IMMIGRATION LAW—A PRIMER
OCTOBER 2006 SPECIAL ISSUE
CLE QUESTIONS AND ANSWERS

The Board of Editors of *The Colorado Lawyer* ("*TCL*") has created a program to make available continuing legal education ("CLE") credits to Colorado lawyers. *TCL* offers a maximum of six general CLE credits (including one ethics credit) to lawyers who read related articles printed in the October issues and who take a self-test. Credits were offered in October 2004 for articles related to "Privacy and Information Security," and in October 2005 for articles related to "Elder Law." The credits for the October 2004 articles are available until October 2006; the credits for the October 2005 articles are available until October 2007.

Six credits (including one ethics) are offered for reading the seven Immigration Law articles printed in this October 2006 special issue. Colorado practitioners who wish to earn CLE credits in this fashion must read *all* of the articles listed below and answer the questions provided. Practitioners then must check their answers to make sure they have correctly answered the questions.

Once the self-test is completed satisfactorily, practitioners may claim the appropriate credits, fill out the printed (or downloaded) Affidavit of Accreditation (*see* p. 30), sign it, and mail it to: State of Colorado Supreme Court Board of Continuing Legal & Judicial Education, 1560 Broadway, Suite 1820, Denver, CO 80202. Call (303) 866-6500 with questions about accreditation procedures.

The Immigration Law-related articles can be found in this October 2006 issue of *TCL* beginning on page 33. The questions, answers, and Affidavit of Accreditation are printed below. All of this material also is available online.

To take the test, read all of the articles listed below either in print or online at the CBA website, http://www.cobar.org/tcl. If accessing the test online, click on the link at the end of each article to get to the test and Affidavit of Accreditation.

The seven articles that have been approved for accreditation are:

- Global Migration, Lawful Employment, and U.S. Immigration Law (Carol Hildebrand)
- What Every Employer (and Every Employment Lawyer) Should Know About Immigration (Nancy B. Elkind)
- Family-Based Immigration: Answers to Frequently Asked Questions (Amber J. Tafoya)
- Immigration Consequences of Criminal Pleas and Convictions (Jeff Joseph)
- The REAL ID Act Border Fence Provision and National Security (Margaret D. Stock)
- Seeking Refuge: The U.S. Asylum Process (Regina Germain)
- 2006 Immigration Legislation in Colorado (Marlin W. Burke)

The *TCL* Board of Editors welcomes comments and suggestions on this CLE program. Please send to Managing Editor Leona Martínez at leonamartinez@cobar.org, or call (303) 824-5324 or (800) 332-6736.

Global Migration, Lawful Employment, and U.S. Immigration Law

By Carol Hildebrand

QUESTIONS

1. What is the difference between nonimmigrants and immigrants, the two main categories of foreign entrants under the U.S. Immigration and Nationality Act ("INA")?

2. What are policy considerations related to authorizing entry of foreign nationals into the United States?

3. What year did immigration law amendments make it possible for foreign people not lawfully present to legalize their status in the United States and what were the basic requirements?

4. Beginning in 1986, with the passage of the Immigration Reform and Control Act, what obligations were placed on employers with respect to their hiring practices?

5. In addition to the immigration law of a country, what other areas of the law should an employer consider when selecting citizens of one country to work in a different country?

ANSWERS

1. Nonimmigrants consist of diplomats, tourists, visitors for business, foreign students, professionals, managers, and executives. They also can be seasonal farm workers and quota-limited seasonal, peakload, or intermittent workers where an employer has demonstrated a shortage of U.S. workers. Nonimmigrants are granted lawful status for a temporary period of time and for a specified activity. There is not a temporary, year-round nonimmigrant category for semi-skilled, lesser skilled, or unskilled workers.
Immigrants, also known as lawful permanent residents, have the right to live and work in the United States indefinitely, as long as they commit no deportable offense. They must qualify on the basis of a close family relationship with a U.S. citizen or another immigrant or on the basis of an employment relationship—usually where the proposed employer has demonstrated a shortage of U.S.

workers. They also may qualify on the basis of a significant investment that creates jobs for ten U.S. workers, or as a previously approved refugee or asylee. Finally, a diversity "lottery" offers permanent residency to certain foreign people who apply and randomly are selected each year.

