



Episode 27: “Immigration Focus, Part 2: Can I Ask That? Bonus Episode, With Jennifer Behm”

Speakers: Rosemary Enright, Barclay Damon, and Jennifer Behm,
Partner at Berardi Immigration Law

[Ari Kwiatkowski]: Hi, everyone, this is a Barclay Damon live broadcast where we discuss all things L&E, labor and employment. I’m Ari. Let’s dig in.

[Rosemary Enright]: Hey, gang. Here I am. Second time. Again, Ari has not gotten a perm, nor has she changed the color of her hair. Yes, it’s Rosemary, once again. And Ari is still in Italy, where we all wish we were—not necessarily on our honeymoon, but, yes, in Italy. So she should be back in a couple of weeks. So you’re stuck with, yes, Rosemary Enright. Again, labor employment attorney with Barclay Damon and the practice group leader for labor and employment. So you may recall back in February and March, Ari did a multi-part series entitled “Can I Ask That?” And she talked about what employers can and cannot say in their job posts. What they can ask on their applications, and during applicant interviews. And we are so lucky to have Jennifer Behm from Berardi Immigration joining us. She’s going to chat with us from an immigration perspective of “Can I Ask That?” And so it’s a bonus episode. So we’re so lucky to have Jennifer. Welcome, Jennifer.

[Jennifer Behm]: Thank you, Rosemary. I’m excited to be here.

[Rosemary]: Yeah. So I think this is your first time joining us on the podcast, isn’t it?

[Jennifer]: Yes, it is.

[Rosemary]: Oh, well, good. Well, good. So the way we roll, Jen, is you have to share a fun fact. So do you have a fun fact you can share with our listeners so they can get to know you a little bit?

[Jennifer]: Fun fact. Well, about when I was in undergrad, I lived on a ship for three and a half months and I literally circumnavigated the globe. I sailed around the world and went to about 12 different countries. And that was through this really awesome study abroad experience called Semester at Sea. And that just totally projected my love for traveling and international affairs and cultures. And that’s also kind of a big reason I started exploring US immigration law. So yeah, I love traveling. I’ve done a lot of traveling since that time, but that experience for three months in my undergrad years it was just totally pivotal and had a huge influence on who I am today.

[Rosemary]: I bet, I bet. I cannot imagine. So you actually searched for those of us who may, you know, not know the sailing lingo, circumnavigate....So that literally means you went around...

[Jennifer]: ...went around the globe. Went to about 12 different countries. Spent about a week in different countries, not in Italy, where Ari is but yeah, I saw a lot of different cultures and did a lot of service projects. And it was really an incredible experience.

[Rosemary]: Wow. So we will get into the meat of the podcast. But I just have to ask. So you know, I hear that like in the South Pacific, like the waves are crazy, a calm day is like a 15 or 20 foot swell. Did you

have that experience?

[Jennifer]: So that stretch of our trip, we went from Japan down to Hawaii and then over to California. That was probably the stretch of our trip where so many people were seasick and yeah, throwing up. I mean, it was definitely a rocky ride.

[Rosemary]: Yeah.

[Jennifer]: It was pretty intense. It was definitely intense.

[Rosemary]: I would think so I would say because you know, I've heard that and I just I can't imagine. So I guess you did get off the ship because I can't imagine. Yeah. My legs being on a ship on water.

[Jennifer]: So wobbly afterwards and me being back on land like I remember. Oh, my gosh. The bed would feel like I'm still rocking and I'm not on a ship anymore. It took a while for my equilibrium to get reestablished to land.

[Rosemary]: I bet, I bet. Well, cool. That's an awesome fun fact.

[Jennifer]: Look into it if you've got college-aged kids in your life.

[Rosemary]: That's right. And if you're looking to get your college-aged kid, you know, out for three months. So there you go.

[Jennifer]: There you go.

