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THE ASSOCIATION COUNTY COMMISSIONERS OF GEORGIA AND THE GEORGIA MUNICIPAL ASSOCIATION RISK MANAGEMENT PROGRAMS

Immigration E-Lert: New I-9 Form and New Fee Schedule

From the Law Firm of Elarbee Thompson, Sapp & Wilson

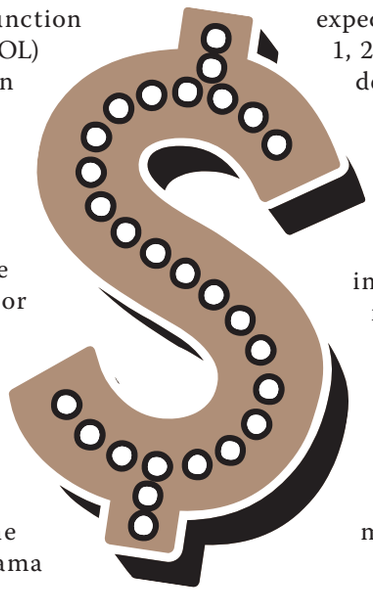
While the incoming Trump Administration is expected to make many changes in immigration policy and law in the coming year, there are two changes now that employers should be aware of. First, an electronic version of the new I-9 form has been issued. The new I-9 form, dated November 14, 2016, must be used by employers for all new hires beginning no later than January 22, 2017. The new document can be found at the U.S. CIS website with this link: *https://www.uscis.gov/i-9.*

The second change is a new, increased filing fee schedule that went into effect on December 23, 2016. For example, the form fee for the I-129 Petition for a Non-Immigrant Worker, which is used by most employers to obtain temporary workers, has increased from $325 to $460, while the form fee for the I-140 Immigrant Petition for Alien Worker has increased from $580 to $700. Only cases received before December 23, 2016 can take advantage of the old fee structure. The new fee schedule can be found at this link: *https://www.uscis.gov/forms/g-1055.*

In the coming year, we should expect changes to current immigration programs beginning with President Obama's Executive Orders dealing with DACA. The President-elect has indicated that immigration will be a priority of his administration, and we should expect some major changes in 2017. E-lerts on immigration and on other relevant employment issues will be sent out as the need arises.

New Overtime Rule Blocked at Least Temporarily

In a decision released late afternoon on Tuesday, November 22, 2016, a federal judge in the Eastern District of Texas has issued a nationwide preliminary injunction barring the U.S. Department of Labor (USDOL) from enforcing its new overtime rule. In short, the district court judge held that the USDOL exceeded its rule-making authority by establishing a salary threshold separate from the duties tests for "executive," "administrative," and "professional" positions exempt from the minimum wage and overtime provisions of the Fair Labor Standards Act (even though a threshold has existed at some level since the 1940s).



As a result of its findings, the district court judge issued a nationwide injunction generally prohibiting enforcement of the new regulations, leaving in place, at least for now, the current rules. It is expected that the Obama administration will file a prompt appeal to the Fifth Circuit Court of Appeals, but most observers do not expect any reversal of this decision by December 1, 2016. Stay tuned, however, as this year has demonstrated on numerous occasions that what is widely predicted will not necessarily come to pass.

This decision does, however, leave most employers in a quandary as they have at least announced changes and/or started implementing changes to comply with the new rule. For those employers who have merely announced changes to overtime eligibility and/or salary boosts due to the new regulations, they may have the option of announcing that those changes are now on hold pending further developments. While doing so will have obvious employee morale and other implications, it would

leave the status quo in place, which is the purpose of the preliminary injunction.

For those that have already made changes in anticipation of the new regulation going into effect on December 1, it may be legally possible to undo those changes, but consideration will need to be given to the business disruption and impact on employee morale, particularly if this would involve taking away a pay increase the employees have already started receiving.