2. Policy considerations that arise include family unification or reunification, alleviation or prevention of suffering, economic development, worker shortages, Social Security funding, defense needs, population pressures, environmental quality, and civil and human rights.

3. The Immigration Reform and Control Act amended the INA in 1986 and offered legalization or amnesty for foreign persons who could demonstrate unlawful presence since 1982. They were granted temporary lawful status followed by full permanent residence if certain conditions were fulfilled.

4. All U.S. employers became obligated to verify the identity and authorization to work of each new hire using a Form I-9, "Employment Eligibility Verification." U.S. employers became obligated to obtain sworn personal information from a new hire about the person's immigration status. The employer then became obligated to review original documents presented by the new hire to establish identity and authorization to work, swearing that the documents appeared genuine on their face and appeared to relate to the newly hired person. On government audit, fines and even criminal penalties could be imposed either for failures in preparing Form I-9 or for the knowing hire or continued employment of workers unauthorized to work in the United States.

5. An employer also will need to consider laws related to export control, wages, benefits, working conditions, and taxation. Employers will need to consider whether employment can be "at will" and when termination is possible and its costs. A country's laws on discrimination, data privacy, and union or work counsel organization should be considered.

What Every Employer (and Every Employment Lawyer) Should Know About Immigration

By Nancy B. Elkind

QUESTIONS

1. Which of the following documents should not be accepted by an employer in connection with Form I-9 to establish an employee's authorization to work in the United States?

a. United States Passport
b. Form I-551 ("green card")
c. Certificate of Naturalization

2. An employer that receives a "no match" letter from the Social Security Administration ("SSA") should take which of the following steps?

a. Immediately terminate the employee because he or she does not have permission to work in the United States
b. Ask the employee to visit the local SSA office to be sure that the correct information is in the agency's system
c. Ask the employee to provide more and/or different documentation in support of Form I-9

3. The H-1B cap does the following:

a. Limits each employer to applying for fifty H-1B visas each year
b. Only applies to employees with advanced degrees
c. Limits to 65,000 the number of visas for skilled workers each year

4. The following individuals likely would qualify for (and be required to obtain) an O-1 visa to work in the United States:

a. Patrick Roy
b. Mick Jagger
c. Rupert Murdoch
d. All of the above

5. An employer wishing to assist an employee attain permanent residence in the United States first must:

a. Apply for a labor certification for that employee
b. Sign a contract for employment of at least five years
c. Send the employee home to his or her home country to await the processing of the case

ANSWERS

1. *c:* The Certificate of Naturalization should not be accepted by employers as proof that the employee has permission to work in the United States. It was removed by statute as an acceptable I-9 document in 1996. However, Form I-9 was reissued in 2005 and still shows that document as acceptable evidence of work authorization. It is safest for employers not to accept the Certificate of Naturalization in support of Form I-9.

2. *b:* When an employer receives a "no match" letter from the SSA, under current rules, the employer should only ask the employee to go to the local Social Security office to straighten out whatever problem seems to exist. The receipt of the first "no match" letter does not give the employer constructive knowledge of an employee's illegal status in the United States. If, however, the employer receives a subsequent "no match" letter for the same employee, the employer does have constructive knowledge that the individual is an unauthorized worker and should be terminated. Also, employers should be very careful about asking an individual employee to provide more or "better" documentation for the I-9, because there is a risk of being discriminatory and asking some employees for more documents than are allowed under the law.

3. *c:* Congress has limited the number of H-1B visas to 65,000 for each fiscal year. Because these visas are for workers in "specialty occupations," the cap limits the number of skilled workers who can be brought to the United States. There is an additional allocation of 20,000 H-1B visas for individuals who earned advanced degrees (Master's or higher) at U.S. universities. Also, employees of organizations affiliated with institutions of higher education are not subject to the cap.

