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Immigration Reform and Employment Verification: The Former May Depend on the Latter

by Stephen M. Darden

Throughout this year, we have witnessed a political phenomenon in the United States of America. The citizenry of our nation – which can be described as both the most powerful nation in the world, because of our military might, as well as the most vulnerable on earth, because of our commitment to individual freedom – has been well ahead of our elected leaders in pressing for immigration reform. Amazingly, over five years after the terrorist attacks of September 11, 2001, the security of the borders that separate our country from Mexico and Canada are only now being given the serious attention they mandated then.

Unsatisfied with inaction on the government's part, grassroots efforts to secure our borders have evolved, such as the Minutemen groups within the states of the Southwestern portion of the U.S.A. Now, dozens of proposals seem to dot the landscape, ranging from a great wall along the Mexican border, to earned citizenship/amnesty as proposed by the Bush administration. While seemingly everyone now believes that something must be done, the consensus as to what has not yet materialized.

It seems that stemming the tide of illegal immigration depends first on recognizing the root cause of most illegal immigration. That is, the hope of a job. Several commentators have called that hope "the employment magnet." This

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brings us to a principle of American jurisprudence that ought not be seriously questioned yet with which some struggle: in order to work in this country, a person is supposed to have the legal right to work in this country.

Neither the immigration debate nor the connection between employment and immigration are new. It was recognized in the 1970s that unlawful immigration was a problem that could potentially stretch our nation's capacity to handle its own population base and millions of unlawful immigrants as well. A commission was established to study the issue.

The work of The Select Commission on Immigration and Refugee Policy, convened in 1978 and known as the Hesburgh Commission, led to the adoption of the Immigration Reform and Control Act of 1986 ("IRCA"). IRCA was viewed by many in the employment community as an inconvenience that served no useful purpose whatsoever. The rationale behind the law – to make it a crime to hire unauthorized immigrants – was so compromised by lack of enforcement methods and personnel that many employers saw the law as merely one more layer of meaningless bureaucratic red tape. The law itself was somewhat poorly communicated, as many employers were still unaware of IRCA several years later.

In retrospect, it is clear that IRCA created an explosion in the demand for, and hence the supply of, false documents. It is generally known that in any major metropolitan area in our land, false documents can now be obtained for a few hundred dollars. It seems unlikely that any illegal immigrant would now apply for a job without authentic-looking credentials. Perhaps the most ill advised aspect of IRCA was its requirement, on the one hand, that only those authorized to work in the U.S.A. be hired, coupled on the other hand with restrictions on the ability of an employer to determine whether documents presented by an applicant were actually authentic. IRCA seems to have been rendered toothless by the dawning of the age of political correctness: employers were forbidden to hire individuals who could not legally work here, but were discouraged from questioning the authenticity of an applicant's credentials. Now, twenty years after IRCA became law, a problem of immense proportions exists.

Any sort of meaningful attempt to reign in unlawful immigration must start with effective enforcement of the nation's existing laws. If guest workers are to be allowed, so be it, but there must be some system for confirming that someone who presents guest worker credentials actually possess those credentials lawfully. The same is true for other designations held by foreigners who are legally authorized to hold jobs in the United States. The Hesburgh Commission said so three decades ago.

In the early 1990s, another commission, this one headed by former Texas Congresswoman Barbara Jordan, was created. It, too, called for effective employment verification. Presently, another study is underway by the Independent Task Force on Immigration and America's Future. It appears that, once again, meaningful employment verification will be recommended.

According to Tamar Jacoby, a well-known journalist and recognized authority on immigration issues, meaningful verification may depend upon the use of a swipe card linked to the databases of the Social Security Administration and Department of Homeland Security. Perhaps she is correct. But if law-abiding employers are to be asked to help solve the nation's illegal immigration explosion, then they should not be saddled with the costs of doing so. It is hard to debate the fact that our country's efforts to regulate illegal immigration have not worked, and it may be fair to ask whether we have ever actually tried. At any rate, it seems fairly obvious that our country cannot afford any more failed attempts because our economy, our government, and our security all depend on our genuine ability to regulate, keep track of, and – yes, in some cases – deny entrance to the Land of Opportunity to citizens of other countries.

