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December 6, 2011

TO: The Pomona College Community

The President and Board of Trustees of Pomona College have asked us to write to the Pomona College community responding to the November 30, 2011 and December 5, 2011 letters to the Board from Michael Teter, and the November 30, 2011 letter to President Oxtoby and the Board from the National Employment Law Project ("NELP").

We have advised the Board during, and the College following, an investigative process that began with the Board's receipt of an internal complaint alleging unlawful conduct by the College, including President Oxtoby's administration, with respect to the verification of employees' legal authorization to work in the United States. The Board engaged us because Sidley has substantial, real-world experience in I-9 compliance counseling and in representing employers before the government in I-9 worksite enforcement investigations, civil proceedings, criminal cases and OSC complaints. Our lawyers are recognized leaders in this field, serving as frequent speakers and authors on the law and procedure of worksite enforcement. We serve on national government liaison committees where we meet regularly with representatives of ICE, OSC, E-Verify and other government agencies in the worksite enforcement area to discuss current trends in enforcement and advocate on behalf of employers for equitable enforcement of the laws. In our pro bono efforts firm-wide, Sidley's lawyers have made a substantial commitment to providing assistance to refugees, asylees, and immigrant survivors of domestic violence. The Political Asylum and Immigrants' Rights Project, one of the firm's three primary pro bono initiatives, is a partnership between our firm and leading non-profit organizations across the country to provide legal representation to these vulnerable members of our communities.[1]

In providing our advice to the College, we drew on our knowledge and experience in compliance counseling and employer defense to recommend a course of action that, in our judgment, best served the College's needs and values while also meeting the College's commitment to complying with the law.

[1] http://www.sidley.com/probono/.

The contents of the complaint and the investigative process and its findings have been and are confidential, due to the serious nature of the allegations, out of respect for the interests of the affected employees, and to ensure that members of the College community are not deterred from coming forward with a good-faith complaints. We have prepared this response because we understand that some in the Pomona community may have been persuaded to accept Mr. Teter's analysis and conclusions on their face. While no doubt well-meaning, his analysis is based on a misunderstanding of the facts and law, as well as a failure to take into account the Board's fiduciary responsibilities to the institution. We hope the following, including the additional information we have been asked to disclose, will be of assistance to the community in understanding the situation and the College's response to it.

1. The Complaint

Mr. Teter asserts that the internal complaint that the Board received did not justify the Board's decision to investigate. Mr. Teter states that the Board's letter "does not specify whether the complaint was anonymous or whether it came from someone with actual knowledge of the College's hiring and verification practices." As the standard to determine whether an investigation is warranted, he cites 8 CFR 274a.9.

The regulation, 8 CFR 274a.9, describes when ICE, as an agency, will investigate a complaint from a third party. That regulation does not apply to an employer's obligations to be in compliance with the law, or to when an employer is on constructive notice of a potential problem and has a legal duty to follow up (which we discuss below).

Furthermore, even if one were to apply the 8 CFR 274a.9 standard to the complaint the Board received, the complaint easily met that standard: The internal complaint was made by someone who was a confirmed employee of the College, but not in the administration. It alleged specific facts about statements made by a specified senior administrator of the College. The complaint alleged that on a specific date and time, and in a specific place, the complaining employee had had a specific conversation with the senior administrator regarding the policies of the College toward its employees, from faculty to kitchen staff, grounds workers, and custodians. The complaint further alleged that during this conversation the senior administrator stated that it was the Oxtoby administration's policy not to undertake the legally mandated verification of work authorization of employees hired by the College, and that no such verification of employees' legal authorization to work was ever in fact undertaken at the College.

The contents and surrounding circumstances described in the internal complaint made it sufficiently credible on its face that the Board was required to investigate in discharging its duties to the College. Accordingly, we were engaged by the Audit Committee of the Board to assist in that process. While not relevant to an employer's obligations, the fact that this internal complaint met the ICE threshold under 8 CFR 274a.9 increased the likelihood of an ICE investigation in the event the complaint were ever sent to ICE, which the complaining employee had the ability to do at any time.

