

Avoiding Liability for Work-Related Injuries to Undocumented Workers

Date: 2.1.2013

Employers are well aware that just one work-related accident or illness can result in medical expenses, rehabilitation services, and liability compensation. A recent Nebraska Supreme Court decision is a reminder that undocumented aliens, as well as legal workers, may bring workers' compensation claims. In *Moyera v. Quality Pork Int'l*, 284 Neb. 963 (Jan. 4, 2013), the Nebraska Supreme Court held that the Nebraska Workers' Compensation Act applies to undocumented aliens and these employees could be entitled to permanent total disability benefits ("PTD benefits") for work-related injuries. Courts in other states also have found that undocumented employees are covered by their state workers' compensation systems, including: (1) Florida, (2) Kansas, (3) Kentucky, (4) Maryland, (5) New Jersey, (6) North Carolina, (7) Ohio, (8) Oklahoma, and (9) Pennsylvania. Such liability can be avoided by carefully managing the hiring process to ensure that you do not employ aliens who are not authorized to work.

In *Moyera v. Quality Pork Int'l*, Ricardo Moyera was injured in an accident arising out of the course and scope of his employment with Quality Pork International (QPI). Moyera was not a legal U.S. resident and could not speak English. He purchased illegal papers to obtain employment in the United States. While working for QPI, Moyera sustained permanent injuries to his foot when a forklift ran over it. Moyera was given a permanency rating and was able to return to work at QPI in a light duty capacity. Shortly thereafter, QPI conducted an audit of all employment files and determined that Moyera did not have proper immigration documents. Moyera was terminated from QPI after he was unable to produce proper documentation showing that he could work legally in the United States. Following his termination, Moyera underwent a functional capacity evaluation, which placed him in the sedentary work category, and gave him a 20% permanent whole body impairment rating.

A rehabilitation consultant later completed a loss-of-earning-capacity analysis for Moyera. The consultant concluded, "[B]ecause of [Moyera's] permanent restrictions and his inability to speak English ... he was not competitively employable and had experienced a 100-percent loss of earning capacity."

Despite the employer's argument that benefits for permanent loss of earning power should be barred for undocumented workers because these benefits depend on an employee's ability to obtain lawful employment in the United States, the Nebraska Supreme Court held that undocumented aliens qualify for permanent total disability benefits. The Court favorably cited cases from other jurisdictions finding employers liable in similar circumstances. It reasoned, "[E]xcluding undocumented workers from receiving disability benefits creates a financial incentive for employers to continue hiring them, in contravention of federal law. Furthermore, allowing an employer to escape liability for the work-related injuries that its undocumented employees sustain gives the employer an unfair advantage relative to competitors who follow the law."

The Court also recognized public policy issues concerning undocumented aliens receiving PTD benefits. The Court found persuasive authority from other jurisdictions and held, "[C]ourts have also raised significant policy concerns. They have concluded that workers' compensation laws reflect a policy choice that employers bear the costs of their employees' work-related injuries because they are in the best position to avoid the risk of loss by

improving workplace safety. We agree that public policy weighs against allowing employers to avoid the costs of their workplace hazards.”

Practical Tips for Employers

As the Nebraska Supreme Court makes clear, all employees of a Nebraska employer covered by the Nebraska Workers' Compensation Act are eligible for benefits if injured in the course and scope of their employment, regardless of their eligibility to obtain lawful employment in the United States. From a compliance standpoint, employers can avoid potential liability for PTD benefits for work-related injuries with an I-9 compliance audit accompanied by training initiatives aimed at preventing the hiring of employees who do not possess lawful work authorization and audits of records. Such initiatives should be undertaken with the assistance of competent legal counsel experienced in immigration compliance. Jackson Lewis attorneys are available to assist employers with these immigration compliance issues and other workplace requirements. For more information, please contact Amy Peck in the Omaha Office, at (402) 391-1991 or Amy.Peck@jacksonlewis.com, or the Jackson Lewis attorney with whom you regularly work.

© 2013, Jackson Lewis LLP. This Update is provided for informational purposes only. It is not intended as legal advice nor does it create an attorney/client relationship between Jackson Lewis LLP and any readers or recipients. Readers should consult counsel of their own choosing to discuss how these matters relate to their individual circumstances. Reproduction in whole or in part is prohibited without the express written consent of Jackson Lewis LLP.

This Update may be considered attorney advertising in some states. Furthermore, prior results do not guarantee a similar outcome.

Jackson Lewis LLP represents management exclusively in workplace law and related litigation. Our attorneys are available to assist employers in their compliance efforts and to represent employers in matters before state and federal courts and administrative agencies. For more information, please contact the attorney(s) listed or the Jackson Lewis attorney with whom you regularly work.

practices

Immigration

Management Education