC; Peoria, IL

The Occupational Safety and Health Administration has begun to take an interest in certain safety incentive programs. Assistant Secretary of Labor for OSHA, David Michaels, has voiced concerns over these programs, asserting they may undermine a workplace culture of safety. Historically, many employers have used incentives to promote employee safety.

OSHA's position was foreshadowed in a March 12, 2012 Memorandum from Richard E. Fairfax, Deputy Assistant Secretary of OSHA. Fairfax pointed out that Section 11(c) of the OSH Act prohibits an employer from discriminating against an employee because the employee reports an injury or illness. Fairfax said that if employees do not feel free to report injuries or illnesses, the employer's entire workforce is put at risk.

According to Fairfax, there are several types of workplace policies and practices that could discourage reporting and therefore could constitute a violation of Section 11(c) and other whistleblower protection statutes. Some of these policies and practices may also violate OSHA's recordkeeping regulations.

Potentially discriminatory policies practices include:

1. An employer maintains a policy of taking disciplinary action against employees who are injured on the job. OSHA views discipline imposed under such a policy against an employee who reports an injury as a direct violation of Section 11(c). Such a policy is inconsistent with the employer's obligation to establish a way for employees to report injuries.
2. An employee who reports an injury or illness is disciplined, and the stated reason is that the employee has violated an employer rule about the time or manner for reporting injuries and illnesses. Such procedures must be reasonable and may not unduly burden the employee's right and ability to report. For example, such rules cannot penalize workers who do not realize immediately that their injuries are serious enough to report, or even that they are injured at all.
3. An employee reports an injury, and the employer imposes discipline on the ground that the injury resulted from the violation of a safety rule by the employee. In some cases, an employer may attempt to use a work rule as a pretext for discrimination against a worker who reports an injury.
4. An employer establishes a program that unintentionally or intentionally provides employees an incentive to not report injuries. For example, an employer might enter all employees who have not been injured in the previous year in a drawing to win a prize, or a team of employees might be awarded a bonus if no one from the team is injured over some period of time.

Such incentive programs might be well-intentioned. However, according to Fairfax, there are better ways to encourage safe work practices, such as (1) incentives that promote worker participation in safety-related activities, such as identifying hazards or participating in investigations of injuries, incidents or "near misses;" (2) positive incentives, including providing tee shirts to workers serving on safety and health committees; (3) offering modest rewards for suggesting ways to strengthen safety and health; or (4) throwing a recognition party at the successful completion of company-wide safety and health training.

Incentive programs that discourage employees from reporting their injuries are problematic because, under Section 11(c), an employer may not "in any manner discriminate" against an employee because the employee exercises a protected right, such as the right to report an injury.

Fairfax concluded that if the incentive is great enough that its loss dissuades reasonable workers from reporting injuries, the program could result in the employer's failure to record injuries that it is otherwise required to record. ■

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