



U.S. Department of Justice

Civil Rights Division

Office of Special Counsel for Immigration-Related
Unfair Employment Practices - NYA
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August 19, 2011

By Email and First Class Mail

Emily Tulli, Esq.
National Immigration Law Center
1441 I Street NW, Suite 1110
Washington, DC 20005

Dear Ms. Tulli:

This letter responds to your email to the Department of Homeland Security, dated July 21, 2011, which has been referred to the Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC"). In your email, you ask whether a union hiring hall can (1) encourage workers to obtain a positive E-Verify Self Check result so that they can be marketed to potential employers as workers who will not run into any E-Verify issues, or (2) require workers to obtain a positive E-Verify Self Check result query before they can be referred for employment by the union hiring hall.

Please note that OSC cannot provide an advisory opinion on any set of facts involving a particular individual or entity. We can provide, however, some general guidelines regarding the anti-discrimination provision of the Immigration and Nationality Act (INA) enforced by OSC, 8 U.S.C. § 1324b, and prohibited employer actions under that provision. The anti-discrimination provision prohibits four types of employment-related discrimination against work-authorized individuals: citizenship or immigration status discrimination; national origin discrimination; unfair documentary practices during the employment eligibility verification process; and retaliation for filing a charge, assisting in an investigation, or asserting rights under the anti-discrimination provision.

With respect to your query, as an initial matter, U.S. Citizenship and Immigration Services ("USCIS") is the primary agency responsible for administering and regulating the use of E-Verify Self Check. The union hiring hall's practices may violate USCIS regulations; specifically, USCIS guidance provides that a positive Self Check result should not be a condition of membership into any group or organization and is not to be required for receipt of any benefit, service, or good from a federal, state or local agency or a private party. USCIS, *Self Check Know Your Rights*, www.uscis.gov/selfcheck (follow "Know Your Rights" hyperlink).

USCIS guidance further provides that employers may not require employees or potential employees to use Self Check under any circumstances. USCIS, *Self Check Know Your Rights*,

www.uscis.gov/selfcheck (follow "For Employers" hyperlink). Requiring applicants to provide proof of their employment authorization before establishing an employment relationship is known as "pre-screening" and may constitute a violation of the anti-discrimination provision of the Immigration and Nationality Act if conducted selectively on the basis of citizenship status or national origin.

An employment eligibility verification policy that is facially discriminatory would violate the anti-discrimination provision of the INA. Further, a policy of encouraging or requiring workers to obtain a positive E-Verify Self Check result by an employer or recruiter or referrer for a fee, even if facially neutral, may constitute an immigration-related unfair employment practice if it is implemented or adopted on the basis of citizenship status or national origin and has the effect of discriminating on those bases. *See* 28 C.F.R. Part 44 Order No. I225-87 Subpart II ("[t]he intent standard makes illegal facially neutral policies which are intended to discriminate on prohibited bases and have that effect.... Further, a facially neutral policy neutrally applied, but adopted for the purpose of discriminating on a prohibited basis and having that effect, is similarly prohibited."). We further note that an employer that considers an applicant or employee's Self Check information in the hiring process, regardless of whether that information comes from a referrer for a fee or other source, may also run afoul of the anti-discrimination provision of the INA if it is determined that the employer is using this information based on the individual's national origin or immigration status.

We hope you find this information helpful.

Sincerely,

A handwritten signature in blue ink, appearing to read "Seema Nanda".

Seema Nanda
Acting Deputy Special Counsel