Stephen Darden practices labor and employment law with Hunter, Smith & Davis, LLP. His maternal grandparents immigrated from their native Albania and became U.S. citizens after World War I. Certification as a labor and employment law specialist is not currently available in Tennessee.
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Hunter, Smith & Davis Welcomes Harold Naramore, MD

Harold Naramore, MD has joined the law firm of Hunter, Smith & Davis, LLP. He will concentrate on health care law and medical malpractice defense. Dr. Naramore, a native of Bristol, Tenn., received his BS and MD degrees from East Tennessee State University and the East Tennessee James H. Quillen College of Medicine. He also did his residency at the Quillen College of Medicine. Most recently, Dr. Naramore received his MBA and JD from the University of Tennessee.

Prior to attending law school, Dr. Naramore practiced medicine for 16 years. Ten of those he spent with Frontier Health, where he served in a variety of capacities including the Chief of the Medical Staff and Medical Director of Woodridge Hospital. He received numerous awards and honors for his work in the medical field.

Dr. Naramore resides in Johnson City with his wife who is also a physician and their 15-year-old daughter.

Have You Heard?

Take note of the following recent developments in employment law.

- The need for a document retention policy may appear to have decreased as the world moves toward electronic storage of documents. However, changes to rules governing litigation, along with court sanctions aggressively penalizing companies who purge (intentionally or not) documents that are evidence demonstrate that companies, now more than ever, need a strong and well-followed document retention policy. If you have changed your method of storing documents in the last few years, if you are uncertain how long you should be keeping records, or if your company has implemented electronic system back-ups and periodic automatic purges, then we encourage you to contact us to assist in a review of your policy on retention of documents and to answer any questions regarding document retention.

- Financial institutions now fall under the umbrella of Executive Order 11246, which establishes affirmative action requirements for certain contractors of federal, state and/or local governments. The U.S. Department of Labor's Office for Federal Contract Compliance ("OFCCP") issued an opinion in early Fall that financial institutions must meet the requirements of Executive Order 11246 and establish an affirmative action plan. The opinion can be found in the "Frequently Asked Questions" section on the Department of Labor's website (www.dol.gov). The OFCCP had previously expressed uncertainty about the coverage of financial institutions under Executive Order 11246, and had not aggressively pursued enforcement efforts in this area. Based on the new opinion, financial institutions should be prepared for the DOL/OFCCP to take a more high-profile and aggressive approach in enforcement of affirmative action plan requirements as it is likely that this issue is on the OFCCP's radar screen at the moment. If you are a financial institution that does not presently have an affirmative action plan, we recommend you consult with legal counsel about whether you are within one of the few exceptions to the financial institution requirement. If you do have an affirmative action plan, it would be wise to have it reviewed by legal counsel (if you haven't already done so) and to stay current on your annual plans. Members of our labor and employment team have extensive experience in preparation and defense of these plans, and they would be happy to assist you in any way you desire.

- The Department of Labor's Uniformed Service Employment and Reemployment Rights Act of 1994 ("USERRA") has another revised poster. If your copy of the poster references individuals in the National Disaster Medical System, then you have the most recent copy of the poster. If you need a copy of the new poster, go to www.dol.gov/vets and click on the link under "USERRA poster" for Non-Federal (State and Private) employers.

- Tennessee employers' obligations to pay out accrued vacation may have subsided with a recent opinion from the Tennessee Attorney General. According to the opinion, employers who have a policy that states an employee will not receive a pay-out of unused, accrued vacation time upon termination are now able to enforce such a policy. This opinion served to strike down a previous interpretation by the Tennessee Department of Labor that required payment of vacation time upon termination, even if a policy stated otherwise unless that policy was mutually binding on the employer and employee. With this most recent opinion from the Tennessee Attorney General, employers are able to dictate whether accrued vacation time should be included in an employee's final wages that are required to be paid out under statute.

For more information on any of these topics, please contact Laura Steel, a member of our Labor and Employment Group, at lsteel@hsdlaw.com or (423) 378-8814.

