THE HOPKINS GROUP
HUMAN RESOURCES BUSINESS SOLUTIONS

# HUMAN RESOURCES UPDATE

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## HIRING ILLEGAL ALIENS HAS A PRICE

U.S. Immigration and Customs Enforcement (ICE) special agents arrested one of the owners of a Mexican restaurant in St. Joseph, Missouri, on a charge that he knowingly hired illegal aliens to work at his restaurants. ICE agents also conducted administrative arrests of nine illegal aliens at the St. Joseph restaurant and twelve illegal aliens at his Cedar Falls restaurant.

The agency says it has stepped up its efforts to enforce immigration laws at worksites. As a result, a number of arrests have been announced in recent weeks.

"Businesses who knowingly employ illegal aliens are on notice that they will be criminally prosecuted," says Pete Baird, assistant special agent-in-charge of the ICE Office of Investigations in Kansas City. "Using ICE's unique immigration and customs law enforcement authorities, we'll also make every effort to seize all assets that may be associated with the illegal activity."

According to the criminal complaint, many of the employees never completed any paperwork or produced any documentation indicating that they were legally authorized to work in the United States. Since 1986, all newly hired employees must complete Form I-9 in which they declare their citizenship. The I-9 also indicates what documents they used to prove their legal ability to work in the US.

## AMAZINGLY, IT STILL HAPPENS

The former owner of a Long Island golf club has agreed to pay $34,000 to settle a caddy's claims that he was sexually harassed after losing two golf games to a woman and then fired when he complained about the harassment. A lawsuit filed by the Equal Employment Opportunity Commission on behalf of caddy Eugene Palumbo claimed that Palumbo was subjected to sexual harassment and retaliatory firing by the Tallgrass Golf Club in Shoreham, New York.

The suit states that after Palumbo lost a golf game to a fellow (female) employee, the club manager subjected Palumbo to "public harassment, humiliation, and discriminatory stereotypes" by posting and distributing a newsletter that derided Palumbo's "manhood," called him a "house b****," and recommended he "move to a particular summer vacation spot that is generally known to have a large gay population."

When Palumbo lost a second match to the same female employee, the club manager distributed a second newsletter that referred to Palumbo as the "ball-less wonder" and indicated he had potential new job opportunities as a "beverage b****" or performing exotic dances for "the boys," according to the lawsuit.

When Palumbo complained about the harassment, the golf club took no effective action to stop it and, instead, fired him, the suit states.

On April 28, Palumbo and former Tallgrass owner DeLalio Fairway Associates entered into a consent decree in which DeLalio agreed to pay $34,000 but did not admit to any wrongful acts against Palumbo. In addition, DeLalio agreed to not discriminate against any employees because of their sex or to retaliate against any employees for asserting their rights under Title VII. DeLalio also agreed that, should it begin to operate a golf club within 3 years of the entry of the consent decree, it would "implement an EEOC-approved anti-discrimination policy and procedure and hire an EEOC-approved trainer to conduct related anti-discrimination training annually for its managers and employees."

***Source:*** *Equal Employment Opportunity Commission v. Tallgrass Golf Club et al.*, U.S.D.C. E.D. N.Y., No. 05-cv-04648 (9/30/05)

**The day of the week when the most job hunters are reviewing and responding to job advertisements is Wednesday, according to eQuest, which manages job posting for employers.**



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# Independent Contractors vs Employees – A Reminder

A reminder about proper classification of independent contractors and employees is always worth mentioning. This is one of the most frequently abused areas in human resources, yet it is easily remedied if employers remember to pay attention to how they are treating their various workers.

Ask yourself these questions to help determine if you have employees or independent contractors. Remedy the situation now to avoid stiff IRS penalties:

- Employer control. If a worker must follow an employer's instructions regarding when, where and how to perform the work, this suggests an employer-employee relationship. This is the biggest single factor in the determination.
- Hours of Work. Setting hours of work suggests the individual is an employee.
- Full-Time. Working full-time or substantially full-time for one employer suggests an employer-employee relationship. Also, how long has the worker been at that one employer?
- Employer's Premises. Work performed substantially or exclusively on company premises suggests the individual is an employee.
- Payment by Hour, Week or Month. Payment on a regular schedule suggests the worker is an employee. Independent contractors are usually (but not always) paid by the job.
- Training. Any direct training provided by the employer suggests the individual is an employee.
- Assistants. If the worker hires, pays, and supervises her own assistants, this suggests that person is running an independent business and is not an employee.
- Profit or Loss. If the worker has no real exposure to profit or loss, beyond that of an ordinary employee, this also suggests an employment relationship.
- Contract. Does the worker have a contract describing a business relationship, with a limited time period and functions to perform?

# "Essential Job Functions" at Issue in Termination

An employer that required an employee to provide proof that she was fit for duty upon her return from FMLA leave did not violate the statute when it terminated her when she could not perform her job's "essential" functions, an appeals court has ruled.

In Bloom v. Metro Heart Group of St. Louis, an employee, who was required to grip equipment nearly all day, reported she had pain and filed a workers' compensation claim. After being on FMLA for three months, she did not present a certification authorizing her performance of the key components of the position without risk of further harm or injury. The employer concluded that she was unable to perform the essential functions of her job and terminated her.

In her lawsuit, the worker alleged her employer retaliated against her and failed to reinstate her to her previous job, despite her contention that she was able to perform the job's functions. A federal district court rejected the employee's claim. The 8th U.S. Circuit Court of Appeals affirmed the trial court's judgment and held that the FMLA does not require employers to reinstate employees to positions in which they cannot perform key duties because of their health limitations.

Employers should ensure that their policies clearly state that employees must document their fitness for duty and ability to perform their job functions when returning from a leave of absence, particularly one that is workers' comp or FMLA related.