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I. ICE Assesses $1 Million Fine Against Abercrombie & Fitch After Form I-9 Audit

U.S. Immigration and Custom Enforcement ("ICE") recently announced that Abercrombie & Fitch had agreed to pay a fine of $1,047,110 for violations discovered during a Form I-9 inspection that ICE conducted in November 2008. ICE is the agency within the Department of Homeland Security ("DHS") that is responsible for worksite enforcement. During its audit, ICE discovered numerous technology-related deficiencies in the electronic Form I-9 verification system that Abercrombie & Fitch used.

In announcing this disposition, ICE underscored that employers are responsible not only for the people they hire, but also for the internal systems they utilize to manage the employment process. Here, the system did not comply with the government's technology requirements. This created a serious gap in Form I-9 compliance and led to the substantial fine that ICE imposed. The Abercrombie & Fitch settlement should serve as a warning to all employers that they need to take the employment verification process seriously and ensure that their electronic systems, or those purchased from vendors, comply with all legal requirements.

II. DOJ Settles Allegations of Immigration-Related Employment Discrimination Against Hoover Inc.

On November 10, 2010, the U.S. Department of Justice ("DOJ") announced that it has reached a settlement agreement with Hoover Inc. ("Hoover") to resolve allegations that Hoover had engaged in a pattern/practice of employment discrimination by imposing unwarranted and discriminatory obstacles for lawful permanent residents in the Form I-9 process. According to the DOJ's findings, Hoover re-verified all permanent residents who had presented a valid permanent resident card for Form I-9 purposes when the card expired. Hoover's U.S. citizen workers, by contrast, were not required to present new documents.

Thomas E. Perez, Assistant Attorney General for the DOJ's Civil Rights Division, reminded employers that "… permanent residents in the United States have the right to continued employment without the burden of presenting new documentation when their green cards expire … ." According to the settlement, Hoover agreed to pay $10,200 in civil penalties, train its human resource ("HR") personnel regarding their nondiscrimination responsibilities in the Form I-9 process, and provide periodic reports to the DOJ for one year.

III. DOJ Issues Instructions for "No Match" Letters

Recently, the DOJ's Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC") issued instructions to employers and employees regarding how to handle "no match" information. A no-match occurs when the name and social security number ("SSN") of an employee do not match. There can be many causes for a no-match. So, the fact that one arises does not, by itself, indicate that the employee lacks employment authorization. However, in assessing whether to initiate an investigation, ICE looks at the number of no-matches that employers receive and how they handle them.

The OSC instructions to employers mirror the "Safe Harbor" regulations that ICE promulgated but withdrew in 2009. When a no-match arises, employers are advised to first check their own records for any administrative errors. If none appears, they should ask the employee to confirm his/her name and SSN. If that does not resolve the problem, the employer should instruct the employee to contact the Social Security Administration ("SSA") to correct or update its records. Employers should have a standard protocol for addressing no-match problems that does not vary by the nationality of the affected employee. Once the employee has been referred to the SSA, the employer should follow up periodically to address the status of the no-match and see if it has been resolved.

Additional information about how to handle no-match situations can be found at the OSC website (http://www.justice.gov/crt/osc/htm/SSA.php).

IV. DOL Discontinues Form I-9 Inspections During OFCCP Reviews

On November 16, 2010, the Office of Federal Contract Compliance Programs ("OFCCP") of the U.S. Department of Labor ("DOL") announced that it will no longer inspect the Forms I-9 of federal contractors during onsite compliance reviews. Under a 1998 memorandum of understanding ("MOU") between the now-abolished DOL Employment Standards Administration and the former Immigration and Naturalization Service, presently the U.S. Citizenship and Immigration Service ("USCIS") within the DHS, the OFCCP was authorized to inspect Forms I-9 during onsite compliance evaluations of federal contractor and subcontractor establishments. The OFCCP has decided not to continue exercising its authority under this MOU because the agency lacks enforcement authority for any violations that are found.

V. EEOC Commissioner Calls for Close Scrutiny of English-Only Employment Requirements

Stuart J. Ishimaru, the Commissioner of the Equal Employment Opportunity Commission ("EEOC"), has called for a close examination of English-fluency employment tests and English-only work rules to determine if they are being used as a subterfuge for national origin discrimination. Commissioner Ishimaru indicated that he was becoming increasingly concerned about the use of language-based work rules to discriminate against job applicants based on their place of birth, ancestry, culture, or native language. For this reason, English-only rules and potential discrimination based on a person's accent were becoming a "hot topic" as the agency examines trends in the workplace.

