Wage and Hour Laws Apply to Undocumented Workers

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Both the Fair Labor Standards Act ("FLSA"), the federal act regulating wage and hour payment of employees, and the New Jersey State wage and hour laws apply to undocumented workers. Labor enforcement agencies, such as the United States Department of Labor ("USDOL") and the New Jersey Department of Labor ("NJDOL") do not enforce the law differently depending on whether a worker is documented or undocumented. Employers cannot use a worker's undocumented status as a defense to paying undocumented workers minimum wage or overtime wages or to retaliate against them for making a complaint about their wages.

Law on Undocumented Workers

Jerusalem Café, LLC v. Lucas is an important 2012 case which decided the issue of whether undocumented workers can sue for an employer's failure to adhere to the FLSA. Several restaurant workers who were undocumented sued claiming they had not been paid minimum wage or overtime compensation for hours worked over 40 in a week. The employer argued that the FLSA does not apply to employers who hire undocumented workers. The U.S. District Court for the Western District of Missouri ruled that the workers' immigration status was irrelevant to the case, pointing out that the workers were suing for back wages and not prospective relief. The case eventually reached the 8th Circuit Court of Appeals, which agreed with the District Court and decided in favor of the undocumented workers. When the employer applied for certification to the United States Supreme Court, it was denied. Thus, it was confirmed that immigration status is not a bar to suing for back wages under federal law. Likewise, in New Jersey an undocumented worker can sue an employer for wage and hour violations.

No Retaliation Against Undocumented Workers Who Raise Good Faith Complaints About Working Conditions

Employers cannot retaliate against employees who raise good faith complaints about working conditions, including wage and hour laws and safety conditions. In a federal case in Boston brought by the United States Department of Labor, a jury held that a construction company retaliated against an undocumented worker after he was seriously injured on the job and the company reported him to immigration officials, who arrested him. The USDOL investigated into the matter and brought a lawsuit on the employee's behalf, which he won. The jury found that the employer reported the employee to the immigration authorities to avoid the fall-out of having no workers' compensation policy in effect at the time of the employee's accident. They awarded the worker compensatory damages of $250,000 and an additional $400,000 in punitive damages.

In addition to suing an employer who retaliates, the U.S. Department of Homeland Security ("DHS") has a process to help address undocumented workers' fears that an employer who is sued for by an undocumented worker may suffer retaliation from the employer. In certain circumstances, the worker may be able to apply for a deferred action that delays the deportation after making a complaint with the U.S. Department of Labor.

A report to the NJDOL may provide one component needed to file an application with the DHS for a deferred action. In addition, a 2024 New Jersey law establishes penalties for employers whom the Commissioner of the NJDOL finds have disclosed or threatened to disclose to a public body the immigration status of an employee in order to retaliate against the employee for making a wage complaint.

TAKEAWAY: Employers should pay all workers according to the minimum wage and overtime laws, and should not report or threaten to report an employee's immigration status in order to defend against wage-related complaints. If you have questions on wage and hour law, contact Stephanie D. Gironda or any member of the Wilentz Employment Law Team. If you have any immigration related questions, please contact Alan J. Pollack, Esq.

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