

Immigration Woes in the Workplace

Companies are often surprised to learn that employing unauthorized workers could subject them to RICO actions. And now the Supreme Court will consider a case that might further complicate matters.

BY MARY E. PIVEC

The prospect of defending a workplace class action inspires fear and loathing in all employers. And with good reason.

Such cases threaten to divert management resources from core business activities for months, or even years. Defense costs can surpass seven figures. Losing verdicts may exceed hundreds of thousands of dollars. Some statutory claims, such as those under the Fair Labor Standards Act, even allow a multiplier effect, which practically guarantees that a back-pay judgment will be doubled.

In the late 1990s, Congress enacted legislation amending the Racketeer Influenced and Corrupt Organizations Act (RICO). Workplace immigration crimes were now part of a list of predicate acts supporting civil and criminal RICO claims. Since that time, Wal-Mart, Tyson Foods, Zirkle Fruit Co., and IBP have been struck with RICO class actions alleging that these employers and their managers conspired with recruiters and temporary-help agencies to supply unauthorized alien workers, allegedly to depress the wages of American and foreign workers.

Under RICO, these employers faced treble compensatory damages, punitive damages, and attorney fees—not to mention the bad publicity fueled by growing anti-immigrant sentiment. Depending on the size of the plaintiff class, these cases have the potential to cost employers even more than nationwide civil rights and overtime class actions.

Corporate employers typically are surprised to learn that the employment of unauthorized workers could subject them to potential RICO actions. Generally speaking, the offenses underlying a RICO suit must fall into one or more of the categories specifically laid out in the 1970 act. Among the cited offenses are violations of the alien transportation, harboring, and employer sanctions laws.

Federal law makes it a felony to hire 10 or more individuals in any 12-month period knowing that the individuals are aliens unau-

thorized to work for the employer. It is also a felony to conceal, harbor, or shield from detection aliens who have illegally entered the United States, or to encourage or induce an alien to come to, enter, or reside in the United States, knowing that such acts would break the law. Depending on the circumstances, employment can be a factor in a harboring charge.

THE ELEMENTS OF RICO

Plaintiffs in a civil RICO immigration class action must claim that one or more persons employed by or associated with an “enterprise” engaged in interstate or foreign commerce has broken these immigration laws, resulting in harm to the class members. The statute defines an enterprise as “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” Where a corporation is charged with racketeering activity, it is important to note that the corporate defendant is not itself the RICO enterprise. Commentators have referred to the relationship between RICO defendants and the enterprise as that of “spoke-and-hub,” with the defendants being the spokes and the RICO enterprise being the hub.

Such a distinction is critical to the analysis of civil RICO immigration complaints. It is important not to confuse the operations of the interstate corporate defendant with the operations of the illegal enterprise. Indeed, courts historically have found that a RICO “enterprise” must be more than an association of individuals or entities conducting the normal affairs of a defendant corporation. In simple terms, you can’t make a corporate spoke into a hub simply because the other spokes work for the corporate spoke. Other courts have disagreed, allowing the possibility that a corporate defendant may be transformed into a hub if it knowingly permits its agents and employees to participate in racketeering activity.

EMPLOYER DEFENSE STRATEGIES

Because class actions can be so expensive to defend, employers should try to defeat such claims early—at the pleading stage if possi-

ble. Faced with a RICO immigration class action, the strategy is the same: identify an overarching, preliminary legal issue that precludes the plaintiffs from stating a viable cause of action, regardless of discovery opportunities, and present that issue to the court in a preliminary dismissal motion. This is just what Mohawk Industries attempted to do in responding to a RICO immigration class action filed against it in the Northern District of Georgia in 2004.

In *Mohawk Industries Inc. v. Williams*, a class of current and former hourly employees filed a complaint alleging that Mohawk employees recruited large numbers of undocumented workers at the U.S. border near Brownsville, Texas, and conspired with others to transport these workers from Texas to Georgia to work at Mohawk facilities. The plaintiffs alleged that Mohawk knowingly employed these illegal workers directly, or used their services under contract through a temporary-help agency, to reduce Mohawk's labor costs. The complaint alleges that Mohawk paid both employees and third-party recruiters to locate undocumented workers, and that Mohawk concealed its efforts to hire and harbor illegal aliens by destroying documents and assisting undocumented workers in evading detection by law enforcement.

