

■ SPECIAL FEATURE

Employment laws also protect unauthorized workers

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New England employers should be aware that people who lack authorization to work in the United States are nonetheless protected under most employment laws, including discrimination and wage-and-hour statutes.

A recent court decision in California illustrates this. In *Salas v. Sierra Chemical Co.*, the California Supreme Court ruled that an employer could be held liable for back wages in connection with a former employee's claims of disability discrimination and retaliation, even though the employee had not been legally authorized to work.

The court relied on a California statute that explicitly extends employment protections to all workers, irrespective of immigration status,

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and concluded that the state law was not preempted by the federal Immigration Reform and Control Act of 1986, or IRCA, which prohibits employers from employing unauthorized workers.

State and federal courts in New England have likewise permitted unauthorized workers to assert claims under various employment statutes. Thus, employers should take appropriate steps to protect themselves from potential liability for such claims.

Background

The plaintiff, Vicente Salas, was a seasonal production line worker for Sierra Chemical Co., which produces chemicals for treating water, including water in swimming pools. Because customer demand for Sierra's products varies significantly based on the season, Salas and other production line employees were periodically laid off and then recalled to work.

In 2006, Salas twice injured his back while on the job. Following the second of the incidents, Salas filed a workers' compensation claim and, upon returning to work, performed modified duties. He then was laid off in December 2006, as part of Sierra's usual seasonal workforce reductions.

In March 2007, Salas spoke with Sierra's production manager about the prospect of being rehired. According to Salas, the manager told him that he could not return to work for Sierra unless he had fully recovered from his back injuries and was no longer seeing a doctor for them.

Subsequently, Sierra sent Salas a letter notifying him that it was recalling laid-off employees and requesting that he provide a doctor's release certifying his ability to return to full duty.

Salas, however, never returned to work for Sierra. Instead, in August 2007, he sued Sierra, alleging that the company had violated the California Fair Employment and Housing Act — FEHA — by failing to provide reasonable accommodations for a disability and by retaliating against him for filing a workers' compensation claim.

In the course of the litigation, Sierra learned that Salas had used another person's Social Security number to obtain employment with Sierra. On that basis, Sierra moved for summary judgment, arguing that Salas' presentation of fraudulent employment authorization documents precluded his claims.

The trial court denied Sierra's motion, but an intermediate state appellate court reversed that denial, holding that because Salas had violated the IRCA by presenting false employment authorization documents to Sierra, he could not recover under California's FEHA.

Salas then filed a petition for review with the California Supreme Court, which agreed to hear the case.

California Supreme Court decision

The California Supreme Court reversed the lower appellate court, holding that Salas' presentation of fraudulent employment authorization documents to Sierra did not preclude his claims under FEHA.

In support of its holding, the court cited a California statute that specifically extends state law employment protections to all workers "regardless of immigration status."

The court also observed that refusing to extend protections to unauthorized workers would inappropriately incentivize employers to

hire such people, as employers would be able to discriminate against unauthorized workers without fear of potential liability.

Further, the court held that the IRCA did not preempt California law insofar as Salas sought to recover back pay for the time period before Sierra learned of his unauthorized status.

The court reasoned that, to that extent, the IRCA did not conflict with California law, since the IRCA does not preclude an employer from paying wages to a worker for so long as it remains unaware of the worker's unauthorized status.

However, the court ruled that the IRCA did preempt California law to the extent that Salas sought back pay for the period after Sierra's discovery of his submission of fraudulent employment authorization documents, since Sierra could not lawfully have paid him wages after that point.

Rulings by other courts

The *Salas* ruling is in line with other court decisions in New England and elsewhere that have allowed unauthorized workers to assert employment claims, thereby extending employment protections to all workers, regardless of immigration status.

For instance, federal courts have held that unauthorized workers may assert claims for unpaid wages under the Fair Labor Standards Act. See, e.g., *Lin v. Chinatown Restaurant Corp.*, 771 F. Supp. 2d 185 (D. Mass. 2011); *Campos v. Zopounidis*, No. 3:09-CV-1138 (VLB), 2011 WL 4852491 (D. Conn. Oct. 13, 2011); *Patel v. Quality Inn So.*, 846 F.2d 700 (11th Cir. 1988); *Zheng Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191 (S.D.N.Y. 2002).

Likewise, federal courts have held that unauthorized workers may assert claims and recover back pay under Title VII, the federal anti-discrimination statute. See, e.g., *EEOC v. City of Joliet*, 239 F.R.D. 490 (N.D. Ill. 2006); *EEOC v. Tortilleria "La Mejor"*, 758 F. Supp. 585 (E.D. Cal. 1991).

The Equal Employment Opportunity Commission, the federal agency that enforces Title VII,

also has endorsed that position, stating in an online enforcement guidance that Title VII "protect[s] all employees in this country who work for an employer with 15 or more employees, including those who are not authorized to work." (See <http://www.eeoc.gov/policy/docs/qanda-undoc.html>.)



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While federal courts in New England appear to have had little occasion to consider this issue, it seems likely that they similarly would find that Title VII permits claims by, and back pay awards to, unauthorized workers. (Note, however, that as a result of the IRCA, certain additional remedies provided for under Title VII — such as reinstatement and front pay — may not be available to plaintiffs whose unauthorized work status has become apparent.)

Finally, as in the *Salas* decision, courts in New England and elsewhere have likewise permitted unauthorized workers to assert employment claims under state laws.

For instance, the Connecticut Supreme Court has held that workers' compensation benefits may be awarded to unauthorized aliens. *Dowling v. Slotnik*, 244 Conn. 781 (1998). Similarly, the Tennessee Court of Appeals recently held that an unauthorized worker could maintain a claim alleging unlawful retaliation for filing a workers' compensation claim. *Torres v. Precision Indus., Inc.*, No. W2014-

00032-COA-R3-CV (Tenn. Ct. App. Aug. 5, 2014).

Like the California Supreme Court, the Connecticut and Tennessee courts reasoned that depriving unauthorized workers of the ability to bring such claims would inappropriately incentivize employers to hire workers illegally.

Recommendations for employers

As a result of these court decisions, there are a number of steps employers should take.

First, employers should audit their employment policies and practices in consultation with experienced employment counsel to ensure that their policies and practices are in compliance with all applicable state and federal laws. A plaintiff's unauthorized work status likely will not preclude him or her from filing suit on a discrimination, wage or other employment-related claim.

Second, in hiring new employees, employers should take care to comply strictly with IRCA's paperwork requirements, including by completing valid I-9 forms for all new hires and retaining copies of related documentation.

Potential monetary sanctions for disregarding I-9 documentation requirements or knowingly hiring or continuing to employ unauthorized workers are severe, reaching as high as \$16,000 per unauthorized worker depending on the number of past offenses.

In addition, criminal penalties may be pursued if U.S. Immigration and Customs Enforcement finds that an employer has engaged in a pattern or practice of knowingly hiring unauthorized workers.

Finally, upon discovering that an employee appears not to have valid employment authorization, an employer should immediately contact experienced employment counsel to determine how best to proceed. While an employer is not permitted to continue to employ an individual who it knows lacks proper work authorization, an employer can subject itself to potential liability for discrimination if it does not proceed with care upon learning of a worker's possible unauthorized status.

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