# OUR PRACTICE

## Workplace Rights

**The workplace has become increasingly regulated by legislatures, agencies, and courts. Slowly, those bodies have been addressing how workplace rights differ for aliens than for U.S. workers. Certain rights and claims apply uniquely to persons born outside the U.S.**

**This page discusses employment discrimination relating to aliens, unemployment compensation, workers' compensation, wage and hour laws, labor laws, remedies for undocumented aliens, at will employment, and how we can help on these workplace issues.**

### Employment Discrimination Relating to Aliens

***Title VII.*** While not tied necessarily to one's citizenship status, Title VII of the Civil Rights Act prohibits employment discrimination on the basis of race and national origin, among other grounds, and the possibility of a Title VII claim must be considered by an employer with 15 employees (full time equivalents) considering policies or actions relating to employees who may be aliens. The Immigration & Nationality Act (INA) also prohibits national origin discrimination, applicable to employers with between 4 and 14 employees, enforceable through the Office of Special Counsel discussed below. Many states have fair employment practices legislation similarly prohibiting race, ethnicity, and national origin discrimination, forming an additional avenue for redress on top of federal law. Given the wealth of information available on Title VII (particularly the EEOC's web site), we do not discuss Title VII further here.

***URIEPs.*** The INA also prohibits employment discrimination on the ground of citizenship status. Prohibited conduct even includes requesting "more or different documents from an applicant than are required" by the I-9 process or "refusing to honor documents tendered that on their face reasonably appear to be genuine," if either act is committed with the intent to discriminate on the basis of citizenship status. There are exceptions for compliance with a law or government contract and for preferring an "equally qualified" citizen. Protected individuals are limited to U.S. citizens, nationals, permanent residents, legalized temporary residents, asylees, and certain refugees-thus, nonimmigrants and other aliens are not protected and may be rejected on the basis of citizenship status. The complainant files a charging document with the Office of Special Counsel for Unfair Immigration Related Employment Practices, or conceivably the EEOC (who may pass it on to the OSC). If the OSC does not file a complaint before an administrative law judge (ALJ) within 120 days of receiving the charge, the OSC is to send a "right to sue" notice to the claimant giving the claimant ninety days from that notice to file his own complaint with an ALJ. The ALJ may order the employer to comply with rules, pay penalties or backpay (going back no more than 2 years before filing of the charge), and reinstatement of employment. There is no right to file a lawsuit in court on this basis, except to a federal court of appeals on appeal from a final ALJ order.

### Unemployment Compensation

As a practical matter, unemployment compensation is only available to a U.S. citizen, permanent resident, or alien otherwise still generally authorized to work at the time benefits are sought. This means that a nonimmigrant alien whose employment authorization was based on the employer's filings (such as H-1B, L-1) cannot receive compensation benefits. Nevertheless, H-1B employers are required to continue to pay and H-1B employee who is not performing work due to a nonproductive status (commonly referred to as "benching").

### Workers' Compensation

The few state courts that have published decisions on the issue have tended to find that even unauthorized or undocumented aliens are eligible for workers' compensation relating to injuries on the job. Otherwise, courts reason, employers would be tempted to seek out undocumented aliens and put them into the most dangerous jobs without fear of liability. Although not being covered by the workers' compensation system might open up possibilities for an injured undocumented alien worker to sue for even more money in a tort claim, the possible difficulty in remaining in the U.S. throughout the protracted court proceedings might be less attractive.

### Wage and Hour Law

The Department of Labor enforces wage and hour laws on behalf of even undocumented alien workers. In particular, when ICE raids a workplace and removes alien workers, DOL notifies the employer of the obligation to pay wages to the workers for work performed, even instructing the employer deliver the wages to the place to which they have been removed, which can create quite a difficulty given the realities of finding a removed worker. The DOL Wage and Hour Division also tends to check for I-9, H-1B and other immigration-related compliance by employers when visiting them.

### Labor Law

The Supreme Court has held that even undocumented workers are protected by the National Labor Relations Act. Employers have been accused by unions of manipulating I-9 compliance in order to defeat union organizing campaigns. If the undocumented alien workers tend to be against the union, the employer can tend not to comply rigidly with I-9 rules in order to keep those workers in the work unit; and if they tend to be for the union, the employer can suddenly comply rigidly with I-9 rules and even seek help from the Department of Homeland Security to determine that documents submitted are fraudulent in order to terminate them and remove them (or enlist ICE to remove them from the U.S. in a raid). These concerns have contributed to the AFL-CIO's decision to support legislative policies to provide permanent residence to undocumented workers already in the U.S.

### Remedies for Unauthorized Workers

Although many employment laws have been found to protect even undocumented workers, agencies and courts have disagreed on remedies available to such workers that may be inconsistent with the worker's actual ineligibility for continued employment under I-9 rules. The law in this area is under constant development and there have been several recent federal court cases that have further changed the law. Despite some setbacks in the Supreme Court, the EEOC has re-affirmed its commitment to continuing to enforce anti-discrimination laws against employers who discriminate against undocumented workers using remaining available remedies.

### At-Will Employment

Although there is a dearth of court decisions on the point, some employers are concerned that the filing of immigration based papers might create exceptions to the doctrine of "at will" employment when it otherwise applies. A sensible way to counteract this notion is to include in any written offer or contract of employment language to the effect that "The proposed employment is an at-will relationship terminable by the employer for any reason, notwithstanding any statements of intention made in relation to any government agency, and the offer of employment is made contingent on the employee's acquisition of valid work authorizing status in the United States enabling the employee to present valid documentation sufficient for the employer to complete Form I-9." An alien who wishes to have more than "at-will" employment in the U.S. should make sure to obtain clear written agreement to the expected terms before taking significant steps, and especially before giving up previous employment.

### How We Can Help

The Immigration Group of Baker Donelson advises clients in relation to immigration-related workplace laws on the federal level, and in relation to state law issues involving states in which attorneys in our firm are licensed

to practice law. We represent employers in defending charges of immigration related employment practices. Our Labor & Employment Law Group represents employers in a wide range of workplace issues.

**Important Links**

- Office of Chief Administrative Hearings Officer (OCAHO)
- EEOC
- Office of Special Counsel