2. The Investigation

Mr. Teter asserts that "even if a duty to investigate arose, the focus of that inquiry should have been limited to the College's policy and practices, not on the status of individual employees." He asserts that there was, therefore, "no need to review the I-9 forms of each employee of the College."

Here, Mr. Teter appears to misunderstand the scope of the complaint, which had two components: (1) it was the policy of the Oxtoby administration not to verify work authorization; and (2) the broader allegation that the College had never, in fact, verified work authorization. The second component was about the alleged performance or practices of the College that was not limited to the Oxtoby administration. Mr. Teter also appears to misunderstand what was required in order for this investigation to reach a reliable conclusion. He assumes a false premise that the allegations could have been resolved without examining I-9 files, and that the College could therefore have stopped short of doing that.

Investigation of the Oxtoby administration's policy required, as one part, a review of the stated policies of the administration, including the current Human Resources department. However, no responsible investigation could limit the inquiry to what the administration stated to be its own policy. Once an investigation starts, witnesses often tell the investigators only what they want the investigators to hear. The investigation, therefore, from the outset also had to examine what the administration had actually done. The I-9 forms themselves are the only objective proof of that. Thus, the only way the investigation could reliably determine the administration's actual policy was to look at whether the required I-9 documentation in fact existed in the files.

Investigation of the broader allegation that the College had never, in fact, undertaken to verify work authorization also required examination of the I-9 files. There was no way to reliably investigate such an allegation about actual performance without examining the I-9s themselves. Moreover, the previous director of Human Resources, who had primary responsibility for the College's performance, is deceased. And since this allegation was not limited in time, it required examination of the I-9s of all employees.

It is important to understand that internal employee complaints about business misconduct are often inaccurate in certain respects, but still expose actual misconduct or situations that the business must rectify. For example, an unlawful policy that a complaining employee believes to affect all sectors of the business might in fact be confined to only a part of its operations. An unlawful practice that a complaining employee believes was in existence for a long period of time might have been confined to more discrete periods. Thus, one could not suspend this investigation upon simply confirming the existence of some, or even many, completed I-9s in the College's files.

The final results showed 84 current employees with deficient I-9 records, which fell into three categories: (1) no I-9; (2) insufficient I-9 documentation; or (3) an I-9 in which the employee had presented one or more fraudulent work authorization documents. All three types

of I-9 deficiencies occurred during and before the Oxtoby administration. While the instances fell far short of demonstrating an unlawful policy existed at any time, they nevertheless indicated deficiencies in the College's actual I-9 performance.

Thus, Mr. Teter is incorrect in asserting that the complaint was "discredited" or that the College proceeded on the basis of "meritless" allegations. The complaint could not have been disregarded without investigation, and the investigation could not have been responsibly conducted without discovering the violations that it did. That the College's hiring policies and procedures are generally in compliance with the law does not mean they yielded results fully in compliance with the law. In 84 cases they did not, and the College as an employer was legally required to remedy each of those cases.[2]

3. I-9 Compliance

At the conclusion of the investigation the College leadership knew the institution stood in violation of federal law and that those violations were ongoing.

It is the employer's legal obligation to complete the I-9 verification process for all employees at the time of hire.[3] An employer that does not comply with these I-9 verification requirements has committed a "verification violation" under the immigration laws. In addition to completing the I-9 verification process at the time of hire, an employer may not lawfully hire or continue to employ anyone it knows to be without proper documentation ("knowing hire" and "continuing to employ" violations).[4] An employer is deemed to know that an employee lacks proper documentation not only where the employer has actual knowledge of that fact, but also where the circumstances are such that it could be "fairly inferred" they would lead a reasonable person to be aware that the employee lacks authorization to work ("constructive knowledge").[5] Under the immigration regulations, constructive knowledge of the employment of an unauthorized worker may include situations where the employer fails to complete or improperly completes the I-9 form[6] or where the employer has information available that would indicate that

[2] Mr. Teter asserts in his second letter that "[o]ne need only look to Scripps's president's recent decision to halt a similar inquiry to understand that President Oxtoby had a choice as to which approach to take." While we do not know the facts of the situation at Scripps, the email sent by its President suggests that she determined that Scripps' Human Resources department had asked some of its employees to complete new I-9s without a factual or legal basis. That is irrelevant to Pomona's situation. Pomona received a complaint that was sufficiently credible to require an investigation, and in the course of conducting the investigation learned that the records of 84 current employees had verification deficiencies. As discussed below, once on notice of those deficiencies, Pomona was not in compliance with its legal obligations until it had followed up with all such employees to verify their documents as required by law.

