



Washtenaw County LEGAL NEWS

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*Indigent defense
in crisis mode*
—page 2

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DRC honors Lloyd Powell



Washtenaw County Chief Public Defender Lloyd Powell received the Dispute Resolution Center's Bernard J. O'Connor Award last Thursday. Above right, Powell acknowledges the applause after receiving the award as DRC Executive Director Belinda Dulin joins in.

Above, anyone who knows Powell, knows how much he respects his staff and he came to the event with a laser pointer so he could point them out.
—Legal News Photos by Frank Weir



Above, Powell posed with, left, Lorne Brown and, far right Tim Niemann, both assistant public defenders. County Commissioner Kristin Judge, next to Powell, introduced him at the event.

The solution to the immigration battleground? 'E-VERIFY!! E-GAD!! E-NORMOUS!!'

By RICHARD W. PIERCE, ESQ.
Richard W. Pierce PC

The problem of those present in the United States without authorization (described legally as "aliens present without the authorization of the Attorney General;" commonly as "illegals" or "illegal aliens") and who work improperly has been a vexing dilemma for decades.

Such workers arguably decrease wages paid to those legally authorized to work. They may cause a burden on social services and schools.

On the other hand, many work at jobs "legals" do not want for a variety of reasons—hours; working conditions; type of job; location; temporary nature of the job.

Such workers help to keep down the cost of food growth and production, construction, and food preparation, keeping the U.S. cost of living relatively low. Further, there would be a tremendous cost in attempting to remove all those here illegally.

Some of those considerations may explain, in part, the seeming reluctance of both Republican and Democratic administrations

of not having been more aggressive in pursuing removal ("deportation") of such workers.

A bigger reason also may be pure financial.

In most cases, those working here without authorization have had FICA and income taxes withheld as they likely presented Social Security cards to obtain employment in the first place.

Many of those cards do not belong to the persons presenting them. Unless legalized somehow, those workers will never be able to collect on the Social Security they have paid into the system. Estimates of the excess Social Security wages on which withholding has occurred for such individuals range upwards to \$500 billion dollars.

This has resulted in actual payments into the Social Security system of perhaps several billion per year for several years which will not be paid out, but which help to sustain some modicum of liquidity in the system.

For many years, the preferred method to deal with the problem of unauthorized employment was through the issuance by the



Social Security Administration ("SSA") of "No Match" letters to Employers.

These were generated by the SSA when it received annual earnings reports from employers and the SSA determined the names provided did not match those it had on record for the specific social security number.

Upon receipt of a No Match letter, the employer had to take

steps with the employee to verify/correct the information with the employee (leading the employee to be, in the words of Ernie Harwell, "long gone"), terminate the employment, or otherwise straighten out the situation.

Although still in use, No Match letters simply have not worked as well as intended.

As a result, the U.S. government has now switched emphasis

to the E-Verify program for federal contractors.

This system is intended to identify illegal workers early in their employment. Authorization for the program is found in two executive orders; one by President Clinton and one by George W. Bush. The Obama Administration has continued the program.

(continued on page 3)

Fired public defender highlights ongoing indigent defense crisis

By JOHN MINNIS
Legal News

Julie Beck took a gamble when she moved back to Michigan from Las Vegas ... and lost.

Beck, chief public defender for Chippewa County in the Upper Peninsula, claims she was fired from her job Feb. 8 because she had the audacity to ask for more help.

The deputy public defender, Rob Stratton, was made acting chief public defender until the Chippewa Board of Commissioners decides whether it is going to scrap the office altogether.

As the only remaining attorney in the public defender's office in Sault Ste. Marie, Stratton has 1,000 cases to handle, more than half of them felonies, including two murders.

"It's truly unfair what they did to him (Stratton)," said Beck, even though she was the one fired. "He's got two homicide trials coming up. One was mine; one was his."

Chippewa is one of three counties with public defender's offices, Beck said. The other two are Washtenaw and Bay counties.

As is the case with most counties, Chippewa formerly contracted out its public defender work.

In 1997, the public defender office was created as a money-saving measure. At the time, attorneys were refusing contracts and began charging hourly for their services.

The office was created with two attorneys and one administrative assistant. The caseload at

the time was 250 cases, including 50 felonies.

Today, with four times the number of cases, the office still employs two attorneys.

Beck said that in past years she sought two additional part-time attorneys and a part-time investigator. This year, after having her pleas fall on deaf ears, she went for broke and asked for two full-time attorneys and a full-time investigator.

