

Avoiding Immigration-Related Litigation in the Current Labor Market

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According to the U.S. Bureau of Labor Statistics, the number of unfilled job openings increased by over three million in the last year. The construction industry has been particularly hard hit by labor shortages, causing many employers to turn to alternative hiring sources, including recruitment and hiring of foreign nationals. This can be a consistent and reliable source of labor in an otherwise difficult market.

However, employers must be mindful of the significant immigration-related compliance obligations involved in hiring and onboarding, as well as in management of programs recruiting foreign nationals for specific positions. In particular, construction industry employers should ensure all recruitment and hiring programs are legally compliant. Additionally, they must be cautious of citizenship discrimination and overdocumentation violations.

Failure to comply can result in costly audits by the Department of Justice, or complaints of citizenship discrimination. The Department of Justice has been particularly active in investigating immigration-related issues over the last year, including securing significant settlements against several employers who engaged in unintentional, technical violations of federal immigration regulations.

Best practices employers can take to avoid immigration-related litigation in the current labor market include:

1. Working with legal counsel to implement any new programs involving recruitment of foreign nationals (*e.g.*, H-2B or J-1 Visa programs), even if working with an experienced recruiting company. Although these programs can be beneficial for employers, the related regulations are complex. It is crucial to design legally compliant programs from the outset.
2. Training all employees who are involved in the hiring process on I-9 compliance, including what information should be provided to new hires when they are completing Form I-9.
3. Not requesting specific documents from new hires to prove their authorization to work in the United States. The I-9 law requires employers to give employees a choice of which documentation they offer to prove identity and work authorization, and to give employees the published List of Acceptable Documents, which can be found online or on page 3 of the Form I-9 on the government website.
4. Making sure all employees involved in the I-9 process understand that they should not reverify employees' work authorization unless required to do so by law. For example, U.S. Citizens and Legal Permanent Residents have the permanent right to work in the U.S. This right does not expire, unlike the work expiration date of Employment Authorization Cards that grant temporary work authorization which expires and needs to be reverified.
5. Performing annual Form I-9 training and anti-discrimination training that includes information on citizenship discrimination. In a government audit, the training documents are evidence to show that the employer had acted in good faith.
6. Engaging in periodic internal I-9 audits, with oversight from legal counsel, to ensure general compliance company-wide. This is particularly important for companies with several employees involved in completion of Form I-9.

There are significant penalties associated with immigration-related discrimination and failure to comply with federal immigration laws. In addition, employers can be held liable for back wages and other losses incurred by individuals affected in these areas. The time and expense involved in the proactive steps above is relatively minimal in comparison to the potential liability.

Please contact a Jackson Lewis attorney with any questions.

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