[3] Immigration and Nationality Act ("INA") 274A(a)(1)(B)(i).

[4] INA 274A(a)(1)(A) and 274A(a)(2).

[5] 8 Code of Federal Regulations ("CFR") 274a.1(l)(1).

[6] 8 CFR 274a.1(l)(1)(i).

the person is not authorized to work.[7] And although an employer may not with discriminatory intent refuse to honor documents that reasonably appear to be authentic,[8] the knowing hire and continue to employ provisions require an employer to respond once the employer is on notice that the documents which have been presented by the employee are likely fraudulent or face liability for knowingly continuing to employ unauthorized workers.

Once on notice of I-9 deficiencies, the College is not in compliance with its legal obligations until it has followed up with all such employees verify their documents as required by INA 274A(a)(1)(B)(i). ICE considers an I-9 violation to be on-going until corrected.[9]

In his second letter, Mr. Teter asserts that the College should have suspended the December 1, 2011 deadline "until the College could determine if the I-9 problem was a result of its own failures." However, it is of no legal relevance whether or not I-9 deficiencies are the result of an employer's "failures." An employer is responsible for maintaining and, if required, producing its I-9s to the government. Indeed, in recognition that errors can occur, in its guidance documents ICE advises employers to regularly audit their I-9 records and make corrections to deficient records.[10]

In his second letter, Mr. Teter further asserts that due to the I-9 retention requirements, the College will continue to be "operating in noncompliance with the law" for a year after the termination of the employees who could not provide valid documents. This assertion is based on a misunderstanding of the I-9 laws and current government practice.

It is true that the immigration law requires an employer to retain the I-9 documentation for three years after the date of hire or one year after the date of termination, whichever is later.[11] But the retention period of the I-9s has no relationship to an employer's liability for knowingly continuing to employ an unauthorized worker. The knowing continue to employ provision requires the employer to respond once the employer is on notice that the documents which have been presented by the employee are likely fraudulent or face liability for knowingly continuing to employ unauthorized workers. An employer who is on constructive notice and who responds reasonably and terminates an unauthorized worker has not committed a knowing continuing to employ violation, so there is no continuing violation past the termination date. While in some

[7] 8 CFR 274a.1(l)(1)(ii).

[8] INA 274B(a)(6); 8 CFR 274a.1(l)(2). See further discussion below.

[9] *U.S. v. WSC Plumbing*, 9 OCAHO 1061 (September 7, 2000).

[10] ICE recommends that employers conduct regular "Form I-9 audits by an external auditing firm or a trained employee not otherwise involved in the Form I-9 process." IMAGE Best Employment Practices, http://www.ice.gov/image/best-practice.htm.

[11] INA 274A(b)(3); 8 CFR (b)(2).

cases civil paperwork violations (as opposed to knowing hire or continuing to employ violations) may persist into the retention period, it is incorrect to state that the employer is "operating in noncompliance with the law."

4. The Risks of Non-Compliance

Mr. Teter asserts that the Board failed to properly weigh the risks of its actions or misrepresented those risks to the community. His first letter appeared to be based on an unstated assumption that the only valid consideration in deciding whether to comply with the law is a calculation of the risk of getting caught. As we understand it, that is not how Pomona College as an institution has ever conducted itself, or wishes to. In his second letter, Mr. Teter modifies his stance but continues to present his assessment of various risks. That assessment is both inaccurate and incomplete.

