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Part Two of a Series

Making rights real: Effectively representing immigrants



Protect their rights by keeping their immigrant status out and protecting them from threats of retaliation

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Part One of this article appeared in the January 2011 issue and presented an overview of the rights and remedies available to immigrants in personal injury and employment matters in California, along with tips about establishing effective communication with your immigrant clients and drafting complaints to avoid making your client's immigration status an issue during litigation.

In Part Two, the author discusses some strategies for resisting defense efforts to intimidate immigrant clients, whether through engaging in aggressive discovery or in conduct outside of the litigation that is aimed at chilling immigrant clients' exercise of their rights.

— Editor

Protecting clients from retaliation

All workers run the risk of retaliation when they file a complaint. However, if your client is undocumented, or has family members who are undocumented, she faces the additional risk that the defendant will threaten to report her to immigration authorities, or take other less extreme but nonetheless harmful measures designed to chill her exercise of protected rights.¹ Thus, in addition to assessing the likelihood that your client's immigration status could arguably be implicated by her legal claim at the outset of the case, you should also explore with your client whether the defendant is likely to engage in retaliatory behavior and try to use the threat of status disclosure as a way to pressure her into abandoning her claims.

Courts have found that reporting an employee to immigration authorities in retaliation for filing suit gives rise to a cause of action for unlawful retaliation under state and federal statutes.² But of course, it is better to take proactive steps to prevent such retaliation from happening in the first place if they are at all foreseeable. Depending on the nature and degree of the perceived risk that a defendant will act, such steps could range from explaining to opposing counsel that any threats to report your client or anyone in the client's family to immigration authorities will be considered unlawful retaliation, to seeking a temporary restraining order or preliminary injunction if the defendant exhibits a clear intention to retaliate or has previously engaged in some retaliatory activity.³



Keeping immigration status out

Pursuing meritorious litigation often includes defending against aggressive efforts by defendants to use plaintiffs' immigration status as a tool to discourage them from continuing to pursue their claims. We have many tools at our disposal to resist defendants' efforts to force disclosure of our clients' immigration status, and should not hesitate to use them early in the case, *even when the client is legally authorized to work here*. As others have noted elsewhere, it is better not to defer questions of discoverability to the time of trial, because the protections that exist in discovery once your client's immigration status or privacy rights are implicated are far broader than the standards for admissibility.⁴

California law clearly bars such discovery in employment and other civil matters. As set forth in subsection (b) of Labor Code § 1171.5, Civil Code section 3339, and Government Code section 7285:

For purposes of enforcing state labor, employment, civil rights, and employee housing laws, a person's immigration status is irrelevant to the issue of liability, and *in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person's immigration status* (emphasis added) except where the person seeking to make this inquiry has shown by clear and convincing evidence that this inquiry is necessary in order to comply with federal immigration law.

Thus, in employment cases, so long as reinstatement is not sought,⁵ these sections make it clear that no evidence can be taken in discovery regarding immigration status – period. This section therefore can be cited in objecting to deposition questions and discovery requests directly related to immigration status, in addition to any other grounds – such as invasion of privacy under Article I, section 1 of the California Constitution – that may be asserted.

There is a strong argument that the prohibition on immigration-related discovery applies in other cases as well, including personal injury cases. As another plaintiff's attorney has pointed out:

[S]ection "a" of these statutes states that evidence of a plaintiff's immigration status is irrelevant. Because it is irrelevant, it cannot lead to discoverable evidence, and weighed against any relevance the defense might articulate are the privacy rights of the individual plaintiff. A bona fide assertion of privacy rights shifts the burden to a defendant to show that the information *is* – not *might be* – directly relevant to the claims.

(See *Hunter Tylo v. Spelling Entertainment Group* (1997) 55 Cal.App.4th 1379, 1387; *Britt v. Superior Court* (1978) 20 Cal.3d 844, 852-853.)

Courts at the state and federal level have recognized the danger of allowing defendants to use discovery of immigration status in this manner and acknowledge the "chilling effect" that disclosure of immigration status has on immigrants' ability to have their claims heard in court.⁶

Conclusion

Representing immigrants presents a challenge as well as a tremendous opportunity to plaintiffs' attorneys. There are many excellent resources out there to help us navigate and succeed in these rewarding cases, including the Web sites and publications of organizations like the National Employment Law Project (www.nelp.org), the National Immigration Law Center (www.nilc.org), and the Southern Poverty Law Center (www.splc.org), who all do research and advocate on behalf of immigrant workers, and have published or co-authored litigation manuals and guides for attorneys who represent them. In addition, sample pleadings and motions on many issues related to representing immigrants in employment matters can be found on

NELP's National Wage and Hour Clearinghouse (www.just-pay.org) and the California Employment Lawyers Association's brief bank (www.cela.org/PracticeMaterials.html). And of course, members of the plaintiffs' bar who represent immigrants on a regular basis, including me and my colleagues at Talamantes/Villegas/Carrera, LLP (www.e-licenciados.com), are happy to lend an ear, offer some curbside advice, or send a brief to a fellow plaintiff's attorney in need!

By arming ourselves with the legal knowledge and practical know-how to effectively represent immigrant clients, we can raise the bar for the rights of all working people in this state while increasing access to justice for a growing but underserved segment of our diverse population.