Commissioner Ishimaru conceded that "political forces" were seeking to limit the EEOC's ability to bring cases in this area. Last year, Senator Lamar Alexander (R-TN) introduced an amendment to the EEOC's appropriations bill that would have reduced the funding available for these cases. At the same time, Commissioner Ishimaru noted that the percentage of workers in the American workplace that speak a language other than English was growing. According to the EEOC, too many employers are responding to these trends by adopting policies that illegally seek to limit the use of foreign languages in the workplace. Commissioner Ishimaru reminded employers that English-only rules can be adopted solely

for nondiscriminatory reasons.

VI. Missouri Man Convicted in Scheme to Place Undocumented Workers in Hotels

On October 28, 2010, a Missouri man was convicted by the U.S. District Court in Missouri for his role in a racketeering scheme that involved placing undocumented workers at hotels in 14 states, including several hotels in the Kansas City, Missouri, area. *United States v. Dougherty*, No. 4:09-CR-00143 (W.D. Mo. Oct. 10, 2010). Beth Phillips, the U.S. Attorney for the Western District of Missouri, indicated that "Mr. Kristin Dougherty was found guilty of racketeering, participating in a Racketeering Influenced and Corrupt Organizations Act ('RICO') conspiracy and wire fraud. He faces a possible sentence of up to 60 years in federal prison without parole, plus a fine up to $75,000."

Ms. Phillips added that this was not an isolated criminal enterprise. The federal RICO indictment alleged . . .

> an extensive and profitable criminal enterprise in which hundreds of illegal aliens were employed at hotels and other businesses across the country. Participants in the scheme used false information to acquire fraudulent work visas for the illegal workers, many of whom were recruited with false promises related to the terms, conditions and nature of employment. Once workers entered the United States, participants in the scheme kept control of the workers through threats of deportation and other adverse immigration consequences.

We have previously noted our concerns about hospitality employers that use the H-2B program to supplement seasonal staffing shortages. The *Dougherty* prosecution is another reminder of the serious consequences that can arise from fraudulent schemes or other unlawful activities in this area.

VII. Fourth Circuit Court Approves Probation Term Barring Participant in H-2B Visa Scheme from HR Work

The recent decision by the U.S. Court of Appeals for the Fourth Circuit in *United States v. Starkes*, No. 09-5051 (4th Cir. Nov. 3, 2010)(unpublished), underscores the dangers inherent in the H-2B program. In *Starkes*, the Fourth Circuit upheld a special condition of probation for an HR manager, who was convicted as part of an H-2B visa fraud scheme, that barred her from working in any position that involved access to labor contracts.

The *Starkes* decision involved the former HR manager at a major hotel in Williamsburg, Virginia. In 2007, Ms. Starkes encountered a member of a criminal organization who asked her to submit fraudulent documentation for H-2B visas that overstated the number of temporary workers the hotel required. In exchange, Ms. Starkes received a $200 gift card and was promised 10 - 15 cents per man-hour for each H-2B employee who worked at the hotel. The government discovered the scheme before Ms. Starkes could profit from the illegal arrangement. Ms. Starkes pled guilty to one count of mail fraud for her participation, and was sentenced to three years' probation, with the special condition that she was prohibited

from engaging in any aspect of the HR business or any similar occupation where she would have access to labor contracts.

The *Starkes* prosecution is part of a growing trend to ferret out fraud committed by management of hospitality employers involved in the H-2B worker program. Every hospitality employer that participates in the H-2B program would be well advised to review its policies and procedures for these employees to ensure that both the organization and its management are satisfying all legal requirements.

VIII. President of Furniture Company Is Indicted for Employing Illegal Workers

On November 1, 2010, the President of a California furniture manufacturing company was indicted criminally for continuing to employ 18 workers after an I-9 audit had revealed they were undocumented. *United States v. Vartanian*, No. 2:10-cr-01196 (C.D. Cal. Nov. 1, 2010). The President has agreed to pay a $10,000 fine and faces a maximum sentence of 66 months in prison. The company's Vice President previously pled guilty to similar charges, agreed to pay a $5,000 fine, and faces a maximum sentence of six months in prison. *United States v. Eberly*, No.2:10-cr-01126 (C.D. Cal. Oct. 14, 2010).

