

BUSINESS WATCH

A Newsletter for Business Owners, Executives and Managers,
Financial Consultants and Their Advisors

Winter/Spring 2008

The New Employment Eligibility Verification Tools — Revised Form I-9 and E-Verify

By *Dustin J. Kessler*

Inside this issue:

Best Lawyers in America® 2008	5
An Expanded FMLA	7
New Shareholder	9
We've Moved	9
Employers: Take that Garnishment Seriously!	10
New Paralegal	11
Our Services	12
In House	11

Employers must be aware of what the government requires of them each time they hire a new employee with regard to verifying that particular employee's employment eligibility. The consequences for an employer who knowingly employs an individual not authorized to work in the United States can be severe.

EMPLOYMENT ELIGIBILITY VERIFICATION — FORM I-9

The Law

In 1986, Congress reformed U.S. immigration laws in an attempt to curb illegal immigration. Recognizing that the vast majority of illegal immigrants enter the United States in search of employment, Congress pledged to do all it could to stop the hiring of these illegal immigrants. The employer sanctions provisions of the Immigration and Nationality Act (INA) were added by the Immigration Reform and

Control Act of 1986 (IRCA). These provisions further changed with the passage of the Immigration Act of 1990 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).

The main purpose of the employer sanctions law is to remove the incentive to hire unauthorized workers by requiring employers to hire only individuals who may legally work here, which includes citizens of the United States, lawful permanent residents, and aliens with authorization to work. To comply with the law, employers must verify the identity and employment eligibility of each person they hire. To do this, employers are required to complete and retain a Form I-9 for each employee they have hired after November 6, 1986.

The law requires an employer to: 1. Ensure that

employees fill out Section 1 of the Form I-9 when they start working; 2. Review documents provided by each employee establishing that employee's identity and eligibility to work; 3. Complete Section 2 of the Form I-9; 4. Retain the Form I-9 for three years after the date the person begins work or 1 year after the person's employment is terminated, whichever is later; and 5. Upon request, provide Forms I-9 to authorized officers of the U.S. Department of Homeland Security (DHS), the U.S. Department of Labor (DOL), or the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) for inspection.

Changes to the Form I-9

Changes enacted in 1996 by IIRIRA mandated a reduction in the number of documents that employers may accept from newly hired employees during the employment verification process.

(Continued on page 2)



Revised Form I-9 and E-Verify

(Continued from page 1)

In 1997, an interim rule was put in place by the former Immigration and Naturalization Service (INS), incorporating the changes required by IIRIRA. However, the Form I-9 was not amended at that time to reflect the changes made by the interim rule. DHS has now updated the Form I-9 to bring it into compliance with the 1997 interim rule. Employers who do not comply with the current regulatory requirements as indicated on the new Form I-9, may be subject to the employer sanctions provisions of the INA. On November 26, 2007, the United States Citizenship and Immigration Services (USCIS) announced that as of November 7, 2007, the new revised Form I-9 is the only valid version of the Form. However, the DHS will not seek penalties against an employer who used the previous version of the Form I-9 prior to December 26, 2007. Thus, all employers should now be using the Form I-9 bearing the notation “(Rev. 06/05/07) N” in the lower right hand corner of the Form.

The most significant change to the Form I-9 is to the “List A” acceptable documents (documents used for establishing both identity and employment eligibility) identified on the form. Five documents are no longer listed as “List A” documents: (1) the Certificate of United States Citizenship (Form N-560 or N-561); (2) the Certificate of Naturalization (Form N-550 or N-570); (3) the Form I-151, a long out-of-date version of the Alien Registration Re-

ceipt Card (“green card”); (4) the Unexpired Reentry Permit (Form I-327); and (5) the Unexpired Refugee Travel Document (Form I-571). Four types of acceptable “List A” documents are retained on the amended Form I-9: (1) the U.S. Passport (unexpired or expired); (2) an unexpired Permanent Resident Card or Alien Registration Receipt Card (Form I-551); (3) an unexpired foreign passport with a temporary I-551 stamp; and (4) an unexpired Employment Authorization Document that contains a photograph (Form I-766, I-688, I-688A, I-688B).

