Court Rejects "Al Capone Defense" To FLSA Violations

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On July 29, a federal appeals court addressed the question of whether the Fair Labor Standards Act's minimum wage and overtime protections apply to undocumented aliens working illegally for an employer. Drawing on an analogy to the unlawful practices of a lawful immigrant, Al Capone, the U.S. Court of Appeals for the 8th Circuit firmly concluded that the FLSA's protections apply, stating:

> "employers who unlawfully hire unauthorized aliens must otherwise comply with federal employment laws. The employer's argument to the contrary rests on a legal theory as flawed today as it was in 1931 when jurors convicted Al Capone of failing to pay taxes on illicit income."

Thus, the 8th Circuit (which covers the states of Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota) found that aliens, whether authorized to work or not, may recover unpaid and underpaid wages under the FLSA, concluding "breaking one law does not give license to ignore other generally applicable laws." *Lucas v. Jerusalem Cafe LLC*

Volunteering For $3.90 Per Hour?
Elmer Lucas and five other aliens without employment authorization to work in the United States were unlawfully employed at the Jerusalem Cafe, a restaurant in Kansas City, Missouri. Some of the unauthorized aliens worked for less than the minimum wage and all worked without receiving overtime compensation for hours worked over 40 in a workweek. The six unauthorized aliens worked between 60 to 77 hours per week and were paid in cash. Their effective hourly wage ranged from $3.90 to $10.39 per hour. The six workers brought suit against the Jerusalem Cafe and its owner alleging willful failure to pay minimum and overtime wages in violation of the FLSA.

The case proceeded to trial and the district court precluded the employer from mentioning the six workers' illegal immigration status. However, during trial, the parties agreed to an exception after the owner wished to answer the question as to why he kept no record of the workers' payments (i.e., "he could not I-9" the workers). The employer and owner also offered testimony that the workers had "volunteered" to work at the restaurant without pay. The jury found in the workers' favor and awarded almost $142,000 in actual damages for unpaid FLSA wages, the same amount in liquidated damages, attorneys' fees and costs.

The restaurant moved for judgment as a matter of law or a new trial on the basis that the workers "as undocumented aliens" were "prohibited by law from receiving any wages ... [and] lacking

standing to sue for backpay under the [FLSA]." The district court rejected both arguments and the employer and owner appealed to the 8th Circuit.

"The Broadest Definition That Has Ever Been Included In Any One Act"

The appeals court analyzed the text of the FLSA, concluding that the FLSA's sweeping definitions of "employer" and "employee" (the latter defined in relevant part as "any individual employed by an employer") unambiguously encompasses unauthorized aliens. The court cited floor debate from then-Senator Hugo Black who referred to the FLSA's definition of employee as "the broadest definition that has ever been included in any one act."

The restaurant argued that the Supreme Court's 2002 decision in *Hoffman Plastic Compounds, Inc. v. NLRB* (interpreting the National Labor Relations Act) meant that the Immigration Reform and Control Act (IRCA) implicitly amended the FLSA to exclude unauthorized aliens. The 8th Circuit rejected the argument, noting that in *Hoffman* the Supreme Court had addressed a different issue – whether unauthorized aliens may receive back-pay *after the date of their termination* (i.e., during periods they did not perform work). The court distinguished *Hoffman*, explaining that the Supreme Court held in *Hoffman* that the National Labor Relations Act applies to the *actual* employment of unauthorized aliens.

The 8th Circuit further noted that its interpretation of the FLSA was consistent with a 2013 decision of the 11th Circuit (*Lamonica v. Safe Hurricane Shutters, Inc.*) and the longstanding position of the Labor Department, which as early as 1942 had ruled that alien prisoners of war were covered by the FLSA.

Finally, the court commented on the congressional purposes in enacting the FLSA and IRCA, finding them to be in harmony. The 8th Circuit stated, "The IRCA and FLSA together promote dignified employment conditions for those working in this country, regardless of immigration status, while firmly discouraging the employment of individuals who lack work authorization."

The court reasoned that holding employers who violate federal immigration law and wage and hour law liable for *both* violations advances the purpose of federal immigration policy by "offsetting what is perhaps the most attractive feature of [unauthorized] workers – their willingness to work for less than the minimum wage." Because the FLSA provides a right to sue and obtain a real remedy, the 8th Circuit found the undocumented aliens had standing to recover damages from the employer.

Breaking One Law Does Not Provide License To Break Others

One facet of this case stands out. Unauthorized aliens are protected for work they have *actually performed* for an employer, whether under the FLSA or the NLRA. But, as to relief (whether back pay or front pay) for work not actually performed, the remedial powers of the law do not necessarily protect unauthorized aliens, as demonstrated in the *Hoffman* decision construing the NLRA. Similar reasoning would seem to preclude an award of FLSA liquidated damages to an unauthorized alien – an issue that the concurring opinion noted was not addressed in the 8th Circuit's *Jerusalem Cafe*

opinion.

For now, however, it is clear at least in the 8th Circuit that, "Employers who unlawfully hire unauthorized aliens must otherwise comply with federal employment laws." While breaking immigration laws may not preclude recovery under the FLSA by an unauthorized alien (who also has violated the law), the unlawful status of the alien does not provide the employer license to violate the FLSA.

For more information contact the author at GBallew@fisherphillips.com or 816.842.8770.

Related People

Gregory D. Ballew
Partner
816.842.8770
Email