4. *d:* All three individuals listed would need to obtain some sort of visa that would allow them to be employed in the United States, if they were coming here to work. The O-1 visa is a temporary non-immigrant visa for an individual of extraordinary ability in the sciences, arts, business, education, or athletics, and each of these individuals likely would qualify for such a visa.

5. *a:* For most employees, the first step toward attaining permanent residence is for the employer to show, through the labor certification process, that it cannot find a U.S. worker to fill the position. Under the PERM rules for labor certifications, the employer must advertise the position in print, and must also pursue three other types of recruitment. If such recruitment does not yield qualified U.S. workers, then the U.S. Department of Labor will issue the labor certification, which is only the first of three steps toward permanent residence for the employee.

Family-Based Immigration: Answers to Frequently Asked Questions

By Amber J. Tafoya

QUESTIONS

1. What is lawful permanent residency?
- a. It is the same as citizenship
- b. It is an immigration status that gives a person authorization to live and work in the United States and travel
- c. It is a non-immigrant visa

2. What is the definition of a "child" in the Immigration and Nationality Act ("INA")?
- a. A "child" is an unmarried individual under the age of 21
- b. A "child" is an unmarried individual under the age of 18
- c. A "child" is an individual under the age of 21

3. Which of the following is a benefit of being an immediate relative?
- a. The beneficiary does not need to apply for an immigrant visa
- b. The beneficiary has a right of inheritance
- c. The beneficiary does not have to wait for an immigrant visa to become available

4. Can a petitioner cancel his or her petition for the alien relative?
- a. No; once the petition is submitted, there is no way to withdraw the petition
- b. Yes; a petitioner may withdraw an application at any time until a decision on the petition is issued
- c. Yes; there is no time limit on withdrawal of a petition

5. How does an immigrant remove the condition from his or her residency?
- a. The immigrant files the USCIS Form I-751 with his or her spouse one year and nine months after receiving the residency or files a Hardship Waiver
- b. The immigrant waits and the condition automatically expires, giving the person lawful permanent residency
- c. The immigrant immediately files a petition to remove the condition

6. Can an intending immigrant self-petition for residency?
- a. No; the immigrant must have a qualifying family member apply on the immigrant's behalf
- b. Yes; if the immigrant is a battered spouse, child, or parent, or became a widow or widower within the past two years, there is a process to self-petition
- c. Yes; there is no requirement that a petitioner must sponsor the applicant for an immigrant visa

ANSWERS

1. *b:* Lawful permanent residents are not U.S. citizens, but have lawful immigration status to work and live in the United States indefinitely.

2. ***a:*** For purposes of the INA, a child must be under the age of 21 and remain unmarried. Marriage of a U.S. citizen's child moves the child into the "preference" category. Marriage of a "child" of a lawful permanent resident destroys the application for residency.

3. ***c:*** Immediate relatives are eligible immediately to apply for an immigrant visa, so there are no lengthy wait times as in the preference categories.

4. ***b:*** The petition may be withdrawn but must be withdrawn before the status is granted. 8 C.F.R. § 103.2(b)(6) states that a withdrawal may be made but not retracted. A new petition would need to be filed.

5. ***a:*** The conditional residency automatically will expire at the end of the two years following the grant of residency. It is very important to file the joint petition or the waiver, as explained in the article, to preserve the beneficiary's residency.

6. ***b:*** If the immigrant's petitioning spouse passed away within two years of the application, the immigrant may self-petition. Immediate relatives who are victims of battery or extreme cruelty also may self-petition without their qualifying family member, on proof of certain elements.

Immigration Consequences of Criminal Pleas and Convictions

By Jeff Joseph

QUESTIONS

1. Which of the following types of offenses can cause an immigrant to be removed from the United States, but would not necessarily prevent admission to the United States?
- a. Crime involving moral turpitude
- b. Aggravated felony
- c. Controlled substance violation

2. Which of the following would be a conviction for immigration purposes?
- a. A plea and a jail sentence
- b. A deferred judgment
- c. A plea and probation
- d. A deferred prosecution where no plea was entered
- e. a, b, and c, but not d
- f. All of the above

