The Florida Bar
www.floridabar.org

The Florida Bar Journal
Advertising Rates • Submission Guidelines • Archives • Subscribe • *News*

September/October, 2013 Volume 87, No. 8

Journal HOME

Breaking It All Down: Employers' Sanctions Under Immigration Law and OCAHO Litigation

by Giselle Carson

Page 38

In 2012, an average 151,000 jobs were added to the U.S. economy each month. Those 1.8 million new employees had to undergo the employment verification process to begin working, *i.e.,* present proper identification, fill out an I-9 form, and, in some cases, be re-verified using the E-Verify system. This I-9 verification process is all too often overlooked, misinterpreted, or performed incorrectly, leading to employer liability, sanctions, and litigation.

This article serves as a breakdown of what is involved in representing employers in employment verification compliance matters. From the U.S. Department of Homeland Security (DHS) investigation to the Office of the Chief Administrative Hearing Officer (OCAHO) litigation to the appeals process, a thorough understanding of past decisions and factors influencing the outcome of a case can assist in the defense of clients and help mitigate penalties.

What is OCAHO?

OCAHO is a component of the Executive Office for Immigration Review (EOIR) whose administrative law judges (ALJ) hear and decide cases arising under the Immigration and Nationality Act (INA), including employer sanctions cases under INA §274A for failure to comply with employment verification requirements.

From DHS Investigation to OCAHO Litigation

Government investigations and audits of employers' compliance with immigration requirements, particularly audits of employers' I-9 forms, are resulting in significant sanctions. As a result, OCAHO's case load relating to these cases has increased significantly in size and complexity in the last five years and is expected to continue. An interesting and encouraging sign, however, is that many recent decisions have resulted in reduced fines on employers.

When an investigation by the Immigration and Customs Enforcement (ICE), a branch of DHS, reveals potential violations of INA §274A, ICE serves a notice of intent to fine (NIF) to the employer specifying the violation and the proposed fines. The employer elects whether to pay the fines, negotiate a settlement, or request a hearing before OCAHO within 30 days of receipt of the NIF. If the employer takes no action after receiving the NIF, ICE will issue a final order. If the employer chooses to litigate, the government files the complaint with OCAHO.

OCAHO's Litigation Process

The government's filing of the complaint begins the litigation process. The complaint must set out "[t]he alleged violations of law, with a clear and concise statement of facts for each violation alleged to have occurred and a short statement containing the remedies and/or sanctions sought to be imposed against the respondent."[1] Although this standard is similar to the one set out in Fed. R. Civ. P. 8(a)(2), the thrust of the two standards are considered substantially different. Particularly, the OCAHO complaint is not

required to show that "the pleader is entitled to relief."

A complaint filed before OCAHO "has already been the subject of an underlying administrative process," such as an ICE inspection, and, thus, an OCAHO complaint "will ordinarily come as no surprise to a respondent that has already participated in the underlying process."[2]

If the complaint is legally sufficient, the case is assigned to the ALJ and a notice of assignment is served to both parties. The respondent has 30 days to file an answer and the complainant may file a reply and affirmative defenses. Thereafter, the ALJ provides a date and time for a hearing and prehearing conference, which can be conducted by phone.

The parties are encouraged to file prehearing statements outlining their positions. Discovery is undertaken as needed and as agreed upon by the parties. After discovery, the parties can file dispositive motions and responses.[3]

Similarly to Fed. R. Civ. P. 56(c), OCAHO Rule 28 C.F.R. §68.38(c) provides that a complete or partial summary decision may be issued if the pleadings, affidavits, or other record evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to summary decision. Typically, settlement attempts are ongoing all the way to the final hearing and the timetable for case resolution varies depending on the case activity (see chart next page).

Employer sanction cases are reviewable by the chief administrative hearing officer.[4] A request for administrative review must be filed with the chief administrative hearing officer within 10 days of the date of the ALJ's final order.[5] Because review by the chief administrative hearing officer must be conducted within this very short deadline,[6] the regulations also require that all requests for review and associated documents be filed and served on the opposing party using expedited filing and serving methods.[7]

