International Municipal Lawyers Association 2010 Annual Conference: Work Session VIII

Municipal Employee Hiring: Sealing the Deal or Sealing Your Fate

Work Eligibility for Non-U.S. Citizens

&

Thoughts on Hiring Letters

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Pt. 1
An Aside on Non-Citizen Employment

- Not intended as an in-depth analysis of issues related to eligibility for work or employment discrimination against non-U.S. citizens.
- Purpose is solely to provide some resources on the issue of citizenship and employment and an overview of the electronic process available to verify work eligibility status for job applicants.

Limits on Employers: Basic Rule

- U.S. Departments of Labor and Justice and EEOC assert that:

  Title VII of the U.S. Civil Rights Act and provisions of the Immigration and Nationality Act limit employers who may seek to require that employees and applicants for employment be citizens of the United States.

On-Line Guidance:

- **INA non-discrimination summary in on-line Handbook for Employers, Instructions for Completing Form I-9. (See paper for URL.)**
- **Handbook Part Four details Unlawful Discrimination and Penalties for Prohibited Practices.**
  - **Title VII prohibits employment discrimination on the basis of national origin, as well as race, color, religion, and sex.**

More On-Line Guidance:

- U.S. Department of Justice, Civil Rights Division,
  - INA bars citizenship or immigration status discrimination with respect to hiring, firing, and recruitment by employers with 4 or more employees, subject to certain exceptions.
  - National origin discrimination with respect to hiring, firing, and recruitment by employers with more than 3 and fewer than 15 employees.
- FAQ list provides "10 steps" to take to avoid immigration-related employment discrimination.

Verification of Eligibility to Work in US

- At same time that employment discrimination is prohibited, employers to whom laws apply must verify that employees are eligible to work in the U.S.
- Form I-9 helps employers verify individuals who are authorized to work in the United States. Complete a Form I-9 for every new employee hired after November 6, 1986.
- E-Verify. To improve accuracy and integrity of process, USCIS operates an electronic employment verification system called E-Verify.

Undocumented Worker - Recourse under Federal Labor Laws

- *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137 (2002) said NLRB lacked authority to order back pay to an undocumented worker who was laid off from his job due to union activities (because of fraud in procuring employment).
- US D of L, EEOC, etc. assert that laws they enforce may provide remedy even in light of *Hoffman* decision.

Conclusion . . . (for now)

Given the uncertainty and potential liability facing employers who hire undocumented workers, understanding and compliance with documentation requirements and use of E-Verify may be sound investments in time and effort.

Pt. 2 - Finalizing the Hiring Decision

- Don't Let a New Hire Start Until Paperwork is Done.
  - **Have a protocol in place to deal with applicants who fail post-offer exam(s).**
  - **Don't send rejection letters to unsuccessful applicants until you are really sure.**
  - **Don't let employment begin until all requirements have been met.**
  - **Document every step of the way.**

RUSHING A HIRE CAN COST $$$$$

- ***Liability***
- ***Another Recruitment***
- ***Wrongful Discharge***
- ***Lower Morale***
- ***Potential Public Black Eye***

Before Finalizing, Clarify Employment Status

- Is the employee "at-will" and does that make a difference?
- What does personnel policy or CBA say about new hires?
- Is there a checklist of what should be done? If not, why isn't there one?

And don't forget the paper work . . . .

- ***State Law Requirements (N.H. Example)***
  - *Notification of Hiring*
    - To Employee (RSA 275:49)
    - To Department of Employment Security
- **Federal Requirements**
  - Form W-4 or W-9
  - Form I-9 – Employer Eligibility Verification

Consistency

- How does each of the following relate to the status of a newly hired employee?
  - Personnel Policy
  - Job Description
  - Employee Handbook
  - Job Application
  - Statements at Interview
  - Collective Bargaining Agreement
  - Ordinance / Charter / Statute
  - Hiring Letter (which can trump all above)!!

Hiring Letter

- Check to see if use required by State Law – if so, include all required components
- [N.H. Statute (RSA 275:49) says
  - **Every employer shall:**
    I. Notify the employees, at the time of hiring of the rate of pay, and of the day and place of payment;
    II. Notify his or her employees of any changes in the arrangements specified above prior to the time of such changes;

What else might you say . . .

- Preservation of At-Will Status, if Applicable
- Please, Be a Nice Employee!
- Anything else might be a problem:
  - **Conflict with personnel policy**
  - **Creation of unrealistic expectations**
  - **Change employment terms**
  - **Create contract (notwithstanding disclaimers)**
    - **See, e.g., *Dillman v. N.H. College*, 150 N.H. 431 (2003)**
      - **This letter is written to confirm New Hampshire College's intent to employ you as Director of AV Studio which is a ten/twelve month (please circle one) position.**

Questions or Comments?

Thank you.

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