Immigration Reform Consequences for Employers

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Why Does Immigration Matter?

- Over 12,000,000 people are in the United States without documentation.
- Approximately 4-6% of the workforce.
- Over 25% of Californians were born outside the United States.
- 75% of H-1B filings were rejected for lack of visas under the H-1B quota.
- Indian and Chinese professionals may wait 20 years for immigrant visas.
- The question is not whether we should fix the system but how and when?

Creative Strategies to Find Talent

- H-1B Specialty Workers (Cap Exemptions)
- Treaty Workers (TN, E-3, H-1B1)
  - Canada, Mexico, Australia, Chile, Singapore
- L-1 Intracompany Transferees
- E Treaty Traders/Investors
- O-1 Extraordinary Ability / Outstanding Researchers
- J-1 Exchange Visitors
- H-3 Trainees

The In House Immigration Perspective

International collaborations

Expanding business overseas

Training programs and internships

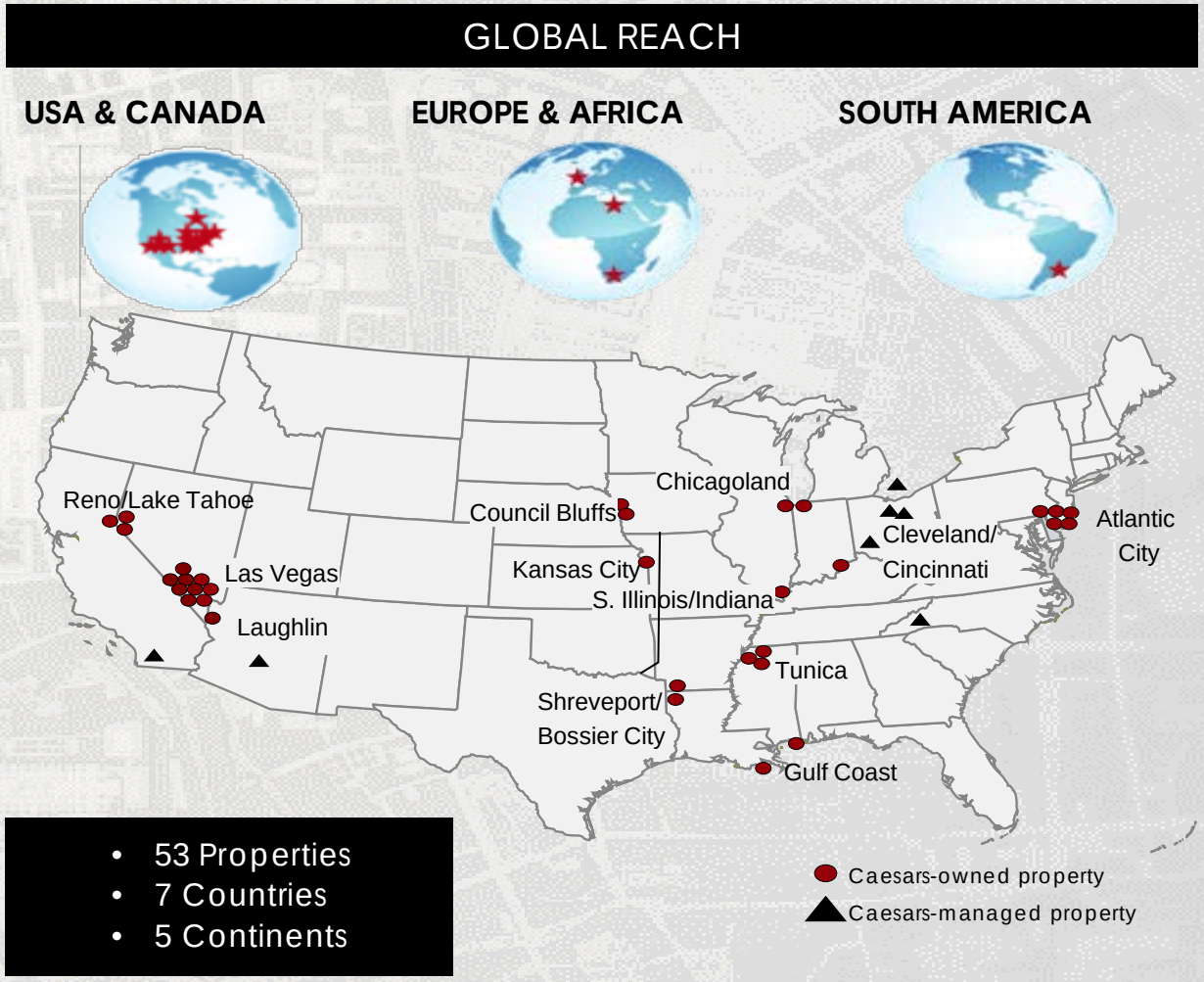
Proposed STEM regulation & education

Lobbying efforts

Caesars Entertainment – Who are we?

Our brands, industry-leading loyalty program and distribution network differentiate Caesars Entertainment:

- World's most geographically diversified casino-entertainment company
- 100+ million annual visitors
- 53 properties with a strong global presence
- More than 20 brands, including Caesars, Harrah's, Horseshoe, Flamingo and the World Series of Poker
- 45 million Total Rewards members – shared with local businesses
- Nearly 70,000 employees
- 390 restaurants, bars and clubs
- Celebrity chefs, including Guy Fieri, Gordon Ramsay and Bobby Flay
- 44,000 hotel rooms
- 302 retail shops
- 1.6 million square feet of meeting space
- 7 golf courses



Focus on Employment

THOUSANDS OF NEW, PERMANENT JOBS ACROSS A RANGE OF FIELDS, INCLUDING:

- Gaming Operations
- Relationship Marketing
- Human Resources
- Finance/Planning & Analysis
- Hotel
- Food & Beverage
- Information Technology
- Total Service

FORTUNE 100 TOP MBA EMPLOYERS 2006

Focus on Employees

Our mission statement at Caesars Entertainment: “We inspire grown-ups to play!”

- Nearly 70,000 employees
- 390 restaurants, bars and clubs
- 44,000 hotel rooms