Of significance to public employers (since part of the states' argument focused on the impact of the rule on state and local governments), the district court judge acknowledged that there was some question as to whether the Supreme Court has backed away from its prior ruling that the FLSA applies to state and local governments, but he determined that absent a clear repudiation of the 1985 decision in *Garcia v. San Antonio Metropolitan Transit Authority,* he was bound to follow that decision.

Should you have any questions about how this new development impacts your particular situation, please contact an Elarbee Thompson attorney.

Seventh Circuit Agrees with the District Court That Officers Possessed a Reasonable Suspicion to Conduct a Traffic Stop and Upholds the District Court's Denial of the Defendant's Motion to Suppress

By Jim Chapman, Attorney, Public Agency Training Council

December 2016

In *United States v. Miranda-Sotolongo,* 827 F.3d 663 (7th Cir. 2016), the United States Court of Appeals for the Seventh Circuit affirmed the District Court's denial of Defendant Alexis Miranda-Sotolongo's motion to suppress after agreeing with the District Court that the law enforcement officer had a reasonable suspicion to conduct a traffic stop of Miranda-Sotolongo's vehicle. Specifically, the Seventh Circuit agreed that, because the officer based the stop on the fact that the number on Miranda-Sotolongo's car's temporary registration tag did not appear in the relevant law enforcement database, the discrepancy gave the officer a reasonable suspicion that the car was either stolen or otherwise not properly registered and authorized a stop. The relevant facts are as follows.

> On September 2, 2013, Officer Jared Johnson spotted Defendant Miranda-Sotolongo driving a white Cadillac on an interstate in Bloomington, Illinois. What caught Officer Johnson's attention was that the temporary Indiana registration tag on Miranda-Sotolongo's Cadillac looked very odd, in that (according to Officer Johnson), a temporary tag is normally placed in the back of a window; it is not a piece of paper placed where the license plate normally goes. Officer Johnson checked the registration number on Miranda-Sotolongo's temporary tag but found no such registration number in the relevant database. So, Officer Johnson asked a police dispatcher to check the registration number. The police dispatcher's computer search revealed no such number either.
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> Accordingly, Officer Johnson stopped Miranda-Sotolongo's vehicle in order to investigate whether the temporary tag was designed to hide a stolen or unregistered vehicle. When Officer Johnson asked Miranda-Sotolongo for his driver's license, Miranda-Sotolongo admitted that he was driving on a suspended license. Officer Johnson then arrested Miranda-Sotolongo. During a subsequent inventory search of the Cadillac, law enforcement officers discovered two guns in the car. As a result, Miranda-Sotolongo was charged with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Miranda-Sotolongo moved the District Court to suppress the guns found in the Cadillac, but the District Court denied his motion. On appeal, Miranda-Sotolongo argued that the initial traffic stop of his Cadillac violated his Fourth Amendment rights and that the District Court erred in denying his motion to suppress the guns as evidence.

The Seventh Circuit began its analysis of Miranda-Sotolongo's appeal by noting that a traffic stop is reasonable when the officer has reasonable suspicion that criminal activity is afoot. *United States v. Uribe,* 709 F.3d 464, 649-50 (7th Cir. 2013). Reasonable suspicion requires more than a hunch. Instead, an officer must be able to identify some particular and objective basis for thinking that the person to be stopped is or may be about to engage in unlawful activity. *United States v. Cortez,* 449 U.S. 411, 417 (1981). The Fourth Amendment requires an officer making a stop to point to specific, articulable facts that suggest unlawful conduct. Id.

Here, the District Court determined that Officer Johnson had specific, articulable facts that would suggest that Miranda-Sotolongo could be involved in unlawful conduct because Miranda-Sotolongo's Cadillac's vehicle registration number did not appear in the law enforcement's relevant database. The District Court reasoned that, because the officer was unable to verify that the car was properly registered, Officer Johnson had a reasonable suspicion that the temporary tag was a forgery designed to mask an unregistered or stolen car.