[Rosemary]: All right. Well, so let's dig in. Like we said, Jen, this is a bonus issue. We so appreciate you coming on. And as I said, we did the multi-part series. You know, "Can I Ask That?" and what we all learned is that there are certain things that you really should not be asking because it may be a violation of an anti-discrimination law or, you know, wage and hour or something like that. So, you know, putting on the maybe the immigration glasses, if we want to call it that, let's start with like job posts and job applications. So I'm just going to throw out a couple of "can we ask these" questions and you tell us. So can an employer state in their job post so you know, to Indeed or Monster or something like that, can they post that US citizenship is required, or "only US citizens will be considered" for a job.

[Jennifer]: So, NO the Immigration and Nationality Act forbids employers from requiring US citizenship for employment. The only exception to this might be is if the job has a restriction for US citizens only because it might be a federal government contract. Like sometimes ITAR comes into play here. But even then, if it's a job that might only have ITAR contract, we tell employers, err on the side of caution. Eliminate any language that says you must be a US citizen to be considered.

[Rosemary]: Yeah, because, you know, it's interesting, Jen, because we see that, you know, a lot you know, on job applications. And I actually recently, Jen, saw on one of my clients' applications that they actually asked, it was, you know, it said, are you...the question was, are you a US citizen or are you eligible to work in the US? And then they asked for the visa number on the job application. Yes.

[Jennifer]: Oh, that's a big no-no.

[Rosemary]: Yeah. And so when yeah. So, Jen when you say it's a no-no, like so what could happen, like. Like, who enforces, who might come and say that's a no-no? And what might they, you know, are there penalties? What happens?

[Jennifer]: Yeah. I mean, as far as enforcement goes for something like that, it's kind of an open, like an open book, right? If somebody's going to blow steam at an employer for them because maybe they're ticked off that they weren't hired for the job, if after going through an interview process...could be like a whistleblower type of effect. I would say it's usually the Department of Labor that's chasing employers who aren't abiding by these sorts of requirements and having these missteps, monetary fines can come into place. But at the end of the day, if there's a violation and you're caught and employers opening their door for audits and sanctions and monetary fines, you want to eliminate that. As a US employer, you don't want to open up your door to the DOL or any government agency to come knocking and trying to catch you for doing something wrong.

[Rosemary]: Well, and you know, it's funny you say that, Jen, because that's exactly what we talked about in that multi-part series. We said, listen, the last thing you want is somebody coming in, going through all of your records, because even though you think you've got everything in order ya know...

[Jennifer]: They're going to find something.

[Rosemary]: They're going to find something, they're going to find something—that is exactly right.

[Jennifer]: And, you know it's important to know even if it was unintentional or it was you know, you have language that's a no-no because somebody just didn't know and they weren't really trying to come at it from a place of discrimination or malice, the government doesn't care about that. Right. You can't claim, oh, I'm so sorry. I didn't know. I didn't mean to do that. They don't care.

[Rosemary]: That's right. Well, it's just like it's just like the anti-harassment laws in particular, sexual harassment specifically states, you know, what your intent was didn't matter if it was offensive and you violated. So same thing here.

[Jennifer]: Exactly. Yeah.

[Rosemary]: Ignorance is not a defense. Right. Exactly. Yeah. So basically. So what, if anything, Jen, that they even say and maybe your answer is, nothing it doesn't matter in the job post or the application.

[Jennifer]: Yeah. I mean, the one thing, if there is no obligation for a US employer to sponsor a foreign national worker—and to clarify, when I say a foreign national worker, I mean someone who is not a US citizen or a green card holder or even then someone with an open-ended work permit like a document called an employment authorized authorization document or EAD card. So if an employer is gung ho that they don't want to open up the door to sponsorship, they can state, we are you know, we are not sponsoring foreign national workers for this position. There's no obligation to sponsor a worker. And in fact, the language that the EEOC recommends is this “in compliance with federal law, all persons hired will be required to verify identity and eligibility to work in the United States and to complete the required employment eligibility verification form upon hire.” So that kind of takes us into the interview process, right?