The civil and criminal sanctions for being in violation of the immigration laws are potentially severe. In an ICE investigation and prosecution, there are civil fines from $110 to $1100 for each verification violation,[12] and civil fines from $275 to 2,725 (for a first-time violator) for each knowing hire or continuing to employ violation.[13] If the government determines that an employer has engaged in a pattern or practice of knowing hire or continuing to employ violations, it can charge the employer or its management with a misdemeanor. A misdemeanor conviction can result in criminal fines of up to $3,000 per employee and, where an individual has been charged, with imprisonment of up to six months.[14] In more serious cases, the government can bring felony charges for knowing employment or harboring of unauthorized workers, with substantially increased criminal fines, forfeiture provisions and, for individuals, terms of imprisonment.[15]

In addition to charging employers under the criminal and civil provisions of the immigration statute, the government can seek to debar employers and individuals who have been convicted of violations of the I-9 laws from receiving federal or state contracts and grants.[16] If the government were to seek suspension or debarment, it would put at risk all of the College's participation in grants from the federal government, including research grants and certain types of financial aid programs.

[12] INA 274A(e)(5); ICE Penalty Memorandum (November 19, 2009), http://www.ice.gov/doclib/foia/dro_policy_memos/formi9inspectionoverview.pdf.

[13] INA 274A(e)(4); ICE Penalty Memorandum.

[14] INA 274A(f)(1); ICE Penalty Memorandum.

[15] INA 274(a).

[16] President Clinton, Executive Order 12989 (February 13, 1996); ICE Penalty Memorandum.

Circular A-110 issued by the U.S. Office of Management and Budget ("OMB") establishes uniform administrative requirements for grants to institutions of higher education and other non-profit organizations. This OMB Circular has been implemented for colleges and universities in the U.S. Department of Education regulations. 34 CFR 74. Under part 74.13, "The Secretary and recipients shall comply with the non-procurement debarment and suspension common rule (implemented by the Secretary in 34 CFR part 85). This common rule restricts sub-awards and contracts with certain parties that are debarred, suspended, or otherwise excluded from or ineligible for participation in Federal assistance programs or activities." That would apply to the College. Circular A-110 (and therefore part 74.13 of the Department of Education regulations) also apply to sub-awards made by state and local governments to organizations covered by the Circular.

The Department of Education has issued non-procurement suspension and debarment rules. 34 CFR 85. Under part 85.110(b), "[a] Federal agency uses the non-procurement debarment and suspension system to exclude from Federal programs persons who are not presently responsible." A conviction or civil judgment of "making false statements" could apply to hiring undocumented workers and making false statements in an I-9 form, and would therefore be grounds for debarment. 34 CFR 85.800(d). Additionally, a serious failure to meet I-9 obligations could, if so "serious or compelling" as to affect "present responsibility," also be grounds for debarment. 34 CFR 85.800(a)(3). ICE has recently expand its suspension and debarment program against employers who violate the I-9 laws.[17] Thus, if the College were to violate its obligations under the I-9 laws sufficiently to attract the attention of ICE, it would risk suspension or debarment that would threaten all of the College's grants, including research grants.

If the College were debarred, it could also lose its ability to participate in certain student financial aid programs, because the government could determine not to entrust any federal funds with a school that lacked "present responsibility." For example, supplemental educational opportunity grants ("SEOGs"), Federal Work-Study, and Federal Perkins Loans are programs where federal funds are provided to colleges for payment or loan to eligible students.

While historically it does not appear that many colleges or universities have been debarred, we do not believe the Board, as stewards of the present and future of the institution, could responsibly have ignored such risks to the livelihoods of its faculty and the educational opportunities of its students.

Mr. Teter asserts that "not a single" institution of higher education has been the target of ICE. No one can say that with any certainty. ICE has never publicly released, and has a policy of not releasing, comprehensive lists of its investigations or audits of employers. The imposition of civil fines is also not public, unless the employer challenges the sanction in an administrative

[17] Michael Davidson, "The ICE Suspension and Debarment Program Heats Up," The Procurement Lawyer, Fall 2010; comments of ICE attorney Michael Davidson at Federal Bar Association worksite enforcement seminar, Chicago, Illinois, October 26, 2011.

hearing. Cases involving criminal prosecution are public, but otherwise the only matters publicly disclosed are those in which ICE has chosen to issue a press release.