3. Convictions prior to which date would not trigger mandatory detention under Immigration and Nationalty Act ("INA") § 236(c)?
- a. April 1, 1997
- b. September 30, 1996
- c. October 8, 1998

4. Which of the following would be considered a conviction for the purpose of immigration law?
- a. A Colorado juvenile adjudication
- b. A deferred judgment
- c. A deferred prosecution
- d. A civil municipal ordinance violation
- e. A conviction that is on direct appeal

5. Which of the following is not a removable offense under INA § 237, 8 U.S.C. § 1227(a)(2)(E)?
- a. Possession of drug paraphernalia
- b. Possession of thirty-one grams of marijuana
- c. Possession of a machete
- d. Violation of the portion of a restraining order dealing with credible threats of violence
- e. Child neglect

ANSWERS

1. ***b:*** Aggravated felonies are a ground of removal under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii). However, aggravated felonies are not a ground of inadmissibility under INA § 212, 8 U.S.C. § 1182. The only way in which an aggravated felony would prevent admission is if it otherwise can be classified as an offense that is covered under INA § 212 (*e.g.*, crime involving moral turpitude or controlled substance violation).

2. ***f:*** The definition of conviction at INA § 101(a)(48), 8 U.S.C. §1101(a)(48), requires: (1) an admission of the essential elements of an offense (a plea) or, in cases where there is a *nolo contendere* or *Alford* plea, a finding by the judge that there are sufficient facts to war-

rant a finding of guilt; and (2) a restraint on liberty. Under these circumstances, a, b, and c would constitute a conviction under the immigration laws, but a deferred prosecution would not.

3. *c:* The Attorney General implemented the Transitional Period Custody Rules after the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub.L. No. 104-208, 110 Stat. 3009. These rules were to remain in effect in the transition period before implementation of the mandatory detention provisions of IIRIRA. The effective date of IIRIRA was April 1, 1997, but the transitional period custody rules remained in place until October 8, 1998.

4. *b:* A juvenile adjudication under Colorado law is considered a civil adjudication in delinquency and, hence, not a conviction of a crime. [*Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981); *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000).] A deferred prosecution is not a conviction because there is no "admission of the essential elements of the offense"—no guilty plea. [INA § 101(a)(48).] A civil municipal ordinance violation is not necessarily an "offense" that would render one removable or inadmissible, unless the ground of inadmissibility or removability can be triggered by conduct alone, irrespective of a "criminal" conviction. To that extent, civil ordinance violations such as noise violations and leash law violations arguably are not convictions but civil violations. On the other hand, prostitution or disorderly conduct may be considered criminal in nature. A conviction that is on direct appeal is not final for immigration purposes. [*Pino v. Landon*, 349 U.S. 901 (1955).]

5. *c:* Possession of drug paraphernalia is a removable offense. [*Luu-Le v. INS*, 224 F.3d 911, 914 (9th Cir. 2000).] Even though a single offense of thirty grams or less of marijuana is an exception to removability under INA § 237(a)(2)(B)(i), paraphernalia has been found to be a crime "related to a controlled substance (as defined in § 102 of the Controlled Substances Act (21 U.S.C. 802))" so as to render someone removable. A single offense of possession of thirty grams of marijuana for one's own use is an exception to removability, but thirty-one grams is not. [INA § 237(a)(2)(B)(i).] Violation of the no contact portion of a restraining order is not necessarily a removable offense, but if the offense involves violating that portion of the order designed to protect the victim from violence or credible threats of violence, the offense would be a removable offense. [INA § 237(a)(2)(E)(ii).] Child abuse, abandonment, and neglect are removable offenses. [INA § 237(a)(2)(E)(i).] Although possession of a firearm is a removable offense, possession of a machete is not. [INA § 237(a)(2)(C).]