The county's previous chief public defender was Elizabeth Church, a law school classmate of Beck's. When the deputy public defender position opened up in 2002, Beck applied for and got the job. She had been living in Las Vegas, having left a private practice in Monroe.

"I had enough beautiful weather and sunny skies," Beck said somewhat wistfully following her termination.

When Church was elected judge of the 91st District Court in 2008, Beck was promoted to chief public defender.

Beck said the board of commissioners made it clear that either she or the public defender's office, or more likely both, was on the chopping block.

Scott Shackleton, chairman of the Chippewa County Board of Commissioners, said Beck wanted to double the budget of the public defender's office, and at a time when funding is falling.

"We weren't really satisfied with the direction of the office and with her as an administrator," he said.

Shackleton said Beck was asked on several occasions if she could do the job with the

resources she had.

"She was quite adamant the answer was 'No,'" Shackleton said. "We had to make a change."

Beck said that as a public defender, she was ethically and legally bound to provide adequate representation, something she could not do with her limited staff.

She sought help from Laura Sager, executive director of Campaign for Justice, a broad-based group of organizations and individuals from across the political spectrum fighting for a fair and effective public defense system in Michigan.

Sager said Beck stood up for the constitutional rights of her clients to effective defense representation and was fired for telling the truth.

"Silencing Julie Beck will only further erode confidence in the fairness of our justice system, lead to costly errors due to time pressure and could result in compromising public safety by wrongfully incarcerating innocent individuals while the guilty remain free to strike again," Sager said.

"The commission should reconsider and join forces with the forces working to reform the system."

Michigan is one of just seven states that has shifted the full burden of funding public defense services onto the shoulders of the counties, Sager said.

In turn, the counties have shifted the burden to those dedicated defense attorneys — both public and private — who struggle to provide the best representation they can, often with

decades-old fee structures, huge caseloads and few if any resources like investigators, expert witnesses or paralegal support.

Some defense attorneys have the courage to speak out, she said. But many private attorneys just stop taking cases because they can no longer do so either ethically or financially.

"We all pay for a public defense system that fails to meet even minimum national standards and that is chronically and severely underfunded," Sager said.

"Gov. Snyder is pledging to restructure state government — now is the time for county commissioners, judges and attorneys to join forces and tell the state that it should step up to this fundamental responsibility."

As recently as January, the State Bar of Michigan's Judicial Crossroads Task Force, in recommendations for transforming the state's courts to meet 21st century realities, took Michigan's public defender system to task.

"Michigan has tolerated an indigent defense system so lacking in resources," the task force reported, "that assigned counsel can only occasionally provide the effective assistance of counsel guaranteed by the U.S. and Michigan constitutions, causing large downstream costs and the risk of costly litigation."

The Judicial Crossroads Task Force recommended advocating "for the state's full assumption of funding for the constitutionally mandated right to counsel for juveniles and indigent defendants."

A 2008 report, "A Race to the Bottom: Speed and Savings Over Due Process: A Constitutional Crisis," by the National Legal Aid and Defender Association, found Michigan ranked 44th, behind Alabama and Georgia, in per capita public defense funding.

"With each passing day, Michigan's public defense system is crumbling under the strain of tight budgets and under-resourced systems, and Michigan residents are bearing this burden," said David Carroll, research director for the NLADA.

According to the House Fiscal Agency, Michigan counties collectively spend \$74.4 million on indigent defense services. This amounts to approximately \$7.35 per capita, which is 38 percent below the national average of \$11.86.

Under Michigan's current system, counties would have to collectively spend \$120.1 mil-

lion in order to match the national average indigent defense cost per capita.

Because of ongoing budget constraints, and lack of oversight from the state, the amount counties pay for public defense is more a function of what their budgets will allow rather than what would truly be considered "reasonable," according to the HFA.

In Beck's case, not only was the funding not up to national standards, neither was the staffing.

State and federal guidelines call for public defenders to handle no more than 150 felonies or 400 misdemeanors in a year. Beck and her deputy public defender found themselves handling some 250 felonies a year each, not counting some 500 misdemeanors.

In an effort to address Michigan's indigent defense system, House Bill 5676, the Michigan Public Defense Act, was introduced by Rep. Bob Constan, D-Dearborn Heights, in 2009 and was referred to the House Judiciary Committee, where it languished without action.

Under HB 5676, the State of Michigan would be responsible for all costs of public defense services through the creation of a "Public Defense Fund."

The Office of Public Defense would annually submit a budget proposal, and the Legislature would annually make an appropriation to ensure that the public defense delivery system is adequately funded statewide.

During the lame duck session last fall, the Sen. Alan Cropsey, R-Dewitt, introduced a substitute for House Bill 5033, an unrelated bill that dealt with mortgage foreclosures.

