

Even when NLRB Orders it, Employers have Little Guidance on Work Authorization Procedures

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Quick, employers: you make a job offer to a promising applicant, only to find out that his work authorization papers are less than perfect. He has a social security card and number but something seems... off. ("Is that a *letter* in the social security number? Is that even possible?") What do you do? Withdraw the offer? Proceed with the hire and pretend you didn't see any problem?

The answer is not a simple one and, in the end, the law leaves employers to use their own reasonable judgment. But what is "reasonable," anyways? Guidance from the government on that question is scant. Add to this the fact that a wrong decision in *either* direction (i.e., denying employment to an authorized worker or granting employment to an unauthorized one) can lead to all sorts of troubles, and you've got a headache at best and, at worst, a potential lawsuit.

The issue has once again come into the news in the form of an NLRB decision involving remedies, called *Mezonos Maven Bakery, Inc.* The background facts of the case, decided last week, are unimportant—what matters is that the employer in the case was found to have violated the law and was facing the consequences. What *also* matters is that a portion of the affected workers had been found to be undocumented. Thus, the question was what sort of concessions the employer could be ordered to give to those workers to make them whole. Under a [2002 Supreme Court decision](#), back pay was off the table. What was available, the Board felt, was a "conditional reinstatement" guarantee—if the undocumented employees are able to provide evidence of their work authorization within a "reasonable period of time" after the Board issues its order, the employer has to rehire in their former positions.

"[C]onditional reinstatement," the Board concluded, "is the only means available to the Board to provide relief to" undocumented workers while also "deter[ri]ng future unfair labor practices." Makes sense. Interestingly, though, the Board did not define what constitutes a "reasonable period" during which the employer is obligated to rehire an employee upon proof of work authorization. (30 days, the Board noted, would *not* be enough time.) Nor did

the Board provide any guidance on how the employer was to assess new work authorization documents presented by the workers.

And there's the rub—even when the Board orders it, employers still must use their own discretion and judgment when evaluating purported work authorization documents. The flip side of this, of course, is that employers are protected from any sort of liability for employing undocumented workers unless they either (a) fail to check for work authorization documents or (b) accept documents that do not even appear *reasonably* real. (In either of those cases, the employer is considered to have “constructive knowledge” of the individual’s lack of work authorization.)

The best that an employer can do, therefore, is ensure that it has appropriate procedures in place for checking new hires’ work authorization. Make sure that I-9s are being completed on time and in the proper fashion. If there is any reason to suspect that an applicant (or a current employee, for that matter) is not authorized, follow up. Do not — I repeat — do not rely upon an individual’s appearance, accent, or other characteristics as proof of work authorization (or a lack thereof).

Maybe, in the end, this new NLRB decision can be viewed as just another reason why employers should be thinking about enrolling in the [E-Verify](#) program, which removes all of the guesswork from this process (at a cost, of course). Years from now, when E-Verify is mandatory on a federal level (you heard it here, folks), we probably will look back on this system of “reasonable” guesses at employees’ work authorization status as quaint. For now, though, employers should treat the I-9 process as seriously as it is. Hinshaw attorneys can help.

With questions on this NLRB case, contact your Hinshaw employment attorney.

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Topics

National Labor Relations Board (NLRB), Undocumented Workers