MS&K LABOR & EMPLOYMENT ALERT

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THOU SHALT NOT, EXCEPT WHEN WE SAY THOU SHALT

Recent Developments Highlight the Often Conflicting Obligations Imposed on Employers by Employment and Immigration Laws

As the debate over US immigration policy and the laws pertaining to the employment of aliens continues, contradictory signals are being sent to employers, as highlighted in the following developments.

In a decision that has raised eyebrows and considerable consternation in the employer community, the Ninth Circuit Court of Appeals, the federal Circuit Court with jurisdiction over California and other western states, affirmed a judgment in excess of one million dollars awarded to a former employee who was terminated after his visa authorizing him to work in the United States expired. (Incalza v. Fendi, __ F. 3d __ March 6, 2007.) The former employee, an Italian citizen, had worked in the United States for high-end retailer Fendi for more than a decade, most recently as a store manager in Beverly Hills. Because Fendi was an Italian-owned company, throughout his employment, Incalza worked under an E-1 visa (available to certain employees of foreign-owned businesses), that was obtained for him with Fendi's assistance. However, due to a change in the company's ownership, Fendi employees no longer qualified for E-1 visas and, upon Incalza's loss of the visa, Fendi terminated his employment. Incalza then sued, raising various claims including wrongful termination in violation of an implied contract not to terminate without cause. The jury found in favor of Incalza on the implied contract claim and the Ninth Circuit affirmed.

In reaching its decision, the Ninth Circuit rejected Fendi's argument that federal law obligated it to terminate Incalza once he lost his work authorization. Although the Immigration Reform and Control Act specifically states that it is "unlawful for a person ...to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment," the Court held that an employer need not terminate an employee in order to comply with this mandate. (See, 8 U.S.C. § 1324a(a)(2).) Rather, the Ninth Circuit stated: "IRCA requires that an employer not 'continue to employ' workers if it discovers that they are unauthorized, but does not bar an employer from suspending an employee or placing him on unpaid leave for a reasonable period while he remedies the deficiency in his status." Here, the court observed, Fendi had provided another similarly situated employee with time off and assistance in applying for an H1-B visa. Accordingly, the Court determined that (1) federal immigration law did not preempt or conflict with the state law wrongful termination claim being asserted and (2) the asserted compliance with federal immigration laws did not constitute "good cause" for terminating the employee.

In affirming the finding that a contract not to terminate without good cause existed, the Ninth Circuit noted the following evidence relied on by the jury: 1) Fendi's policy not to terminate employees without good cause, 2) the custom of the fashion industry

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Q: WHAT STEPS CAN AN EMPLOYER TAKE TO MINIMIZE THE RISK OF BEING RAIDED OR OTHERWISE SUBJECTED TO ICE ENFORCEMENT EFFORTS?

A: AN EMPLOYER SHOULD TAKE THE FOLLOWING STEPS:

- *Regularly conduct training regarding proper I-9 Form completion*
- *Only permit trained personnel to process and complete I-9 Forms*
- *Conduct periodic internal audits of completed I-9 Forms and backup documentation*
- *Establish internal procedures for responding to no-match letters received from the Social Security Administration*
- *Obtain legal advice before taking adverse action against or terminating an employee or applicant who is believed not to be authorized to work in the United States*

Q: ARE THERE STEPS THAT CAN BE TAKEN TO AVOID THE KIND OF "IMPLIED CONTRACT" CLAIM ASSERTED IN INCALZA V. FENDI?

A: AN EMPLOYER SHOULD TAKE THE FOLLOWING STEPS:

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not to terminate employees without good cause, 3) Incalza's thirteen years of service with Fendi, and 4) oral assurances of continued employment given to Incalza by Fendi management.

While the Ninth Circuit was affirming a million dollar verdict against an employer because it terminated an unauthorized alien, the Department of Homeland Security's Immigration and Customs Enforcement ("ICE") unit has been undertaking aggressive enforcement measures to crack down on the employment of unauthorized aliens. In December 2006, ICE simultaneously raided six meat packing plants, in six states, operated by Swift & Company, detaining and/or arresting over twelve hundred employees. This raid, the largest immigration enforcement effort in US history, occurred despite the fact that Swift & Company had been voluntarily participating in the federal government's "Basic Pilot" program, which is an online verification system that allows employers to confirm the eligibility of new hires by checking the personal information they provide against Federal databases. In a statement issued in response to the raids, Swift & Company's President and CEO noted that the company had "played by the rules and relied in good faith on a program [Basic Pilot] explicitly held out by the President of the United States as an effective tool to help employers comply with applicable immigration laws." In just the past few weeks, hundreds of other employees were detained at similar raids on Michael Bianco, Inc., a leather factory outside of Boston, and Sun Drywall and Stucco, Inc., a construction company in the Tuscon area of southern Arizona. In both cases, the companies' presidents and other managers, including Sun's human resources manager, were also arrested and charged with such crimes as knowingly hiring and/or conspiring to knowingly hire undocumented workers.

At the same time that the Department of Homeland Security is conducting raids, including on employers who have voluntarily participated in Basic Pilot, it is encouraging employers to participate in another voluntary initiative launched last year, the ICE Mutual Agreement Between Government and Employers ("IMAGE") program. As described on the agency's website (www.ice.gov), an employer participating in this program must agree to submit to an I-9 audit conducted by ICE. Although participating employers will receive the designation of being an "IMAGE Certified" employer, it is unclear whether employers will directly benefit from the program. Earlier this year, twenty-one slaughterhouse employees of Smithfield Packing Co., an IMAGE-participating employer in North Carolina, were arrested and hundreds more are under review as a result of an ICE-conducted I-9 audit.

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- *Except where a written "term" agreement is desired, take all steps necessary to insure that all employment is and remains "at-will" and that no oral or "implied" contracts are entered into with any employee*
- *Have employees sign "at-will" employment contracts which provide that any change in the at-will relationship must be contained in a written agreement signed by a specified agent of the employer*
- *Carefully review all policies and written communications to insure that no unintended promises or representations are made to employees*
- *Train managers and supervisors regarding the scope of their authority and how to avoid making potentially binding promises and representations*
- *Include clear "at-will" employment language in all employment applications, offer letters and employee handbooks*
- *Before they are carried out, insure that all adverse employment actions and terminations are carefully reviewed for consistency, as well as compliance with applicable employment and immigration laws*
- *Consult counsel as needed to avoid potential liability*