

Business Law Update

June 2011

ICE-Proof Your Business

By Joanna C. Kloet, Attorney

While several giant U.S. companies, including McDonald's and Wal-Mart, made big headlines after being slapped with heavy penalties for illegally hiring alien workers and failing to comply with the I-9 regulations, small, local businesses are also being systematically targeted by Immigration and Customs Enforcement (ICE). Recent federal investigative targets have included smaller companies such as a drywall installer, a regional staffing company, and the owner of several sandwich shops. All of these businesses received massive financial penalties, and in some cases individual executives were criminally convicted and sentenced to federal prison.

I-9 requirements include examination of identity documents and completion of Form I-9 for every employee hired. Employers must retain all I-9s for certain periods of time during and post employment.

ICE's actions illustrate that all employers, no matter the size, nature, or location of the business, need to be aware that their compliance with these federal hiring laws may be subject to a sudden investigation.

The Basics of I-9 Compliance

Employment eligibility verification requirements include the examination of identity documents and the completion of Form I-9 for every employee hired. Three major components of the I-9 verification requirements are:

1. The worker must attest to his or her lawful status and work authorization in the U.S.
2. The employer must attest that it has examined the identity and employment eligibility documents.
3. The employer must complete, maintain, update, and retain the I-9 for three years after hiring or referral, or one year after the individual's termination, whichever is later.

The law punishes an employer that has "actual knowledge" that an employee is an illegal unauthorized worker. Importantly, the law also punishes an employer that has what the law deems "constructive knowledge", which is defined as "knowledge that may fairly be inferred through notice of certain facts and circumstances that

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would lead a person, through the exercise of reasonable care, to know..." For example, constructive knowledge can be found where the employer:

- (i) fails to complete or improperly completes the Employment Eligibility Verification Form, I-9;
- (ii) has information available to it that would indicate that the alien is not authorized to work; or
- (iii) acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf.

Penalties

Civil fines can range from \$375-\$3,200 per unauthorized worker. Paperwork violations have fines of \$110 to \$1,100 for each I-9. These penalties increase if the employer has been previously sanctioned.

Additionally, any person or entity that engaged in a pattern or practice of violations of these provisions has violated criminal law and is subject to imprisonment for up to six months and/or a fine of up to \$3,000 for each unauthorized alien with respect to whom such a violation occurs, notwithstanding any other provisions of federal law relating to civil fines.

Finally, in addition to these immigration-specific offenses, other provisions of law make an employer liable for both fines and imprisonment for false statements it may have made in conjunction with filing the I-9. Similarly, an employer should be aware that employers that aid or abet the preparation of false tax returns by failing to pay income or Social Security taxes for illegal alien employees, or that knowingly make payments using false names or Social Security numbers, are subject to criminal and civil sanctions

under the Internal Revenue Code.

Anatomy of an Audit

Initially, ICE will serve the company with notice of a request for the company's I-9s. ICE may also issue a subpoena or demand for additional materials, including payroll documents, corporate and financial documents, lists of management and human resources personnel, and any Social Security "no-match" letters the company may have received.

ICE may then return with a demand to terminate specific employees. Alternatively, ICE may return and provide the employer ten days to correct these errors. Finally, during this time, the federal government may be building a civil or criminal case against the employer for violations of the law, which may ultimately result in civil or criminal sanctions.

Legal counsel can help prepare an employer to be "audit-ready". Likewise, in the event the employer is targeted for an audit during this sudden and intense period, the employer would be well-advised to retain counsel early to best position itself in the event the investigation results in a civil or criminal prosecution.

Employers should be aware that I-9 compliance and, more generally, the proper vetting and hiring of authorized employees are complex areas. Although the law can be vexing and unclear, a lack of knowledge of the legal requirements is not a defense to civil or criminal charges. Additionally, a good faith effort to comply with the regulations is not a steadfast defense.

In light of ICE's recent stepped-up enforcement efforts, an employer should be certain it is ready to properly respond to an audit or investigation within the extremely short period allowed by law.

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Visas Available for Temporary Workers

By Robert M. Suarez, Attorney

A nonimmigrant is an alien who wishes to enter a country for a temporary period. Many visas allow nonimmigrants to enter the United States temporarily, including H-2B, H-1B and E3 visas.