In addition, the amended Form I-9 modifies one acceptable “List A” document, replacing the “unexpired foreign passport with an attached Form I-94 indicating unexpired employment authorization” with “an unexpired foreign passport with an unexpired Arrival-Departure Record, Form I-94, bearing the same name as the passport and containing an endorsement of the alien’s nonimmigrant status, if that status authorizes the alien to work for the employer.” All of these acceptable “List A” documents were carried over from the previous Form I-9, with the exception of the Form I-766, which is a new version of the Employment Authorization Document that has been added to “List A”. Further, the amended Form I-9 notifies employees that providing their Social Security number is voluntary pursuant to the Privacy Act.

However, if the employer participates in the E-Verify program (discussed below) an employee must provide his or her Social Security number.

When Employers Must Complete the Form I-9

Employers must complete the Form I-9 every time they hire any person to perform labor or services in return for wages or other remuneration. This requirement applies to everyone hired after November 6, 1986. Employers must ensure that the employee fully completes Section 1 of the Form I-9 at the time of the hire (when the employee begins working). Employers must review the employee’s documents and fully complete Section 2 of the Form I-9 within three business days of the hire.

Employers DO NOT need to complete a Form I-9 for persons who are: 1. Hired before November 7, 1986, who are continuing in their employment and have a reasonable expectation of employment at all times; 2. Employed for casual domestic work in a private home on a sporadic, irregular, or intermittent basis; 3. Independent contractors; or 4. Employed by a contractor providing contract services to an employer. However, notwithstanding the foregoing, employers cannot contract for the labor of an alien if they know that the alien is not authorized to work in the United States.

(Continued on page 3)



Revised Form I-9 and E-Verify

(Continued from Page 2)

Reverifying Employment Authorization for Current Employees

Whenever an employee's work authorization expires, an employer must reverify his or her employment eligibility. Employers may use Section 3 of the Form I-9, or, if Section 3 has already been used for a previous reverification, use a new Form I-9. If an employer uses a new Form I-9, it should write the employee's name in Section 1, complete Section 3, and retain the new Form I-9 with the original Form I-9. The employee must present a document that shows either an extension of the employee's initial employment authorization or new work authorization. If the employee cannot provide the employer with proof of current work authorization, an employer cannot continue to employ that person.

Reverifying or Updating Employment Authorization for Rehired Employees

If an employer rehires an employee for whom it had previously completed a Form I-9, it must ensure that he or she is still authorized to work. If an employer rehires an employee who has previously completed a Form I-9, the employer may reverify on the employee's original

Form I-9 (or on a new Form I-9 if Section 3 of the original has already been used) if: 1. The rehire is within three years of the initial date of hire; and 2. The employee's previous grant of work authorization has expired, but he or she is currently eligible to work on a different basis or under a new grant of work authorization than that when the original Form I-9 was completed.

To reverify, an employer must: 1. Record the date of rehire; 2. Record the document title, number and expiration date (if any) of any document(s) presented; 3. Sign and date Section 3; and 4. If reverifying on a new Form I-9, write the employee's name in Section 1.

If the employee has previously completed a Form I-9, an employer may update on the employee's original Form I-9 or on a new Form I-9 if: 1. The rehire is within three years of the initial date of hire; and 2. The employee is still eligible to work on the same basis as when the original Form I-9 was completed.

To update a Form I-9, the employer must: 1. Record the date of rehire; 2. Sign

and date Section 3; and 3. Write the employee's name in Section 1.

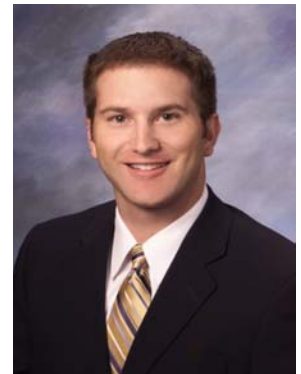
Employers always have the option of completing Sections 1 and 2 of a new Form I-9 instead of completing Section 3 when rehiring employees.

Retaining the Form I-9

Employers must retain completed Forms I-9 for all employees for three years after the date they hire an employee or one year after the date employment is terminated, whichever is later. The Forms I-9 can be retained in paper, microfilm, microfiche or electronically. If an employer chooses to retain the Form I-9 in paper format, an employer may simply reproduce the complete two-sided Form I-9 by making either double-side or single-sided copies. An employer may retain completed Forms I-9 onsite, or at an off-site storage facility, for the required retention period, as long as the employer is able to present the Forms I-9 within three days of an audit request from DHS, OSC, or DOL officers.

