November 2014 Immigration Alert

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I. Kimberly N. Grant Joins EBG

Epstein Becker Green ("EBG") is pleased to announce that Kimberly N. Grant has joined its nationwide Immigration Law Group ("ILG") as Senior Counsel. Prior to joining EBG, Ms. Grant was an attorney at a corporate immigration law firm, where she focused on providing advice to human resources personnel, in-house counsel, and foreign national employees in a broad range of clients, from small and medium-sized

organizations to Fortune 500 companies, in the area of U.S. immigration law. Ms. Grant has extensive experience serving clients in, among other industries, the consumer products, specialty packaging, hospitality, pharmaceutical and biopharmaceutical, medical device, specialty chemicals, content marketing, aviation, and confectionery industries. She recently was named to the *2014 New Jersey Rising Stars* list in the area of immigration. We are fortunate that Ms. Grant has chosen to join the ILG, and we welcome her to our growing family.

II. DHS Announces Enhancements to ESTA Program

On November 3, 2014, the Department of Homeland Security ("DHS") announced enhanced security measures that foreign nationals ("FNs") seeking to use the Electronic System for Travel Authorization ("ESTA") to come to the United States under the Visa Waiver Program ("VWP") must satisfy. In response to concerns about foreign fighters who are citizens of VWP-eligible countries, DHS has added new questions to ESTA questionnaires to provide another layer of security for the VWP, while continuing to facilitate visa-free travel to the United States.

FNs who already have valid ESTA registrations do not need to update them. Starting November 3, 2014, however, all FNs registering in ESTA for the first time, or renewing previous ESTA registrations, will have to provide additional passport information, contact and employment information, and details of other potential names or aliases. DHS believes that the answers to these questions will improve the country's ability to screen prospective VWP travelers and more accurately and effectively identify those who pose a security risk.

III. USCIS Launches New E-Verify Website

On October 6, 2014, U.S. Citizenship and Immigration Services ("USCIS") launched a new, employee-centered E-Verify ("MyE-Verify") website that allows workers to create personal accounts and protect their personal information from identify theft. While signing up for the system is voluntary, MyE-Verify allows workers to check their employment eligibility status before applying for a job. Currently, MyE-Verify offers the following features:

- the ability for workers to create free and secure personal accounts to manage the use of their personal information in the E-Verify system;
- the ability for an individual to lock his or her Social Security number to prevent its unauthorized or fraudulent use in the E-Verify system; and
- information on employee rights and employer responsibilities during the employment eligibility verification process.

According to the USCIS, MyE-Verify accounts and the Social Security number locking feature are initially only available to residents of Arizona, Colorado, the District of Columbia, Idaho, Mississippi, and Virginia. The USCIS plans to release these features to the rest of the country in phases. Additional features that will be available on the system include:

- reminders of when a worker's employment eligibility documents are expiring;
- a case history that shows past use of a Social Security number in E-Verify and Self Check; and
- a case tracker showing prior E-Verify and Self Check status.

In order to set up a MyE-Verify account, workers first must complete the self-check process. To complete this process, a worker must: (1) enter his or her identity, (2) take an identity assurance quiz, and (3) enter his or her employment eligibility documentation information. After creating a MyE-Verify account, a worker can lock his or her Social Security number for up to one year (repeatedly) and unlock the Social Security number when applying for a job. Unauthorized use of a locked Social Security number in E-Verify will result in a tentative non-confirmation.

IV. OSC Offers Guidance on OPT Inquiries

On August 19, 2014, the Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC") issued a technical assistance letter in response to an inquiry from an organization that acts as a staffing company and that wants to retain information in an international student registry system indicating whether student candidates for employment already have applied for Optical Practical Training ("OPT") and, if so, what were the approval dates. If a student has not yet applied for OPT, the organization wants to inquire about when the student is eligible to apply and/or for which dates OPT is expected to be approved. The organization wanted the OSC to advise whether requesting this information from international students and then providing it voluntarily to employers would conflict with the Immigration and Nationality Act ("INA").

The OSC responded by indicating initially that it was unclear whether the organization acts as recruiter or referrer for a fee. If it so acts, the organization would be subject to the INA's anti-discrimination provision. The OSC explains that when a recruiter or referrer for a fee merely asks whether international students have applied for OPT or asks for approval dates, it is unlikely to violate the anti-discrimination provisions of the INA. However, by collecting and making available this information, it may lead prospective employers to engage in hiring practices that could violate the anti-discrimination provisions of the INA in certain circumstances.