- 302 retail shops
- 1.6 million square feet of meeting space
- 7 golf courses
- Hire approximately 11k employees (2014)
- Approximately 10% of our employees are in the US on a visa
- Top 3 departments with employees on visas:
  - Food and Beverage (35%)
  - Hotel Operations (30%)
  - Casino Operations ((17%)

The Outside Immigration Counsel Perspective

- The Big Picture, Immigrants Create Jobs and Improve the Economy
  - High Demand for Skilled and Unskilled Workers (High-Tech to Agriculture)
    - 2009: 41% of US STEM Master degreed graduates are FNs
    - 2011: 76 % of patents issued by the top 10 US Universities included at least 1 FN
    - 2 million agricultural jobs available, only 600,000 USC farm workers available
  - Entrepreneurship Driven by Immigrants
    - 2013: 1 out of 3 entrepreneurs starting privately-held venture-backed companies are foreign-born
    - 2010: 40% of the Fortune 500 founded by immigrants resulting in employing 3.6 million and earning $1.7 trillion in revenue
    - 2013: Immigrant-founded venture-backed companies now publicly traded have a total market capitalization of $900 billion and employ over 600,000

References provided by the American Immigration Council

Immigration- Navigating the Maze

- Provide inbound assistance to non-U.S. citizens and permanent residents to come into the United States.
- Provide guidance to employers with employees and operations outside the U.S.
- Ensure companies remain in compliance with immigration and employment laws in filing petitions and after employment begins.

Immigration Compliance

I-9 Compliance

- Obama Administration
- 2009 shift in focus of workplace enforcement from arresting illegal workers to pressured employers not to hire undocumented workers.
- ICE has conducted over 7,500 audits and imposed over $80 million in fines.
- Increase in Electronic I-9 Vendors

E-Verify

- Not mandatory in California
- California Specific Legislation
- Retaliation

Examples of Compliance Actions

Infosys

- Whistleblower investigation for misuse of B-1 business visitor category and I-9 violations by Departments of State, Justice, and Homeland Security;
- Record $34M settlement;
- Required enhanced corporate compliance measures.