To store Forms I-9 electronically, an employer may use any electronic

(Continued on page 4)



Dustin J. Kessler is a member of our Business, Securities and Immigration Departments.

Revised Form I-9 and E-Verify



(Continued from page 3)

recordkeeping, attestation, and retention system that complies with DHS standards, which includes most off-the-shelf computer programs and automated data processing systems. However, the system must not be subject to any agreement that would restrict access to and use of it by an agency of the United States.

The Form I-9 can be electronically generated or retained, provided that: 1. The resulting form is legible; 2. No change is made to the name, content, or sequence of the data elements and instructions; 3. No additional data elements or language are inserted; 4. The employee receives the Form I-9 instructions; and 5. The standards specified under 8 CFR 274a.2(e) (described below) are met.

Employers may store electronically generated Forms I-9 in a storage system that includes: 1. Reasonable controls to ensure the integrity, accuracy and reliability of the electronic storage system; 2. Reasonable controls designed to prevent and detect the unauthorized or accidental creation of, addition to, alteration of, deletion of, or deterioration of an electronically completed or stored Form I-9, including the electronic signature if used; 3. An inspection and quality assurance program evidenced by regular evaluations of the electronic generation or storage system, including periodic checks of electronically stored Forms I-9, including the electronic signature if used; 4. A retrieval system that

includes an indexing system that permits searches by any data element; and 5. The ability to reproduce legible and readable hardcopies.

Retaining Photocopies of Documents Presented by Employees for Employment Eligibility Verification.

An employer is required to thoroughly examine all documentation presented by the employee to verify his or her employment eligibility. An employer is protected from liability if the employee presents a false document as long as the documents provided appear to be genuine, relate to the employee and the employer has no knowledge of the fraud. The law does not require, nor prohibit, an employer from copying and retaining documents presented by employees for I-9 purposes.

This writer is of the opinion that an employer should photocopy the documents presented by an employee to verify his or her employment authorization as evidence that they were, in fact, reviewed. Such photocopies may provide evidence for the “good faith” defense if the documents later prove to be false. However, some lawyers would disagree with this position and assert that retaining a fraudulent document may, if clearly false, support immigration enforcement in pursuing sanctions against the employer.

If an employer chooses to retain photocopies of the documents presented by the employee, it must photocopy the documents of all new hires, not just those it thinks may be

aliens. To do otherwise, may subject the employer to a charge of unfair immigration-related employment practices. If an employer chooses to retain photocopies, they should be kept with the Form I-9 for that particular employee.

Inspection

If inspected, employers will be given three days notice to provide officers with the Forms I-9. The employer must make Forms I-9 available upon request at the location where the Department of Homeland Security, Office of Special Counsel or the Department of Labor requests to see them. If an employer stores Forms I-9 at an off-site location, they must inform the inspecting officer of the location where they are stored, and make arrangements for the inspection. If an employer refuses or delays an inspection, it will be in violation of DHS retention requirements.

If an employer stores Forms I-9 electronically, the employer must: 1. Retrieve and reproduce only the Forms I-9 electronically retained and supporting documentation specifically requested by the inspecting officer, including documentation that shows who has accessed the computer system and the actions performed within or on the computer system during a given period of time. 2. Provide the inspecting officer with appropriate hardware and software, personnel, and documentation necessary to locate, retrieve, read, and

(Continued on page 5)

Revised Form I-9 and E-Verify



(Continued from page 4)

reproduce any electronically stored Forms I-9, including any supporting documents and other data used to maintain the authenticity, integrity, and reliability of the records. 3. Provide the inspecting officer, if requested, any reasonably available or obtainable electronic summary files, such as a spreadsheet, containing all of the information fields on all of the electronically stored Forms I-9.

E-VERIFY

The Web-based Verification Companion to the Form I-9

Since verification of the employment eligibility of new hires became required, the Form I-9 has been the foundation of the verification process. The Illegal Immigration Reform and Immigrant

Responsibility Act (IIRIRA), enacted in September 1996 and mentioned above, authorized the creation of three pilot programs to test the feasibility and desirability of electronically verifying the work-authorization status of newly hired employees. Two of the pilot programs have been terminated and the third, known as the Basic Pilot Program, has been expanded in scope and extended until November 2008. In June of 2004, a Web version of the Basic Pilot was implemented. This electronic employment eligibility verification system is today referred to as E-Verify.

