

PUBLICATION

Tyson Foods Acquitted - Anyone Else?

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Tyson Foods and two high level managers were acquitted on various criminal charges of employing undocumented aliens. That may give the government pause before pursuing another legitimate company, but the case may be unique, and other companies can take some important lessons.

For three years the government investigated Tyson Foods, focusing on its plant in Shelbyville, Tennessee. INS Agents wired for sound posed as "coyotes" and got some "rogue" mid-level managers desperate for more workers to ask for workers from Mexico and to admit other violations of laws relating to hiring workers known to be illegal.

The government eventually took the case to the grand jury. Meanwhile, Tyson had gotten in some trouble a few years earlier about alleged influence over of a USDA official, and in a plea bargain enhanced its "corporate compliance program" and appointed a government-approved compliance officer to enforce the program by gathering and following up on any illegal activity.

Even while the government agents were taping conversations in Shelbyville, the ethics officer had gotten wind of a small incident in that plant and wrote a letter to the government reporting possible problems with hiring illegal workers in Shelbyville. Rather than disclose the undercover operation and root out the wrongdoing mid-level managers, the government kept it secret, hoping to trace the trail of knowledge and action up the corporate chain to the top.

The Justice Department brought the matter to a federal grand jury in Chattanooga, TN, and it brought the compliance officer to testify 7 different times over almost a year before bringing an indictment. At the trial, the officer was called by the government to testify about all of the evidence he had found reflecting undocumented workers in the company. But Tyson's lawyers on cross examination brought out how the officer, with the upper management's support, had voluntarily participated in a "pilot program" to check new hires' information against a Social Security Administration database and had taken other steps to follow up on information received about possible problems. Tyson presented evidence that much of what the government complained of reflected that some workers turned out to be illegal (and then were fired), but not that the company had known that when hiring them. Some managers who had pleaded guilty testified that upper management knew it was happening but didn't want to know the details.

If the jury had wanted to convict the company, the rogue managers' actions would have been enough to support a guilty verdict as a matter of law. But the jury decided that, on the whole, the company had tried to follow the law and that the witnesses who had pleaded guilty were self-interested in assisting the government's case. Thus, the jury acquitted Tyson and the upper level managers.

Shortly after the indictment, the assistant U.S. attorney handling the case told one of our attorneys that this prosecution was the "wave of the future," to use criminal laws to deter the employment of unlawful aliens. Arguably, the Tyson acquittal reflects that, if this case was the tip of an iceberg, the iceberg may be melting a little, because the government will have to think twice before the next indictment after losing a case it pursued for four years ending in a six week trial.

But other government investigations may be afoot, and the prospect continues that merely complying with I-9 rules (checking documents when hiring people) is not enough, especially in an industry with large numbers of unskilled workers performing unpleasant tasks, where undocumented aliens are likely to be. An employer cannot routinely require more or different documents or take other adverse action toward workers who look or sound foreign or were born in another country, but it can and should have a policy to look out for, and follow up on, the kinds of things that tend to show up when unlawful aliens are employed: social security "mismatch" letters; health benefits' administrators reports of multiple claims by different workers (even in different companies using the same administrator) with the same identification information; out of state drivers licenses presented by many workers; and documents of different workers with the same document number. Use of temporary agencies in these industries must be handled with great care. Rumors from other workers that certain workers are illegal are particularly problematic.

Avoiding employment of undocumented workers is one part of an overall compliance program that any sizeable company should adopt and enforce, particularly in the wake of Enron scandal and the enactment of the Sarbanes-Oxley law on corporate compliance.

The Tyson Foods case also is a symptom of the American economy's dependence on undocumented aliens and the unavailability of legal means to bring needed foreign workers efficiently to jobs in the U.S., whether temporarily or permanently. While some people rationally argue that amnesties and legalizations only encourage more immigration, it seems clear that illegal immigration will continue anyway in the absence of programs to legalize some workers already here AND to create reasonable means for further inflows in proportion to the needs of the U.S. economy.

Disclosure: Baker Donelson was hired to represent individually the compliance officer, who turned out to be only a witness and not a target of the investigation. Baker Donelson also represents Tyson in several unrelated matters.

How We Can Help

Baker Donelson's Immigration Team regularly counsels employers on I-9 compliance. We perform private audits of I-9 documents, prepare compliance programs, and train managers and workers in implementing those programs. We evaluate particular questionable documents and situations. We help employers participate in the INS "Basic Pilot" program even when not based in one of the 7 pilot states. We defend sanctions actions by INS for paperwork and "knowingly hire" violations of I-9 rules. We work with our strong Litigation Department to bring and defend claims against competitors based on employment of unauthorized aliens. We advise and defend employers and managers in criminal proceedings relating to employment of aliens. We coordinate our Team's services closely with our firm's well-respected Labor and Employment Law Group and with our firm's White Collar Crime Group. We provide advice and coordinate with tax U.S. and foreign preparers concerning U.S. taxation of international companies doing business in the U.S., and concerning the U.S. taxation of international workers placed here and abroad.