[Rosemary]: Yep.

[Jennifer]: This advice is to employers, look, leave it open. You can write, “We will not sponsor workers,” but anyone who interviews and you're screening them normally, if they're not indicating that they need sponsorship, you can proceed with that. And during the pre-offer interview process, there's two questions about work authorization that employers can ask, and they should be worded something like this. So the first could be employment at our company is subject to verification of

an applicant's identity and eligibility for employment as required by immigration laws. Are you authorized to work lawfully for our company? OK, and then it should be a yes or no question. And then the second follow-up question that should be asked or could be asked is, will you now or in the future require our company to sponsor you for immigration benefits? This is sometimes called sponsorship for employment-based visas. Yes or no. Now, it's important because if you're going to ask these questions, that second question in particular, it has to be asked of every applicant. It should be part of the regular interview process. And the danger in not asking that of every applicant is that if you have if you have a recruiter or somebody, again, who might not know better, but is maybe assuming that someone who has an accent or someone who isn't white, isn't an American or a green card holder or immediately authorized to work or a foreign national, if you have someone assume that and they're picking and choosing who they're asking those, "do you need sponsorship" questions of that can lead to a discrimination claim. Right. So you want to be careful if you're going to ask specific questions during the interview process. They need to be asked of every candidate, and it should be part of the regular screening process. It should be part of your procedures.

[Rosemary]: Right. Well, you know what? I have to admit, I had not thought about that, Jen. So is it just the second question about the sponsorship or is it both of them?

[Jennifer]: I mean, I tend to be conservative, right? And I like my clients to have processes and procedures. So I say ask both of these questions. These are the two questions that are allowed to be asked when it comes to work authorization.

[Rosemary]: And it's everybody.

[Jennifer]: Everybody. It's everybody. It's part of the interview process.

[Rosemary]: Right. And so and then if the person at that point answers "no" or "yes, I need sponsorship" or whatever they would answer, you could, an employer could at that point, Jen, say, we're not what would be the right word? What would be the right response, Jen?

[Jennifer]: If the company knows they're not sponsoring, they could say, we will not sponsor...we do not sponsor workers for visas. Period. It shouldn't be we won't sponsor you. It should just say, it should just be "we don't sponsor workers," period.

[Rosemary]: Got it. OK. And they're allowed to do that. So there's no obligation right?

[Jennifer]: Yeah. Now, I think it's also important to note that an employer should not specifically ask for the individual's current work authorization or visa status until after the offer has been extended. Now, Rosemary, that's not to say that some individuals going back to that second question, might say, oh, yeah, for example, maybe I have an open-ended work permit right now. I don't need sponsorship for the next two years, but in the future, I'm going to want an H-1B visa.

[Rosemary]: Mm hmm.

[Jennifer]: Sometimes they're open books and sometimes that's good, that's a good thing. It allows an employer to keep their options open and have a collaborative conversation about that. But what an employer wants to avoid is pigeonholing a candidate into disclosing that information before an offer has been extended, because that can get them in some hot water.

[Rosemary]: So Jen, you were just saying, you know, it's great to have this collaborative, you know, relationship or communication or dialogue with the applicant. And you said so they might say, I'm on this open-ended work visa or whatever it's called for two years. But at the end of that,

I'll be looking for sponsorship. So let's say, could an employer do this—could they say, all right, that's fine, now the individual voluntarily disclosed it post-offer. So they've complied with everything you've told them thus far. Could they—at the end of the two years when the employee says, hey, I need the sponsorship—can they say we're not sponsoring you and let them go?

[Jennifer]: They could. Again there is no obligation for a US employer to sponsor a foreign national worker for a work visa.