E-Verify is a partnership between the Department of Homeland Security (DHS) and the Social Security Administration (SSA) and provides an automated link to federal databases to help employers determine the employment eligibility of new hires. E-Verify allows participat-

ing employers to electronically compare employee information taken from the Form I-9 against more than 425 million records in the SSA's database and more than 60 million records in the DHS's immigration databases. E-Verify is currently voluntary and free to employers and is available in all 50 states, as well as U.S. territories except for American Samoa and the Commonwealth of the Northern Mariana Islands.

Employers who participate in the E-Verify Program complete the Form I-9 for each newly hired employee and may accept any document or combination of documents acceptable on the Form I-9. However, if the employee chooses to present a "List B" (documents establishing identity only) and "List C" (documents establishing work

(Continued on page 6)

The following firm lawyers were listed in "The Best Lawyers in America® 2008" publication:

Joseph J. Barnettler — Corporate Law

Gregory B. Minter — Immigration Law

Bruce D. Vosburg — Intellectual Property Law

Robert T. Cannella — Labor and Employment

Nick R. Taylor — Trusts and Estates

Susan J. Spahn — Trusts and Estates

Revised Form I-9 and E-Verify



(Continued from page 5)

authorization only) combination, the “List B” document must have a photograph.

After completing the Form I-9 for a new employee, E-Verify employers submit an electronic query that includes information from Sections 1 and 2 of the Form I-9. After submitting the query, the employer will receive an automated response from the E-Verify system regarding the employment eligibility of the individual. In some cases, E-Verify will provide a response indicating a tentative nonconfirmation of the employee’s employment eligibility. This nonconfirmation does not mean that the employee is necessarily unauthorized to work in the United States. Rather, it means that the system is unable to instantaneously confirm that employee’s eligibility to work. In the case of a tentative nonconfirmation, the employer and employee must both take steps specified by E-Verify to resolve the status of the query.

Employers are also required to follow certain procedures when using E-Verify that were designed to protect employees from unfair employment actions. Employers may not verify selectively and must verify all new hires, both U.S. citizens and non-citizens. Employers may not prescreen applicants for employment; check employees hired before the company became a participant in E-Verify; or reverify employees

who have temporary work authorization. Employers may not terminate or take other adverse action against employees based on a tentative nonconfirmation.

USCIS announced in early February that more than 52,000 employers have signed up to participate in E-Verify. In just one year, the number of employer participants has more than tripled, and on average 1,000 employers are signing up for E-Verify every week. USCIS expects participation to increase to more than 100,000 employers this year and 300,000 in 2009. President Bush’s fiscal year 2009 budget requests \$100 million to expand E-Verify. USCIS continues to announce major enhancements to the program and in September announced a new photo screening tool that allows employers to compare photos on employee’s identification and eligibility documents against nearly 15 million images stored in DHS databases.

Employers can register online for E-Verify at <https://www.vis-dhs.com/EmployerRegistration>, which provides instructions for completing the registration process.

CONCLUSION

Employers must be aware of the Employment Eligibility Verification requirements and procedures in order to ensure that they are fully protected should they receive a visit from immigration enforcement officials. E-Verify, along with the Form I-9, protects jobs for authorized U.S. workers, improves the accuracy of wage and tax reporting, and helps U.S. employers maintain a legal workforce. Employ-

ment Eligibility Verification compliance and participation in E-Verify, if an employer chooses to participate, should be a part of any employer’s customary practices, and standard procedures for compliance should be a part of every business’ operating plan. Please contact either Gregory B. Minter or Dustin J. Kessler if you have any questions. ▶

BUSINESS WATCH is published periodically by the Business Department of the law firm of **Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O.**, and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only. You are urged to consult legal counsel concerning your own situation and any specific legal questions you have.

Questions, comments, and address changes can be directed to Larry P. Grill, Office Administrator, 200 Regency One, 10050 Regency Circle, Omaha, Nebraska 68114-3794 (402) 342-1000.