The OSC further explained that, if the registry led a prospective employer to prefer non-immigrant, non-citizens over authorized U.S. workers in hiring, then that hiring employer could violate the anti-discrimination provision of the INA. Similarly, the OSC noted that a prospective employer's preference for hiring certain candidates over other work-authorized candidates based on national origin (including based on linguistic and cultural skills) also could violate the INA's anti-discrimination provision's prohibition against national origin discrimination. Therefore, the OSC concluded that it would discourage this practice and that it does not recommend finding an alternative method for providing prospective employers with student candidates' OPT application and approval dates to be used as a selection criteria in hiring.

It is important to note the context of the OSC's technical assistance letter. It was not solicited by an employer, rather by an organization that acted as a staffing company. Inquiries by employers regarding the immigration status and actual or potential work authorization of prospective employment candidates are not, by themselves, evidence of discrimination. With the exception of "Protected Individuals," employers are free to factor a candidate's immigration status into whether he or she is an appropriate candidate. The speculative concerns raised by the OSC regarding the actions of an employer do not alter these rules.

V. California Expands Definition of "Unfair Immigration-Related Practice"

California continued its trend of immigrant-friendly legislation in the state when it amended two major labor laws in June 2014. California Labor Code § 1019 was amended to expand the definition of "unfair immigration-related practice" to include threatening to file or the filing of a false report or complaint with any state or federal agency. Under this law, any "employee or other person who is the subject of an unfair immigration related practice … may bring a civil action for equitable relief and any applicable damages or penalties."

Under revised California Labor Code § 1024.6, an employer may not discharge an employee, or in any manner discriminate, retaliate, or take any adverse action against an employee, because the employee updates or attempts to update his or her personal information based on a lawful change of name, Social Security number, or federal employment authorization document. Under this revised legislation, an employer's compliance with this section will not serve as the basis for a claim of discrimination, including any disparate treatment claim.

While federal law is the primary source of immigration law, employers need to remember that there are a growing number of state immigration laws that might apply to their operations. Under these amendments, it appears that an employer in California may not take an adverse employment action against an employee who admits that he or she previously provided a fake name, fraudulent Social Security number, or otherwise lied in connection with Form I-9 completion. This may conflict with the honesty policies of many employers, so these amendments threaten to further complicate an already challenging workplace

environment for California businesses.

VI. D.C. Circuit Expands Definition of "Specialized Knowledge" for L-1B Classification

On October 21, 2014, the U.S. Court of Appeals for the District of Columbia Circuit held that the USCIS abused its discretion when it refused to consider whether culturally acquired knowledge of a specialty chef met the "specialized knowledge" requirements necessary to satisfy the L-1B classification. See *Fogo De Chao (Holdings) Inc. v. U.S. Dept. of Homeland Sec.,* No 13-5301 (D.C. Cir. Oct. 21, 2014). In *Fogo*, the USCIS denied an L-1B petition for a specialty chef. Between 1997 and 2006, however, the USCIS and its predecessor agency, the Immigration and Naturalization Service ("INS"), had granted Fogo nearly 200 L-1B petitions for "gaucho" chefs who had learned the churrasco style of cooking and service firsthand in the Rio do Sul region of southern Brazil. These specialty chefs then went on to train American employees on this specialized cooking technique.

Without any change in the statute defining "specialized knowledge" or regulations interpreting that statutory provision, the USCIS suddenly reversed course in 2010 and began denying L-1B petitions for these positions. To the USCIS, the "culinary skills, knowledge of … native regional culture and 'authenticity' gained through [the] life experiences" of these specialty chefs could not, as a matter of law, constitute specialized knowledge. The U.S. District Court for the District of Columbia affirmed this decision.

However, the D.C. Circuit disagreed, noting that "nothing in the regulations or previous [agency] guidance explains why informational knowledge, experience, and skills that would otherwise be considered specialized lose that status just because they were originally acquired through one's upbringing, family traditions, and life experience outside of the workplace." Further, the D.C. Circuit found that the USCIS had failed to follow its own guidance by not considering the economic burden on Fogo if the visas were not granted, including the amount of in-house training required for American chefs. The D.C. Circuit remanded the case back to the USCIS to reconsider these L-1B petitions by formulating a rule that articulated whether and when cultural knowledge could be a relevant component of specialized knowledge. In this regard, the D.C. Circuit placed the burden on the agency to articulate, if deemed appropriate, a line between actual skills and knowledge derived from an employee's traditions and upbringing, and the simple status of being from a particular region.