While we are not aware of any press releases involving I-9 enforcement against a non-profit college or university, that says nothing about whether such government enforcement has occurred or is currently ongoing. Furthermore, neither Mr. Teter nor anyone else is in a position to compare the quality of Pomona's I-9 compliance with that of any other institution, much less compare the risks of government action in the context of an existing employee complaint.

Mr. Teter further asserts that ICE's policy statements reveal that the agency focuses its efforts on employers dealing with "critical infrastructure facilities – airports, seaports, nuclear plants, chemical plants and defense facilities." While we agree that this is an accurate statement of the focus that ICE has announced, the reality of ICE's public statements and current enforcement activity make it clear that the agency interests reach substantially beyond the types of employers listed in this statement.

First, ICE recently announced in a public presentation that the agency considers food processing and service to be in the category of "critical infrastructure."[18] So Pomona's dining services now fit, however unfortunately, within ICE's stated focus.

Second, ICE press releases have numerous announcements of enforcement action taken against ordinary employers who have nothing to do with "critical infrastructure" such as airports, seaports, nuclear plants, chemical plants and defense facilities. As discussed above, these press releases are not a complete picture of ICE's enforcement activities. But even recent press releases report actions against ordinary businesses such as restaurants, food processing, landscaping, hotels, and roofing. In addition to its purely educational operations, a college like Pomona has other business operations like dining services, grounds, housing, and maintenance that are closely akin to these sorts of ordinary business operations. There is nothing in any ICE enforcement policy that remotely suggests the agency is "hands off" simply because those operations are conducted on a college campus.[19]

It is inescapable that had the College followed the course that Mr. Teter suggests, it would now be sitting on 84 ongoing I-9 document violations, including the continuing employment of 17 persons who could not demonstrate legal authorization to work. If the government had initiated an investigation or audit, the College would have had no defensible explanation available as to why it failed to even look at its I-9 records in response to an internal complaint it received concerning the President, purportedly based on statements by a senior administrator, or as to why the College took no action once on notice of deficiencies in its records.

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[18] Comments of ICE official Rachel Ross at Federal Bar Association worksite enforcement seminar, Chicago, Illinois, October 26, 2011.

[19] We do agree with Mr. Teter's assertion that Pomona falls outside ICE's additional focus on employers who engage in abusive or exploitive employment practices.

An employer who ignores internal complaints without investigation, or disregards the results of internal I-9 audits that are conducted, increases the likelihood that the government will bring criminal charges against the employer and the managers with authority over hiring and retention of workers. And while the law provides an affirmative defense to employers who have made a good faith effort to comply with the I-9 process,[20] that defense is not available to a charge of continuing to employ unauthorized workers where the employer had notice of the unlawful status of the workers.[21] Many of the government's immigration-related cases are resolved on a civil basis. But when the government obtains evidence that the employer knew (or had reason to know) that some of its workers were unauthorized and failed to take reasonable steps to investigate and terminate their employment, a civil case can turn into a criminal prosecution. Therefore, to reduce the risk of a criminal prosecution, it is important that employers investigate questions about workers' status, and terminate the employment of any undocumented workers that are identified.

On the other hand, in the event of an ICE audit, the agency has stated that it will give credit to the employer for the I-9 records that it took the initiative to correct before commencement of the government investigation.[22] Furthermore, in their guidance documents, ICE and the Citizenship and Immigration Services agency ("CIS") advise employers to regularly audit their I-9 records and make corrections to deficient records.[23]

Finally, while Mr. Teter simply assumes the College would never be on ICE's "radar," he ignores the risk that the complaining employee in this case could at any time have sent the complaint directly to ICE in order to put Pomona there. ICE routinely states that it conducts I-9 enforcement against specific employers based on leads and complaints.

Continuing his risk assessment, Mr. Teter asserts that subjecting employees to intrusive and arbitrary verifications may violate federal law. We agree with that general proposition, but that was never the situation here.