Sirsai, Inc.

- Numerous H-1B violations, including willful failure to pay wages, material misrepresentations of material facts on LCA, and failure to post LCA;
- Debarment for two years;
- $405,175 in civil penalties;
- $983,039 back pay wage assessment to be recalculated.

Employment Outside Counsel Perspective

Employers Will Need to Be Vigilant In Their Employment Practices

- It is still a good practice to include "honesty policies" in employee handbooks
- California has new laws which require careful implementation of honesty policies
  - California Labor Code § 1019
  - California Labor Code § 1024.6
  - No Federal equivalent yet

- Employers need to be aware of other immigration and employment laws that do not readily stand out
  - California Vehicle Code § 12801.9

Pandora's Box

Office of Acquisition Management

- The Office of Acquisition Management determines who may be eligible for federal contracts. A single charge of knowingly continuing to employ an alien without work authorization can result in a recommendation to debar a company from federal contracts.

Office of Special Counsel

- The Office of Special Counsel has been charged with protecting employees from citizenship and nationality discrimination. This includes reviewing E-Verify data to determine if there is a basis for patterns of discrimination. Statistical anomalies may result in OSC audits which are far more detailed than I-9 audits.

Securities & Exchange Commission

- ICE can refer the matter to SEC for investigation of hiring practices and other compliance issues which can relate to public companies. Publicly traded companies must adequately disclose risk to their investors, include immigration and employment because of the potentially punishing repercussions.

Hypothetical – Corporate Changes

Mammoth Corporation acquires Mouse Corporation. In the process of the Mouse acquisition, Mammoth decides to split off one division of the acquired entity and maintain the remainder of the company. Of these employees, 40 remain employed under Mammoth. 5 will be spun off into the new entity.

Hypothetical: Changing Identities

Sally is the HR Director at a logistics company located in Los Angeles. Homer Simpson has been working for the company for a year and has had good performance in a warehouse position. Homer tells Sally that he wants to update his employment information. His new name is Jerry Garcia and he has a new social security number. He provides a work authorization card with the new name which is consistent with this new information.

What does Sally do?

Hypothetical - Unionized Company

A large online retailer's distribution center received a series of anonymous complaints about Abe being undocumented worker. Abe also happens to be part of a management group friendly to management and its union avoidance campaign. Brian is in HR and decides to run a Social Security Verification for Abe and discovers his SSN is doesn't exist.

The Year Ahead

- ✓ Election Year
- ✓ Immigration Reform
- ✓ STEM Litigation
- ✓ FY17 H-1B Cap
- ✓ Adopt E-Verify?
- ✓ I-9 Audits

Immigration: How immigration reform will affect the workplace

More than 12 million people live in the United States without legal immigration status. We are at the edge of the greatest immigration political chess match in American history. President Obama threw down the first challenge with his Immigration executive action. As immigration reform is being developed, community leaders, lawyers and employers are stuck with many questions and few answers. By the time NAPABA's national conference takes place, we will be only a year from the presidential election and immigration may be the largest single issue to address. This article will provide an unique view from the perspective on what these changes mean for non-profits, large corporations, and government.

The first portion of this article will strictly review employment based immigration lawyer. This article addresses serious questions on how reform will affect businesses who utilize visas, international workforces and address immigration compliance. The second half of this article reviews the issues associated with the intersection of immigration reform and employment law. In particular, how employment law issues in California demonstrate the complexities of state-to-state differences.

Combined, these articles provide the reader an understanding that while reform may be made with the right intentions, the impact could lead to the road to hellish confusion for employers.

