

The following Labor & Employment news may be of interest to you in your business and is provided as a bulletin for our clients and friends from the attorneys in the Hall Estill Labor & Employment practice group. Should you have any concerns, questions, or assistance relating to the topics in this update or any other matter, please contact any one of our attorneys.

### **Hiring Unauthorized Workers**

The Immigration Reform and Control Act of 1986 (IRCA) makes it unlawful for an employer to knowingly hire an unauthorized alien. The IRCA requires U.S. employers to hire only persons who may legally work here: citizens and nationals of the U.S. and aliens authorized to work. The IRCA makes all U.S. employers responsible for verifying, through a specific process, the identity and work authorization or eligibility of all individuals, whether U.S. citizens or not, hired after November 6, 1986. To implement this, employers are required to complete Employment Eligibility Verification Form I-9 for all employees. An employer's obligation to review documents is not triggered until a person has been hired, whereupon the new employee is entitled to submit a document or combination of documents of his choice to verify his identity and work eligibility. In addition, the law obliges employers not to discriminate against individuals on the basis of national origin or citizenship, or to require more or different documents from a particular individual.

The IRCA requires an employer to: (a) Ensure that employees fill out Section 1 of the Form I-9 when they start to work; (b) Review documents establishing each employee's identity and eligibility to work; (c) Properly complete Section 2 of Form I-9; (d) Retain Form I-9 for 3 years after the date the employee begins work or 1 year after the employee is terminated, whichever is later; and (e) Make Form I-9 available for inspection by an officer of the Immigration and Naturalization Service, the Department of Labor, or the Office of Special Counsel for Immigration Related Unfair Employment Practices upon request.

Making the task of ensuring compliance with the IRCA more difficult are its non-discrimination provisions. Under the IRCA, employers are liable for any discrimination, whether intentional or inadvertent, that results from an overzealous attempt to comply with the provisions of the IRCA. Thus, employers must be especially careful in how they render and phrase hiring and termination decisions. Employers who engage in practices or policies that consider the immigration status of the worker may trigger the IRCA's anti-discrimination provisions. In a nutshell, the I-9 process may not be used to pre-screen employees for hiring. Furthermore, an employer may not demand more or different documents than an employee chooses to present, provided that the documents presented are acceptable under the I-9 requirements. Likewise, employers may neither require nor accept any more documentation than the minimum necessary to substantiate identity and work eligibility.

As many employers know, there is a two-edged sword with IRCA. You have to ensure that you are hiring properly documented workers, by and through the I-9 process, while at the same time ensuring that the process is not being used to discriminatorily screen out employees. However, following proper procedures and policies, and maintaining appropriate paperwork will provide employers the tools they need to comply with IRCA and avoid costly fines and or lawsuits in the future.

## **Guidance on Inclement Weather Policies**

With the harsh winter this year, the two November 2005 opinion letters issued by the United States Department of Labor (DOL) regarding inclement weather become increasingly relevant. These opinion letters clarify the DOL's stance on winter weather policies as they affect exempt salaried employees. The opinion letters deal with employer policies regarding compensation for situations when the workplace remained open, but employees could not make it to work due to inclement weather, and for situations when the workplace was forced to close as a result of the inclement weather.

First, the opinion letters state that employees do not lose their exempt status if the employer instructs them to take vacation or leave deductions for full or partial days during office closures due to inclement weather, so long as the employees receive in payment an amount equal to their guaranteed salary. The DOL cautions that employers must pay exempt employees with no accrued leave or a negative leave balance their full salary when the absences are caused by the employer (e.g., an office closure).

Next, the DOL considers whether employees retain their exempt status if their employer directs them to take vacation, leave deductions or leave without pay if they fail to report to work because of the weather when the employer's offices remain open. The DOL states that an employee who is absent because of transportation difficulties is absent for "personal reasons." Thus, the employer may require the employees to take vacations or take deductions from their leave banks. If the employees have no accrued vacation or leave benefit, the employer may make salary deductions.

The opinion letters are based upon specific fact situations and may not be applicable to all employer leave policies. Further, the opinion letters also emphasize the importance of adhering to the salary deduction rules set forth in the Fair Labor Standards Act. Because improper deductions from an employee's salary may result in the loss of exempt status, employers should seek guidance from counsel before changing any leave policies concerning absence.

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