An Expanded FMLA By Carla Heathershaw Risko



The Family and Medical Leave Act (FMLA) has recently been expanded. On January, 28, 2008, President Bush signed the National Defense Authorization Act, which provides new family leave for families of military personnel. The FMLA as originally drafted requires employers with fifty or more employees to provide eligible employees with up to twelve weeks of unpaid leave for the employee's own serious health condition, the serious health condition of a family member, or the birth, adoption or placement of a child. The amendment provides two new areas of leave – leave due to a family member's call to active duty and leave for caregivers of an ill or injured service member. Like traditional FMLA, these new areas of leave are only available to "eligible" employees (those who have worked for the employer for at least twelve months, and have worked a minimum of 1,250 hours in the last twelve-month period), prohibit any discrimination against the employee for requesting and/or taking leave, and require that the employee be returned to the same or an equivalent position upon expiration of the leave.

Leave Related to a Call to Duty

The first new provision allows an employee to take up to twelve weeks of FMLA leave for a "qualifying exigency" when a spouse, child or parent is on active military duty or has been notified of an impending call to duty. This expansion simply provides a new triggering event for leave without affecting the existing terms and conditions of FMLA leave, including the amount of leave available to the employee. The leave can be taken on an intermittent basis. The employee still has only twelve weeks of leave available in every twelve month period, whether it be

used for leave related to a family member's active military duty or for one of the original categories of leave. For example, an employee might take six weeks of leave following the birth of a child, use another two weeks to care for a family member with a serious health condition, and have four weeks that could be used for a qualifying exigency when a family member is called to active duty. But once the employee has expended a total of twelve weeks, he or she has no more FMLA leave available until the next twelve month period begins.

The big question, of course, is what is a "qualifying exigency?" Congress instructed the Department of Labor to issue regulations defining "qualifying exigencies" and the DOL has issued a statement that this new provision will not go into effect until it issues such regulations. It is unknown how quickly the DOL will finalize regulations, but DOL recently issued proposed regulations which solicit comments regarding the implementation of the family leave related to active duty. One of the questions on which DOL is soliciting comments is whether "qualifying exigencies" should be items of an urgent or one-time nature which arise out of the deployment or whether this should include routine occurrences. It is reasonable to assume that "qualifying exigency" will cover leave to spend time bonding with a family member who has been called to active duty, as well as leave necessary for the employee to prepare and execute legal or business documents, such as powers of attorney and wills. It is also possible that the term will include leave necessary to perform routine maintenance on the service member's home or property, or to complete tasks that would have been performed by the service member, but for his or her active duty commitment. Comments on the proposed regulations are due to DOL no later than April 11, 2008, thus, it is safe to say that employers will not be *required* to provide FMLA leave related to a family

member's call to active duty until, at the earliest, late spring. In the interim, however, DOL encourages employers to provide this type of leave to qualifying employees based on the employer's best judgment of what constitutes a "qualifying exigency." If an employer chooses to begin providing such leave immediately, it would be advisable to institute a "temporary" or "interim" policy outlining the circumstances under which leave will be granted, but clearly retaining the right to redefine the policy once the DOL regulations are issued.

Employers who choose to wait until the final regulations are released by DOL will not be in violation of the FMLA for denying leave related to a call to active duty. However, these employers must not forget that employees in Nebraska already have the right to take a leave of absence when their child or spouse is serving military duty lasting 179 days or longer. The Nebraska Family Military Leave Act uses the same criteria as the FMLA for determining employee eligibility (that is, at least twelve months of employment and 1,250 hours within the immediately preceding twelve month period), but applies to any employer with at least 15 employees (versus the FMLA's requirement that the employer have a minimum of 50 employees within a 75 mile radius). Employers with between 15 and 50 employees must permit up to fifteen days of leave, and employers with fifty-one or more employees must permit up to thirty days of leave. The employer cannot discriminate

(Continued on page 8)

An Expanded FMLA



(Continued from page 7)

against the employee for taking leave, and must restore the employee to his or her position at the end of the leave period.

Leave to Care for a Service Member

The FMLA has also been expanded to provide leave when necessary to care for an ill or injured service member. Unlike the provision for “qualifying exigencies” leave which does not go into effect until the DOL issues regulations, the caregiver provision became effective upon signing. While this provision may sound similar to the traditional FMLA leave available to attend to a family member with a serious health condition, there are significant differences in the new provision. First, the provision provides leave not only for caregivers who are the spouse, parent or son or daughter of the ill or injured service member, but also for a caregiver who is the “next of kin” to the service member. “Next of kin” is defined as the nearest blood relative of the service member, so could include siblings, aunts/uncles, grandparents and cousins.