The D.C. Circuit decision in *Fogo* serves as a welcome respite from the increasingly narrow construction that the USCIS has placed upon the definition of "specialized knowledge" required to satisfy the L-1B classification despite the absence of any legislative or regulatory changes.

VII. ICE Fines United Airlines for Unfair Immigration-Related Employment Practices

On September 30, 2014, the OSC and United Continental Holdings, Inc./United Airlines, Inc. ("United Airlines"), settled claims alleging that United Airlines requested documents that unlawfully re-verified the employment authorization of lawful U.S. permanent residents. While disputing the charges, United Airlines agreed to pay a fine of $270,000, and $55,000 was dedicated for a fund to reimburse employees negatively affected by United Airlines policies. Under the settlement, United Airlines also had to notify these employees and send them a Back Pay Notice Letter providing them with an opportunity to claim lost compensation.

The OSC settlement also required United Airlines to: (1) notify the OSC of any changes to employment practices and allow the OSC to comment, (2) ensure that United Airlines internal reporting software did not contain the expiration dates of permanent residence cards, and (3) provide the OSC for the next two years with a list of all employees with expiring employment authorization that must be re-verified so that the OSC would be able to inspect these I-9 forms.

In considering this settlement, it is important to remember that United Airlines was not fined for hiring undocumented workers; rather, it was fined for committing unfair immigration-related employment practices by verifying the expiration of green card documents that the INA prohibited. The United Airlines

settlement thus serves as another painful reminder of the importance of satisfying Form I-9 requirements without violating the INA's anti-discrimination provisions or committing the unfair immigration practices that this law contains. Employers need to continue addressing these issues as part of their overall risk management policies.

VIII. ICE Issues $2 Million Fine Against Employer in the Hospitality Industry

Immigration and Customs Enforcement ("ICE") recently fined The Grand America Hotels and Resorts ("Grand America") $2 million for hiring undocumented workers, and then terminating and rehiring them through temporary staffing agencies. In 2010, ICE audited Grand America and found that it had employed 130 undocumented employees. After receiving a warning notice from ICE, Grand America terminated all of these employees. A year later, ICE discovered that Grand America had rehired many of these undocumented workers through staffing agencies that it had created. To avoid criminal liability, Grand America agreed to cooperate with the investigation and to pay a $2 million fine. Grand America also agreed to complete extensive remedial measures concerning its employment practices and training of staff in charge of the Form I-9 verification process.

IX. NLRB Sanctioned for Directing Employer to Circumvent Form I-9 Requirements in Back-to-Work Order

On October 31, 2014, the U.S. District Court for Arizona approved an award to Farm Fresh Company Target One, LLC ("Farm Fresh") of $55,739 in counsel fees as the prevailing party in an action initiated by the 28th Regional Office of the National Labor Relations Board ("NLRB"). *Overstreet, NLRB Regional Director v. Farm Fresh Company Target One, LLC*, No. Cv-13-02358-PHX-HVW (D. Arizona October 31, 2014). In *Overstreet*, the NLRB alleged that Farm Fresh engaged in unfair labor practices after its workers decided to unionize by, among other things, firing four union supporters. Farm Fresh countered that the four workers resigned when they learned that the company would be using E-Verify to verify the identity and work authorization of all workers. In response to the NLRB's direction to reinstate the four workers, Farm Fresh indicated that it would do so if they were authorized to work in the United States. The NLRB refused to accept this solution and took the position in the case that Fresh Farm should be directed first to reinstate the four workers, irrespective of their work authorization status.

When District Court Judge Wake agreed with its position, Fresh Farms moved for an award of counsel fees as the prevailing party in the action on this issue. In this regard, Judge Wake characterized the NLRB's position as one that would, if accepted, require Fresh Farms to forgo confirmation of the legal status of its employees in the manner required by federal and Arizona state law. The court found that the NLRB had failed to demonstrate that its position was "substantially justified" or that an award was unjust. Judge Wake thus granted the company's request and awarded $55,739 to Fresh Farms to reimburse it for that portion of its counsel fees directed at this issue.