Before addressing this conclusion by the District Court, the Seventh Circuit addressed Miranda-Sotolongo's initial argument that the real reason for the traffic stop was Officer Johnson's mistaken belief that Miranda-Sotolongo's temporary registration tag was in the incorrect place on his car under Indiana law. The Seventh Circuit noted that Miranda-Sotolongo's understanding of Indiana law – not Officer Johnson's understanding – was correct in that Indiana law required Miranda-Sotolongo to place the temporary registration tag exactly where he did: where a license plate would normally go and not in the rear window.

Nevertheless, the Seventh Circuit stated that they need not decide whether an Illinois police officer's mistaken view of an Indiana traffic law was reasonable because the reason for the traffic stop was not to investigate the placement or form of the tag but to verify that the tag was not disguising a stolen or unregistered vehicle. The fact that Indiana has chosen to use pieces of paper that appear easy to forge as temporary tags might have contributed to Officer Johnson's suspicions. But, Officer Johnson also had information that this particular temporary tag did not appear in the database in which it should have been found. Finding reasonable suspicion under these circumstances was, therefore, justified because finding reasonable suspicion here would not allow the police to stop just any vehicle with a temporary Indiana registration tag.

The Seventh Circuit also rejected Miranda-Sotolongo's argument that the computer search of the temporary tag constituted an impermissible search under the Fourth Amendment. The Seventh Circuit explained that a police officer's check of a vehicle registration in a database is not a Fourth Amendment search because the registration check involves only checking publicly displayed registration information against official public records. Because the police conducted a check of a database containing only non-private information and did so using only registration information that could be seen by any member of the public, Officer Johnson did not conduct a Fourth Amendment search regardless of whether he had an articulable suspicion that Miranda-Sotolongo was engaged in unlawful conduct. Thus, Officer Johnson would be able to rely on the information obtained from that computer database search as a basis for the stop.

Finally, the Seventh Circuit opined that police officers encounter situations of uncertain legality all the time. Uncertainty does not always justify a traffic stop which can intrude substantially on a person's privacy and dignity. "[S]uspicion so broad that [it] would permit the police to stop a substantial portion of the lawfully driving public" is not reasonable. *United States v. Flores,* 798 F.3d 645, 649 (7th Cir. 2015) (possibility that license plate frame covered unknown information on license plate did not justify traffic stop).

Reasonable suspicion, however, does not require the officer to rule out all innocent explanations of what he sees. The need to resolve ambiguous factual situations – ambiguous because the observed conduct could be either lawful or unlawful – is a core reason the Constitution permits investigative stops like the one at issue here. As the United States Supreme Court noted in *Terry v. Ohio* 392 U.S. 1, 23 (1968), and as the District Court suggested in its suppression ruling here, it "would have been poor police work" for an experienced officer to give up an investigation of suspicious behavior solely because that behavior might also have an innocent explanation. For that reason, a stop conducted in the face of ambiguity is permissible so long as it remains sufficiently probable that the observed conduct suggests unlawful activity. The relevant inquiry is not whether particular conduct is innocent or guilty but the degree of suspicion that attaches to particular types of noncriminal acts. An officer need not be absolutely certain. Without specifying mathematical probabilities, the degree of suspicion needed to justify a traffic stop is considerably less than proof of wrongdoing by a preponderance of the evidence and less than that needed for probable cause.

Accordingly, the Seventh Circuit affirmed the District Court's denial of Miranda-Sotolongo's motion to suppress by concluding:

> "Officer Johnson had learned that the registration information on Miranda-Sotolongo's car did not appear in the database specifically designed for the purpose of verifying that information. He had also observed that the registration tag could easily have been a home-made forgery. In his view, these facts, taken together, meant there was a distinct possibility that the car was either unregistered or stolen. We agree. Although it turned out that the car was neither, Officer Johnson had the reasonable suspicion needed to justify his initial detention of the defendant in the traffic stop." *Miranda-Sotolongo,* 827 F.3d at 669-670.

Note: Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.

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A Service Organization of the Association County Commissioners of Georgia and the Georgia Municipal Association

This Month:

Reasonable Suspicion for Traffic Stops

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