



# DELAWARE

## EMPLOYMENT LAW LETTER

Part of your Delaware Employment Law Service

Vol. 21, No. 11  
November 2016

## **Possible enhanced workers' comp for Delaware's undocumented workers**

by Cassandra Roberts

*Workers' compensation is a difficult and highly specialized area of the law. It's also an aspect of employment law that all employers should be concerned about. The law — and probably your workers' comp insurance plan — places a high premium on getting people back to work. But what happens when you discover that your injured employee is an undocumented immigrant who isn't legally allowed to work — for you or anyone else? A new case from the Delaware Supreme Court should provide an answer to that question, but we fear it won't be an answer that's good for employers.*

### ***Delaware workers' comp law***

Unlike some other states' laws, Delaware's workers' comp laws allow an undocumented worker who is injured on the job the same entitlement to benefits as any other worker. Until recently, an employer's attempt to curtail total disability for a medically released undocumented worker would proceed in the same fashion as it would for a member of its documented workforce.

Under the law, a medically cleared undocumented worker receiving total disability benefits would have

her benefits terminated if any of the following happened:

1. She voluntarily signed an agreement indicating that she is able to return to the same type of work she previously performed (known as a "final receipt").
2. She actually returned to work.
3. She refused a job offer.
4. The employer obtained a hypothetical labor market survey.

For an employer seeking to stop benefits to an undocumented worker, a labor market survey would show that there is no work available for the employee because she isn't legally allowed to work in the United States, and she therefore isn't entitled to any benefits.

However, a new case before the Delaware Supreme Court tackles the distinction between documented and undocumented workers and their eligibility to return to work. The result may be that an undocumented worker is entitled to full benefits even though she isn't legally allowed to work.

### ***Case that could change the law***

Workers' comp cases are unique in that they begin before the Delaware Industrial Accident Board (IAB). The IAB hears each side's evidence and then decides if an individual is entitled to workers' comp benefits and, if so, at what level. Any appeals go before the Delaware Superior Court and, ultimately, the Delaware Supreme Court, our state's highest appeals court.

On September 28, 2016, the Delaware Supreme Court heard oral arguments in Magdalena Guardado's case. The IAB's decision consisted of three key propositions:

1. Guardado was employable medically — that is, she had the physical ability to return to some form of work activity.
2. She was a displaced worker. In other words, she wasn't readily employable despite being physically able to work. That conclusion was based on several factors, including her age, her

lack of skill, her illiteracy in written or spoken English, her ability to use only one hand, her level of education, her length of time in the workplace before she was injured, and her status as an undocumented worker. As the IAB judge stated, "There is no doubt that Guardado, with her capabilities and limitations, is going to have a very difficult time finding a job."

3. The labor market survey relied on by the employer wasn't a valid showing of available employment. Put another way, the labor market survey focused only on the fact that Guardado wasn't legally allowed to work in the United States rather than on the type of work she could theoretically perform if she was a documented immigrant.

On appeal, the Delaware Superior Court concentrated on the fact that federal laws prohibit employers from hiring undocumented workers and that the difficulty of showing job availability following a work accident is "appropriately borne by the employer[, which] must take the employee as it hired her." In other words, if employers want to avoid this behemoth of an obstacle in the quest to terminate workers' comp benefits, they must check an employee's immigration status before offering employment.

And that was exactly the question on appeal to the Delaware Supreme Court: Who bears the burden if an employee isn't legally eligible to work in the United States: the employee or the business that hired her? *Roos Foods v. Magdalena Guardado*, Del. Supr., No. 160, 2016.

### ***Implications for employers***

The Delaware Superior Court's decision on this issue is punitive toward employers without regard for the practical implications. If the Delaware Supreme Court upholds the decisions of the IAB and the Delaware Superior Court, an undocumented worker who is cleared to return to work with limitations may continue to receive workers' comp benefits until she dies or leaves the United States. That's because an undocumented employee will never meet the other three grounds for termination of benefits — being

able to return to her previous job, accepting another job, or refusing another job offer — since she isn't legally allowed to work.

In effect, an employer that hires an undocumented worker would be permanently punished, even if the employer did its due diligence in completing an I-9 form but was the victim of employee fraud. As a practical matter, this situation also creates a disincentive for the employee to make any efforts to return to the workforce, even if she could find an employer that would hire her.

### ***Bottom line***

The Delaware Supreme Court is expected to render its decision in the next 90 days, and we will update you when the decision is issued. However, it appears likely that the supreme court will uphold the decision of the superior court, punishing employers that hire undocumented employees. The bottom line is, it's more important than ever to ensure that your workforce is legal and that you have the documentation to prove it.

*The author can be reached at [lrussell@ycst.com](mailto:lrussell@ycst.com).*

**Copyright 2016 M. Lee Smith Publishers LLC**

**DELAWARE EMPLOYMENT LAW LETTER does not attempt to offer solutions to individual problems but rather to provide information about current developments in Delaware employment law. Questions about individual problems should be addressed to the employment law attorney of your choice.**

[Back to Results](#)

[Back to Search](#)

[Exit Search](#)