X. OCAHO Decision Warns Employers Regarding Retaliation Claims

The recent decision by the Office of the Chief Administrative Hearing Officer ("OCAHO") in *John A Breda v. Kindred Braintree Hospital LLC*, 10 OCAHO NO. 1202 (2013), illustrates how an employer's counterclaim against an employee filing a charge, complaint, or lawsuit, often can cause more problems than the alleged violation. In *Breda*, Mr. Breda filed a charge with the OSC alleging that Kindred had terminated him because he was a U.S. citizen and replaced him with an H-1B worker. Mr. Breda also filed an action raising similar claims in Massachusetts state court. In response, Kindred filed a counterclaim alleging that the OSC charge was frivolous and seeking attorney's fees and damages. The state court dismissed Kindred's counterclaim. At that point, Mr. Breda filed a second OSC charge alleging Kindred's counterclaim was made in retaliation for the original OSC charge.

Kindred argued that OCAHO did not have jurisdiction over Mr. Breda's retaliation claim. The administrative law judge ("ALJ") disagreed. Under 8 U.S.C. § 1324(b)(5), it is "an unfair immigration-related employment practice for a person or other entity to … retaliate against any individual for engaging in protected conduct." Because the OSC claim was protected conduct and Kindred filed a retaliatory claim in state court, the ALJ determined that Mr. Breda's claim fulfilled the statutory requirements. In this regard, the ALJ

found that Kindred's conduct had a chilling effect on Mr. Breda as well as "protected charging parties or witnesses who may become aware of Kindred's counterclaim and be deterred" from contacting the OSC. As a result, Kindred was: (1) barred from obtaining any relief under its counterclaim, (2) ordered to post a notice advising employees of their rights, and (3) forced to remove negative information from Mr. Breda's personnel file.

On August 26, 2014, in *John A Breda v. Kindred Braintree Hospital LLC*, 11 OCAHO NO. 1225 (2014) the ALJ awarded Mr. Breda his attorney's fees from Kindred. The ALJ noted that Kindred's argument that its counterclaim against Breda in Massachusetts state court was not retaliatory was to no avail because it simply reflects the hospital's disagreement with the prior decision. The *Breda* decision underscores how important it is for employers to consider all of the potential ramifications of raising claims or counterclaims against any employee who files discrimination claims alleging employer misconduct.

At EBG, our Immigration Law Group, working closely with our Labor and Employment practice, can assist you in safely navigating through these provisions to avoid the type of problems that Kindred encountered.

XI. USCIS Alerts Employers of Change in Ink Color on Certain Documents That May Be Presented During the Form I-9 Process

On July 1, 2014, DHS began using secure *blue* ink on the following stamps and card:

1. DHS Parole Stamp
2. Temporary I-551 Alien Documentary Identification and Telecommunication (ADIT) Stamp
3. Refugee Stamp (Section 207)
4. Asylum Stamp (Section 208)
5. Initial/Replacement Form I-94 Card

Employers must be aware of this change in secure ink color when they examine documents that are presented by employees during the Form I-9 employment eligibility verification process. Employers cannot reject an unexpired acceptable document that is presented by a worker nor can they specify which documents they will accept.

XII. CBP Offers Guidance to Optimize Processing if Traveling on a TN or L-1 Visa from Canada

Beginning in mid-September, U.S. Customs and Border Protection ("CBP") began optimizing the process for first-time Canadian TN and L-1 applicants seeking entry into the United States under the North American Free Trade Agreement ("NAFTA"). In this regard, CBP has designated ports of entry that will ensure a more efficient approach to processing the high volume of TN and L-1 applicants. Please visit www.CBP.gov to find out additional information on these ports of entry.

XIII. DOS Issues November 2014 Visa Bulletin

The U.S. Department of State ("DOS") has issued its Visa Bulletin for November 2014. This bulletin determines who can apply for U.S. permanent residence and when. The cutoff dates for family-based immigration continue to show backlogs and regressions due to the heavy demand for these visas. On the employment-based side, the November Visa Bulletin showed that the employment-based second ("EB-2") preference for China is barely ahead of the employment-based third ("EB-3") preference for that country. The EB-3 Chinese quota is January 1, 2010, while the EB-2 quota has only reached December 8, 2009. In the November Visa Bulletin, the EB-2 quota for India has retrogressed to February 15, 2005. The EB-2 cutoff date for the rest of the world remains current. In the November 2014 Visa Bulletin, the cutoff date for the EB-3 category is as follows: June 1, 2012, for all chargeability, including Mexico and the Philippines. The EB-3 cutoff date for India is November 22, 2003. The DOS's monthly Visa Bulletin is available at http://travel.state.gov/visa/bulletin/bulletin_1360.html.

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About Epstein Becker Green

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