[Rosemary]: Right. So even though they disclosed it and said, I'm going to need one in year three, so doesn't matter, they could say, fine, we'll hire you. And then when it comes time for that, say, we're letting you go and that's it.

[Jennifer]: Yeah. OK, good. All right.

[Rosemary]: Well, since you had mentioned that. All right, so just quickly, so we know what we do on the... what we can do and cannot do on our application and on our website. I love these two interview questions. And I think it's brilliant to say ask them across the boards and that's it. It's just part of your job.

[Jennifer]: Processes, right? Yeah. Standard practices.

[Rosemary]: That's right. And don't ask for any other additional information like my poor client who actually had on there, give us your visa number and all of this.

[Jennifer]: Yeah. You don't want to...you don't want to collect that up front. And that's collecting that information is where the I-9 form comes into play. We know what a I-9 form is and that's required of all new hires, whether you're a US citizen, a green card holder, a foreign national. Now, as an immigration attorney, I'm really only getting the questions when it comes to employers completing I-9s for foreign nationals, because oftentimes HR or whoever's doing the onboarding, they're not familiar with the documents that are required to satisfy the I-9 obligations and terms. And again, this is where employers want to be really careful because when it comes to completing I-9s, employers cannot require specific documents to verify the foreign national's identity.

[Rosemary]: Oh, really? I didn't know that.

[Jennifer]: They can give guidance, but just like US employers are just like US employees, a US employer can't require a US passport—if the employee wants to provide their driver's license and birth certificate or Social Security card. You can't go to an employee and say you have to give me X, Y, and Z documents.

[Rosemary]: I did not realize that, Jennifer, I hate to admit that, but I did not know that.

[Jennifer]: It's a common I don't even want to call it a mistake, Rosemary, because the way I see it play out, especially if I'm collaborating with an employer and an employee on visa benefit right?

[Rosemary]: Yeah.

[Jennifer]: I will then give the extra guidance. Hey, employee, on your first day of work or hey, employer, here's our approval notice this suffices for I-9 purposes, this bottom document or whatever. Whatever suffices, right? Because I know what these work permit documents are and I'm familiar enough with I-9s in the context of a foreign national worker, it's not always that intuitive. And if you've never dealt with foreign national documents before, you might not know exactly what's perfect for I-9 purposes. So something to keep in mind. If there's any doubt about I-9 completion,

then ask your immigration attorney or ask HR or somebody who is a little bit more familiar to give you guidance. If you're not quite sure that something's appropriate or not.

[Rosemary]: Right. And so what happens? Because, you know, for our listeners, just so you know, I have had this happen several times, not I, but my clients have. And I've reached out to Jen and she's helped them. But Jen, let's share with the group. What do you do? You made the conditional offer. And a lot of employers, as you know, Jen, will have the employee start, right. So they start working because they have, what is it, three days, Jen, or whatever.

[Jennifer]: Yeah. Three days.

[Rosemary]: So they have them. They have three days before they have to produce that, I guess the I-9 documentation. And so the employee is now started work and now all of a sudden, Jen, the documents they produce are either expired or they're not appropriate. What does the employer do? What do they do?

[Jennifer]: It varies. It depends. Sometimes if there's expired documents, there's certain times that receipt notices to show a pending renewal application might come into play. Right. So that's again, when we're not sure and it's clearly a tricky situation. Ask your immigration attorney for further guidance. Right. But if somebody is refusing to show appropriate documentation by day three, an employer can terminate. Right. And they probably should. Right. If the employee's not giving any documentation to show lawful work authorization or documentation that fits within the parameters of what an I-9 will accept for purposes of proving lawful work authorization an employer can terminate.

[Rosemary]: Yeah. Because as you know, Jen, we had that and we had an employee. Yeah, yeah. And this in these particular instances, the individuals were not turning in the documentation. Oh, I'll get it. And one of them was, oh, I'm waiting for this document to be sent. And so the question we then had, Jen, was this, I remember it was, it happened to be a woman. And she said, it should be here within the next week. And we called you and I believe your counsel was, you can't let her work.