Business Immigration: A view from the employer side

Immigration Reform has been a hotbed topic since President George W. Bush entered office over fifteen years ago. Both Democrats and Republicans on Capitol Hill agree that the current US immigration system of laws and regulations are broken and flawed. But the issue is not that how the system is flawed but how to fix it. The current immigration laws had their roots beginning with the adoption of the *US Constitution*. Specifically, *Article I, Section 8, Clause 4* of the Constitution expressly states Congress has the power to "establish a uniform Rule of Naturalization" and with that power passed its first immigration law with the *Naturalization Act of 1790* enabling only "free white persons" to naturalize. Several more laws were passed before that increased the statutory physical residency requirements to remain in the US before 'free

white persons' were qualified to naturalize. In 1868, the *Fourteenth Amendment* was added to the *US Constitution* that stated, ""All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States" that was further expanded to the naturalization of African-Americans in 1870. But due to the infamous *Chinese Exclusion Act* of 1882, people of Chinese ethnicity were excluded to naturalize until it was repelled in 1943 by the *Magnuson Act*. Mass Chinese immigration to the US in the late 1800s was so feared that several related *Chinese Exclusion Act* laws were also passed during this time including the *Page Act* that allowed for the easier deportation of Chinese laborers and women along with the *Geary Act* that required Chinese immigrants to carry a resident permit identification document or risk deportation.

Additional US immigration laws remained restrictive heading into the 20th Century with laws that prevented the immigration of the mentally and physically challenged along with those that prevented people sixteen years of age of older from immigrating if they could not read English. Further laws preventing Asian immigration were implemented including the *Asiatic Barred Zone Act* of 1917, which barred immigration of all Asians and the *Emergency Quota Act* of 1921, which established national immigration quotas based on proportionate ethnic number of foreign-born residents who were living in the United States as of the 1910 census. This meant that people from northern Europe, especially England, had higher and far greater authorized numbers to immigrate to the US compared to the rest of the world. These restrictive laws remained in place until the *Immigration and Nationality Act* (i.e. *McCarran–Walter Act*) of 1952 was passed by vast majority of Congress. The *McCarran–Walter Act* put into place a system to allow the immigration of three types of applicants, (1) those possessing special skills or are relatives of US citizens; (2) refugees; or (3) all other immigrants that are subject to an annual quota not exceeding 270,000 per year. Other parts of the Act allowed deportation of immigrants engaged in subversive activities and expanded US nationality to residents of Puerto Rico and Guam along with putting in place the procedures to naturalize.

But the *McCarran–Walter Act* was still found restrictive and was called by President Truman as 'discriminatory' and the reason why he vetoed the bill even though Congress overruled his veto. It was not until the *Immigration and Nationality Act Amendments* (i.e. *Hart-*

Celler Act) of 1965 was passed and signed into law by President Johnson that many of the past discriminatory issues in past laws were changed. A majority of the *Immigration and Nationality Act Amendments* entail many of the same laws we still have today including the various nonimmigrant designations such as the heavily-used H-1B nonimmigrant process. But the laws did not stop there as several major tweaks continued to be added to the law. They include the *Refugee Act* of 1980, the *Immigration Reform and Control Act* of 1986 (IRCA), the *Immigration Act* (MMACT) of 1990, and the *Illegal Immigration Reform and Immigrant Responsibility Act* of 1996 (IIRIRA). The *Refugee Act* allowed for increased humanitarian-based admission of refugees into the US by raising refugee admissions from 17,400 to 50,000 for each fiscal year. IRCA was created to minimize illegal immigration by forcing the magnet of illegal immigration, all US employers, to verify the work authorization of their workforce through the I-9 verification system we know today. But IRCA also contained an amnesty for the approximate three million illegal immigrants already in the United States. After IRCA, IMMACT was passed that loosened-up the immigration laws to increase annual immigration visas for US permanent residency to 675,000. IMMACT also created the EB-1 to EB-5 employment-based categories, the diversity lottery, and added the Temporary Protected Status for people escaping war-torn countries. It further created the O and P nonimmigrant visa designations for people with outstanding or artistic achievements, and made major changes to the H-1B program, just to name a few. While IMMACT could be viewed as the law that provides many immigration benefits, IIRIRA is its exact opposite. IIRIRA put into place harsher requirements for foreign nationals to remain or keep their immigration status. These included three to ten year debarments from being allowed entry into the US based on past overstays lasting over six months, harsher deportation penalties for a broader level of convictions including petty theft and multiple DUIs, and the authorization of extensive jail times for those that are deportable.