The immigration law provides that an employer may not "knowingly and intentionally discriminate" in the hiring or discharge of work-authorized employees based on their citizenship

[20] INA 274A(a)(3).

[21] *Mester Mfg. Co. v. INS*, 879 F.2d 561, 567 (9th Cir.1989). While the employer in *Mester* had a different basis for its constructive knowledge (it had received notice from the government that some of its employees where likely not authorized to work), it is well-settled that *Mester* stands for the general proposition that the good faith defense is not available to employers who have been put on constructive knowledge that an employee is not authorized to work and fail to act promptly on that notice.

[22] Comments of ICE official Rachel Ross at Federal Bar Association worksite enforcement seminar, Chicago, Illinois, October 26, 2011.

[23] *See* http://www.ice.gov/image/best-practice.htm.

status or national origin.[24] The immigration statute also prohibits employers from asking employees for more or different documents than required by the I-9 rules if "made for the purpose or with the intent of discriminating against an individual" ("document abuse").[25] In the recent investigation, the College reviewed the I-9 files of all current employees, and requested proper verification of all employees with insufficient documents, in a consistent and uniform manner without regard to the employee's race, claimed citizenship status, position or any other individual characteristic. Under the statute and case law, it is not sufficient to establish that the employer's action had a disparate impact on its employees – the employer must have knowingly and intentionally discriminated against its employees based on their citizenship status or national origin.[26] Furthermore, in the event that one of the terminated workers decided to file a charge alleging immigration-related discrimination by the College, the charge could not proceed as unauthorized workers are not one of the protected classes for immigration-related national origin or citizenship discrimination provisions[27] or document abuse claims.[28]

The anti-discrimination provisions must be read consistent with the employer's obligation to properly verify the work authorization of its employees and to respond reasonably to situations where it has been put on notice that an employee may not be authorized to work. This is consistent with the policy behind the anti-discrimination provisions, which is to ensure that employers who are obligated to verify work authorization for their new employees do not discriminate against work-authorized employees who look or sound foreign, not to tie the hands of the employer from conducting legitimate investigations into the work authorization of workers that it has good-faith reason to believe may not be authorized to work.

Mr. Teter cites a settlement in the Office of Special Counsel ("OSC") investigation of Maricopa Community Colleges in Arizona as support for his argument that the College may be vulnerable to an immigration-related discrimination charge. However, the facts in our situation and the Maricopa Community Colleges proceeding were very different. OSC reports that its investigation of Maricopa Community Colleges revealed that the employer

> required all newly hired non-U.S. citizens to present additional work authorization documents beyond those required by law, but did not require U.S. citizens to do

[24] INA 274B(a)(6). Note that the protected classes for citizenship and national origin discrimination under these provisions are limited to U.S. citizens, certain lawful permanent residents, and refugees and asylees.

[25] INA 274B(a)(6), 28 CFR 44.200(a)(3).

[26] INA §274B(a)(6), 8 U.S.C. §1324b(a)(6); *U.S. v. Diversified Technology & Services of Virginia, Inc.*, 9 OCAHO no. 1095 (2003) (document abuse after IIRIRA is no longer a strict liability offense and therefore intentional discrimination under the traditional tests must be applied).

[27] INA 274B(a)(3).

[28] *Brown v. Baltimore City Public Schools*, 3 OCAHO no. 480 at 4 (June 4, 1992); *U.S. v. Hyatt Regency Lake Tahoe*, 6 OCAHO no. 879 (May 16, 1996).

> so. The INA requires employers to treat authorized workers in the same manner during the hiring process, regardless of their citizenship status. However, OSC found that Maricopa Community Colleges imposed different and greater documentary requirements on at least 247 non-U.S. citizens, and did not end this practice until January 2010, almost a year after OSC initiated its investigation.[29]

According to the OSC report, Maricopa Community Colleges required non-U.S. citizens to provide more documentation at the time of hire than it did for U.S. citizens. In our situation, the College did no such thing. The investigation revealed no indication that the College required additional documentation from non-U.S. citizens compared to anyone else at the time of hire. After the investigation, the College required all employees who previously had not provided the required documentation to update their files with acceptable documents, regardless of their citizenship status or national origin, and with no intent to discriminate.[30]

