



Employment Law Alert

Legal developments affecting human resource management

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Illegal but protected: Federal Appeals Court holds that undocumented aliens enjoy employee status under National Labor Relations Act

By *Andrew B. Prescott*

The New Year has begun with a win for unions that organize illegal aliens. Federal law prohibits employers from knowingly hiring workers who cannot prove their legal right to work in the United States, but, as one employer recently learned, an employer must bargain with a union elected by apparently undocumented workers. *Agri Processor Co. v. National Labor Relations Board (D.C. Cir. 2008)* is the latest in a line of cases granting illegal aliens full “employee” status under federal law.

According to *Agri Processor*, a kosher meat products wholesaler in New York, it unknowingly hired workers who had provided false Social Security numbers. After the company’s workers voted to unionize, the company discovered that a majority of the voters in the union election were illegal aliens. Crying foul, the company refused to bargain. The National Labor Relations Board (NLRB) upheld an unfair-labor-practice finding, rejecting the notion that workers who should not have been hired in the first place cannot be considered employees under federal labor law. The NLRB majority rejected the suggestion that saddling an employer with an obligation to bargain with employees the employer would have to fire under immigration law produces a “peculiar” result.

Agri Processor took its case to the United States Circuit Court of Appeals for the District of Columbia. The court agreed with the NLRB. The court decreed that the plain language of the National Labor Relations Act (NLRA) and the United States Supreme Court decision in a 1984 decision – *Sure-Tan, Inc.* – compelled the sustaining of the unfair labor practice.

In *Sure-Tan*, the United States Supreme Court had held that undocumented aliens fit squarely within the NLRA definition of employee. After *Sure-Tan*, specifically in 1986, Congress passed the Immigration Reform and Control Act (IRCA), which made it unlawful to employ undocumented workers, but the D.C. Circuit dismissed IRCA as cause for departing from *Sure-Tan*. According to the two judges deciding against *Agri Processor*, Congress will have to expressly amend the definition of “employee” under the NLRA before illegal aliens will lose their rights under the NLRA. Until then, the concern expressed by the dissenting judge in *Agri Processor* – that legal workers’ rights and votes

(e.g., to vote against unionization) suffer dilution by the votes of people who should not have been hired in the first place – will remain unaddressed.

The D.C. Circuit also agreed with the Board's view that the Supreme Court's 2002 holding in *Hoffman Plastic Compounds, Inc. v. NLRB* did not change the result compelled by the NLRA and *Sure-Tan*. In *Hoffman Plastics*, the NLRB found that Hoffman Plastics had unlawfully fired a worker for union organizing, but, at a hearing regarding back pay, the worker – a Mexican national – admitted that he obtained employment at Hoffman by submitting someone else's birth certificate and that he had no lawful right to work in the U.S. The Board nonetheless ordered back pay, but the Supreme Court reversed. According to the Supreme Court, federal immigration policy, as expressed by the IRCA, precluded awarding back pay to a worker who was legally unavailable for work during the back-pay period. Rather than view this as permission to rely on the IRCA, the D.C. Circuit deemed *Sure-Tan* the "directly controlling" precedent.

Employers should read *Agri Processor* and similar holdings under other federal laws as a clear message about the collateral consequences of hiring undocumented workers. An employer who hires such workers cannot escape the effects of their unionizing activities. At least until Congress or the Supreme Court says otherwise, an employer may get stuck with a union voted in by those who had no lawful right to be working in the first place. And unions will not hesitate to organize illegal workers, knowing that the results of the election will persist even if the workers' status becomes known. Many employers will certainly find such a result quite peculiar.

For more information on this issue or any other labor or employment law matter, please contact your regular Nixon Peabody attorney or:

- Andrew B. Prescott at 401-454-1016 or aprescott@nixonpeabody.com