



## Bulletproof Your Immigration Policy For The New Year

### *Hospitality Industry Key Target In 2010*

By Sarah Hawk (Atlanta)

2009 brought a bold new audit initiative from the Department of Homeland Security (DHS) that will continue into 2010, with widespread investigations into companies' hiring records and I-9 policies.

In early July, Immigration and Customs Enforcement (ICE) issued 652 Notices of Inspection to businesses nationwide, including a number of businesses in the hospitality industry. DHS Assistant Secretary for ICE, John Morton stated that "ICE is committed to establishing a meaningful I-9 inspection program to promote compliance with the law." Morton referred to the auditing of 652 businesses I-9 forms as "only the first step in ICE's long-term strategy to address and deter illegal employment."

In 2008, ICE sent out only 503 similar notices, so 2009 will result in at least a 30% increase in audit notifications. These audits reflect a shift in the White House policy toward illegal immigration, focusing on employers instead of the illegal employees. ICE will continue to investigate employers in the hospitality industry using I-9 form audits to ensure that they are in compliance with all immigration laws.

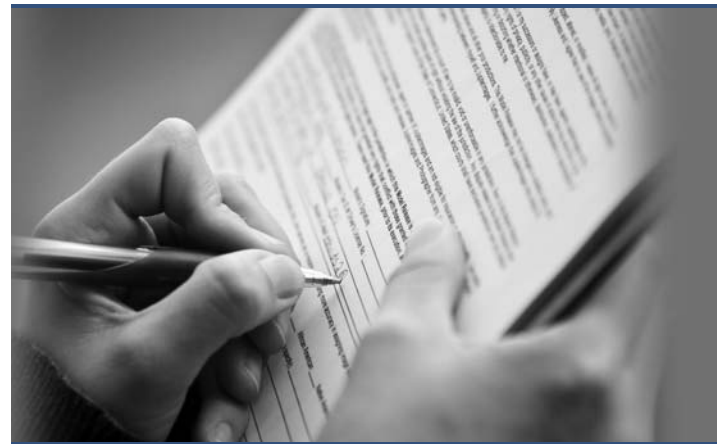
#### **Impact of an ICE investigation**

ICE has taken a no-holds barred attitude in its worksite enforcement actions against employers which can involve police-style raids, the possibility of million-dollar fines, the threat of jail time for business owners, and the certainty of months of damaging press coverage for companies under investigation for employing undocumented workers.

In May 2009, three labor-leasing companies and eight individuals were charged in a 45-count indictment in relation to a criminal conspiracy to provide hundreds of unauthorized workers to hotels and other businesses across the country. The labor-leasing companies secured contracts with hotels and resorts promising to provide legal workers and to follow all labor and immigration laws. Among other things, the defendants are accused of using false information to obtain fraudulent H-2B work visas, fulfilling labor contracts using undocumented workers, and failing to properly pay the workers. The government is seeking a \$6 million forfeiture of money obtained as a result of their alleged offenses.

The indictment of labor leasing companies for the hotel industry is further evidence of the scrutiny that is being placed on the hospitality industry and why it's necessary to ensure your contractor's compliance, as well as your company's, with all immigration laws.

In 2010, ICE is expected to continue its quest to aggressively pursue employers who knowingly employ undocumented workers and who abuse the immigration system. Although any employer may be subject to an ICE investigation, ICE targets employers in what it calls our "nation's critical infrastructures," which has been defined to include the hospitality industry. Take steps now to reduce your risk of enforcement action if ICE investigates your company.



#### **Steps To Take Now**

Two enforcement initiatives were implemented this year: I-9 audits and H-1B site investigations. In 2010, we expect I-9 audits and H-1B site visits to be two of the main avenues used to ensure employers are in compliance with federal immigration laws.

#### **Form I-9 Audits**

Due to the increased focus on employers' I-9 practices, and the fact that the hospitality industry is one of ICE's targeted areas for worksite enforcement investigations, employers in the hospitality industry must prepare for an I-9 audit. A Notice of Inspection issued to a company requires surrender of I-9 forms within 3 business days, unless legal counsel can negotiate an extension in certain circumstances for large employers.

Here are 10 steps to protect your company and prepare for an ICE I-9 form inspection:

1. **Conduct an internal audit** of your I-9 forms and correct any errors or omissions on the forms. I-9 paperwork fines/violations can result from \$110 to \$1100 for each I-9 form.
2. **Have outside legal counsel audit** your I-9 forms and assess the company's level of compliance and exposure for potential fines.
3. **Re-verify any expiring work authorization.** Create a tickler system to remind you of employees expiring work authorizations. But remember that you are not permitted to re-verify an employee's permanent residence card (green card).
4. **Complete I-9 forms if any are lost or missing.** Use payroll records to ensure that you have I-9 forms for all required current

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# EEOC Settles Beef With Restaurant

By Karen Gieselman (Columbia)

On November 2, 2009, the Equal Employment Opportunity Commission (EEOC) announced that it settled a class action lawsuit against Lawry's Restaurants Inc. The EEOC reported that the west coast steakhouse chain agreed to settle the lawsuit, alleging gender discrimination, for more than one million dollars.