[Jennifer]: No, she didn't have the proper work authorization, unfortunately. And that's the tricky thing when we are dealing with foreign nationals who are waiting on the government to adjudicate the benefit government processing times are in the pits right now.

[Rosemary]: Yeah.

[Jennifer]: And COVID hasn't helped that. Sometimes again, a pending application will suffice and they're on the immigration side. Recently, actually, the government came out and basically said, hey, we know our processing times stink. We're going to allow these expired documents. We're giving them an additional 540 days of extended authorization, and this is an automatic benefit. And I've had some Barclay Damon clients come back to me and say, hey, we had to terminate so and so, or place them on unpaid leave. They came back to us with this rule, is this accurate? And I'll say yes again. It seems counterintuitive; it doesn't 100% fit within the I-9 parameters of like List A, List B, List C documents, but it takes my expertise to say, OK, this is the annotation that you're going to write. They have lawful work authorization. You can on-board them again reverify whatever you need to do. So hiring foreign nationals, it can be tricky for I-9 purposes. I wouldn't immediately rule them out if they're not providing those right documents. But, you know, if they aren't providing accurate documentation, you also don't want to keep them on board. It's unfortunately, it's almost like a catch-22. You're kind of almost damned if you do and damned if you don't if you terminate them too early without really looking at it and they are authorized to work, they can come back and say, you're not giving me you know they're going to raise a claim of discrimination. Right? And then

on the flip side, if you keep them employed and they don't in fact have work authorization and the government catches wind of that, you're...you know, there could be fines and penalties. So it can be tricky, but that's why you get your trusty immigration attorney on board.

[Rosemary]: That's right. That's exactly right. And just quickly, so because I'm looking at, I know how busy you are. So just are there any other, you know, things that employers should be keeping in mind? So we know what we shouldn't be asking on the you know, on the job application. Part of the interview, this has been terrific on the I-9 stuff, I learned a ton. But is there anything else we should be, you know, thinking about or mindful of?

[Jennifer]: Yeah, my biggest recommendation is adopt employment practices and policies that refrain from discrimination and based on citizenship or national origin, whether that's actual or perceived, right. You want to treat all workers and job candidates consistently when it comes to recruitment and interviewing and hiring without regard to their actual or perceived national origin. You just never know. Don't assume that only US citizens are authorized to work because many non-US citizens do have open-ended work permits that don't require employer sponsorship and they're good to go on day one. They'll fill out their I-9, they'll give you a copy of their open-ended work permit, and they're good to go. So you don't want to make any assumptions and I think that's my best piece of advice. Don't assume...if I find in my practice when a foreign national does need work authorization they're typically forward about that earlier on in the process. And when you have a candidate who's willing to have a productive conversation up front, that can make it easier all around for long-term planning purposes. Those are candidates when they're willing to share that information. I often find that it can be a productive hire and maybe an employer doesn't want to immediately rule them out.

[Rosemary]: Yeah, and, you know, I think those the points you've made just, I personally think apply to the employment relationship in general. Right.

[Jennifer]: A thousand percent, Rosemary?

[Rosemary]: I mean, if you've got that collaborative, you know, communication and you're working together, and you're not making assumptions and you carry that through the employment relationship, you're going to have in most cases, you know, a productive, productive relationship, working relationship. So that's terrific. So, yeah. So all right. Well, good. Well, Jen, thanks so much for joining us here.

[Jennifer]: It was a pleasure, this was fun.

[Rosemary]: Yeah, it was a lot of fun. And like I said, I learned a ton and I'm sure all of our listeners did too. And will you come back and join us?

[Jennifer]: Sure I will.

[Rosemary]: All right. Good. All right. Have a great day and we'll talk to you soon.

[Jennifer]: You too Rosemary!

[Rosemary]: All right. Bye-bye.

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