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Employment Law Outlook

Summer 2018

U.S. Supreme Court Allows Employers to Include Class Action Waivers in Arbitration Agreements

William M. Furr

On May 21, 2018, the United States Supreme Court held that class action waivers in employment arbitration agreements are enforceable under the Federal Arbitration Act (FAA). The Supreme Court resolved a split in the lower courts as to whether the National Labor Relations Act (NLRA) prohibits courts from enforcing mandatory class or collective action waivers in employment arbitration agreements. Although arbitration agreements requiring employees to arbitrate disputes rather than try them in court have been upheld for many years, the National Labor Relations Board (NLRB) ruled in 2013 that employers violate the NLRA if they require employees to arbitrate claims individually rather than joining class actions or collective actions.

The Supreme Court sided with the employers who argued that the FAA allows employers and their employees to agree to arbitrate individual claims and to prevent the collective litigation of such claims. The Supreme Court held that the NLRA's protection of "concerted activity" by employees did not prohibit employers and employees from agreeing to individualized arbitration proceedings.

In an interesting twist, the United States Solicitor General supported the employers' position in this case while the National Labor Relations Board's General Counsel argued the opposite side before the Supreme Court.

Based on the Supreme Court's ruling, employers and employees can now enter into arbitration agreements in which the parties agree that any disputes will be resolved by individualized arbitration proceedings and not in court. ■

ICE Age: The New Era of Increased Worksite Inspections and I-9 Audits

James B. Wood

Since the passage of the Immigration Reform and Control Act of 1986 (IRCA), all U.S. employers have been required to verify the identity and work eligibility of all people they hire, and to document that information using the Employment Eligibility Verification Form I-9. Immigration Customs Enforcement (ICE) is the federal agency under the Department of Homeland Security tasked with enforcing IRCA through various worksite enforcement strategies.

ICE's Homeland Security Investigations (HSI) division approaches worksite enforcement with a three-pronged approach:

1. Compliance, including I-9 inspections, civil fines, and referrals for debarment from federal contracts;

2. Enforcement through the criminal arrest of employers and administrative arrests of unauthorized workers; and

3. Outreach through the IMAGE program or the ICE Mutual Agreement between Government and Employers.

Employers who knowingly hire and employ unauthorized immigrant workers can face criminal penalties and civil fines ranging from between $548 to $21,916 per offense. Additionally, ICE has the authority to levy civil penalties on employers for substantive and uncorrected technical errors on the I-9 Forms ranging from $220 to $2,191 per Form.

While I-9 compliance has always been important, ICE is now working to develop a new "culture of compliance" among

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Ten States Now Have Paid Sick Leave Laws

Cameron A. Bonney

Historically, employers had the choice to offer or not offer paid sick leave to their employees. Since 2011, however, ten states and the District of Columbia, along with several municipalities, have adopted state paid sick leave laws. For employers conducting business in multiple states, it is important to be aware of these developments. Employers that want a one-size-fits-all comprehensive sick leave policy must fully understand and consider the paid sick leave laws of each state in which they operate and must comply with the most generous paid sick leave regulations.

The most recent state to join this paid sick leave trend, New Jersey, enacted the New Jersey Paid Sick Leave Act on May 2, 2018. When this law goes into effect on October 29, 2018, New Jersey will join Connecticut, California, Massachusetts, Oregon, Vermont, Arizona, Washington, Rhode Island, Maryland, and the District of Columbia, that have all enacted paid sick leave laws.

While these state laws have similar structures, it is important for employers to know the law of each state in which they operate. The state laws vary on how quickly the sick leave accrues, what the paid sick leave covers, and which employers and employees are eligible for the paid sick leave. For example, in New Jersey sick leave must accrue at a rate of at least one hour of paid sick leave for every 30 hours worked by the employee. However, employees in New Jersey will be limited to banking 40 hours of paid sick leave per year, regardless of their total hours worked. New Jersey's state law will preempt the law of the numerous New Jersey localities, which had their own sick leave laws.

Violations of these new state paid sick leave laws can be costly for employers. Looking to New Jersey's law as an example, a violation of the paid sick leave law is regarded as a violation of wage payment requirements under the New Jersey State Wage and Hour Law. The law allows employees to bring private civil actions, and, if successful, the employer will be liable for both actual damages and an equal amount in liquidated damages.

As more states enact laws providing paid sick leave for employees, employers will need to stay up-to-date to ensure that their policies comply with the new laws and regulations.■

An Employer's Favorite IRS Letter – Letter 227-K

Cher E. Wynkoop **Corina V. San-Marina**

Employers subject to the Affordable Care Act could receive a Letter 226-J from the IRS. This initial correspondence from the IRS notifies employers that they *may be liable* for an Employer Shared Responsibility Payment (ESRP).

If an employer responds to a Letter 226-J, the reply from the IRS will come in the form of one of the following five 227 letters:

- **Letter 227-J** – this is the letter you will receive if you agreed with the penalty amount proposed by the IRS and submitted Form 14764, ESRP Response. The letter provides information where and when to pay the penalty and consequences if it is not paid on a timely basis. After issuance of this letter, the case will be closed.

- **Letter 227-K** – this is the letter you will receive if the IRS agrees with you that you do not owe a penalty. After issuance of this letter, the case will be closed.