These prosecutions arose out of an audit by ICE of the company. ICE identified 61 workers who it claimed were not authorized to work, and the company represented to ICE that they had been terminated. In fact, the company continued to employ 18 of these workers and acted to shield them from detection.

The ICE agent in charge of this case stated that criminal prosecutions of employers that knowingly hire or retain undocumented workers were an important weapon in the country's effort to reduce the demand for illegal labor.

IX. E-Verify to Include U.S. Passport Photo-Matching Capability

On November 10, 2010, the DHS announced that the E-Verify program had been upgraded to include the capability to match U.S. passport photos. According to the DHS, this is an improvement that promises to "further enhance the integrity of the [E-Verify] program by enabling [employers] to automatically check the validity and authenticity of all U.S. passports and passport cards presented for employment verification checks … ."

Since November 10, 2010, employers using E-Verify have been able to verify the identity of new employees who present a U.S. passport by comparing that data with U.S. Department of State ("DOS") records. DHS Secretary Janet Napolitano said that "[i]ncluding a U.S. passport photo matching in E-Verify will enhance our ability to detect counterfeit documents and combat fraud … ."

X. November 12, 2010, H-1B Cap Count

The USCIS has announced that, as of November 12, 2010, approximately 47,800 new H-1B petitions have been filed for fiscal year 2011 against the 65,000 cap. USCIS also reported

that approximately 17,400 new H-1B petitions have been filed for holders of advanced U.S. degrees against the 20,000 cap for these cases. This leaves room for approximately 17,200 new H-1B approvals under the 2011 "Regular" Cap quota, and 2,600 H-1B approvals under the 2011 "Masters" Cap quota.

As you can see, the quota for new petitions under the 2011 quota is filling up. The USCIS will continue to accept all eligible H-1B cases until a sufficient number of H-1B and H-1B1 petitions have been received to reach the statutory limits. Employers interested in securing H-1B status for employees prior to October 1, 2011, should consider filing their H-1B petitions as soon as possible.

XI. Record Numbers Apply for 2011 Diversity Lottery

The DOS just announced that a record 15 million people around the world entered the 2011 Diversity Lottery program. This program offers an expedited path to permanent residence in the United States. Approximately 100,000 "winners" are randomly selected by an electronic draw each year, but only 50,000 are eligible to secure the green cards that they will need to enter and remain in this country.

The Diversity Lottery program was launched in 1990 to promote more diversity in our immigrant population. The program offers citizens of foreign countries that may be underrepresented due to quotas in our immigration laws the opportunity to secure a green card. Countries that have a large number of their citizens in the United States – such as Mexico, China, India, and the Philippines – are excluded. There is no limit on the number of times that a person can apply, but no country can represent more than 7 percent of the total lottery winners each year. Last year, nationals from Ethiopia, Egypt, and Nigeria received the largest number of immigrant visas under the program.

The Diversity Lottery program remains controversial, and Representative Bob Goodlatte (R-VA) has already introduced legislation in the House of Representatives to abolish the program. Although the number of visas covered by the program is small, critics contend that the visas should go to foreign nationals who better serve the national interest. Given the current political climate, the program is likely to be part of the overall national debate on comprehensive immigration reform.

XII. DOS Issues December 2010 Visa Bulletin

The DOS recently issued its Visa Bulletin for December 2010. This Bulletin determines who can apply for permanent residence and when. The cutoff dates for the Employment-Based Third Preference are as follows: February 22, 2005, for all chargeability, including the Philippines and the Dominican Republic; December 8, 2003, for China; July 1, 2002, for Mexico; and January 22, 2002, for India. The cutoff dates for the Employment-Based Second Preference are as follows: Current for all chargeability, including the Dominican Republic, Mexico, and the Philippines; May 8, 2006, for India; and June 8, 2006 for China. The DOS indicates that cutoff dates for the Employment-Based First Preference are unlikely. The monthly Visa Bulletin is available at: http://travel.state.gov/visa/bulletin/bulletin_1360.html.

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