Save the Date... Upcoming Employment Law Seminars

Healthcare Cost Management:
Safe & Effective Implementation of a Cost Savings Program

February 8 • 11:30 am – 1 pm
MeadowView Conference Center • Kingsport

Virtually every business is forced to contend with rising healthcare costs. Most typical approaches have involved passing on more of the cost to employees, simply absorbing the increase (thereby reducing profits) or reducing the quality of the benefits offered. This session will explore innovative ways to reduce the health care costs you pay for your employees without resorting to the typical, negative approaches, and will discuss the legal issues involved with implementing these strategies. This discussion will be beneficial to any employer who provides healthcare benefits to its employees.

We are honored to welcome Michael Puck, Director of Human Resources for BAE SYSTEMS Ordinance Systems, Inc., as our guest speaker. Mr. Puck will offer cutting-edge insight into effective health care cost-reduction methods.

The Aging Workforce:
Issues and Strategies for Addressing the Coming Crisis

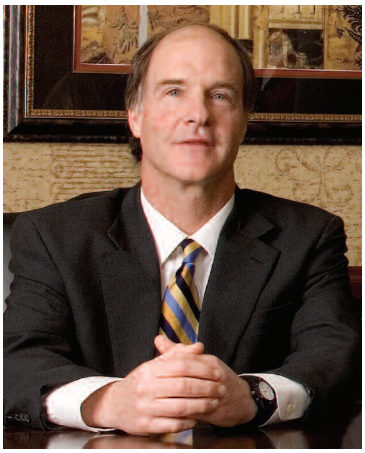
April 24
Centre at Millennium Park • Johnson City

As the Baby Boomers near retirement age, businesses are starting to recognize the many and varied implications of the loss of this component of their workforces. In this seminar, attendees will explore the legal aspects of handling the loss of experienced workers through retirement, disability or death. Specifically, we will discuss strategies for retaining seasoned employees, recruiting new employees to replace those who are retiring, managing health care costs for an older workforce, and minimizing discrimination and harassment concerns.

For more information or to register, contact Melissa Sizemore at (423)378-8800 or msizemore@hsdlaw.com, or visit www.hsdlaw.com.

Attorneys In The News

Mark Dessauer Named to "150 Best Lawyers List"



For the third consecutive year, Mark Dessauer has been named to the list of the "150 Best Lawyers in Tennessee." The 2007 list will be published in the January issue of Business Tennessee Magazine.

The list is a result of hundreds of editorial interviews with respected lawyers, judges, top clients and corporate directors in specific areas of practice. Mr. Dessauer is a partner in the firm and chair of the firm's Corporate/Business Practice Group.

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Morris Hadden Featured in Midsouth Super Lawyers List

S. Morris Hadden, the senior partner of Hunter, Smith & Davis, LLP, has been named to the Midsouth Super Lawyers List – a resource to assist attorneys and sophisticated consumers in the search for legal counsel. Using a multi-step process that incorporates peer recognition and professional achievement, the publisher identifies qualified candidates. A system of balloting, peer evaluation, and internal research acts as a system of checks and balances that produces a diverse and comprehensive listing of outstanding lawyers year after year.

Mr. Hadden has been an active civil litigator and trial lawyer for 35 years, having tried over 200 jury trials in the fields of commercial litigation, products liability, arson/fraud and class actions. A graduate of the University of Tennessee College of Law, he is a Fellow in both the American College of Trial Lawyers and the ABA Foundation. He served as a Special Justice on the Tennessee Supreme Court in 1996 and was an FBI Agent for three years following law school. He is on the Board of Governors of the Tennessee Bar Association and in the International Association of Defense Counsel.

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This is an advertisement.

Michael L. Forrester Admitted to Nation's Highest Court

Micheal L. Forrester with Hunter, Smith & Davis, LLP was admitted to practice before the U.S. Supreme Court in early December 2006. Mr. Forrester was presented to the court by Larry Wilks, president of the Tennessee Bar Association and an attorney in Springfield.

Mr. Forrester joined 12 other lawyers from across the state for the two-day program in Washington, D.C. that included a private tour of the Supreme Court and the admissions ceremony. The ceremony, which was held in open court, was presided over by Chief Justice John Roberts.

To qualify for admission to the Supreme Court bar, an attorney must present a personal statement, proof that he has been admitted to practice before the highest court in his state for at least three years and a certificate of good standing from that court. In addition, each attorney must be sponsored by two existing members of the Supreme Court bar who can vouch for their moral and professional character. Because of these high standards, less than one percent of the nation's attorneys are admitted to practice before the Supreme Court.

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