First filed in March 2006, the lawsuit alleged that for decades that company had intentionally discriminated in its hiring practices. The settlement captured the attention of employers and the media because the class action claimed that the restaurant violated Title VII of the Civil Rights Act of 1964 by discriminating against men. In particular, the lawsuit alleged that Lawry's practice of only hiring females for its server positions constituted gender discrimination.

## Sex-Based Selection of Servers

The legal action stemmed from a complaint by one of the restaurant's busboys. The busboy complained that he had been denied a higher-paying server position as a result of his gender. The EEOC investigation determined that Lawry had prohibited men from working as servers since 1938 and based its policy on tradition. Since Lawry's instituted the policy over seventy years ago, female servers had dressed in costumes from the 1930s and 1940s. The EEOC determined that despite the policy's roots in tradition and history, the practice of only hiring women for server positions adversely affected male employees and applicants on the basis of their sex.

The voluntary settlement reached by the parties requires the restaurant to pay \$300,000 for an advertising campaign regarding hiring, \$500,000 to individuals within the class, and \$225,000 for training all of its employees on compliance with federal anti-discrimination laws. According to Lawry's, beginning in 2004, shortly after the initial EEOC charge was filed, the Company began hiring male servers and its hiring practices have complied with the law throughout the litigation. Rich Cope, the director of marketing for Lawry's, was quoted as saying that "[w]hen we were first approached with the charge, we took substantial efforts to work with the EEOC to remedy the situation."

## Hairy Hiring Practices

Creating a marketing image and a niche in a competitive hospitality market is essential to a successful business. Employers may seek to further

the image by hiring and promoting individuals who fit the image. Litigation over such efforts dates back to the 1970s when several federal lawsuits alleged that the practice of only hiring female flight attendants was not a legitimate or lawful business practice. In the early 1980s, Southwest Airlines unsuccessfully defended its practice of only hiring female flight attendants and the company's arguments that being female was an essential occupation qualification were rejected.

Only in very narrow circumstances can an employer successfully defend a gender discrimination claim by claiming that its gender-based hiring practices were based on a *bona fide* occupational qualification (BFOQ). The BFOQ defense is very narrowly applied and requires an employer to show that failure to discriminate on the basis of gender would undermine the essence of the business operation.

Hooters of America, Inc., the restaurant chain known well for its orange and white clad "Hooters Girls," has tangled for the last decade and a half with the EEOC over its policy of only hiring females to be servers. At the time this article was drafted, Hooters website explained and justified its policy stating that "[t]he element of female sex appeal is prevalent in the restaurants, and the company believes the Hooters Girl is as socially acceptable as a Dallas Cowboy cheerleader, Sports Illustrated swimsuit model, or a Radio City Rockette."

In the early and mid-1900s, the EEOC alleged that Hooters' hiring practices discriminated against men and the agency conducted an extensive, four-year investigation. Hooters responded by waging a prominent public campaign challenging the EEOC's allegations and centered its campaign on the phrase, "Washington Get a Grip." The EEOC eventually dropped its investigation, but Hooters' challengers were undeterred and a class action lawsuit was brought against the company. In 1997, the company settled the lawsuit for \$3.75million. Under the terms of the settlement, the company allowed males to work as bartenders and hosts, but continued to hire only women for server positions.

Despite the agreement, Hooters still faces legal challenges to its practice. In February 2009, a Texas man filed a gender discrimination lawsuit seeking to enjoin the company from discriminating against men in its hiring practices. The man argued that the primary function of a Hooters Girl was to serve food and drinks and, therefore, the company could not establish the defense of *bona fide* occupational qualification. According to multiple media outlets, a Vice President of Marketing at Hooters stated in response to the lawsuit, "[i]f we lose this go round, you can expect hairy-legged guys in the Rockettes to line up and male models in the Sports

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## Box Score Compiled by the HLL Staff

As predicted, unions are *not* waiting for EFCA to pass to try to organize hospitality employees. In our two-month stretch at least seven representation petitions were filed.

