



U.S. Department of Justice

Civil Rights Division

*Office of Special Counsel for Immigration-Related
Unfair Employment Practices - NYA
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May 30, 2013

BY FIRST CLASS MAIL AND EMAIL (dforbush@hcplaw.com)

Deanna L. Forbush, Esq.
Haygood Cleveland Pierce & Thompson, LLP
611 East Glenn Ave.
Auburn, AL 36830

Dear Ms. Forbush:

This letter responds to your e-mails dated April 26, 2013, and May 7, 2013, to the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC). In your emails, you ask if your client, an E-Verify user, can make its Forms I-9 available for inspection by a private vendor who would issue "pay cards," which are paychecks, to your client's employees. The "Vendor, the Vendor's bank, and/or the applicable governing authorities thereof" would be permitted to inspect the Forms I-9 to verify the identity of the employees for whom the vendor is issuing the paychecks, and the employer would have to retain the Forms I-9 for five years from the date of termination "for inspection purposes." You state that you believed this practice may violate 8 U.S.C. § 1324a(b)(5).

Please note that OSC cannot provide an advisory opinion on any set of facts involving a particular individual or entity. However, we can provide some general guidelines regarding employer compliance with the anti-discrimination provision of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b, enforced by OSC, and employer actions under that provision. The anti-discrimination provision prohibits four types of employment-related discrimination: citizenship or immigration status discrimination; national origin discrimination; unfair documentary practices during the employment eligibility verification (I-9 and E-Verify) process ("document abuse"); and retaliation for filing a charge, assisting in an investigation or asserting rights under the anti-discrimination provision. 8 U.S.C. § 1324b.

Pursuant to federal law, a person or other entity that hires, recruits or refers an individual for employment must verify the identity and employment authorization of each person hired, recruited or referred. 8 U.S.C. § 1324a(b)(1)(a). The form designated for that purpose is the Form I-9. 8 CFR § 274a.2; U.S. Citizenship and Immigration Service (USCIS) Handbook for Employers, Guidance for Completing Form I-9 (M-274) (Rev. 03/08/13). A person or entity is also charged with retaining the Form I-9 and making it available for inspection by the Department of Homeland Security, OSC, and the Department of Labor. 8 U.S.C. § 1324a(b)(3).

Pursuant to 8 U.S.C. § 1324a(b)(5), Forms I-9 “may not be used for purposes other than for enforcement of [the Immigration and Nationality Act and certain provisions of federal criminal law].” The accompanying DHS regulations also provide:

(4) Limitation on use of Form I-9. Any information contained in or appended to the Form I-9, including copies or electronic images of documents listed in paragraph (c) of this section used to verify an individual’s identity or employment eligibility, may be used only for enforcement of the Act and sections 1001, 1028, 1546, or 1621 of title 18, United States Code.

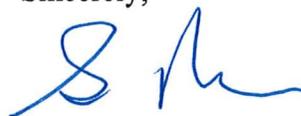
8 C.F.R. § 274a.2(b)(4). In our view, sharing Forms I-9 with a private entity in order to have that entity verify employees’ identities for payroll purposes is not a use related to enforcement of the Act or one of the specified criminal laws, as set forth in the statute and accompanying regulations. For further information on disclosure of Form I-9 documents, OSC suggests that you contact the USCIS Verification Division at (888) 464-4218. Furthermore, the practice you describe may result in the third party vendor questioning the sufficiency of documents presented to the employer, which documents the vendor would have not seen in their original form. To the extent the employer requests additional or different documents from an employee based on the vendor’s scrutiny of Forms I-9, the request could be perceived by the employee to constitute document abuse in violation of the anti-discrimination provision of the INA.

Insofar as your client is an E-Verify employer that may be printing the E-Verify results screen and attaching the print-out to its employees’ Forms I-9, your client may have additional considerations. Under the E-Verify MOU, an employer must “use the information it receives from SSA or DHS pursuant to E-Verify and this MOU only to confirm the employment eligibility of employees as authorized by this MOU.” Art.II, C.13. Further, an employer is required to ensure that the information is “not disseminated to any person other than employees of the Employer who are authorized to perform the Employer’s responsibilities under this MOU, except for such dissemination as may be authorized in advance by SSA or DHS for legitimate purposes.” *Id.* Additionally, the E-Verify MOU states that information which the employer receives from SSA is governed by both the Privacy Act and the Social Security Act, and that misuse of the information may result in criminal penalties. *Id.*; Art. II, C14. There may be other relevant federal, state, or local laws, regulations or executive orders regarding the dissemination of personally identifiable information (PII) similar to that contained in the E-Verify print out and Form I-9 by which your client must abide.

If you have further questions that pertain to the anti-discrimination provision of the INA, please contact OSC’s employer hotline, 800-255-8155, or visit OSC’s website at www.justice.gov/crt/about/osc.

We hope this information is helpful. Thank you for contacting OSC.

Sincerely,



Seema Nanda
Deputy Special Counsel