

# H.R. ALERT \*

JANUARY 2006

## The EEOC Approves Revisions to its Employer Information Report, the EEO-1, Effective for the 2007 Reporting Cycle

The purpose of the EEO-1 form is to report to the government an entity's workforce demographics divided into job categories by ethnicity, race, and gender. The current EEO-1 form has been in existence for the last three decades. Private employers of 100 or more employees and federal contractors with 50 or more employees are required to file this annual report. Recent changes to this form effective for the 2007 Reporting Cycle include an increase to the number of job categories as well as a new "two or more races" category. Opponents of these revisions have argued that the new category is ambiguous and requested that the EEOC allow employees to choose the race or ethnicity they primarily identify with or allow for more detailed reporting. The EEOC has rejected these concerns.

The following are highlights of the new EEO-1 Report:

- (1) Employers are encouraged to ask their employees to voluntarily report their ethnicity and race. Employers can only use factual

observances regarding an employee's race and ethnicity in filling out their yearly report if employees do not volunteer to self-identify.

- (2) The reporting category of officials and managers is now divided into two separate subgroups: "first/mid-level officials and managers" and "executive/senior level officials and managers."
- (3) Non-managerial financial and business occupations have shifted from the "officials and managers" category to the "professional category."
- (4) Hawaii employers are now covered.
- (5) New race and ethnic categories are titled, "Asians not Hispanic or Latino," "Native Hawaiian or other Pacific Islander not Hispanic or Latino," "two or more races not Hispanic or Latino." The revisions additionally separate "Pacific Islanders" from "Asians" and rename "Hispanic" to "Hispanic or Latino" and "Black" to "Black or African American."

## EEO-1 2005 Filing Deadline Extended to March 31, 2006 for Companies Located in Areas Damaged by Katrina

The 2005 EEO-1 filing deadline of September 30, 2005, has been extended to March 31, 2006, for all companies located in the New Orleans, Louisiana; Biloxi, Mississippi; and Mobile, Alabama, geographic areas that were severely damaged by Hurricane Katrina. This extension applies to companies headquartered in

those areas as well as establishments located in those areas of companies headquartered elsewhere. Should you have specific questions concerning this matter, please contact us, or you may contact the EEO-1 Joint Reporting Committee at 1.866.286.6440 (toll-free) or [e1.techassistance@eeoc.gov](mailto:e1.techassistance@eeoc.gov).

## DOL Finalizes USERRA Regulations

On December 19, 2005, the Department of Labor published the final version of its notice to employers for use in informing employees of their benefits, rights and obligations under the Uniformed Services Employment and Reemployment Rights Act

(USERRA), 70 FR 75246-75313. The rule became effective on January 18, 2006. The regulations have been published in a question and answer format which may be obtained from our office or the Department of

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Labor website. These regulations aid in clarifying the law for returning service members and employers and insure that rights under USERRA are executed without unnecessary delays. USERRA serves to protect returning service members from discrimination and retaliatory acts due to military service, including future military obligations, whether voluntary or involuntary, in time of peace or war. Furthermore, USERRA protects individuals not performing services in the armed forces so long as the individual is engaging in any of the activities protected by the Act itself. USERRA applies to all public and private employers regardless of size, foreign employers doing business in the United States, and American companies operating either directly or through an entity under its control in foreign countries unless compliance with USERRA would violate the law of the foreign country.

The regulations make clear that in the absence of express guidance, any questions should be resolved in the manner most favorable to the employee, subject to the employer's established policies and practices. The regulations also contain information regarding continuation of medical and health benefits, reemployment after service in the uniformed services, the "Escalator Principle" and notice requirements.

More information regarding the USERRA regulations will follow. If you have any questions, please contact us. You may also visit the Department of Labor's website at <http://www.dol.gov/vets/regs/fedreg/final/2005023960.htm> for the full text of the USERRA regulations.

### **DHS Hits Cap on H-1B 'Exemption' for Workers With Advanced Degrees**

The Department of Homeland Security's office of U.S. Citizenship and Immigration Services will no longer accept H-1B applications for fiscal year 2006 on behalf of foreign workers who have advanced degrees from U.S. universities, because it has received enough petitions to meet the annual 20,000 cap on those visas.

The current law exempts up to 20,000 H-1B visa applicants from the 65,000 annual cap if those workers have advanced degrees from American colleges or universities. The H-1B program allows employers to hire highly skilled foreign workers for up to six years.

Because USCIS may already have received more petitions than can be filled under this year's 20,000 allotment for foreign workers with advanced degrees, the agency said it will process all of its pending applications through a "computer-generated, random selection process" until it has approved 20,000 petitions. With USCIS's announcement, employers will have virtually no access to new H-1B workers until the start of the next fiscal year on Oct. 1, 2006. USCIS stopped accepting petitions for regular H-1B workers in August because the 65,000 cap had been reached.

### **U.S. Supreme Court Decides to Review Case to Determine the Standards in which the Hiring of Undocumented Workers Violates the Racketeer Influenced and Corrupt Organizations Act ("RICO")**

On December 12, 2005, the United States Supreme Court decided to review the U.S. Court of Appeals for the Eleventh Circuit's decision in *Williams v. Mohawk Industries, Inc.*, 411 F.3d 1252 (11th Cir. 6/9/05); cert. granted, 126 S.Ct. 830 (U.S. 12/12/05). The Supreme Court granted certiorari to resolve a Circuit split on corporate liability under the Racketeer Influenced and the Corrupt Organization Act ("RICO"), 18 U.S.C. §1962(c) et seq., for the employment of undocumented illegal aliens.