Employer	City & State	Union	Date
Ollie's Noodle Shop & Grille	New York, NY	318 Restaurant Workers Union	9/10/09
Quail Lodge Resort & Golf Club	Carmel, CA	UNITE HERE LOCAL 483	9/10/09
Comfort Inn Downtown Historic Area	Philadelphia, PA	UNITE/HERE	9/14/09
Trump Plaza Hotel	Atlantic City, NJ	United Automobile, Aerospace and Agricultural Implement Workers of America	9/15/09
Hotel Belair	Los Angeles, CA	Unite Here Local 11	9/24/09
Hard Rock Hotel & Casino	Las Vegas, NV	International Brotherhood of Teamsters Local 995	9/25/09
Sportsystem Gaming Management at Buffalo Raceway	Hamburg, NY	Teamsters Local 375	9/29/09

# Is It Time For You To Adopt (An Arbitration Policy)?

By Jim Holland (Kansas City)

When you fire an employee, there is always the concern that your termination decision will end up under the microscope of litigation – the human resources equivalent of Monday-morning quarterbacking. But instead of having that employment dispute resolved in a courtroom, you may want to consider adopting an arbitration policy that substitutes an arbitration hearing for a courtroom trial.

When you go to arbitration, your case will generally be tried before a single arbitrator, as opposed to a judge and jury. The arbitrator typically is a highly qualified and experienced attorney or retired judge, who is sworn to apply the law in a fair and impartial manner. While no dispute-resolution system is perfect, arbitration of employment disputes has a lot to recommend it.

## Leveling The Playing Field

The idea that employment disputes should be resolved in a courtroom is a relatively recent phenomenon. The Civil Rights Act of 1964 ushered in the modern era of anti-discrimination laws. But with limited remedies the impact on litigation was softened somewhat. The flood of lawsuits effectively started in 1991 with the amendment of the 1964 Civil Rights Act to allow for jury trials in most discrimination, harassment and retaliation cases. And it's not only large employers who are hit with lawsuits. The most common targets are employers with between 15 and 100 employees.

From an employer's perspective, going to court to litigate an employment dispute has significant disadvantages: the process is expensive, slow, time consuming and disruptive, and is often an ineffective way to resolve the claim. Litigation is often the classic "no win" proposition. When faced with a lawsuit, your options are to spend money to settle, or spend money to defend the case with no guarantee of result.

If an employer is unwilling to settle the claim (because the claim is totally groundless, the employer is concerned about the precedent settlement would set, or some other reason), the employer either pays its attorneys a great deal of money and wins, or pays its attorneys a great deal of money and loses, which in turn results in paying even more money to the employee and his attorney. The cost of defending a simple discrimination case is rarely less than \$100,000, even if the employer "wins." Employers choosing to litigate claims also face a disadvantage in the courtroom because most jurors have a natural sympathy for the employee asserting the

claim. The result is the employer faces an uneven playing field in the courtroom.

Many employers have attempted to curtail costs and resolve disputes more efficiently by adopting arbitration policies, and taking employment claims to arbitration. Courts allow for the arbitration of employment disputes – provided the process protects the legal rights of employees and the arbitration policy is carefully drafted to comply with the law. Under a well-drafted arbitration policy, employees retain all protections they have under the law. They can still assert all claims available under the law. The employer typically pays most of the cost of the arbitration process, yet still saves money over litigation.

The most common way to implement a policy is to publish it in your employee handbook, and have employees either sign or initial their consent to the arbitration policy. The policy can be either voluntary or mandatory. The arbitration process can also be established through individual employment contracts. Some employers include an arbitration agreement as part of their written application for employment.

## Getting It Enforced

While many employers have embraced arbitration of employment disputes, there are opponents to the idea of arbitrating rather than litigating. The principal opposition to employment arbitration comes from plaintiff attorneys who file lawsuits against employers. They commonly challenge the enforcement of arbitration policies, and an employer who is served with a lawsuit in which the employee/plaintiff is subject to an arbitration policy may have to engage in some legal wrangling to ensure that the lawsuit is dismissed and the arbitration agreement is enforced. Because the law generally allows, and even favors, arbitration, courts normally enforce the policies, but they must be properly drafted to include all the necessary safeguards.

For most employers, an arbitration policy can be of great value in helping reduce the costs and risks of employment disputes. If you want to explore adopting an arbitration policy for your company, give your Fisher & Phillips attorney a call.

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## Box Score Compiled by the HLL Staff

Since July, 2009, we are aware of eleven petitions which went all the way to an election. Unions were victorious in five of them.

