

**Wimberly Lawson**  
 Wright Daves & Jones, PLLC

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**Briefly**  
 March 2011 Volume 11, Issue 3

**IMMIGRATION UPDATE ON ENFORCEMENT POLICIES  
 AND EMPLOYER I-9 AUDITS**



**Jerry Pinn** .....

*"In the year that ended September 30, 2010, ICE conducted audits of more than 2,740 companies, nearly twice as many as the prior year, and levied a record \$7 million in fines."*

The Obama Administration continues to shift its enforcement policies towards I-9 audits, while the new Republican leadership in the House of Representatives conducts hearings on improving the enforcement approaches. The Administration has established an audit office designed to improve verification of company hiring records. The center is to be staffed with specialists who will study the I-9 employee files collected from companies targeted for audits. In the year that ended September 30, 2010, ICE conducted audits of more than 2,740 companies, nearly twice as many as the prior year, and levied a record \$7 million in fines. In contrast, the Bush Administration had focused on high-profile raids in which thousands of illegal immigrants were arrested and placed in deportation proceedings. Some have called the Obama Administration's focus on employers "silent raids." The audits could not only result in large fines, but can result in the firing of illegal immigrants discovered on the company's payroll.

The new Republican leadership in the House has started Congressional hearings on worksite enforcement to determine whether the current Administration's enforcement policy is succeeding. Both political parties appear to be gearing their efforts toward stronger immigration enforcement. There appear to be many inconsistencies in the way in which ICE has been implementing their audits, including the lack of uniformity and in how ICE targets employers, lack of uniformity in what compliance measures are necessary, and the targeting of employers whose violations seem to be mere technical errors.

**DISCUSSION WITH ICE ABOUT I-9 CORRECTIONS**

From time to time, ICE officials meet with various private sector "stakeholders" including members of the American Immigration Lawyers Association (AILA). The most recent meeting was held on November 22, 2010, and the AILA members prepared certain minutes of the discussion. As usual, ICE issued a disclaimer that AILA's interpretations of the meeting do not necessarily represent ICE's official position or policy.

In the course of the meeting, AILA asked ICE if it could provide guidance concerning I-9 corrections. ICE indicated that the most important issue is whether or not the employer's actions are reasonable. To assess whether an employer acted reasonably, any corrections need to make clear both what happened and when. The contemporaneous notes and information on the I-9 form need to show that the employer has acted reasonably. If an employer makes a correction during an internal audit, then that should be indicated on the corrected I-9.

AILA pointed out that OCAHO decisions were clear that an employer can correct technical violations in I-9's right up to the time of presentation. Some ICE auditors instruct employers that corrections made post-NOI (Notice of Inspection) do not count, but this is contrary to the case law. The judge in *United States v. Naim Ojeil*, 7 OCAHO 984 (1/12/98), was quite clear, saying "I hold that a paperwork violation ceases to be continuing from the time it is corrected," and further clarifying that "... a paperwork mistake, once cured, is no longer a violation ... an employer who is in compliance on the day of inspection is no longer in violation. The government's interest in encouraging employers to correct mistakes is considerable, and is undermined by punishing employers who correct paperwork mistakes at or before inspection." ICE responded that it views the good faith of an employer differently when corrections are made post-NOI – ICE is tougher on those. ICE would look favorably upon pre-NOI corrections in some situations where the same correction might lead to a fine if the correction is made post-NOI. The only violations that the employer will be offered an opportunity to correct by ICE post-NOI are technical ones. Moreover, ICE asserted that a substantive violation concerning timeliness cannot be corrected, no matter when the correction occurs. ICE declined to comment on AILA's further questions that it seems to be saying that if an I-9 is

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## DOES THE RETALIATION CONCEPT UNDER TITLE VII EXTEND TO ONE'S RELATIVE OR SIGNIFICANT OTHER?



**Terri Bernal** .....

"The Court determined that a 'person adversely affected or aggrieved' could include one that 'falls within the zone of interests' sought to be protected by the statute."

In a recent U.S. Supreme Court ruling, the Court addressed whether an employer retaliated against an employee because his fiancé had filed a discrimination charge. *Thompson v. North American Stainless*, 131 S. Ct. 863 (U.S. 2011). The Court determined that a "person adversely affected or aggrieved" could include one that "falls within the zone of interests" sought to be protected by the statute. The Court concluded therefore that the terminated employee fell within such a zone of interests protected by Title VII and had standing to sue.

However, the Court was concerned about the difficult line-drawing problems that may occur concerning the types of relationships entitled to protection. While retaliating against an employee by firing his fiancé would dissuade an employee from engaging in protected activity, the Court was troubled about the firing of an employee's girlfriend, close friend, or trusted co-worker. Such situations could arguably place an employer at risk any time it fires an employee who happens to have a connection to a different employee who filed a charge with the EEOC.

