Bloomberg BNA

Daily Labor Report®

NUMBER 25 FEBRUARY 8, 2016

Immigration

Harvester With 'Chaotic' Hiring Season Gets Penalties for I-9 Violations Lowered

A Montana cherry harvester with a ''chaotic'' seasonal hiring process is on the hook for $29,600 for various I-9 violations after a Justice Department administrative law judge Feb. 4 reduced the penalties originally sought by Immigration and Customs Enforcement (*United States v. SKZ Harvesting, Inc.*, DOJ OCAHO, No. 15A00017, 2/4/16 [published 2/8/16]).

In a decision released Feb. 8, Administrative Law Judge Ellen K. Thomas lowered ICE's proposed penalty from $74,587 to $29,600. She also dismissed ICE's charges that SKZ Harvesting Inc. knowingly hired five unauthorized workers.

''This is not a case in which job seekers visited an office to fill out applications, after which the employer had an opportunity to consider those applications at leisure in an orderly fashion,'' Thomas said. Rather, as owner Kari Zavala explained, the hiring process was ''highly chaotic,'' involving the hiring of 50 to 60 people ''in an outdoor setting on one very long day and night.''

In such circumstances, Thomas said, it wouldn't be surprising that some unauthorized workers might ''escape notice or slip through the cracks.''

Fines Often Reduced. The case is one in a line of the DOJ's Office of the Chief Administrative Hearing Officer decisions reducing penalties for violating employment eligibility verification rules. In some cases, such as this one, the employer's arguments against liability limit the amount it has to pay, even if they don't get the employer off the hook entirely.

For example, in *United States v. A&J Kyoto Japanese Rest. Inc.*, DOJ OCAHO, No. 12A00065, 6/13/13, the employer made several unsuccessful arguments against liability, but OCAHO reduced ICE's proposed penalty by nearly $50,000. And in *United States v. Hartmann Studios, Inc.*, DOJ OCAHO, No. 14A00008, 7/8/15, OCAHO rejected an employer's liability argument related to ICE's delay between the audit and issuing the notice of intent to fine, but nevertheless reduced the penalties by almost $200,000.

Since 2013, when SKZ's I-9 forms were audited, ''ICE has noticed the OCAHO trend of reducing the fine in a number of cases and has taken steps to modify its fine calculation methodology,'' Yova Borovska, an attorney with Buchanan Ingersoll & Rooney in Tampa, Fla., told Bloomberg BNA Feb. 8. ''Therefore, the initial fine amounts have been lower in recent years, which in my experience facilitates the negotiation process and discussions, and helps to settle these cases before they proceed to OCAHO,'' she said.

However, a ''major reason'' for the fine reduction here was ''the small size of the employer, its high turnover rate of seasonal employees, and its unsophisticated nature,'' Borovska said in an e-mail to Bloomberg BNA. ''Larger and more sophisticated employers would likely have had a tougher time making the same arguments and likely would have been hit with higher fines.''

Borovska also warned employers that they can, as here, get hit twice by an ICE audit, even if they get away with only a warning the first time.

''This is not an exception, but it happens a lot,'' she said. ''Employers that have been audited in the past must ensure that they are compliant and, in fact, may be hit with a higher fine.''

Inadvertent I-9 Destruction Not a Defense. In the present case, Thomas said SKZ was on the hook for failing to prepare and/or present I-9 forms for 52 of 55 employees, despite a ''variety of arguments and potential defenses.''

The company's chief argument was that Zavala inadvertently destroyed most of the I-9s. ''While the fact that these forms were actually prepared may be taken into account in setting a penalty, it cannot operate to avoid liability for these violations,'' Thomas wrote.

The ALJ also rejected SKZ's argument that it shouldn't be liable for two incomplete I-9 forms because the missing information was contained in photocopies attached to them. ''Whether or not documents are attached to the form, the required information has not been affirmatively attested to under oath,'' Thomas said.

But the ALJ found ICE went overboard in calculating the penalty.

SKZ is a small business, and there was no evidence of bad faith, Thomas found. She also rebuffed ICE's contention that SKZ's failure to respond to the agency's prior warning notice constituted a history of previous violations, stating that ''OCAHO case law has long held otherwise.''

Thomas also mitigated the penalty based on the undisputed fact that SKZ actually prepared the missing I-9s, even if Zavala inadvertently destroyed them.

 ISSN 0418-2693

Finally, Thomas rejected ICE's contention that mismatches between Social Security numbers and workers' names was evidence of unauthorized workers. Because such mismatches occur ''for a variety of reasons,'' they aren't conclusive proof that workers are unauthorized, she said.

An ICE attorney represented the agency. The Border Crossing Law Firm represented SKZ.

BY LAURA D. FRANCIS

To contact the reporter on this story: Laura D. Francis in Washington at lfrancis@bna.com

To contact the editor responsible for this story: Susan J. McGolrick at smcgolrick@bna.com

Text of the opinion is available at http://src.bna.com/cu0.

  DLR ISSN 0418-2693