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Endnotes

¹ For example, in *EEOC and Bethancourt v. City of Joliet*, 239 F.R.D. 490 (N.D. Ill. 2006), the district court issued a protective order barring the employer from requiring the employees to fill out I-9 forms when the employer had been in operation for over 17 years but had only distributed these forms after the EEOC filed a Title VII lawsuit on behalf of the workers and the discovery deadline was approaching. The court found that:

[A]llowing the defendant's action will have the effect not of enhancing compliance with immigration employment laws, but of undermining the enforcement of and compliance with such laws. It is well known and understood that one of the main motivations for the hiring of undocumented workers is the reality that such workers are unlikely to complain if discriminated against, underpaid, overworked or subjected to abusive work environments because they fear deportation...



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239 F.R.D. at 492. (emphasis added) The court also barred communications between the employer and the employees related to I-9 compliance, stating:

Although the court hesitates to intervene in the communication between an employer and its employees, it is clear that plaintiffs and class members must be protected from intimidation which will deter them from asserting their rights under Title VII... Absent such protection, there is a significant possibility that the lawsuit will be fatally undermined long before any determination on the merits.

Id. For discussion of this and other similar cases, see William R. Tamayo, "Immigration Status, Threats to Deport and Employment Discrimination: the EEOC's Approach in Litigation," available at <http://www.wcsap.org/events/workshop2009/Immigration%20Status,%20Threats%20to%20Deport%20and%20Employment%20EEOC%20Approach%20Feb2009.pdf>.

² See e.g., *Singh v. Jutta*, 214 F.Supp. 2d 1056 (N.D. Cal. 2002) and *Contreras v. Corinthian Vigor Ins. Co.*, 25 F.Supp. 2d 1053 (N.D. Cal. 1998) (both holding that reporting plaintiffs to immigration authorities in retaliation for filing wage claims could give rise to claims for unlawful retaliation under the Fair Labor Standards Act (FLSA)). Like the FLSA, California's Fair Employment and Housing Act and Labor Code wage provisions are remedial statutes whose effectiveness depends on employees' ability to bring claims thereunder with impunity. Thus, the same basic analysis should apply to retaliation claims under these statutes. See generally, *Robinson v. Shell Oil, Co.* (1997) 519 U.S. 337, 346 ("A primary purpose of antiretaliation provisions [is] [m]aintaining unfettered access to statutory remedial mechanisms.").

³ See, e.g., *Centeno-Burney v. Perry*, 302 F. Supp. 2d 128 (W.D.N.Y. 2003) (granting preliminary injunction prohibit-

ing employer from contacting local, state, and government agencies where employer had evidenced intention to contact those authorities to deport workers in retaliation for their assertion of claims under the FLSA and other labor statutes). Under California law, in determining whether a plaintiff is entitled to preliminary injunctive relief, courts will weigh the following: (1) the likelihood that plaintiff will prevail on the merits of the claim and (2) the balance of harms that will result from the issuance or nonissuance of the injunction. *Butt v. State of California* (1998) 4 Cal.4th 668, 678; *IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69-70.

⁴ See Pasternak and Ocegueda, "Your Client's Immigration Status Is Not an Issue – Don't Let the Defense Make It One," *supra* note 6.

⁵ This is because reinstatement would presumably require the employer to obtain immigration status information from the plaintiff to comply with the requirements of IRCA, and thus would fall under the exception to irrelevance under subsection (a) of these statutes.

⁶ While an exhaustive list of such cases would be far too long to cite here, see, e.g., *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004), cert. denied, *NIBCO, Inc. v. Rivera*, 544 U.S. 905 (2005) (affirming protective order that barred discovery of plaintiff-employees' immigration status in Title VII litigation); *EEOC v. First Wireless Group, Inc.*, 225 F.R.D. 404 (E.D.N.Y. 2004) (following *Rivera* and denying discovery of charging parties' immigration status in Title VII case); *Flores v. Albertsons Inc.*, 2002 U.S. Dist. LEXIS 6171, 2002 WL 1163623, *6 (C.D. Cal. Apr. 9, 2002) (finding immigration status irrelevant to claims for unpaid minimum wages and overtime, denying defendants' motion to compel production of immigration status-related documents).

⁷ See *supra* note 11 for a non-exhaustive list of some of the immigration-related conduct that could make someone subject to criminal prosecution under federal law.

⁸ See *Garner v. United States*, 424 U.S. 648, 652 (1976).

⁹ See, e.g., *Andrade, et al. v. Madra's Café Corp., et al.*, 2005 WL 2430195 (E.D. Mich. 2005); *Pontes v. New England Power Company*, 2004 WL 2075458, at *1-2 (Mass. Super., Aug 17, 2004).

¹⁰ See *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 460 (rejecting defendant's contention that plaintiff's "immigration status and other suggested 'bad acts' are somehow admissible to attack plaintiff's credibility" under Evidence Code section 787); *Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 345 (following the reasoning of *Rodriguez v. Kline* in affirming trial court's order excluding evidence of plaintiff doctor's prior licensing violations on grounds that such evidence could not support defendant's "unclean hands" defense; noting that, "The misconduct that brings the unclean hands doctrine into play must relate directly to the cause at issue. Past improper conduct or prior misconduct that only indirectly affects the problem before the court does not suffice. The determination of unclean hands defense cannot be distorted into a proceeding to try the general morals of the parties.").

¹¹ See *Rivera v. Nibco, Inc.*, 364 F.3d 1057 (9th Cir. 2004) and its progeny for the legal authority for such protective orders. Sample pleadings and briefs in state and federal court can be obtained from the author of this article.

¹² See, e.g., *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452 (holding that trial court abused its discretion in, among other things, denying plaintiff's motion in limine regarding his immigration status and alienage).