The REAL ID Act Border Fence Provision and National Security

By Margaret D. Stock

QUESTIONS

1. In 2005, the U.S. Congress passed a new law affecting border fences, as part of
- a. The National ID Act
- b. The California Coastal Zone Management Appropriations Act
- c. The Emergency Supplemental Appropriations Act for Tsunami Relief
- d. The Endangered Species Act
- e. The Illegal Immigration Reform and Immigrant Responsibility Act

2. The 2005 border fence provision is unique among federal laws because
- a. It delegates unprecedented authority to the Secretary of Homeland Security
- b. It authorizes the National Guard to assist with border security
- c. It authorizes the states to play a role in border security
- d. It allows for a lawsuit to be brought as an original action in the U.S. Supreme Court
- e. None of the above

3. Congress apparently passed the border fence provision because
- a. Governor Arnold Schwarzenegger of California demanded passage and threatened not to send California National Guard troops to the border
- b. Environmental lawsuits were holding up construction of a fence in Smuggler's Gulch
- c. Hundreds of immigrants were dying each year in Smuggler's Gulch
- d. The United States and Mexico had signed a treaty regarding the border fence and Congress was merely implementing the treaty

4. Judicial review under the border fence law
- a. Lies in both state and federal court
- b. Does not exist
- c. Is limited to constitutional claims only
- d. Requires as a condition precedent the filing of a request for administrative review before the Environmental Protection Agency
- e. Requires filing an original action in the U.S. Supreme Court

5. Department of Homeland Security ("DHS") Secretary Michael Chertoff has
a. Not yet exercised his authority under the border fence law
b. Has refused to follow Congressional instructions regarding the border fence, under the "unitary executive" theory
c. Has waived the application of the Administrative Procedures Act so as to complete the border fence
d. Has asked Congress to amend the border fence law to give the DHS broader authority over the states

6. Environmental groups were unsuccessful in challenging the new law as a violation of
a. Substantive due process
b. An unconstitutional delegation of power to the executive
c. A violation of the unitary executive theory
d. The state secrets doctrine

ANSWERS

1. *c:* On February 11, 2005, as part of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Congress enacted an amendment to § 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. This section of law gave authority for construction of a border fence.

2. *a:* The border fence provision discussed in this article grants authority to the Secretary of DHS to "waive all legal requirements such Secretary, in such Secretary's sole discretion" determines are necessary to ensure quick construction of a border fence. Technically, this allows the Secretary to waive almost any law—although to date, the Secretary has chosen to waive only environmental laws.

3. *b:* The California Coastal Commission objected to the Border Patrol's plans to construct a border fence in Smuggler's Gulch, and several environmental groups had filed lawsuits challenging the construction.

4. *c:* U.S. district courts have exclusive jurisdiction over actions brought under the border fence law, and appeal can only be taken to the U.S. Supreme Court. Lawsuits can be filed only if they allege constitutional violations.

5. *c:* DHS Secretary Michael Chertoff invoked his authority under the new law on September 13, 2005, and published a notice in the Federal Register in which he waived the application of eight laws, including the Administrative Procedures Act.

6. *b:* Environmental groups argued that the new law was an unconstitutional delegation of legislative power to the executive branch of the government, but a U.S. District Court judge held that Congress had given the DHS Secretary "an intelligible principle" by which to act in constructing the border fence.

Seeking Refuge: The U.S. Asylum Process

By Regina Germain

QUESTIONS

1. The five grounds for asylum set forth in U.S. law and the United Nations Convention Relating to the Status of Refugees are:
a. Race, religion, nationality, gender, and political opinion
b. Race, religion, nationality, sexual orientation, and political opinion
c. Race, religion, nationality, membership in a particular social group, and political opinion
d. Race, religion, military service, membership in a particular social group, and political opinion

2. Who makes the initial determination about who qualifies for asylum in the United States?
a. Office of the United Nations High Commissioner for Refugees
b. Department of Homeland Security Asylum Officers and Immigration Judges
c. Board of Immigration Appeals
d. Article III Judges

3. Under U.S. law, where is the term "persecution" defined?
a. In the Immigration and Nationality Act
b. In the Code of Federal Regulations
c. Both "a" and "b"
d. In BIA and federal court case law

4. Based on changes to the law enacted in 1996, and based on coercive population control policies, individuals seeking asylum in the United States are seeking asylum under what protected ground in the "refugee" definition?

a. Race
b. Religion
c. Nationality
d. Political Opinion

5. An applicant for asylum in the United States must file for asylum within _____ (time period) of his or her last entry to the United States or show extraordinary or exceptional circumstances for failing to do so.
a. One year
b. 180 days
c. 90 days
d. 10 days

ANSWERS

1. *c:* These grounds are set forth in the refugee definition found at 8 U.S.C. § 1101(a)(42) and Article 1 of the 1951 Convention and 1967 Protocol Relating to the Status of Refugees.