Second, the leave is available to care for a service member, including a member of the National Guard or Reserves, who is “undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness.” Traditional FMLA leave for a “serious health condition” requires the patient be receiving in-patient care or at least “continuing treatment by a health care provider.” The new provision for leave to care for an ill or injured service member, however, does not necessarily require that the patient be receiving on-going treatment. Instead, the caregiver of a service mem-

ber who is recuperating from a serious illness or injury or is on the military’s temporary disability retired list, will now be entitled to take FMLA leave even though the service member has been released from a doctor’s care.

Third, an employee may take up to twenty-six weeks of leave to care for an ill or injured service member. The twenty-six weeks, however, is the maximum amount of Family and Medical leave to which an employee is entitled under the law, so an employee who had already taken FMLA leave within the current twelve month period is not entitled to an additional twenty-six to care for an ill or injured service member. For example, an employee who had already used ten weeks of leave for the birth of a child, would only be entitled to take sixteen weeks to care for an injured service member. Alternatively, an employee who uses twenty-six weeks of leave to care for a service member, could not take any additional time during that twelve month period for his or her own serious health condition. Additionally, if a husband and wife work for the same employer, the two of them are entitled to a combined total of twenty-six weeks, not twenty-six weeks a piece.

Finally, the Act specifically provides that the leave to care for an ill or injured service member “shall only be available during a single twelve month period.” Thus, until and unless the DOL clarifies otherwise, it appears that leave to care for an ill or injured service member is intended to be a one-time opportunity. Moreover, this limitation would apply regardless of whether the employee exhausted the entire twenty-six weeks during the twelve month period. This limitation does not apply to the original categories of FMLA

leave or to the expanded leave related to a family member’s active military duty. The leave entitlement under those categories continues to start afresh with every new twelve month period. Thus, it is possible that a spouse, parent or child (but not a “next of kin”) could take twenty-six weeks of leave in the first twelve month period to care for an ill or injured service member, then take up to twelve weeks of leave during subsequent twelve month periods, so long as the injured service member’s condition constitutes a “serious health condition” as required for traditional FMLA leave.



Carla Heathershaw Risko practices in all areas of employment and human resource law.

More Changes to Come

In addition to the two new categories of leave, more changes to FMLA are expected soon. After receiving over 15,000 comments in response to a Request for Information (RFI) regarding the FMLA, the DOL published a report on the findings of its RFI in June 2007. In February, the DOL issued a Notice of Proposed Rulemaking (NPRM) for FMLA which includes proposals regarding the leave for military family mem-

(Continued on page 9)

An Expanded FMLA



(Continued from page 8)

bers as well as traditional FMLA, and is open to public comment until April 11, 2008. DOL has indicated that at the conclusion of the comment period, it will issue final regulations. If you would like to review the NPRM or make comments regarding the proposed changes, you may do so by visiting www.dol.gov/esa/whd/fmlanprm.htm. The attorneys at Fitzgerald, Schorr, Barmettler and Brennan will be pleased to assist employers having questions regarding the implementation of FMLA, including the new provisions for family military leave. ►

NEW SHAREHOLDER



We are happy to announce that Camille R. Hawk has been appointed a shareholder in our firm.

Ms. Hawk has a bachelor's degree in sociology and a juris doctor from Creighton University. She has taught seminars and authored articles on real estate law, foreclosure law, collection law and creditor rights. Ms. Hawk practices in the areas of real estate law, mortgages and lending law, banking law and creditor rights.



WE'VE MOVED

Effective January 7, 2008, we are now

Located at

200 Regency One

10050 Regency Circle

Omaha, Nebraska 68114-3794

Phone and fax numbers remain the same.



Employers: Take that Garnishment Seriously!

By Robert T. Cannella

In a March, 2008 decision, the Nebraska Supreme Court upheld a \$19,137 judgment against a Hall County real estate firm that failed to adequately answer a garnishment. The lesson for Nebraska employers and others served with garnishments is to take garnishments seriously and, when answering them, disclose all relevant information in some manner.