The regulations do not provide that a request for review be in a specific format. Instead, the regulations state that "[a] party may file with the [c]hief [a]dministrative [h]earing [o]fficer a written request for administrative review…stating the reasons for or basis upon which it seeks review."[8] The opposing party must file a brief in opposition within 21 days of the date of the ALJ's final order.[9] The CAHO has 30 days from the date of the final order to modify or vacate the ALJ's order. The CAHO has the authority to review the ALJ's order de novo.[10] An aggrieved party has 45 days from the final agency order to file a petition to review the final order with the U.S. court of appeals for the appropriate circuit.[11]

Burden of Proof and Penalty Determination

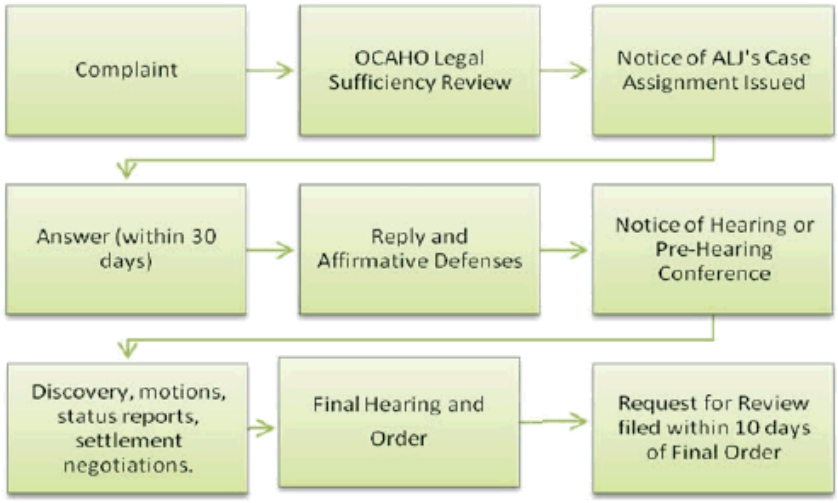
The government has the burden of proof with respect to both penalty and liability and must prove the existence of any aggravating factor by a preponderance of the evidence.[12] The INA and the regulations provide for a minimum and a maximum range for civil monetary fines for I-9 violations. For violations that occurred on or after September 29, 1999, the fines range from $110 to $1,100 per violation. Once ICE establishes a base fine determined by an evaluation of the types and percentage of violations, ICE can enhance or mitigate the fine based on five statutory factors.

In assessing the penalty, the regulations[13] provide that the following five factors must be considered: 1) The size of the business; 2) the good faith of the employer; 3) the seriousness of the violation; 4) whether the individual was an unauthorized alien; and 5) any history of previous violations.

Even though, in practice, ICE often aggravates and sometimes mitigates employers' penalties by allocating 5 percent to each factor, the law does not require that equal weight be given to each factor. Rather, the weight to be given to each factor is based on the specific facts and circumstances of the case.[14] Additionally, the court in assessing a reasonable fine may consider other nonstatutory factors.

How Are These Factors Applied to Enhance or Mitigate the Fines?

• *The Size of the Business* — The number of employees is one of the factors used in this determination. In general, a company with fewer than 100 employees is considered a small business, which can provide for a mitigation of fines. However, no single factor is determinative.



Other factors considered in this determination include revenue or income, amount of payroll, Small Business Administration classification, assets, physical size and scope of facilities, past and present profitability, nature of ownership, geographical scale (*i.e.,* whether it is local, regional, statewide, or national enterprise), and length of time in business.

In *U.S. v. Alyn Indus., Inc.*, 10 OCAHO no. 1141 (2011), ICE sought to enhance the penalties and argued that Alyn was a moderate-sized business based on its revenue ($4.8 million in 2009 and $3.7 million in 2010), amount of payroll, and length of time in business. ICE also contended that other subfactors should be considered, such as that Alyn might not have used all its resources to comply with the law and that a higher penalty would enhance future compliance.

The ALJ held that while an employer's financial data may assist in understanding the size and scope of an operation, an employer's ability to pay is not a proxy for size. The fact that Alyn was profitable did not change the fact that Alyn was a small employer. Alyn had 50 to 62 employees during the time in question. The ALJ considered the size of Alyn a neutral factor that did not serve to enhance or mitigate the fine. The seasonal nature of a business, the degree of turnover, and lower employee levels in off-season are also factors that have been considered.[15]

• *The Good Faith of the Employer* — An employer can plead a good faith defense when it can show that it made "a good faith attempt to comply with the requirements," but nevertheless committed certain violations. The analysis of whether the employer can claim good faith begins with determining whether the employer attempted to comply with its §1324a obligations *prior to the issuance of the notice of inspection*.[16]

In *U.S. v. Occupational Resources Mgmt., Inc.* (ORM), 10 OCAHO no. 1166 (2013), ICE aggravated all penalties for lack of good faith because ORM's employees backdated the employer's attestation in §2 of Form I-9 to make them appear as though the forms had been prepared timely. The ALJ upheld this aggravation, finding that backdating is clear evidence of culpable conduct.