With the implementation and enforcement of many of these immigration laws, the influx of illegal immigrants has not stopped. Following IRCA in1986, an estimated twelve (12) million undocumented workers have entered the US (five percent of the US population) with a vast majority being from Mexico. Not blinded to these numbers, one of President George W. Bush's major platforms upon entering office was to draft an immigration reform bill dealing with these numbers. But 9/11 changed all of that. After 9/11, immigration reform took a backseat to

advocating tougher stance on illegal immigration with stronger controls and borders. Capitol Hill proposed such bills as the House's 2005 *Border Protection, Anti-terrorism, and Illegal Immigration Control Act of 2005* (a very restrictive immigration bill that increased US enforcement and deportation abilities but put nothing in place for legalizing the undocumented workers already here), and the Senate's 2006 *Comprehensive Immigration Reform Act* (a bill imposing both increased enforcement while changing many processes within the current system of legalized immigration). Neither bill ever left Capitol Hill because of the major differences between the House and Senate over the debate.

With President Barack Obama's entry into the White House in 2008, he targeted two critical areas for his administration to take care of, comprehensive health care and immigration reform. Unfortunately comprehensive immigration reform remains up in the air. The Obama administration originally turned its sites to fixing the US 'broken' immigration system by proposing a 'something for everyone' plan of:

1. Implementing a committee that follows the economic needs of US industry and proposes changes to US business-based immigration to meet those needs,
2. Prevention and enforcement of unauthorized employment,
3. Improved border enforcement,
4. Improved interior enforcement for overstays and law violators,
5. Implement a program to provide a path to legalized the current number of undocumented immigrants and workers in the US, and
6. Implement programs to help new immigrants adjust to life here.

However the plan died with Congressional debate. Frustrated by the stalemate, the States started implementing their own immigration legislation. Some such as Arizona required any businesses doing business in that state be registered with and implement E-Verify. E-Verify is an online work authorization verification system managed and directed by the Department of US Homeland Security's Immigration Control and Enforcement (ICE) Division. E-Verify is strictly voluntary but once a US employer signs up for it, requires the US employer to verify any of their new hires immediately after the US employer completes the mandatory I-9 verification process.

Not only the States but some local jurisdictions and counties too required the same for any businesses doing business in their cities or counties. Other states, such as Illinois, made it illegal for companies to be registered with E-Verify. This Illinois law has since been found unconstitutional as being a violation of the Supremacy Clause. Arizona has even gone further and allowed its local law enforcement to make reasonable suspicion stops for those required to keep their immigration paperwork with them.

Where does that leave us now? The next chapter in this twisting and turning debate has forced President Obama to enact his executive power rights announced at his November 2014 speech where he outlined his Executive Order on the issue. President Obama's Executive Order includes a 'deferred action' program called the *Deferred Action for Parents of Americans and Lawful Permanent Residents*, also known as the *Deferred Action for Parental Accountability* (DAPA), allowing for an estimated 45% of illegal immigrants (estimated at over five million) to legally stay and work in the United States in three year increments. Other portions of the Executive Order includes an end to the Secure Communities program partnership between the states and ICE in sharing deportation detention responsibilities, providing increased resources for border enforcement, and adding new procedures for retaining high-skilled foreign nationals. Since the Executive Order announcement, on December 4, 2014, the Attorney General for the State of Texas filed a lawsuit claiming DAPA was unconstitutional. The lawsuit was signed-on and supported by twenty-five (25) other states. On February 16, 2015, the Federal District Court issued a temporary injunction from implementing DAPA, which the Obama Administration appealed but which Homeland Security is following until the court process runs its course.

Besides DAPA, the Executive Order includes portions that are less controversial for implementing streamlined legal immigration processes to *boost our economy and promote naturalization*. One is to provide portable work authorization for high-skilled workers awaiting US permanent residency for themselves and their spouses. Under the current system, employees with approved US permanent residency applications often wait years for their visas to become available. Homeland Security will make regulatory changes to allow these workers to move or change jobs more easily. Included in this order to is to create new work authorizations for

spouses of H-1B employees the H-1B employee receives their approved US permanent residency petition.