Employer	City & State	Union	Date	Result
Hampton Inn, O'Hare	Schiller Park, IL	Teamsters	7/8/09	Union Win 15 – 1
Rancho, La Quinta Country Club	LaQuinta, CA	Laborers	7/13/09	Company Win 30 – 26
Kiahuna Players LLC	Koloa, HI	Longshoremen & Warehousemen	7/15/09	Company Win 9 – 5
Planet Hollywood	Las Vegas, NV	Teamsters	8/4/09	Union Win 18 – 17
Cavallo Point Hotel	Sausalito, CA	Operating Engineers	8/4/09	Company Win 3 – 2
Aramek Sports, LLC	Camden, NJ	Service Workers United	8/4/09	Company Win 45 – 24
The Point at Poipu	Koloa, HI	Longshoremen & Warehousemen	8/11/09	Union Win 57 – 30
Sheraton Suite Philadelphia Airport	Philadelphia, PA	Workers United (SEIU)	8/13/09	Union Win 24 – 21
Liberty Feeds		Food & Commercial Workers	8/14/09	Company Win 13 – 10
Borgata Hotel Casino & Spa	Atlantic City, NJ	Theatrical Stage Employees & Moving Picture Machine Operators	8/19/09	Company Win 40 – 15
Tropicana Casino Hotel	Atlantic City, NJ	Teamsters	8/27/09	Union Win 44 – 24

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employees or prior employees. A missing I-9 form can result in a \$1000 fine.

5. **Use the correct version of the I-9 form.** Currently, employers are permitted to use either the February 2, 2009 or August 7, 2009 version of the I-9 form.
6. **Purge forms** that you are not required to have. You may destroy I-9 forms three years from an employee's date of hire, or one year from the employee's date of termination, whichever is *longer*. If ICE audits your I-9 forms, you can be fined for errors on I-9 forms that could have been purged.
7. **Create an I-9 Audit Action Plan** that details the steps to take if your company is served with a Notice of Inspection.
8. **Conduct I-9 training** for employees responsible for completing I-9 forms based on the common mistakes found during the I-9 audit.
9. **Consider using an electronic I-9 program**, such as the Fisher & Phillips *I-9 Solution*, to enter and store I-9 forms as a mechanism to increase your company's compliance with the I-9 process.

The *Hospitality Update* is a periodic publication of Fisher & Phillips LLP 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, and you are urged to consult counsel concerning your own situation and any specific legal questions you may have. Fisher & Phillips LLP lawyers are available for presentations on a wide variety of labor and employment topics.

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10. **Have a written immigration and I-9 policy** and distribute it companywide and emphasize to your HR and Key Employees their responsibility for legal compliance.

### H-1B Site Audits

In 2010, H-1B employers in the hospitality industry should be prepared for unannounced site visits from U.S. Citizenship and Immigration Services (USCIS) to confirm the information submitted in H-1B filings.

The USCIS Office of Fraud Detection and National Security (FDNS) has commenced an audit of the H-1B program. As a part of the audit program, investigators are visiting H-1B employers to verify the accuracy of the information in the H-1B petition. Under the H-1B regulations, FDNS does not need a subpoena to investigate H-1B employers.

During these unannounced site visits, the investigators may request to speak with the company representative who signed the H-1B petition to confirm information contained in the H-1B petition, including the employee's job title, salary, work location, education background, employer's business, and revenue. They may also request to speak with the H-1B employees themselves, and the H-1B employees' supervisors. The investigator may also request to take photographs of the employer's facility.

You should review any H-1B petitions submitted for employees and ensure the accuracy of the information contained in the petition and confirm that the terms and conditions of the employee's employment have not changed. If you find substantial changes in the job title, duties, salary, work location or other inaccuracies in an H-1B petition, contact an immigration attorney to determine the best course of action to correct the inaccuracy.

The H-1B cap is expected to reach the yearly quota in early 2010, but has not yet been reached for this fiscal year. **As of October 30, 2009**, approximately **53,800** H-1B cap-subject petitions had been filed toward the H-1B cap of 65,000. Employers may continue to file new H-1B petitions until the quota is reached.

Please contact a member of our Global Immigration Group if you have questions about anything contained in this article.

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*Illustrated* swimsuit issue." The Company reached a confidential settlement of February 2009 lawsuit in April (at the time of publication no reports of "Hooters Boys" or "hairy-legged" male Rockettes were reported as a term or condition of settlement).

### Help Wanted

The recent litigation against Lawry's and Hooters is a cautionary tale for employers. Hiring practices which select individuals based on a protected characteristic, such as gender, are closely scrutinized by the EEOC, the courts, and the public. Only in very limited, narrow circumstances can a company justify a discriminatory hiring practice. The ability to market a company's image through employees' physical appearances is generally not going to satisfy the *bona fide* occupational qualification defense and resulting litigation can tarnish the company's reputation and put a sizable dent in the corporate bank accounts.

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