H-2B: Restaurant and Construction Workers

The H-2B visa allows foreign nationals to work in non-agricultural jobs for less than one year. These non-agricultural jobs are for unskilled laborers in the bar, restaurant, or construction industry. Both the employer and the employee must meet eligibility requirements. The employer must prove that the job is a one-time seasonal position, and that there are no qualified and willing U.S. workers available for the job. The nonimmigrant employee must prove that a job offer is pending, and have intentions of returning home upon the expiration of the H-2 visa period.

The statutory numerical limit, or “cap,” on the total number of nonimmigrants who may be issued an H-2B visa is set by Congress. The H-2B cap is 66,000 per fiscal year, with 33,000 to be allocated for employment beginning in the first half of the fiscal year and 33,000 to be allocated for employment beginning in the second half of the fiscal year. The fiscal year runs from October 1 to September 30. During the second half of fiscal year 2011, as of April 8, 2011, only 23,366 petitions were received and processed. Out of those petitions, 20,921 were approved.

H-1B: Specialty Professional Occupations

In contrast to the H-2B, the H-1B visa allows businesses with a Federal Identification Number to employ nonimmigrant professionals to work in a specialty occupation for up to six years. These specialty occupations include accountants, engineers, nurses, and doctors. Unlike the H-2B applicants, H-1B applicants do not have to show intent of returning to their home country while

applying for the visa. However, like the H-2B visa, H-1B visas are subject to an annual cap. The annual fiscal cap is 65,000, and this cap has been met for the 2011 fiscal year. Thus, 2012 petitions, seeking an Oct. 1, 2011 start date, could be filed beginning April 1, 2011.

H-2B employers must prove that the position offered requires knowledge that is exclusively obtained through studies at an institution of higher learning, that the employee has attained at least a bachelor’s degree, and that the position directly relates to that specific degree.

E3: Australian Workers

The newest type of visa is the E3 work visa, which is specifically designed for Australian nationals who want to enter the U.S. as nonimmigrants and work temporarily in a specialty occupation. Much like the H visas, the E3 visa is subject to an annual cap. Specifically, a maximum of 10,500 E3-visas are issued during each fiscal year. As of April 15, 2011, the maximum cap has not yet been reached. To qualify for an E3 visa, the nonimmigrant employee must show that the U.S. job will qualify as a specialty occupation. This means that the occupation requires a minimum of a bachelor’s degree. It is not enough that the nonimmigrant employee holds a particular degree. The U.S. job itself must require a bachelor’s degree or higher qualification. The Immigration and Nationality Act (INA) defines “specialty occupation” as a job requiring:

- A theoretical and practical application of a body of specialized knowledge; and
- The attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent).

Thus, to qualify for an E3 visa, the nonimmigrant employee must possess at least a bachelor’s degree

and use this degree to fulfill the eligibility criteria for the job in the U.S. For example, if seeking a chemical analyst position, the nonimmigrant would qualify by possessing a bachelor's degree in biology or chemistry, and the job announcement would require the preceding degree(s). The U.S. employer is not required to submit a petition to the Department of Homeland Security as a prerequisite for the E3 visa; however, the U.S. employer must file a Labor Condition Application (LCA) for Nonimmigrant Workers with the U.S. Department of Labor (DOL).

An Australian national may travel to the U.S. in order to interview for a job prior to obtaining the E3 visa; however, the E3 application cannot be completed from within the United States. Instead, all E3 visa applicants must appear abroad at a U.S. Consulate or Embassy for an interview. To begin the E3 visa application process, the nonimmigrant must apply using Form DS-160, which can be found on the Department of State Web site. Once the application is submitted, the prospective nonimmigrant employee will wait approximately one to two weeks, and then receive an invitation for an E3 visa interview in Sydney, Melbourne, or Perth. At the interview, the following proofs will be required:

- Proof of at least a bachelor's degree;
- Proof that the U.S. job requires such a degree;

- Proof that the U.S. employer has filed the LCA; and
- Proof of non-criminal background.

Conclusion

It is important to note that only Australians qualify for the E3 visa, only specific countries qualify for H-2B visas, and that employers must file specific documents with the U.S. DOL in order to become certified to hire E or H-visa employees. Given these intricacies of immigration law, especially those encountered by foreign nationals seeking U.S. employment or permanent residence, an immigration attorney can answer questions and file the proper applications to insure that foreign job seekers and employees meet U.S. immigration requirements. By speaking with an immigration attorney, eligibility requirements can be confirmed or evaluated. Many circumstances can cause a person to be inadmissible to the U.S.; therefore, it is important to consult with a knowledgeable immigration attorney prior to filing H or E visa applications, which vary in cost. Additionally, immigration attorneys can assist employers who desire to hire foreigner laborers or professionals, by insuring that the proper LCA forms are filed with the DOL, completely, on time, and with the proper application fees.