2. *b:* Both Asylum Officers and Immigration Judges have the ability to grant asylum in the first instance. *See* 8 C.F.R. § 1208.1 (a).

3. *d:* The term "persecution" has been defined only in case law.

4. *d:* The Immigration Reform and Immigrant Responsibility Act of 1996 amended the definition of "refugee" to include individuals who have been persecuted or fear persecution based on coercive population control practices such as forced abortion or forced sterilization.

5. *a:* In 1996, the law changed to include a one-year filing deadline. *See* 8 U.S.C. § 1108(a)(2)(D).

2006 Immigration Legislation in Colorado

By Marlin W. Burke

QUESTIONS

Assume the following are true:
a. In the absence of any other extenuating circumstances, presence in the United States without permission from the U.S. government is a violation of federal civil law
b. Regulation of immigration is exclusively granted to the U.S. Congress by Article I, § 8 of the U.S. Constitution
c. Article XX, § 6(h), of the Colorado Constitution concerning home rule cities and towns, provides "[t]he statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters"
d. Case law interpreting that section of the state constitution holds generally that a city may not prohibit what a state allows and may not allow what the state disallows; additionally, there are matters of statewide concern over which state interest are superior, matters of local concern over which local charters and ordinances are superior, and matters of mixed concern

1. What piece of legislation passed in the 2006 legislative session raises issues of potential conflict between state and local authority implicating the home rule charter provision of the state constitution?
a. House Bill ("H.B.") 1343, prohibiting political subdivisions of the state from contracting with any employer who knowingly employs or contracts with a subcontractor who knowingly employs "illegal aliens"
b. H.B. 065-1023, which requires all political subdivisions of the state to verify the immigration status of all persons applying for any publicly funded benefit
c. Senate Bill ("S.B.") 90, requiring cities to instruct their peace officers to notify the U.S. Immigration and Customs Enforcement Office of any person in their custody whom they have probable cause to believe is without lawful status under federal immigration law
d. H.B. 065-1009, prohibiting local entities from issuing professional, commercial, or business licenses to any person unable to verify his or her legal status in the United States

2. Under what legislation will nearly all drivers' licenses be required to be renewed within the next two years, regardless of the expiration date appearing on the currently issued license? Why?
a. H.B. 1343, because employers who have any contract with a public entity are required to verify that all of their employees are eligible to work in the United States and that the employer does not employ "illegal aliens" or contract with subcontractors who do

b. H.B. 065-1017, because all employers, regardless of whether they have public contracts, are required to produce on demand of the Director of the Department of Labor documentation proving they have attempted to verify the work status of any employee in their employ, or pay a fine of $5,000 to $20,000
c. Real I.D. Act, because no one not having a driver's license that meets the requirements of federally mandated standards will be able to access any federal facility or federally regulated commercial aircraft
d. H.B. 1023, because it requires people applying for benefits to have a valid Colorado driver's license

3. You are driving south just out of Cheyenne, Wyoming, on a bitterly cold, snowy, windy night and come upon a young woman beside a stalled car, in obvious distress, trying to catch a ride. You stop to help. She gets in your car. You notice her accent and ask where she is from. She says Peru. You ask her where she is going. She says she is going to Denver. It happens that is home and where you are headed. At the end of the trip, she is very grateful and offers to pay you for your gas. You should:

a. Graciously refuse to let her pay for the gas
b. Let her pay you
c. Fill the tank and let her pay the gas station attendant
d. Take her to a police station and explain to them what has happened

Consideration: S.B. 206 created a new class 3 felony, "smuggling of humans":

A person commits smuggling of humans if, for the purpose of assisting another person to enter, remain in, or travel through the United States or the State of Colorado in violation of immigration laws he or she provides or agrees to provide transportation to that person in exchange for money or anything of value.