While the Court found the above argument troubling, it did not think it justified a categorical rule that third-party reprisals do not violate Title VII. The Court declined to identify a fixed class of relationships for which third-party reprisals are unlawful. While noting that firing a close family member will almost always meet the standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, the Court was reluctant to further generalize. The Court said that the standard for judging harm must be objective.

## OSHA WITHDRAWS PROPOSED RULE ON REPETITIVE-MOTION DISORDERS



**Mary Moffat Helms** .....

"The proposed rule would add a separate column for musculoskeletal disorders to the OSHA Form 300..."

On January 25, 2011 OSHA announced that it has temporarily withdrawn a record-keeping proposal on musculoskeletal disorders pending further review, citing a need for "greater input from small businesses." The proposed rule would add a separate column for musculoskeletal disorders to the OSHA Form 300, which employers use to record injuries and illnesses. Small business argued that the question of what constitutes a musculoskeletal disorder is one of great medical uncertainty, and that the rule's costs are much higher than OSHA had estimated. However, OSHA stated that its withdrawal was only temporary. According to the news release, OSHA will hold a joint meeting in the future with the Small Business Administration to "engage and listen to" small businesses regarding the proposal.

The announcement is the second time within a week that an OSHA initiative that had drawn broad opposition from industry groups has been withdrawn or postponed. On January 18, the agency announced the withdrawal of its proposed reinterpretation of the occupational noise exposure standard in response to concerns about costs of the measure. Each of these moves follows an order by President Obama on January 18, 2011 that regulatory agencies review rules with an eye toward halting those that are unnecessary or put "unreasonable burdens on business." The noise standard reinterpretation would have forced some employers who already provide employees with ear protection, to retrofit equipment to make it quieter or otherwise remove employees from noise.

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## MORE EMPLOYERS CHANGING FIXED TERMINATION DATES FOR LEAVES OF ABSENCE



**Kelly Campbell** ....

**"The EEOC said the inflexible policy ignored the 'individualized analysis' in the accommodation requirements of the ADA."**

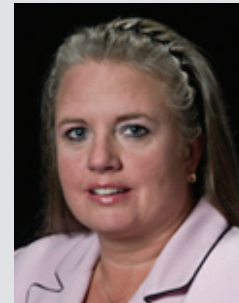
Supervalu has just announced that it will pay \$3.2 million to 110 former employees to settle a lawsuit brought in Chicago by the EEOC, which alleged that the grocery chain's stores operated an overly rigid and illegal disability leave policy. The EEOC claimed that Supervalu had a policy and practice of terminating the employment of employees with disabilities at the end of medical leaves of absence rather than bringing them back to work with reasonable accommodations. The EEOC said the inflexible policy ignored the "individualized analysis" in the accommodation requirements of the ADA. It also claimed that the employer violated the ADA by prohibiting employees with disabilities from participating in the company's light duty program if they were not injured on the job. A similar \$6.2 million settlement occurred a year ago in Chicago, involving the retailer Sears Roebuck.

Under the recent Consent Agreement, Supervalu will revise its leave policies to communicate with those on leave about their return-to-work options, conveying that employees with disabilities need not be released with no restrictions in order to return to work, and that accommodations are available to ensure a smooth return to work.

In a November conference sponsored by the Chicago Bar Association, EEOC officials indicated that "one size fits all" disability leave policies, which provide for a maximum leave period resulting in the automatic termination of employment of an employee who does not return to work within the allotted time frame, are almost always going to lead to instances where employees are denied the required individual analysis and reasonable accommodations. The EEOC wants more flexibility built into such policies, particularly where an employee exhausting the maximum leave will be able to return to work within a short period of time or with certain restrictions. The EEOC feels that many employers confuse their obligations under the FMLA and the ADA, as the FMLA allows a maximum 12-week policy, but the ADA's concept of "reasonable accommodation" may require more flexibility.

## KNOW YOUR ATTORNEY MARGARET L. NOLAND

MARGARET L. NOLAND is a Senior Associate in the Cookeville, Tennessee office of Wimberly Lawson Wright Daves & Jones, PLLC, joining in September 2008. She is a practicing attorney since 1988, having focused primarily on workers' compensation and personal injury. She obtained a Bachelor of Arts degree in chemistry with honors from the University of Tennessee at Knoxville in March 1983. In 1988, she received a Doctor of Jurisprudence degree from the University



of Tennessee College of Law in Knoxville. She currently serves as the City Attorney for Baxter, Tennessee. She is a member of Tolletts Chapel United Methodist Church in Crossville, Tennessee, where she is treasurer and worship leader. She is also Chairman of the Trustees of the Cookeville District of the United Methodist Church. She is active in community affairs, including the Bread of Life Rescue Mission in Crossville, Tennessee, where she has volunteered since its inception in 2001.