In *U.S. v. Snack Attack d/b/a Subway Rest. # 3718*, 10 OCAHO no. 1137 (2010), the employer claimed ignorance of the verification requirements as evidence of good faith and pointed to the affirmative steps it took after the NOI was issued to become compliant, such as providing I-9 training and enrolling in E-Verify. It also blamed its employees for backdating §1. The ALJ found that the employer acted in bad faith and noted that "ignorance and mistake" are insufficient arguments when "reasonable care and diligence" are required. The court stressed that in this case there was not "a scintilla of evidence" to suggest that the employer took any pre-notice effort to learn and comply with its verification obligations. Its prospective attempts at compliance were irrelevant to the good faith analysis. Additionally, the court noted that it is the employer's responsibility to ensure that its employees complete the I-9 form correctly.

In contrast, in *U.S. v. Siam Thai Sushi Restaurant*, 10 OCAHO no. 1174 (2013), ICE also sought the

aggravation of penalties for an alleged lack of good faith because the restaurant had failed to complete I-9s for 100 percent of its workforce (about 10 employees), and only completed them after the notice of inspection was issued. The ALJ declined to aggravate the fines based on the lack of good faith and noted that a high number of missing and/or defective I-9s without some additional evidence were not enough to support a finding of lack of good faith. To demonstrate lack of good faith the record must show culpable behavior beyond mere paperwork noncompliance.

• *The Seriousness of the Violation* — Not all violations are considered equally serious. Failure to prepare an I-9 form is considered one of the most serious violations because an employer could potentially be employing an unauthorized worker during the entire time that the worker remains unverified. The longer the employer delays the verification the more serious the violation becomes.[17]

The absences of the employee's attestation in §1 and/or the employer's attestation in §2, the omission of proper documents to establish identity or employment eligibility, or the listing of improper documents are also considered among the most serious paperwork violations[18] and are generally assessed the highest fines. Potentially less serious violations include the failure to note List A, B, or C documents as proof of identity and employment authorization, and failure by the employee to check the box in §1 to attest to her or his status in the U.S. when other documentation exists to establish the employee's status.

In *U.S. v. Modern Disposal Inc.*, 10 OCAHO no. 1175 (2013), ICE mitigated the penalties and reasoned that the employer showed a "measure of compliance" because 108 I-9 forms did not contain violations as compared to 55 I-9s, which were untimely. The court disagreed with this "novel approach" of measuring the seriousness of the violations since this percentage is already used to assess the base penalties. The court noted that "the seriousness of a violation must be evaluated with reference to the I-9s involved in the violation, not on whether the employer's other I-9s were satisfactorily completed." Using a different assessment, the court agreed with the government's net penalties and held that "where the government reaches a reasonable appropriate penalty, the result need not be disturbed."

• *Whether the Individual was an Unauthorized Alien* — This determination involves not whether there were some unidentified, unauthorized workers in the workforce, but "whether…the individual was an authorized alien."[19] To carry its burden of proof, the government must identify the specific alleged unauthorized individual(s) and provide objective evidence of the unlawful status of the individual.

If the presence of unauthorized workers is established, then the fines can be enhanced for the I-9s that correspond to the unauthorized worker(s). It is not appropriate to aggravate the penalties for other violations involving other individuals based on the presence of unauthorized workers.[20]

• *History of Prior Violations* — Employers typically point to the lack of a prior history of violations as a mitigating factor. However, OCAHO case law does not support that leniency is warranted based solely on the lack of prior violations. When the employer has a history of no prior violations, this factor is generally treated as neutral.[21]

• *Other Nonstatutory Factors* — OCAHO case law provides that the ALJ can consider other nonstatutory factors when assessing fines for I-9 violations. Factors that have been considered include the employer's ability to pay the proposed fine,[22] the state of the economy and whether an inappropriately high fine could lead to a business closure and laying off workers,[23] the undue hardship on the business,[24] and the general public policy of leniency to small entities as set out in the Regulatory Flexibility Act, 5 U.S.C. §601 *et seq.* (2006), amended by §223(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, 110 Stat. 864 (1996).[25]

Conclusion

This is a complex and rapidly evolving area of law. Although OCAHO recently issued several employer-favorable decisions, the majority of those decisions involved companies that were considered small businesses. Large employers should expect less leniency and higher standards, especially if they have

significant revenue and resources.