- **Letter 227-L** – this is the letter you will receive if you contested parts of the penalty calculation, provided the IRS with the relevant documentation, and the IRS agreed. In this case, you still owe an ESRP, but it is less than what was noted in the initial Letter 226-J. This letter will contain the revised list of employees and other information on which the penalty is based. The letter provides information on how to pay if you agree with the revised calculation. If you disagree, you can request a conference with an IRS supervisor or go to the IRS Office of Appeals.

- **Letter 227-M** – this is the letter you will receive if you contested parts of the penalty calculation, provided the IRS with the relevant documentation, and the IRS did not agree. If any of the information provided to the IRS based on which the penalty is calculated changed, the letter will contain the revised list of employees and other information on which the penalty is based. The letter provides information on how to pay if you agree with

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ICE Age: The New Era of Increased Worksite Inspections and I-9 Audits

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American employers. ICE's Acting Executive Associate Director for HSI, Derek Benner emphatically stated in May 2018 that "employers need to understand that the integrity of their employment records is just as important to the federal government as the integrity of their tax files and banking records." Director Benner stated that ICE's "worksite enforcement strategy continues to focus on the criminal prosecution of employers who knowingly break the law, and the use of I-9 audits and civil fines to encourage compliance with the law."

As of May 2018, seven months into fiscal year 2018 (FY18), ICE reported that it had already initiated more worksite investigations and I-9 audits than *all of fiscal year* 2017 (FY17).

- **FY18 through May 2018** – ICE has opened 3,510 worksite investigations, initiated 2,282 I-9 audits, and made 1,100 criminal and administrative worksite-related arrests.
- **FY17** – ICE opened 1,716 worksite inspections, initiated 1,360 I-9 audits, and made approximately 300 arrests.

Related to this increase in activity, ICE has initiated more worksite enforcement fines and forfeitures – from $2 million in FY16 to $97.6 million in FY17.

In this new amplified focus on immigration and I-9 compliance, ICE has indicated that it intends to further ramp up its worksite enforcement by conducting up to 15,000 I-9 audits per year through the utilization of a national I-9 inspection center. As the number of I-9 audits increases, it is important for employers to be prepared if selected for an audit. Preparedness is especially critical because once ICE issues an employer a *Notice of Inspection* initiating an I-9 audit, it only gives the employer three business days to provide their I-9 Forms, as well as other business documentation, such as a list of the current employees, payroll records, tax statements, Articles of Incorporation, and business licenses.

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Employers may want to consider the following tips and recommendations to help ensure they remain in compliance with I-9 and immigration requirements.

I-9 Internal Audit
Employers should consider conducting a self-audit or engaging an immigration attorney to conduct an internal audit to review their I-9 Forms. An internal audit will go through all of the employer's I-9 Forms ensuring that an I-9 is on file for all current and relevant past employees. Moreover, through an audit, employers may be able to find various errors which can be corrected, so that if ICE later inspects the employer's I-9 Forms the errors will not be considered substantive. An internal I-9 audit may also help to identify undocumented workers who have provided documents that may appear genuine but have nuanced signs indicating they are in fact not genuine. Ultimately, an internal audit is the most effective and important tip as it may help employers in reducing liability during an ICE audit.

Training
Employers should also consider yearly training for the employees responsible for the I-9 process to ensure that these employees understand the employer's verification system and policies, understand the I-9 requirements (including the requirements for each section of the I-9), know the requirements for documentation that can be accepted for I-9 purposes, and understand the importance of balancing I-9 compliance with non-discriminatory employment practices.

E-Verify
While E-Verify is required for certain employers, such as federal contractors and some employers in certain states (e.g. employers in North Carolina who employ 25 or more full-time employees or employers in Virginia employing an average of 50 or more employees in Virginia who enter into contracts in excess of $50,000 with any Virginia agency), it is not yet required for all employers universally throughout the U.S. Nonetheless, E-Verify is an effective tool available to all employers and can significantly reduce the likelihood of employing undocumented workers. There are various pros and cons to consider before implementing E-Verify, but employers should at least investigate whether E-Verify is appropriate for their organization.

Develop an ICE Audit Plan
Finally, given the increase of I-9 audits nationwide, it would also be wise for employers to consider developing and implementing an ICE Audit Plan, so that if they are served with a Notice of Inspection, their employees know what to do, what to prepare, who to contact within the company and outside with external counsel, and what to expect. With ICE investigations and audits on the rise, it is prudent to plan in advance to be prepared in this new ICE Age.■

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An Employer's Favorite IRS Letter – Letter 227-K

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the penalty amount. If you disagree, you can request a conference with an IRS supervisor or go to the IRS Office of Appeals.

- **Letter 227-N** – this is the letter you will receive if you contested the penalty through the IRS Office of Appeals. This letter states that the Office of Appeals has made its determination. If you disagree with the determination made by the Office of Appeals, you can file a petition with the Tax Court or the Federal District Court. The IRS will send you a separate letter explaining your rights following the decision made by the Office of Appeals.

Unless you receive Letter 227-K (the IRS agrees you do not owe a penalty!), you should be prepared to pay the penalty or appeal the determination. You have to make sure that any correspondence from the IRS is opened immediately and forwarded to the appropriate person. Time is of the essence if you want to exercise your appeal rights or not be charged additional interest on the penalty amount. If you decide to appeal the determination, you should consult with your legal and/or tax advisor.■

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