RICO specifically includes in its definition of "racketeering activities" any act which is indictable under the Immigration and Nationality Act if perpetrated for financial gain. In *Williams*, the plaintiffs filed a class action lawsuit alleging that Mohawk's knowing and widespread employment and harboring of illegal alien workers depressed wages for its hourly employees and discouraged workers' compensation claims, thereby reducing Mohawk's labor costs and depressing wages in violation of federal and

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state RICO statutes. Plaintiffs alleged that Mohawk conspired with recruiting companies to employ and shelter illegal workers to keep their labor costs low. Plaintiffs also alleged that Mohawk and its recruiters traveled to the Mexico-Texas border, recruited illegal alien workers, transported the illegal workers to Georgia, provided housing for, and then knowingly accepted fraudulent documentation from the illegal alien workers. Plaintiffs additionally alleged that Mohawk destroyed relevant documents and assisted the illegal workers in their attempts to evade law enforcement by shielding these workers during inspections at Mohawk's facilities.

Although Mohawk filed a motion to dismiss plaintiffs' action for failure to state a claim upon which relief could be granted, the district court denied Mohawk's motion regarding the RICO allegations. Mohawk appealed the district court's denial of its motion to dismiss to the Eleventh Circuit.

On appeal, the Eleventh Circuit held that contrary to Mohawk's assertions, plaintiffs sufficiently alleged a claim under RICO, finding plaintiffs established the required elements of proof on a federal civil or criminal RICO violation. According to the Court, a plaintiff must offer proof of:

- (1) conduct
- (2) of an enterprise
- (3) through a pattern
- (4) of racketeering activity.

The pattern must include two acts of racketeering activity. In this case, the Court found that plaintiffs had properly alleged a pattern of racketeering activities which included "hundreds, even thousands, of violations of federal immigration laws" in its recruiting, employment and harboring of undocumented workers.

In the course of its opinion, the Court also considered whether or not the association between Mohawk and the third party recruiting firm constituted an enterprise for purposes of RICO and if that enterprise had a common goal sufficient to show proof of conduct of an enterprise. An enterprise under RICO

"includes any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity." The Court stated that the Eleventh Circuit had never required anything other than a "loose or informal association of distinct entities" when offering proof of an association in fact. The Court found that plaintiffs sufficiently alleged an enterprise under RICO between Mohawk and its third party recruiters through its assertion that the recruiters were paid by Mohawk and assisted Mohawk in the recruitment and transportation of illegal workers. Furthermore, the Court found that the complaint sufficiently alleged that both Mohawk and the third party recruiters reaped a significant economic benefit from the employment of illegal aliens constituting a "common goal." The allegation that the two entities shared a "common purpose of making money" was sufficient under RICO to withstand a motion to dismiss.

The Eleventh Circuit concluded that plaintiffs' complaint did state a cause of action under federal RICO statutes and noted that its decision is in line with the Second, Sixth, and Ninth Circuit decisions. The Court did note, however, that its decision conflicted with the Seventh Circuit's holding that a common purpose does not include merely a shared goal. The Seventh Circuit held that in employing undocumented aliens, the "employer wants to pay lower wages" and the recruiters "want to be paid more for their services rendered" which were actually divergent goals in *Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir. 2004). The Eleventh Circuit, in considering the Seventh Circuit's holding in *Baker*, explained that "there has never been any requirement that the common purpose of an enterprise be the sole purpose of each and every member of the enterprise."

The Supreme Court granted Mohawk's petition for certiorari to review and resolve the Circuit split on the standards involved in holding a corporation liable as part of a RICO enterprise for immigration violations. The grant of certiorari in this matter is a strong reminder of the heightened obligations imposed on employers when recruiting, interviewing and hiring immigrant workers.

**MARK YOUR  
CALENDARS**

*Thursday  
February 16, 2006*

**New Orleans Employment Law Breakfast Briefing**

“Key Recent Legal Developments and Tips on Planning for a Pandemic  
Post Hurricane Katrina and Threat of Avian Flu and SARS”

*For more information, please contact: Michelle Prentice at 504-584-9250*

**H.R. ALERT**

Inquiries concerning topics addressed in the *H.R. Alert* may be directed to Nan Alessandra, Jane Armstrong, Kim Boyle, or David Korn. Your comments, questions, and suggestions are encouraged.

**NEW ORLEANS, LOUISIANA**

M. Nan Alessandra**	alessann@phelps.com	(504) 584-9297
Jane E. Armstrong	armstroj@phelps.com	(504) 584-9244
Kim M. Boyle	boylek@phelps.com	(504) 679-5790
David M. Korn	kornd@phelps.com	(504) 584-9374
Ellen Romig Fihlman*	ellen.fihlman@phelps.com	(504) 584-9391

**BATON ROUGE, LOUISIANA**

Susan W. Furr	furrs@phelps.com	(225) 376-0230
Thomas H. Kiggans	kigganst@phelps.com	(225) 376-0247
Karleen J. Green	greenk@phelps.com	(225) 376-0244

\*Contributing Editor

\*\*Managing and Contributing Editor

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