4. One of your business clients tells you that he is trying to comply with the requirements of H.B. 1343, because he was just awarded a contract to provide the drywall and finish work for the interior of the new county jail. He needs to hire twenty new employees, in addition to the forty he currently has working for him, so as to meet the requirements of the contract on schedule. To be sure he is in compliance with the requirements of the new legislation and because he knows the public contract will require him to certify that he has verified the eligibility of his employees to work in the United States, he has had his human resources person prepare an employment application for the new job applicants that he also will give to his current employees, asking for their names, addresses, and social security numbers and whether they are legally entitled to work in the United States. He also has applied to the Department of Homeland Security to be accepted into the "Pilot Program" so that he can try to verify the eligibility of his employees to work in the United States. He asks you if there is anything else he should do. Additionally, you note on the form he wants all of his employees and job applicants to fill out a question asking the citizenship of the employee or job applicants. He asks you also what documents the state will accept to prove employability. What should you advise him?

a. The employer should be prepared to keep and have readily available for inspection records on all employees, including photo copies of any documents on which he relied to verify the eligibility of each employee to work. Such records must be kept as long as the employee is employed by the employer.
b. He should not present the form asking employees to disclose their citizenship and asking them to certify that they are eligible to work in the United States until after a job offer is made. Presenting it before the job offer is made will make it appear that the form is being used as a pre-employment screening tool, which is a violation of H.B.1343, the provisions of the public contract, and federal and state civil rights laws.
c. H.B. 1017 directs one to 8 U.S.C. § 1324(a) to determine who may accept employment. The employer really has two obligations under the requirements of any of the legislative acts passed by the legislature in the 2006 sessions. The first is to verify the identity of the person to be sure he or she is who says he says he is. The acceptable documents for determining identity at least until the effective date of Real I.D., which is May 11, 2008, is the list that appears at 8 C.F.R. § 274a.2(b)(1)(v), discussed in the paragraph devoted to S.B. 110 above. Use of the SAVE program or Basic Pilot Program is to detect fraudulent Social Security numbers. It is one more part of verifying the person's identity.
d. The employer's obligation is to determine whether the person is eligible to work. The person must have from the federal government a document demonstrating work authorization, have a current permanent resident card, often referred to as a "green card," or be a U.S. citizen. There are no exceptions. H.B. 065-1017 requires the employer to inquire into and record the employee's citizenship. In the case of foreign nationals, citizenship is irrelevant. The question to be asked is if she is not a U.S. citizen, does she have a document evidencing work authorization or a green card? Accordingly, the employer should ask and record citizenship because the law says to do so but also should keep a copy of whatever document the employer relied on in believing the individual had the legal right to work in the United States.
e. All of the above.

5. Your client with the jail contract calls again two weeks later and tells you that the Social Security Administration ("SSA") has just notified him again that his foreman, a highly valued employee, has a social security number that doesn't match. This happened in the past. Your client told the foreman to get the matter resolved. Obviously, the matter wasn't resolved. Client confronted the foreman who finally admitted he has been in the United States since he was a child but he really isn't legal. Client has heard about H.B. 1015, which requires an employer who employs someone without a valid social security number or Federal Taxpayer Identification number to withhold state taxes at a rate of 4.63 percent of the gross wages paid. He also has heard that H.B. 065-1020 referred a ballot initiative to the voters in November that will prohibit wages paid to an employee who has no work authorization to be deducted as a business expense. He has discussed this with the foreman. The foreman has agreed to allow the deduction of state taxes

from his wages and to allow his wages to be adjusted to make up for the employer's loss of a business expense deduction. The foreman wants to keep his job, and the client wants to keep the foreman, who is a good worker and a friend. What is your advice?

a. Encourage the employer to retain the foreman and pay the tax penalties

b.Tell the client that he will have to terminate the foreman

ANSWERS

1. *c:* S.B. 90 raises issues of possible conflicts concerning the distribution of power between state and local governments. S.B. 90 requires political subdivisions at their own expense and on pain of loss of local government assistance administered by the Department of Local Affairs to enforce or at least cooperate in the enforcement of federal civil law.