Mohawk responded by filing a preliminary dismissal motion, asserting that the complaint failed to allege the existence of an enterprise distinct from the operations of the corporation—as required under RICO. The District Court denied Mohawk's motion, reasoning that the plaintiffs should be given the opportunity to prove that Mohawk had some role in directing the affairs of the enterprise by telling recruiters to obtain illegal workers for employment by Mohawk. Mohawk was granted permission to seek interlocutory review by the U.S. Court of Appeals for the 11th Circuit; discovery was stayed pending the outcome of the appeal.

Unfortunately for Mohawk, the 11th Circuit upheld the District Court's ruling. The appeals court noted that similar immigration racketeering claims had survived dismissal motions in the 2nd, 6th, and 9th Circuits, albeit based not on an enterprise challenge, but on the question of whether the plaintiff employees lacked standing and could demonstrate a causal connection between the alleged illegal acts and the alleged harm. Mohawk's lawyers had urged the trial and appellate courts to adopt the reasoning of the 7th Circuit in an appeal brought by meat-processing giant IBP in 2004.

The 7th Circuit held, among other things, that there was no way by which plaintiffs could establish that IBP "operated or managed" a separate and distinct criminal enterprise for RICO purposes, since recruitment and hiring are intrinsic to its normal operations as an employer. The 11th Circuit noted that the Supreme Court had not yet ruled upon the nature of the proof required to satisfy the operation and management test under RICO and otherwise refused to follow the 7th Circuit's interpretation of that requirement.

Not satisfied with the 11th Circuit's ruling, and citing the apparent conflict in the circuits, Mohawk petitioned for review by the Supreme Court. Mohawk contended that it is settled law that, for RICO purposes, a corporate defendant must "conduct" or "participate" in the affairs of some larger separate enterprise—not just its own affairs—in order to incur liability under RICO.

On Dec. 12, the Supreme Court granted the petition, agreeing to address the narrow issue of whether a corporate defendant, in combination with non-employee recruiters and temporary-help agencies acting on the corporate defendant's behalf to furnish unautho-

rized alien workers, may constitute an "enterprise" for purposes of stating a RICO cause of action. And thanks to the Mohawk case, U.S. employers will know whether they can be held liable under RICO for treble damages and attorney fees for violations of the employer sanctions laws.

Perhaps the most difficult challenge for Mohawk lies in the liberal pleading requirements under the Federal Rules of Civil Procedure. The 3rd Circuit, for example, while agreeing with the proposition that a corporation, in association with an affiliate, its own employees, or third-party agents, cannot be said to form a separate, distinct enterprise for RICO purposes, has nevertheless permitted such suits to proceed beyond the 12(b)(6) stage.

The 3rd Circuit has ruled that under the liberal pleading requirements of the federal rules, it is theoretically possible for a corporation to take a separate active role in RICO violations also committed by its agents and employees. As such, courts in the 3rd Circuit typically postpone consideration of the "distinct enterprise test" until the summary judgment stage after the evidentiary record has been fully developed.

Thus, it is possible that the Supreme Court could grant a pyrrhic victory to Mohawk by approving its contention that, in the abstract, a corporation ordinarily could not constitute the requisite "enterprise" for RICO purposes absent evidence of high-level involvement in the pattern of illegal conduct, but nevertheless deny Mohawk's request for dismissal of the complaint with prejudice.

The Court might simply order the case remanded to the District Court, paving the way for the costly discovery Mohawk had sought to avoid in the first place. By doing so, the Court could postpone until another day the question of how much involvement a corporation must actually exhibit in order to be transformed into a criminal enterprise for RICO purposes.

LESSONS FOR EMPLOYERS

There is no doubt that the mood of the country and Congress has turned ugly with all the news about unauthorized workers in certain sectors of our economy, particularly in construction, food processing, restaurants, and hospitality. Citizens have volunteered to serve as vigilantes on our borders to detect and deter entry to the undocumented. And the House of Representatives rejected President George W. Bush's call for a guest-worker program that would enable U.S. businesses to lawfully employ qualified foreign workers for jobs that do not require a college degree.

The House has approved legislation requiring employers to verify and document the identity and work eligibility of all workers, not just new hires. That legislation would also substantially increase the civil and criminal penalties for immigration workplace offenses.

The U.S. Chamber of Commerce has recognized the crisis the new legislation would create by forcing employers to fire large numbers of employees, without any means of recruiting replacement workers. In addition, global companies operating in the United States now have the freedom lawfully to transfer management personnel and key employees to employment in the United States. Should the House bill ultimately become law, many employers could find themselves in the position Mohawk does today.

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