Another section of the Executive Order allows Homeland Security to expand immigration options for foreign entrepreneurs that meet certain criteria for creating jobs, attracting investment, and generating revenue to help grow the US economy.

The Executive Order will allow Homeland Security to propose changes to expand and extend the use of existing Optional Practical Training (OPT) programs for STEM (Science, Technology, Engineering, and Mathematics) foreign national graduates and require stronger ties between OPT students and their colleges and universities following graduation in the STEM field.

The Executive Order grants Homeland Security to provide clarification of its guidance on L-1 intra-company visas who transfer from a company's foreign office to its US office and allows the US Department of Labor to take regulatory action to modernize its labor market test (ie PERM process) for employers to sponsor foreign workers for immigrant visas while ensuring American workers remain protected.

Of those mentioned above, the only provision to take effect is the one allowing H-1B spouses employment authorization upon main H-1B beneficiary's approved US permanent residency petition. Employment authorization for H-1B spouses of approved I-140 was implemented on May 26, 2015. As for the rest of the Executive Order pertaining to boosting our *economy and promoting naturalization*, we have no word on where or when those will be implemented. However, due to the vagueness of the Order's language, it is anyone's guess when they will truly be implemented, if at all.

Immigration and Employment Law

With the current state of Immigration Reform in the United States, only one thing is truly certain – there won't be any quick or easy answers with respect to how immigration and employment law will evolve, or even if these two areas of law will harmoniously grow together in the years to come.

As the footing for how to deal with immigration issues in the workplace becomes more unsure, employers across the nation, but particularly in California, have been hard-pressed to come up with solutions to avoid potential pitfalls for liability in dealing with an ever-increasing workforce of undocumented employees.

- The Presumed Benefit of Honesty Policies

In a day and age of rampant wrongful termination claims, the tool of honesty policies has been seen as both a shield and sword in employment actions. According to a CareerBuilder survey performed last year, nearly one out of five employees admitted to lying at the office at least once per week. The same survey indicated that a quarter of hiring managers fired employees for having been caught engaging in dishonesty in the workplace.

While employment is presumptively at-will in California and other states, the general premise of having an honesty policy in an employee handbook is to support a subsequent termination if an employee is ever found to have been dishonest in their employment. In 2013, in the matter of Hanson v. Mental Health Resources, Inc. (D. Minn. 2013) 948 F. Supp. 2d 1034, the District Court of Minnesota supported an employer defendant's honesty policy in its employee handbook, ruling that the plaintiff employee's dishonesty in listing her boyfriend as her "spouse" and/or "partner" in her health insurance beneficiary paperwork were reasonable grounds for the plaintiff employee's termination. Specifically, at the outset of her employment during her new hire orientation, the plaintiff employee completed standard employment forms relating to benefits, including forms related to health insurance coverage. As explained in these forms, the employer's health insurance coverage extended only to spouses and same-sex domestic partners. In completing these forms, however, the plaintiff employee identified her boyfriend as her "spouse," and neglected to indicate whether she was "married" or single." Later, in a subsequent life and disability insurance election form, the plaintiff employee listed her boyfriend as her "beneficiary" and "partner." One year later, the plaintiff employee requested FMLA pregnancy leave. During the preparation for this leave, it was discovered that the plaintiff employee had dishonestly obtained health insurance coverage for her opposite-sex, unmarried partner. As a result, the employer terminated the plaintiff two months later.

In a subsequent action for discrimination, and denial of and retaliation for having requested FMLA leave, the Minnesota District Court held that the employer's honesty policy was sufficient to overcome any temporal presumptions of discrimination and retaliation, as well as arguments of pretext by the plaintiff.

Given rampant wrongful termination suits across the nation, it is therefore highly advisable for employers to have an honesty policy in their employee handbooks and/or policy manuals. That said, however, in the bustling and often confusing intersection between immigration law and employment law, employers who do not obtain advice on how to apply honesty policies carefully with their immigrant workforces could be creating issues instead of resolving them.