2. *c:* Real I.D. Act, because it provides that by May 2008 no one may access federal facilities using a state driver's license or identification card unless it complies with federally mandated standards. "Federal facility" is not defined, which means that the term will broadly apply to any facility constructed with federal funds or that houses federal offices, such as post offices, federally leased premises for federal offices, military reservations and includes by specific inclusion any federally regulated commercial air craft. States issuing a driver's license must collect Social Security numbers, report them to the SSA, and verify them through the SAVE program to assure that the numbers are genuine and "match" with SSA records. Once these licenses are issued, one can expect that they will be the "gold standard" for any activity requiring proof of identification—from cashing a check to renting a hotel room to buying a car. All state legislative enactments requiring identification will dovetail into the Real I.D. matrix. H.B. 065-1023 allows other forms of identification for those applying for public benefits. Presumably, infants, the disabled, and the very elderly may not have drivers' licenses and may use other forms of identification for purposes of H.B. 065-1023. H.B. 1343 requires employers with public contracts to clear employees through the SAVE program. Real I.D.-compliant drivers' licenses, once they are issued, will moot that requirement, because the state already will have cleared the license-holder through SAVE before the license was issued. The Act says that state-issued drivers' licenses and identification cards that do not meet minimum standards will not be sufficient.

3. The statute is vague. It does not require specific intent on your part. If you accepted payment for your gas to get to Denver, you may have committed a class 3 felony. You knew she might be illegal, you let her pay you for the gas and, because you gave her a ride across the Wyoming–Colorado line, you helped her to "enter and remain" in Colorado, in violation of immigration law. The question here is whether the phrase "in violation of immigration law" refers to what you intended when you gave her a ride or to her status as she traveled into and remained in Colorado. Then, the question becomes whether you leave her stranded on the side of the road or give her a ride and risk a "discussion" with the District Attorney.

4. *e:* All answers apply.

5. *b:* The legislature passed seven bills dealing with issues ancillary to immigration in the regular session. In the two week "special session," it passed another dozen bills. There was some confusion as to what had been done among the various proposals that were passed. In this case, H.B. 065-1020 and H.B. 065-1015 would seem to allow room for an employer to employ undocumented workers under some circumstances, as long as the employer and the employee are willing to bear the tax consequences. This is legislation that was inspired by a law passed in Georgia this spring.

H.B. 1343 ("Act"), passed in the regular session, is unforgiving of employment of undocumented labor *if the labor is employed under the public contract*. Under H.B. 1343, which deals with employers performing public contracts, the knowing employment of undocumented laborers under the contract will result in the termination of the contract, allow the public entity to treat the contractor as though he willfully breached the contract, and authorizes the public entity to sue for actual and consequential damages arising out of the breach of the contract. The employer also will be placed on a list for two years. The final bill enacted into law does not say what is the consequence of being on the list. However, the versions leading up the final Act provided that an employer on the list would be banned from getting another public contract as long as its name is on the list. The Director of the Department of Labor, who has some rulemaking discretion under the Act, might fill in the legislative gap and put the consequence for being on the list into the enforcement of the Act. If the client is willing to continue employing the foreman, but is willing to be certain that the foremen does not perform on the public contract, H.B. 1343 will not come into play.

If the client in this case is not involved in a public contract, H.B. 065-1017 really does not impact this situation either. H.B. 065-1017 applies to new hires. It does not apply to employees on the payroll when this act takes effect on January 1, 2007. H.B. 065-1017 requires the employer to verify the employability of any new hire, keep records of the documents relied on to verify employment, certify that the employer has not altered or falsified any documents, and certify that the employer has not hired any new undocumented employees. Because the foreman is a long-time employee, his continued employment will not be affected by H.B. 065-1017.

Notwithstanding all of that, however, it is still and has been for a very long time illegal under federal law for an employer to employ undocumented persons. Also, under immigration law, it is illegal for anyone not authorized to work to be employed in the United States. The penalties can be very severe for either party.

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