



Unionized Employers Must Bargain Over the ‘Finer Points’ of Completing I-9 Forms

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In an unpublished decision, the U.S. Court of Appeals for the Fourth Circuit affirmed a National Labor Relations Board (NLRB) order holding that the employer—Frontier Communications Corporation—violated Section 8(a)(1) and (5) of the National Labor Relations Act (NLRA) by failing and refusing to provide the Communications Workers of America (the “Union”) with notice and an opportunity to bargain over the effects of its request for current employees to complete new I-9 forms.^[1]

Background

In 2013, Frontier discovered that it was not in compliance with the Department of Homeland Security’s Form I-9 requirements, which are set forth in the Immigration Reform and Control Act of 1986 (IRCA). IRCA mandates that employees complete Section 1 of the Form I-9 on or before their first day of employment. IRCA currently requires employers to review original documentation establishing the employee’s identity and work authorization and complete Section 2 of the Form I-9 within three business days of the employee’s first day of employment. Noncompliance can result in significant civil penalties for the employer and potentially criminal sanctions.

Upon discovering its non-compliance, Frontier reached out to all affected employees, including those represented by the Union. Frontier negotiated with the Union regarding the review and maintenance of documents needed for the Form I-9, including its willingness to work with certain Union members who had difficulty providing the required documentation.

In 2019, during a subsequent self-audit, Frontier found that it was “massively noncompliant” with IRCA’s I-9 recordkeeping requirements. As such, Frontier emailed thousands of employees, including Union members, requesting they complete new I-9 forms.

Unlike in 2013, Frontier did not notify the Union and refused to bargain.

The Union filed an unfair labor practice charge with the NLRB. Frontier argued it had no duty to negotiate over its decision to request new I-9 forms because the company was obligated to abide by the legal mandates of IRCA. After the NLRB ruled in favor of the Union, the board sought enforcement of its order from the Fourth Circuit. Frontier cross-petitioned for review of the NLRB's order.

Summary of the Court's Findings

The Fourth Circuit agreed with the NLRB and the Union: "Section 8 of the NLRA makes it an unfair labor practice for an employer to 'refuse to bargain collectively with the representatives of his employees.' That statutory duty to bargain requires the employer to 'confer in good faith with respect to wages, hours, and other terms and conditions of employment . . .'" (citations omitted). Despite this general rule, "employers need not bargain over non-discretionary actions taken to comply with legal obligations."

The Court acknowledged that Frontier's reliance on its I-9 legal compliance obligations was "seemingly straightforward." Nevertheless, the Court held that the company failed to consider the impact and "direct effects" that its decision to request new I-9 forms would have on employees' terms and conditions of employment. "Frontier is correct that its basic decision to adhere to federal law and obtain properly completed I-9 forms from all of its employees fell outside of its duty to bargain with the Union," the Court observed, "[b]ut the same is not true with respect to the finer points of that effort."

Specifically, the Court agreed with the NLRB that Frontier had "room to negotiate" over details of the process for correcting I-9 errors and omissions, including how and when employees would present their documentation, whether Frontier would keep copies, and how Frontier would assist employees who struggled to complete the process in a timely manner. The Court also took specific note of the fact that Frontier had bargained with the Union on such matters in

2013.

Key Takeaway

This case highlights that IRCA's legal mandates do not grant unionized employers unilateral authority to administer their I-9 compliance programs with respect to current employees. While there is no dispute that employers must correct I-9 errors and omissions, unionized employers must provide pre-implementation notice to bargaining representatives and bargain over the effects of the I-9 correction process. In addition to the bargaining topics discussed by the Court, unionized employers may also need to bargain over any discretionary reliance on the Department of Homeland Security's temporary, COVID-related I-9 "flexibilities" first announced in March 2020 and currently extended to July 31, 2023. Additional information regarding the extension of Form I-9 flexibilities due to COVID-19 can be found [here](#).

For more information, contact the authors of this article or any member of our [Labor & Employment Practice](#).

[1] NATIONAL LABOR RELATIONS BOARD, Petitioner, COMMUNICATIONS WORKERS OF AMERICA, DISTRICT 2-13, Intervenor, v. FRONTIER COMMUNICATIONS CORPORATION, Respondent. FRONTIER COMMUNICATIONS CORPORATION, Petitioner, No. 21-1892, 2022 WL 17484277, at *1 (4th Cir. Dec. 7, 2022)

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