- The Lurking Pitfalls of Honesty Policies in California

Employers with a high demographic of employees from other countries may believe that terminating an employee for having dishonestly provided information about his or her personnel information, such as a social security number, will be shielded by an argument that they were simply enforcing their company honesty policy. The thought would be, "An employee whom I suspect is undocumented has changed their legal name and/or social security more than once. Therefore, it appears they have been dishonest in their practices and I can terminate this employee for the same pursuant to our honesty policy." In California, without more investigation, this would be folly.

California Labor Code section 1024.6 specifically creates liability for any employers who terminate or otherwise takes any adverse action against any employee for having updated his or her personnel information:

"An employer may not discharge an employee or in any manner discriminate, retaliate, or take any adverse action against an employee because the employee updates or attempts to update his or her personnel information based on a lawful change of name, social security number, or federal employment authorization document."

California Labor Code section 1019 also creates separate liability for both employers and individuals.

"It shall be unlawful for an employer or any other person or entity to engage in, or to direct another person or entity to engage in, unfair immigration-related practices against any person for the purpose of, or with the intent of, retaliating against any person for exercising any right protected under this code or by any local ordinance applicable to employees. Exercising a right protected by this code or local ordinance includes the following: (1) filing a complaint or informing any person of an employer's or other party's alleged violation of this code or local ordinance, so long as the complaint or disclosure is made in good faith; (2) seeking information regarding whether an employer or other party is in compliance with this code or local ordinance; or (3) informing a person of his or her potential rights and remedies under this code or local ordinance, and assisting him or her in asserting those rights."

Given these two statutes, an employee in California may conceivably have been hired using a false identity or social security number, but then come forward to his or her employer in order to attempt to update his or her personnel information. And given the reality we are all now faced with, which is that such practices are widespread and prevalent, assuming the update would result in a lawful change of one of the foregoing listed in the Labor Code section 1024.6, any attempt by the employer to take action against the employee could result in significant exposure to liability and damages for both the employer and any individual involved in the decision-making process for the employment action.

While there does not appear to be any restriction on an employer's ability to terminate or take adverse action against an employee for the initial dishonest act of relying on false documents to obtain employment, California's Labor Code sections may have opened the door to a slippery slope where, hypothetically, an employee could argue that the dishonesty would not have been known but for the employee's attempt to correct his or her personnel information; and, therefore, the adverse action(s) taken against the employee were not simply because of alleged dishonesty, but because of the acts protected under the Labor Code. This is akin to the concepts present in the laws relating to evidence in criminal proceedings that occasionally (and to the shock of many) invalidate all evidence and information obtained from

unlawful search and seizures or interrogations (e.g. Fruit of Poisonous Tree, Miranda rights, etc.).

Further, it is clear that a concern of discrimination is specifically contemplated in California's Labor Code. As an ever-growing portion of the nation's employees come from other countries, and may or may not be documented, the next question is whether the EEOC may, at some point, attempt to push the use of honesty policies in the same direction as questions regarding post-employment criminal conduct (e.g., criminal background checks).

- Can an Activist EEOC Push the Use of Honesty Policies in the Same Direction as Criminal Conviction Checks

As many employers are now aware, due to nationwide "Ban the Box" ordinances, the use of criminal background checks and questions during the interview process regarding criminal history as guides for whether to hire an employee, can be a perilous process.