The substitute would have created an Indigent Defense Counsel Commission to "study and make recommendations regarding providing a flexible, cost-effective, and fiscally responsible indigent defense delivery system that is responsive to and respectful of jurisdictional variations and local community needs and interests."

The substitute bill, however, failed to get action in the House.

"There simply wasn't enough time to address it properly in the waning hours of lame duck," Sager said.

Elizabeth Lyon, director of governmental relations for the State Bar, said the Indigent Defense Counsel Commission proposal, which stems from an agreement between the State Bar and the Michigan Judges Association, might be reintroduced this legislative session.

EVENTS CALENDAR

Tuesday, March 8 - The WCBA's Estate Planning, Probate and Trust Law section will meet at noon at Kensington Court, 610 Hilton Blvd., Ann Arbor.

Speaker is Deputy Probate Register Julie Owdziej.

RSVP by Friday, March 4 to Candy Newton at 994-4912 or newtonc@ewashtenaw.org.

Wednesday, March 9 - Women Lawyers Association of Michigan Washtenaw Region is sponsoring a "Mentoring Happy Hour" with law students from the University of Michigan and Cooley Law School from 5:30 p.m. to 7 p.m. at Bar Louie, 401 East Liberty, in Ann Arbor.

Appetizers provided with a cash bar.

Friday, March 11 - The WCBA's Criminal Law section will meet at noon at 110 North Fourth Ave., Ann Arbor.

The topic is "The Employment Consequences of Criminal Behavior."

Tuesday, March 15 - The WCBA's Trial Practice section will meet at noon at 200 North Main Street, lower level conference room.

Speaker Rod Crawford of Crawford and Winiarski will discuss, "Expert Testimony from an Expert's Point of View."

Wednesday, March 16 - The WCBA's Tax Law section will meet at noon at 200 North Main Street, lower level.

The topic will be, "Michigan Business Tax Update," the speaker to be announced.

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Reach of 'E-Verify' program and its MOU's likely to expand, Pierce says

(continued from page 1)

Additionally, those who are required to enroll include employers ordered to participate by an appropriate Administrative Law Judge; and, employers seeking to hire F-1 (foreign) students in science, technology, engineering and mathematics who are seeking a 17 month extension of what is called Optional Practical Training.

This article concentrates on the federal contractors, but the process is much the same; penalties and enforcement are identical.

E-Verify is a free internet-based system operated jointly by the U.S. Citizenship and Immigration Services ("CIS") and the SSA.

It is important to note in addition to the U.S. program, that as of December 2010, at least 26 states had also enacted or were seriously considering legislation requiring employers in such states or those contracting with the state to use the E-Verify program.

By the close of 2010, over 240,000 employers, representing more than 830,000 work sites were using E-Verify. It is estimated that the Federal E-Verify program currently covers over 4,000,000 workers. Approximately 1,000 new employers enroll weekly.

The starting point for E-Verify is the by now well-known I-9 Form, introduced by the Immigration Reform and Control Act of 1986 ("IRCA").

Briefly, IRCA requires every intending employee to provide certain documents to the prospective employer showing the person is present legally and has authority to work in the US.

As mentioned, the nearly universal document utilized by non-U.S. citizens and lawful permanent residents ("green card" holders) has been a Social Security card.

During enrollment, one of the major requirements of E-Verify is for the employer to sign a Memorandum of Understanding ("MOU"). Among other items, the MOU obligates the employer to provide access to employment records to the SSA and CIS.

Full terms of the MOU may be found at www.uscis.gov (type "E-Verify Form" into the search window).

The E-Verify system may not be used to pre-screen employees prior to hiring; nor may it be used to verify EXISTING employees, except for "Federal" contractors discussed below.

SSA will use information from the I-9 process to determine the validity of the individual worker's documents for name, SSN, and date of birth. It may be that all SSA information matches correctly, but the CIS next checks its records for citizenship and immigration status.

If the employee is not verified by both agencies, a "Tentative Nonconfirmation" is issued to the employer. The employer must notify the employee of the TNC; the employee has eight days to contest the TNC. If the matter is not resolved favorably, the worker must be terminated.

The law requires every "Federal contractor" or subcontractor

(including sub-subs), or recipient of American Recovery and Reinvestment Act funds, to enroll.

E-Verify covers a contract with the U.S. if the period of performance is more than 120 days and is for \$100,000 or more ("Federal contract"). It is up to the government contracting officer to note that the contract is subject to E-Verify. Subcontractors (no matter the tier) are subject to E-Verify if their contracts are \$3000 or more.

