



U.S. Department of Justice

Civil Rights Division

Office of Special Counsel for Immigration-Related
Unfair Employment Practices - NYA
950 Pennsylvania Ave, NW
Washington, DC 20530
Main (202) 616-5594
Fax (202) 616-5509

NOV - 1 2012

Via Email Aarons@infosolutionsteam.com

Aaron Shackelford
Information Solutions
326-A-1 N. Bloomington
Lowell, AR 72745

Dear Mr. Shackelford:

This letter is in response to your email received by the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) on August 24, 2012. Your email requests clarification on two issues. First, you would like clarification on whether it is acceptable for an employer who is presented with an "invalid (fraudulent)" document to request the employee to "provide a different document." Specifically, you express concern that not only may an employee presenting false documents commit a felony but that an employer asking to see additional documents may lead the employee to commit another felony. In your email, you do not describe the factors upon which you relied to conclude that the documents are fraudulent. Second, your email requests guidance regarding a "current [company] policy . . . to immediately term[inate] anyone that presents fraudulent documents" and deem those individuals ineligible for rehire.

As you may know, OSC enforces the anti-discrimination provision of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324b. The anti-discrimination provision prohibits four types of unlawful conduct: (1) citizenship or immigration status discrimination; (2) national origin discrimination; (3) unfair documentary practices during the employment eligibility verification (Form I-9) process ("document abuse"); and (4) retaliation for filing a charge or asserting rights under the anti-discrimination provision. Although OSC cannot give you an advisory opinion on any set of facts involving a particular individual or company, we are pleased to provide some general guidelines regarding compliance with the anti-discrimination provision of the INA.

Regarding your first question, an employer "may reject a document presented by an employee if the document *does not reasonably appear to be genuine* or to relate to the person presenting it." USCIS - *Is This Document Acceptable?*, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnexto id=d6c08318c9c64310VgnVCM100000082ca60aRCRD&vgnnextchannel=5c1f8318c9c64310VgnVCM100000082ca60aRCRD> (last visited Sep. 14, 2012) (emphasis added); *See also* Form M-274 at 28 (stating "documents that are clearly inconsistent may be rejected."). To the extent an employer knows a document to be fraudulent but nevertheless accepts it, it may be deemed to

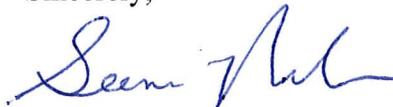
have violated 8 U.S.C. § 1324a, which is enforced by U.S. Immigration and Customs Enforcement. If an employer rejects a document that does not reasonably appear to be genuine or to relate to the employee, an employer may ask the employee if he or she is able to provide other documents from the Lists of Acceptable Documents on Form I-9. Form M-274 at 42. To avoid violating the anti-discrimination provision, employers should scrutinize documents in the same manner for all similarly-situated employees.

Regarding your second question, whether barring an employee that the employer believes presented fraudulent documents from rehire is legally permissible depends on the circumstances of the case. It is unlawful for an employer with knowledge that an individual is not work-authorized to employ the individual. 8 U.S.C. § 1324a(a)(1); *See also Fact Sheet: Form I-9 Inspection Overview*, <http://www.ice.gov/news/library/factsheets/i9-inspection.htm> (last visited Sep. 14, 2012) (stating “Employers determined to have *knowingly* hired or continued to employ unauthorized workers . . . will be required to cease the unlawful activity, may be fined, and in certain situations may be criminally prosecuted.”) (emphasis added). However, if work-authorized employees’ genuine documents are erroneously rejected based on a belief that those documents are fraudulent, that employee may choose to file a charge under the anti-discrimination provision. In such instances, OSC’s investigation focuses on the employer’s intent.

You also inquire about a company policy that deems individuals that presented false documents ineligible for rehire. If an employer rejects a presently work-authorized individual from employment based on the individual’s prior undocumented status, that employee might choose to file a charge under the anti-discrimination provision. OSC’s investigation in such circumstances would focus on whether an employer’s “dishonesty policy” is consistently applied to employees who make false representations on their applications for employment or other forms without regard to citizenship status or perceived national origin, and whether the employer’s claimed reason for termination is in fact a pretext for citizenship status discrimination. *See, e.g., Simon v. Ingram Micro Inc.*, 9 OCAHO no. 1088 at 13-14 (2003) (discussing cases holding that termination for misrepresentations or dishonesty is a legitimate nondiscriminatory reason). *See also Aguirre v. KDI American Products, Inc.*, 6 OCAHO no. 882 (1996) (refusing to hire or rehire someone who has presented false employment eligibility documents or made a false statement on the application and I-9 form not likely to violate the anti-discrimination provision if honesty policy applied consistently). Accordingly, consistent application of a dishonesty policy would not constitute a per se violation of the anti-discrimination provision.

We hope this information has been helpful, and all of your concerns have been addressed.

Sincerely,



Seema Nanda
Deputy Special Counsel