Over the course of several years, California has evaluated the issue of whether the use of convictions in employment applications may result in a disparate impact on persons of a particular race or national origin. In Hetherington v. State Personnel Board (1978) 82 Cal.App.3d 582, the California Court of Appeals examined whether the status of being an ex-felon could permissibly restrict an employee's hire. In applying federal law, the Court explained that "the employment practices provisions of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.)… provide[] essentially that if an employment practice has a disproportionate adverse effect against any group in terms of race, color, religion, sex or national origin, such employment practice (such as a test or standard) is unlawful, unless it can be shown to be related to job performance." (Hetherington, supra, 82 Cal.App.3d at 594, citing Grigss v. Duke Power Co. (1971) 401 U.S. 424, 430-431.) The Court went on to state that "under these federal statutes, it has been held that an absolute ban from employment in any position, of any person convicted of any crime other than a minor traffic offense, is unlawful where such practice ha[s] a disparate impact against [a protected status] and where there is no showing that the employment standard [i]s related to job performance, or justified in terms of business necessity." (Hetherington, supra, at 594, citing Green v. Missouri Pacific Railroad

Co. (8th Cir. 1975) 523 F.2d 1290, 1295.) (emphasis in original.) However, "where [an] employer show[s] that criminal conduct does bear a relationship to the duties of a particular occupation, such standards have been sustained." (Hetherington, supra, 82 Cal.App.3d at 594.)

Wisconsin was one of the first States to codify that "it is an act of employment discrimination to []: (1) refuse to hire, employ, admit or license any individual, to bar or terminate from employment… any individual, or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment… because of [arrest record or conviction record]; or (2) to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which implies or expresses any limitation, specification or discrimination with respect to an individual or any intent to make such limitation, specification or discrimination because of [arrest record or conviction record]." (Wisconsin Fair Employment Act (WFEA) section 111.31(1).)

The theory behind "Ban the Box" ordinances is based on the fact that the Federal Government has raised concerns that, as a general effect, a narrow range of employees belonging to specific ethnic minorities have been negatively impacted by employers' usage of criminal convictions records in the hiring process – resulting in what has been described as a disproportionate selection, or even artificial selection using biological terms, of employees, while excluding others.

While honesty polices, in and of themselves, do not create a disparate impact on any protected class, there is the possibility that, as in the way of criminal convictions, their implementation by employers could result in a similar "disproportionate selection."

It is well known that certain industries in the nation and certain States deal quite regularly, whether by choice or circumstance, with employees immigrating from other nations, such as Mexico and Latin America. Should the number of terminations relying on dishonesty in the workplace based on personnel information increase over time in those industries or States, it is conceivable that certain protected classes of individuals will end up being

terminated for the same, in higher numbers. At that point, it will likely not only be possible, but probable, that a new wave of discrimination lawsuits will ensue – all based on the intersection between immigration and employment in the United States.

- Further Employment Issues in Immigration

In addition to the issues raised by honesty policies used by employers, there are several other new employment laws in California that businesses will need to be conscious of.

Starting on January 1, 2015, under Vehicle Code section 12801.9, the California Department of Motor Vehicles began issuing driver's licenses to undocumented persons so long as they could submit satisfactory proof of identity and California residency. The law also made it a violation of the California Fair Employment and Housing Act ("FEHA") for an employer to discriminate against an individual because he or she holds or presents such a driver's license. The FEHA now specifies that "national origin" discrimination includes discrimination on the basis of possessing such a driver's license.

The legislation also made it a FEHA violation for an employer to require a person to present a driver's license, unless possessing a driver's license is required by law or is required by the employer, and the employer's requirement is otherwise permitted by law. However, actions taken by an employer that are required to comply with federal I-9 verification requirements under the Immigration and Nationality Act ("INA") do not violate California law.

The new law also requires employers to treat employee driver's license information as confidential and prohibits disclosure to any unauthorized person or use for any purpose other than to establish identity and authorization to drive.

In addition, under Labor Code section 1041, private employer regularly employing 25 or more employees shall reasonably accommodate and assist any employee who reveals a problem of illiteracy and requests employer assistance in enrolling in an adult literacy

education program, provided that this reasonable accommodation does not impose an undue hardship on the employer.

So while necessary increased protections for none-English speaking employees are in place in order to develop and enhance California's workforce, employers will be tasked with continuing to follow ever-evolving regulations when both hiring and then retaining immigrant employees. And as immigration and employment laws continue to develop, it will be incumbent upon our government to help develop a harmonious balance between the two – as the future, and the people entering into it, deserve an equal balance, so that both employees and employers are protected properly.