Nature of garnishment: Garnishment is a legal procedure by which an individual or organization holding a money judgment against a second individual or organization can require a debtor of the second individual or organization to make payments on the judgment. For example, if Adam holds a money judgment against Bill, Adam can use garnishment procedure to require Bill's employer to pay part of Bill's wages to Adam to help satisfy Adam's judgment against Bill. Adam does that by having a garnishment served on Bill's employer. By answering that garnishment, Bill's employer provides Adam and the court information about the wages owed to Bill. The garnishment also instructs Bill's employer whether he is legally required to withhold any of Bill's wages from Bill to satisfy the garnishment. If Bill's employer fails to answer the garnishment, Bill's employer is presumed to be indebted to Bill for the full amount of the judgment held by the judgment creditor.

The parties and the underlying debt: In the recent Nebraska Supreme Court case, the creditor recovered a \$30,000-plus judgment against the debtor (the "underlying judgment"). The debtor happened to be working as a real estate agent with a real estate firm ("Realty

Linc"). On September 8, 2006, the creditor – hoping to collect something on her judgment – had the court issue a garnishment to Realty Linc. The president of Realty Linc answered the garnishment interrogatories.

The garnishment answers: The garnishment interrogatories asked whether the debtor agent was currently employed by Realty Linc. (Answer given: "Yes".) The garnishment next asked whether Realty Linc owed the agent any money for wages at the time Realty Linc was served with the garnishment or if Realty Linc would owe the agent any earnings within the next 60 days. (Answer: "No.") The garnishment then asked how often the agent was paid. (Answer: "Commission.") The garnishment asked for the agent's earnings per pay period. (Answer: "Commission.") The garnishment asked for the amount legally required to be withheld from the agent's earnings for taxes, the agent's resulting disposable earnings for the pay period, and the portion of those earnings subject to garnishment under the instructions that accompanied the garnishment. (Answer given to each of those questions: "N/A.") The garnishment also asked Realty Linc if it had any property, credits, or monies owing to the agent, other than any earnings described previously. (Answer: "No.") The garnishment instructed Realty Linc to hold any wages due to the agent to the extent of the amount due to the creditor, but to pay to the agent the disposable earnings not subject to garnishment.

The court proceedings and the evidence: The creditor, claiming the garnishment answers were wholly inadequate, filed an application with the court to determine the liability of

Realty Linc and asked for a judgment against Realty Linc for the full \$30,000-plus amount of the underlying judgment owed by the agent to the creditor.

A hearing was held on September 29 – twenty-one days after the creditor had the court issue the garnishment. At the hearing, Realty Linc's president stated that the agent was an "associate broker" and, as such, Realty Linc considered the agent to be an independent contractor rather than an employee. When asked why Realty Linc's garnishment answer had stated the agent was currently employed by the firm, Realty Linc's president stated, "[I]t depends on how you define, 'Employ,'" and that due to space limitations on the form, there "was no opportunity to answer any other way." Realty Linc's president also stated that at the time he answered the garnishment, he was not aware the agent was due to receive any commissions during the next sixty days. He knew the agent had real estate closings scheduled within the next sixty days, and he had no specific reason to believe any of the scheduled closings would not take place as scheduled, but he said he did not know whether Realty Linc would owe the agent any commissions within that sixty days period. He said that on average the agent received commission at least monthly, and that he had answered the garnishment to the best of his ability given the way the questions were drafted.

A managing broker from another real estate firm testified that the debtor agent was involved in eight real estate closings during the three-week period preceding the hearing and that for those eight properties sold, commissions of approximately \$19,000 would have been due to Realty Linc.

(Continued on page 11)

Employers: Take that Garnishment Seriously!



(Continued from page 10)

The trial court found that the agent had generated commissions totaling \$19,137 during the 21 days after the garnishment had been answered, and that Realty Linc's president "knew or should have known" the agent had commissions to be paid during the 60 days following answering of the garnishment. No evidence had been offered as to how the approximately \$19,000 of commissions generated by the agent were to be divided between the agent and Realty Linc. The trial court entered judgment in favor of the creditor and against Realty Linc for the full commission amount generated by the eight property closings— \$19,137.00, plus court costs.

The Nebraska Supreme Court upheld the judgment against Realty Linc and in favor of the creditor. The Supreme Court wrote:

"As a general rule, a garnishee owes a duty to act in good faith and answer fully and

truthfully all proper interrogatories presented to him. * * *. The garnishee is expected to, in some appropriate manner, properly disclose all relevant facts within his knowledge at the time of submitting an answer concerning his indebtedness to the judgment debtor or concerning money or property of the judgment debtor then in his possession."