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LLC's: Even More Protection from Creditors

By George F. Bearup, Attorney

Late last year Michigan amended its Limited Liability Company (LLC) statute to make it difficult for creditors who win a monetary award in a lawsuit (judgment creditors) to access a member's LLC interest. The statute confirmed that a member's judgment creditor may obtain a *charging order* against the member's membership interest. The charging order entitles the judgment

creditor to whatever distributions would otherwise be due to the partner or transferee whose interest is the subject to the order, without the consent of the creditor.

However, the judgment creditor's reach is limited. It is entitled only to receive any LLC distributions to which the member is entitled with respect to the

member's interest. Consequently, if a distribution is to be made to the member, then the creditor's charging order attaches and the payment must be made by the LLC to the judgment creditor. However, the amended statute also makes it very clear that:

1. the judgment creditor does *not* become a member of the LLC. The LLC member who is subject to the *charging order* remains the LLC member, and thus retains all rights and powers of membership, except the right to receive distributions to the extent charged. In other words, the member continues to vote and control the decisions that affect the LLC, not the judgment creditor; the statute clarifies that the *charging order* does not result in an assignment of the member's LLC interest;
2. the judgment creditor may *not* foreclose on the *charging order*, which is, in effect, a lien on the member's LLC membership interest;
3. the *charging order* is the *exclusive remedy* by which a judgment creditor may satisfy its judgment from the member's LLC interest; and

4. any court order to which a member may have been subject that requires the LLC to take an action, to provide an accounting, or to answer any inquiry of the judgment creditor is ineffective, nor is it available to future judgment creditors of a member. A court *cannot* issue an order that grants relief to the judgment creditor to this effect.

In sum, a judgment creditor cannot foreclose on its lien and it cannot request an accounting or seek answers to inquiries with regard to the LLC. If the LLC members wish to stop taking distributions (e.g., they increase their payroll), there is little that a judgment creditor can do to recover funds from the LLC or its member in satisfaction of its judgment. The amended statute clarifies that a *charging order* is the sole remedy available to a judgment creditor under all laws, and that in the absence of any LLC distributions made to the member, a judgment creditor's judgment will remain unsatisfied.

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Lien Rights at Risk with Non-Permanent Identifying Information on Dies

By Robert M. Suarez, Attorney

A recent ruling could impact the lien rights of automotive suppliers that make or use molds and dies, as well as financial institutions with security interests in those materials. The Michigan Molder Lien Statute, also known as the Molders Act, has provided a moldbuilder with a possessory lien on any die, mold, or form belonging to a customer in the amount due the moldbuilder from the customer for its plastic fabrication work. A moldbuilder may retain possession of the die, mold, or form until the amount due is paid. If the amount due isn't paid, the Act allows possessory liens to be attached. In that case, the possessory

lien would take priority over a lender's interest. For example, in 2009 a plastic injection subcontractor was granted priority over a secured creditor, in a case in which the lender took possession of molds, pursuant to a trial court order, and later sold the molds. The subcontractor was found to have priority because there was nothing in the Act indicating that a lender's interest had priority over possessory liens.

The Michigan Code on Lien Eligibility

The conditions necessary for a moldbuilder to be

eligible for a possessory lien and jump in front of other secured creditors are rather specific. The Act states:

- (1) A moldbuilder shall permanently record on every die, mold, or form that the moldbuilder fabricates, repairs, or modifies the moldbuilder's name, street address, city, and state.
- (2) A moldbuilder shall file a financing statement.

Make it Permanent

Courts have held that the Code makes it very clear that permanently recording the required information on the mold and filing a financing statement created a lien in favor of the moldbuilder. The key is "to permanently record."

To have a secured possessory interest, the moldbuilder must permanently mark a die or mold with the moldbuilder's name, address, city, and state, in order to give the possessor of the die or mold actual or constructive notice. Without this notice, the moldbuilder is unable to take possession of the mold in the event the customer does not pay.

In a recent case, the Michigan Court of Appeals also used the Code's language to find that affixing readily removable identifying information to an object was not permanent enough to provide notice, and thus violated the Act.