Employers must be diligent with employment verification compliance and other immigration requirements. Failure to complete an I-9 form is considered one of the most serious violations because the employee is presumed to be working unauthorized. As comprehensive immigration reform evolves in Congress, employer immigration compliance continues to be a critical issue. When defending employers in these matters, remember that the law allows for consideration of nonstatutory factors and a thorough evaluation of the case is key to achieving the best outcome.

[1] 28 C.F.R. §68.7.

[2] *U.S. v. Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148 (2012) (addressing the applicability of federal pleading standards in OCAHO cases).

[3] 28 C.F.R. §68.38.

[4] 8 C.F.R. §1324a(e)(7); 28 C.F.R. pt. 68.

[5] 28 C.F.R. §68.54(a)(1).

[6] 28 C.F.R. §§68.53(c), 68.54(b), and 68.54(d).

[7] 28 C.F.R. §§68.54(c) and 68.6(c).

[8] 28 C.F.R. §68.54(a)(1).

[9] 28 C.F.R. §68.54(d).

[10] *Maka v. INS*, 904 F.2d 1351, 1356 (9th Cir. 1990); *Mester Mfg. Co. v. INS*, 900 F.2d 201, 203-04 (9th Cir. 1990).

[11] 8 U.S.C. §1324a(e)(8); 28 C.F.R. §68.56.

[12] *U.S. v. Amer. Terrazzo Corp.*, 6 OCAHO no. 877 (1996).

[13] 8 U.S.C. §1324a(e)(5).

[14] *U.S. v. Raygoza*, 5 OCAHO no. 729 (1995); *see also U.S. v. Hernandez*, 8 OCAHO no. 1043 (2000).

[15] *U.S. v. Giannini Landscaping, Inc.,* 3 OCAHO no. 573 (1993) (employer found to be a small business based on a maximum of 33 employees, fluctuation of workforce, and business and gross profits of $250,000).

[16] *U.S. v. Great Bend Packing Co.*, 6 OCAHO no. 835 (1996).

[17] *U.S. v. El Paso Hospitality, Inc.*, 5 OCAHO no. 737 (1995); *see also U.S. v. Fortune E. Fashion, Inc.*, 7 OCAHO no. 992 (1998) (finding failure to prepare I-9 within three business days as serious, but

distinguishing between delays of a few days and those of a few months).

[18] *Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act Added by Section 411 of the Illegal Immigration Reform and Immigration Responsibility Act of 1996* (Mar. 6, 1997) (the Virtue Memorandum or Interim Guidelines), 74 Interpreter Releases 706 app. 1 (Apr. 28, 1997).

[19] 8 U.S.C. §1324a(e)(5).

[20] *U.S. v. Seven Elephants Distributing Corp.*, 10 OCAHO no. 1173 (2013).

[21] *U.S. v. New China Buffet Rest*., 10 OCAHO no. 1133 (2010).

[22] *U.S. v. H & H Saguaro Specialists,* 10 OCAHO no. 1147 (2012).

[23] *U.S. v. Snack Attack Deli, Inc. d/b/a Subway Rest. # 3718*, 10 OCAHO no. 1137 (2010).

[24] *U.S. v. MEMF LLC d/b/a Black & Blue Steak & Crab-Buffalo*, 10 OCAHO no. 1170 (2013).

[25] *U.S. v. Siwan & Sons, Inc. d/b/a Subway #35029 and Subway #23095*, 10 OCAHO no. 1179 (2013).

Giselle Carson *is a shareholder with Marks Gray, P.A., in Jacksonville. She practices in the areas of U.S. and global immigration, civil litigation, and business law. She is a frequent writer and lecturer on immigration issues, and she represents clients in federal and state courts and before federal and state agencies. She is the international chair for the Jacksonville Chamber of Commerce and on the board of the Jacksonville Bar Association.*

This article is submitted on behalf of the Labor and Employment Law Section, Robert Stuart Turk, chair, and Robert Eschenfelder, editor.

[Revised: 08-27-2013]

Journal HOME