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**“IMMIGRATION  
UPDATE”  
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missing or not signed, an employer would not be given any credit if it has the I-9 signed before it is surrendered; or that a missing I-9 generally would not be credited if it is completed. AILA noted that practitioners typically advise employers that they should try to come into compliance before presenting their I-9s to ICE, and, if necessary, make all necessary corrections they can before surrendering the I-9s.

ICE was asked whether corrections to section 1 of the I-9 form can be made by someone other than the employee. ICE does not feel comfortable with section 1 corrections being made by anyone other than by the employee. ICE states that an unauthorized correction could lead to perjury charges. But ICE adds that if an employee provided authorization for the correction, such authorization could be documented and attached to the I-9 form, then this could be okay when ICE evaluated the totality of the circumstances.

ICE viewed the use of the wrong version of the I-9 form as, per se, a technical violation, so it must be corrected. In determining the standard for substantive violations, AILA believes that the standard for such violation should be that if an I-9 error could have led to the hiring of an unauthorized worker, then and only then should the error be a fineable substantive violation. When asked if ICE agrees, ICE indicates it has been drafting revised regulations and is evaluating this issue. ICE's current benchmark is the Virtue memo and the 1998 proposed regulations. AILA members complained that some ICE offices are charging I-9 violations as substantive when AILA believes they should be considered technical violations with an opportunity to correct the deficiencies. AILA also noted that some offices consider certain I-9 errors as technical when the error is so minor and inconsequential that it is a waste of auditor time to bring it to the employer's attention and is burdensome and time consuming for the employer to have to correct the I-9. Examples include: workers signing above the signature line instead of in the signature box; failing to check the attestation box for permanent resident but the A number is recorded in section 1 and section 2; noting initials for the issuing agency instead of spelling it out; company initials are recorded instead of spelling out the full name of the company.

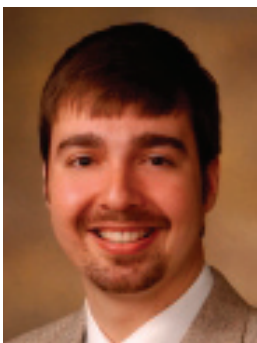
AILA members complained that there is very little guidance for employers who seek to correct errors that they have discovered in their I-9 files, and that the “guidance” that is provided varies significantly among the district offices of ICE. AILA point to the preamble in proposed regulations issued in 1998 as providing the following guidance: “How can Employers Correct Technical or Procedural Verification Failures . . . To be deemed to have properly corrected a technical or procedural failure identified in section 1 of the form I-9, the employer must ensure that the individual, preparer, and/or translator corrects the failure on the Form I-9, initials the correction, and dates the correction. To be deemed to have properly corrected a technical or procedural failure identified in sections 2 or 3 of the form I-9, the employer must correct the failure on the form I-9, and then initial and date the correction.”

Regarding guidance where errors are difficult or impossible to correct, the Preamble states: “The Service recognizes that the correction of technical or procedural failures is sometimes impossible, whether due to the nature of the failure, such as a timeliness failure or the inability of the employer to access the necessary information such as when the information has been independently destroyed or is inaccessible due to termination of the individual's employment. This rule proposes that, where the employer's explanation of an inability to correct a technical or procedural failure is reasonable, the employer will be deemed to have complied with the requirement, notwithstanding the inability to correct the failure.”

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## **WHETHER THE SAME RACIAL SLUR STANDARD APPLIES TO ALL RACES**

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**Jesse Nelson** .....

**“The unusual question addressed by the court was whether an employer can be held liable under Title VII for condoning the social norm...”**

An interesting issue of racial slurs arose in a recent case in which a white television news anchor was discharged for saying the n-word during a newsroom editorial meeting. *Burlington News Corp.*, 111 FEP Cases 226 (E.D. Pa. 12/28/10). Some meeting attendees apparently were offended by the use of the word, but no one believed it was used as a racial slur. Nevertheless, the television station investigated the matter and terminated the news anchor.

Apparently while investigating the matter, the employer found that both the plaintiff and an African-American co-worker had used the word, but the plaintiff was immediately suspended while the African-American employee was not punished. The unusual question addressed by the court was whether an employer can be held liable under Title VII for condoning the social norm ... that it is acceptable for African-Americans, but not whites, to say the n-word. As the law prohibits treating employees of one race differently from another, the question is whether there is justification for treating one racial group who says the word differently from another. The court concluded that acting within the social norm does not justify departure from Title VII's demand that employers refrain from discrimination based on race, and it denied the television station's Motion for Summary Judgment, concluding the issue is one for the jury.