In *CG Automation & Fixture, Inc v Autoform, Inc*, the appellate court had to decide if affixing identifying information on the risers that accompanied the dies was sufficient to subject the dies to a lien under the Act. A riser, also known as a feeder, is part of the metal die casting mold that acts as a reservoir to prevent shrinkage as the die solidifies. The issue in the case was whether a riser was a die. In this case, the plaintiff moldbuilder placed an identification tag on the "risers" accompanying the dies, and sold them to a supplier

who never paid. The supplier closed its entire operation, but sold the dies to another merchant prior to closing. The plaintiff moldbuilder sued the merchant seeking immediate possession of the tooling under the Act.

The moldbuilder prevailed at trial, but lost on appeal when evidence showed that the plaintiff moldbuilder permanently affixed its identifying information to the metal risers. The risers could be separated from the dies and transferred for use with other tools. The court used the Michigan Code's language to determine that the Code directed moldbuilders to "permanently record on every die, mold or form" identifying information. This implied that the Legislature clearly intended for subsequent possessors of the die to receive actual notice of the name and address of the moldbuilder. This meant that a die fabricator was to also perpetually preserve its identity "on every die...." The appellate court's findings were supported by the fact that the third-party merchant successfully used the die without the accessory risers. Therefore, the risers were not equivalent to the dies, but separate and distinct devices used in conjunction with the dies. Due to this separation, the subsequent possessor of the die (the third-party merchant) dealt with an entity that purchased the die and the tooling (the risers) from the moldbuilder, but was sold only the die. Therefore, the subsequent possessor could not have acquired actual or constructive notice of the moldbuilder's interest.

Conclusion

The Act requires a two step process in order to obtain an enforceable possessory lien: (1) the permanent recording of information on the mold or tool, *and* (2) the filing of a financing statement. The recent ruling suggests that a moldbuilder must affix its information the die and not a fixture which can be separated. This separation prevents actual or constructive notice to a subsequent user/possessor of a die or mold – a requirement needed for this type of possessory lien to attach and

be enforceable. Moldbuilders should insure that if they place identifying information on the risers or other fixtures, the risers or other fixtures cannot be separated from the dies or molds. If risers can be

separated, then the moldbuilder's lien rights will be in jeopardy.

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News from the SHRR Business Law Practice Group

Upcoming Event

Smith Haughey will host the following seminar – “**Making the Grade: Legal Know-How for Business Owners**” – in Traverse City on June 7. For more information and to register, visit <http://tinyurl.com/SHRR-6-7-11>.

Congratulations are in Order

Smith Haughey congratulates our client, **Comfort Keepers**, for being named to the 50 Companies to Watch list published by Michigan Celebrates Small Business.

Smith Haughey congratulates our client, **Swift Printing** and their staff, on receiving the Small Business of the Year EPIC Award, presented by the Grand Rapids Chamber of Commerce.

Speaking Engagements

Janis Adams and **Joanna Kloet** each gave presentations at a recent meeting of the Traverse Area Human Resources Association. Janis' topic was, “Employment Background Checks: Criminal Convictions and Credit History.” Joanna's topic was “I-9 Audits and Other Employment Immigration Matters.”

Successful Outcomes

Scott Gordon successfully represented his client, a well driller, in a breach of contract case. As a result of Scott's successful argument, the judge

declared the defense frivolous and ordered our client's attorney fees paid.

Joanna Kloet was successful in assisting two clients in obtaining U-visas, based on the clients' cooperation and assistance with law enforcement in prosecuting a serious felony committed against the minor applicant.

Megan Smith and **Jon Siebers** assisted The Geek Group in purchasing the former West Side YMCA building in Grand Rapids through a land contract with a local developer. Megan helped the Group navigate the Special Land Use process and the Group received approval from the City Planning commission to operate an educational science center and community workshop at the new Lab. Megan also helped the organization achieve property tax-exempt status.

Steve Stawski obtained summary disposition on behalf of a bank client to dismiss a challenge to the validity and terms of a mortgage that was placed as security for a commercial loan.

Rob Suarez has been successful in numerous recent immigration cases recently including obtaining asylum status for an Uzbek family; arguing a motion for Voluntary Departure on behalf of our client detained by Immigration Customs Enforcement; obtaining a venue change on behalf of our client, a Cuban refugee, whose matter was pending in El Paso, Texas; assisting two separate clients obtain approval for green cards; and defending our client in deportation proceedings before the U.S. Border Patrol.

Attorneys



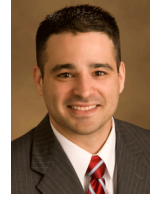
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