Mr. Teter further suggests that the College's actions may have violated the National Labor Relations Act (NLRA). Although we are not the College's labor counsel, we understand that the NLRA, which governs the collective bargaining rights of employees, makes it an unfair labor practice for an employer to discriminate against an employee because of his or her union-related activity. We further understand that the National Labor Relations Board (NLRB), the federal agency that enforces the NLRA, and the courts have consistently found that analysis of any such claim requires exploration of the employer's motive in making the challenged employment decision. If a charging party is unable to show that the employee's support for a union was a "motivating factor" in the decision to terminate his or her employment or if an employer is able to show that it would have taken the action it did regardless of the employee's union support, there is no violation of the NLRA.

With respect to the situation at hand, even assuming that a terminated employee had engaged in union-related activity, the College did not consider any such activity at all in

[29] http://www.justice.gov/crt/about/osc/htm/fall2010_newsletter.html.

[30] Similarly, today's Department of Justice announcement regarding its filing of a complaint against the University of California, San Diego Medical Center states, "The department's independent investigation revealed that the medical center engaged in a pattern or practice of subjecting newly hired non-U.S. citizens to excessive demands for documents issued by the Department of Homeland Security in order to verify and re-verify their employment eligibility, but did not require U.S. citizens to show any specific documentation. The Immigration and Nationality Act's (INA) anti-discrimination provision prohibits employers from placing additional documentary burdens on work-authorized employees during the hiring and employment eligibility verification process based on their citizenship status or national origin (emphasis added)." http://www.justice.gov/opa/pr/2011/December/11-crt-1578.html. Again, this situation is very different from that of the College, where there is no indication that the College required additional documentation from non-U.S. citizens at the time of hire or during employment, and the College required all employees who previously had not provided the required documentation to update their files with acceptable documents.

terminating the employee, but rather was compelled to take that action, as discussed above, for reasons totally independent of any union support.[31]

The letter from NELP also asserts that organization's concern that the College is trying to intimidate workers who are in the "midst of a labor organizing campaign." We doubt anyone would seriously disagree with NELP's basic theme that workers should not be mistreated when asserting their rights. However, an application of that theme to Pomona's situation would, as discussed above, reflect a misunderstanding of the actual facts and sequence of events on this campus.

5. Support Options

Although not discussed in the letters from Mr. Teter or NELP, we understand there may be a notion circulating in the community that the College could have provided immigration sponsorship to the affected employees rather than terminating them.

Unfortunately, the College cannot provide immigration sponsorship to employees unless they fall into a category that permits sponsorship. The College is able to sponsor faculty under the H-1B classification for professional positions that require specialized bachelor's degrees. There is generally no visa classification that is available for individuals working in non-professional positions. Also, any work visas and long-term processes such as green card sponsorship are not available to individuals who have been in the United States for over a year without authorization. And even if the College would be able to pursue a long-term sponsorship strategy for an employee, the College could not presently employ that worker unless he or she is presently authorized to work in the United States. The College cannot employ a person it knows is presently not authorized to work, or about whom the College has such constructive knowledge. In addition to the constructive knowledge the College gained from the I-9 review process itself, the regulations specifically provide that an employer has constructive knowledge that a person may not be authorized to work if that the employer knows the person is in the process of pursuing lawful permanent residence.[32]

[31] In his second letter, Mr. Teter asserts that the College conducted a "verification check" of all College employees nine years ago "during the last major push for a union." We are unaware of any factual support for that statement. To our knowledge, the College has never conducted a verification of all College employees. The present investigation included an internal audit of all of the College's I-9 records, but the College only requested updated documents for those employees whose files were found to have verification deficiencies.

[32] 8 CFR 274a.1(l)(1)(ii).

Unfortunately, Pomona's recent experience is the unavoidable product of present federal law, which, until changed, will continue to compel employers to take difficult and painful action against employees they value and wish to retain. As the College moves forward, we would welcome the opportunity to assist those interested in working for change.

Sincerely,

Marketa Lindt
Ronald C. Cohen