The Supreme Court noted that Realty Linc's failure to properly answer the garnishment "may have potentially subjected Realty Linc to a judgment for the full" \$30,000-plus amount of the underlying judgment, but that "Realty Linc's appearance at the hearing to determine liability defeated this claim." Since no evidence had been offered as to how the approximately \$19,000 of commissions generated by the agent were to be divided between the agent and Realty Linc, the Supreme Court upheld the judgment against Realty Linc for the

full \$19,137 plus court costs.

Conclusion: Most employers perceive a garnishment of employee earnings as a nuisance and diversion of productivity, and as drawing the employer against its will into an employee's personal affairs. Garnishments are all of that. Nevertheless, failure to respond properly to a garnishment can subject an employer to unexpected liability. To paraphrase the Nebraska Supreme Court, "[An employer who receives a garnishment] is expected to, in some appropriate manner, properly disclose all relevant facts within his knowledge at the time of submitting an answer concerning his indebtedness to the judgment debtor [employee] or concerning money or property of the judgment debtor [employee] then in his possession." Failure to do so can convert an employee's debt into a debt of the employer. ►



Robert T. Cannella is the head of our Labor and Employment Law Group.

New Paralegal

Angie Baudler has joined our firm as a paralegal in the Immigration Department. Ms. Baudler obtained an Associate Degree in Legal Assisting from Nebraska College of Business in 1993 and was awarded the Certified Legal Assistant designation by the National Association of Legal Assistants in 1995. She has over 14 years of law office experience, primarily in the area of employment based immigration. Ms. Baudler is a member of the National Association of Legal Assistants and the Nebraska Association of Legal Assistants.



PREPARED BY THE
BUSINESS
DEPARTMENT OF
FITZGERALD, SCHORR,
BARMETTLER &
BRENNAN, P.C., L.L.O.

200 Regency One
10050 Regency Circle
Omaha, Nebraska 68114

Phone: 402-342-1000
Fax: 402-342-1025
Email: fitzlaw@fitzlaw.com

We're on the Web!

www.fitzlaw.com

Our Services

Business

- *Business Counseling
- *Corporations, LLCs & Partnerships
- *Entity Taxation
- *Business Succession Planning
- *Dispute Resolution & Litigation
- *Financing & Lending
- *Business Contracts

Immigration Law

- *Business/Employment
- *Employer Sanctions
- *Family & Medical
- *Consular Practice

Securities

- *Private Placements
- *IPOs & Registered Offerings
- *Federal & State Securities Issues
& Litigation
- *Industrial Development & Other Bonds

Public Bodies

- *Municipalities
- *Local Government Transactions
- *Post Secondary Educational Institutions
- *Governmental Financing

Employee Benefits

- *Defined Contribution & Defined Benefit
Plan Documents
- *Consulting on Operation & Correction
of Retirement Plans
- *Retirement Benefits for Executives &
Tax-Exempt, Religious &
Governmental Employees

Intellectual Property

- *Trademark & Copyright Registration
- *Computer Software Protection & Licensing
- *Contracts & Licenses
- *Trademark, Patent, Copyright & Computer
Litigation

Employment Law

- *Employee Policies
- *Hiring – Firing
- *Discrimination Prevention/Complaints
- *Employment Contracts
- *Labor Disputes

Real Estate

- *Conveyances
- *Development
- *Leasing
- *Like-Kind Exchanges

IN HOUSE

Nick R. Taylor has just been appointed as the Nebraska State Chair for the American College of Trust and Estate Counsel. ACTEC is an invitation-only association of estate planning attorneys. Nick also serves on two of its national committees: Retirement Benefits in Estate Planning and Charitable Giving and Exempt Organizations.

Bruce D. Vosburg and Gerald L. Friedrichsen have been selected to be included in the *Corporate Counsel Section, Super Lawyers 2008* and along with **Nick R. Taylor** were selected for inclusion in *Great Plains Super Lawyers 2007-2008*.

Nick R. Taylor recently presented “Using Life Insurance for Business, Estate Tax, and Personal Planning Solutions” to a Nebraska life insurance agent training event and is speaking to the Chartered Financial Advisor Society of Nebraska in March on uses of trust.

Thomas R. Ostdiek will be a moderator at a seminar in late March entitled “Commercial and Real Estate Loan Documents in Nebraska: More than Just Papers.”