It is mandatory that contractors and succeeding levels of subcontractors advise those downstream of the E-Verify requirement in their respective contracts.

A Federal contractor must use the system to verify all new hires as well as those existing employees assigned to the Federal contract (it has the choice of using E-Verify for all existing Workers). The system is optional (at least at the Federal level) for non-Federal contractor employers, except those noted above.

Certain contracts with the U.S. government are exempt. A significant exception is that E-Verify only applies to work performed in the United States. Also not covered are contracts which involve only "commercially available off-the-shelf ("COTS") products, and agricultural products shipped in bulk.

Additionally, E-Verify does not apply to commercial services contracts which are part of the purchase of COTS, performed by the COTS provider, and normally provided for in a COTS transaction.

Further, verification is not required of those with certain types of security clearances. Colleges and Universities, state and local governments, and sureties under Federal agency takeovers only need verify new hires and existing employees working on Federal contracts.

Moreover, a worker is not considered assigned to a Federal contract if he or she normally performs only support work with no substantial duties under that contract.

So, why enroll?

There are any number of reasons. First, for Federal contractors, it is simply Econ 101—it allows the employer to obtain or retain Federal contracts.

Second, it provides a rebuttable presumption against knowingly having hired unauthorized workers.

The third reason is just practical—E-Verify likely is the wave of the future. It is probable that there will be more pressure at the U.S. level to expand coverage.

In addition to U.S. E-Verify, as mentioned, over half the states have enacted (or are considering enacting) some form of legislation requiring E-verify. Especially for large, multi-state employers, even those without Federal contracts, at some point, compliance will be an easier matter administratively.

If an employer chooses not to comply, what happens? Nothing good.

First, as stated, it loses the right to continue, or obtain, U.S. government contracts for one year. Non-registration may have a negative business impact with some clients. If an employer

does not terminate a non-complying worker and fails to notify CIS, the employer is subject to a fine of between \$500 to \$1000 per failure.

Finally, if an employer should have terminated an employee and it is later determined the worker was in fact unauthorized, the employer will be presumed to have knowingly hired an unauthorized person which enhances penalties as set forth below.

For paperwork violations, the penalties are \$110 to \$1,100 for each violation (each mistake on the same I-9 counts as a separate violation), and a Cease and Desist Order will be issued. That issuance raises the probability of knowingly hired for future cases.

If the employer is found to have knowingly hired, that raises the fine to \$375 to \$3,200 per worker for the first offense; for the second offense--\$3,200 to \$6,500 per worker; for each subsequent--\$4300 to \$16,000 per worker.

Each knowingly hired violation also increases the prospects of a finding of a CRIMINAL pattern/practice. In that event, in addition to the above, a fine may be levied of \$3,000 per worker and up to six months jail. Prosecutions

will likely include against the top executives and managers, not just the lower rung personnel.

Much more information can be found at www.uscis.gov; click onto "E-Verify" on the right side. Also, Google: "Frequently Asked Questions: Federal Contractors and E-Verify (Revised April 2010);" "E-Verify Supplemental Guide for Federal Contractors," and, "E-Verify User Manual for Federal Contractors." All are official CIS publications.

Will E-Verify make any impact on unauthorized employment? No doubt, in many cases, the answer is "Yes."

Some areas are obvious—public construction projects; defense contracts (suppliers are exempt); security firms providing services to the governments; colleges and universities receiving Federal contracts/grants.

It is not so clear that there will be much effect on occupations where it is likely that there are many working illegally—food growth and production; restaurants; private construction; many low skill service industries.

Some of these industries—like agriculture—are treated as COTS and exempt from E-Verify. It is likely, absent a mistake

by SSA or CIS in its initial determination, when confronted with a TNC, an employee will still be "long gone," but that will start at the beginning and not after a year or more of unauthorized employment as happens under the No Match letter process.

Nevertheless, as we go forward, the reach of E-Verify and the required MOUs will likely expand.

So, as with Old McDonald, "And on his farm, he had an E-Verify, with here a MOU, there a MOU, everywhere a MOU MOU."

Richard Pierce has practiced in Ann Arbor since 1968 and has concentrated in immigration and nationality law since 1985. He is an active member of the American Immigration Lawyers Association, and a past President of the Washtenaw County Bar Association.

His writing includes: "Immigration Reform and Control Act of 1986," "Immigration Aspects of the U.S. Canadian Free Trade Agreement," and "Love, Marriage, Immigration and Divorce" which have appeared in the Washtenaw County Bar Association's Res Ipsa Loquitur.

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