

# Court Awards Against National Labor Relations Board for Improper Restriction Regarding E-Verify

## Labor & Employment Law Update

By Michael Hughes and Sara Zorich on November 11, 2014

On October 30, 2014 in the case of *Overstreet v. Farm Fresh Co. Target One LLC*, No. 2:13-cv-02358, the Arizona Federal District Court ordered attorney's fees be paid to Farm Fresh Co. Target One LLC (Farm Fresh) by the National Labor Relations Board (NLRB) due to the NLRB's demand that Farm Fresh reinstate four employees without following the federal and Arizona state laws governing the use of E-Verify.

In 2013, Farm Fresh was purchased through an asset purchase agreement by a new owner. The new owner (after receiving advice and guidance from the Dept. of Homeland Security) sought to treat all existing employees as new hires after the company acquisition. As part of that transition, all employees could be run through E-Verify to confirm their authorization to work in the United States. On March 1, 2013, it was announced to all employees that due to the acquisition, all employees would be run through E-Verify. Four days later some employees sought unionization and four employees were terminated. The employees claimed their termination was in violation of the National Labor Relations Act (NLRA) and an administrative law judge agreed, finding the employees should be reinstated. Farm Fresh agreed to reinstate the employees but stated that the employees would be required to be run through the Federal E-Verify system which was the process for all other existing and new employees. The NLRB refused to allow any "conditions" on the reinstatement and sought injunctive relief under Section 10(j) of the NLRA from the Arizona Federal District Court restraining Farm Fresh for the "unconditional" reinstatement of the four employees. The court, however, sided with the employer and found that the employees, like all other employees of the company, should be treated as "new" employees and processed through E-Verify. Moreover, the court awarded the company over \$55,000 in attorney's fees under the Equal Access to Justice Act.

Employers should be cautioned that the facts of this case are very fact specific. In general, employers cannot require employees to go through additional testing or application process when ordered by the NLRB to be reinstated. It was only

because the company through the acquisition was able to treat all employees as “new employees” and process all employees through E-Verify in accordance with federal and Arizona law. This case shows the important interplay immigration laws can have on both employment and traditional labor disputes. Further, it highlights that any reinstatement ordered by the NLRB cannot be predicated on terms that are against the law.

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