



U.S. Department of Justice

Civil Rights Division

Office of Special Counsel for Immigration-Related
Unfair Employment Practices - NYA
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January 8, 2015

BY EMAIL (afela@polarislaserlaminations.com)

Anna Fela
Polaris Laser Laminations, LLC
2725 Norton Creek Drive
West Chicago, IL 60185

Dear Ms. Fela:

This is in response to your email dated November 12, 2014, to the Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC" or "Office"). We apologize for the delay in responding. In your email, you request guidance for an employer that accepted an employee's work authorization documents that appeared genuine, where the employee later presents "a new social security number and [work authorization] documents and states that the previous documents were not real." You ask whether "this situation opens [the employer] up to any discrimination issues in any way if [it] choose[s] to keep or terminate the employee," and you request guidance on "the correct steps going forward."

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, which OSC enforces. The anti-discrimination provision prohibits four types of employment-related discrimination: (1) citizenship or immigration status discrimination; (2) national origin discrimination; (3) unfair documentary practices during the employment eligibility verification (Form I-9 and E-Verify) process ("document abuse"); and (4) retaliation for filing a charge, assisting in an investigation, or asserting rights under the anti-discrimination provision. 8 U.S.C. § 1324b. For more information about OSC, please visit our website at: <http://www.justice.gov/crt/about/osc>.

As you may know, an employer is required to verify the identity and employment authorization of all newly-hired employees by completing the Form I-9. 8 U.S.C. § 1324a. During that process, an employee may choose to present either one unexpired document from List A of the Form I-9's List of Acceptable Documents or a combination of one unexpired List B document and one unexpired List C document. See Form I-9 Instructions, p.3. When reviewing the documentation presented, an employer must accept documents that reasonably appear to be genuine and to relate to the person presenting the document(s). *Id.* The employer should then record information about the document(s) presented in Section 2 of the Form I-9. *Id.*

In a situation where an employer has properly completed these steps, and an employee later provides the employer with new work authorization documentation and explains that the previously-presented documentation was not genuine, U.S. Citizenship and Immigration Services (“USCIS”) – the agency that publishes the Form I-9 -- provides additional guidance. According to the USCIS Handbook for Employers, Guidance for Completing Form I-9 (Form M-274 Rev. 04/30/13), available at <http://www.uscis.gov/sites/default/files/files/form/m-274.pdf>:

“You may encounter situations other than a legal change of name where an employee informs you or you have reason to believe that his or her identity is different from that previously used to complete the Form I-9. For example, an employee may have been working under a false identity, has subsequently obtained a work authorized immigration status in his or her true identity, and wishes to regularize his or her employment records. In that circumstance you should complete a new Form I-9. Write the original hire date in Section 2, and attach the new Form I-9 to the previously completed Form I-9 and include a written explanation.

In cases where an employee has worked for you using a false identity but is currently work authorized, the I-9 rules do not require termination of employment. . . .”

USCIS Handbook for Employers at 24.

This Office cannot identify any violation of 8 U.S.C. § 1324b when an employer consistently accepts documents that employees choose to present that reasonably appear to be genuine and relate to the individual, regardless of whether an employee admits that the documents previously presented for employment eligibility verification were “not real.” Nor can this Office identify any 1324b violation when an employer allows an employee to continue employment under the circumstances you present. However, to the extent an employer rejects valid work-authorization documentation or terminates employees because of their citizenship status or national origin, the employer could violate the anti-discrimination provision.

An employee who is terminated under the circumstances you describe may allege citizenship status discrimination. Citizenship status discrimination under the anti-discrimination provision of the INA occurs when an employer treats individuals differently during hire or termination on the basis of citizenship or immigration status. U.S. citizens, recent lawful permanent residents, refugees, and asylees are protected from this type of discrimination. To the extent a protected individual files a charge alleging discriminatory termination based on perceived or actual immigration status or the perceived lack of authorized status, this Office would investigate the charge. We note that an employer with a consistently-followed policy of terminating individuals for providing false information during the hiring process may have a legitimate non-discriminatory reason for the termination. Accordingly, whether or not this Office concludes that such a termination violates the anti-discrimination provision depends upon the facts presented.

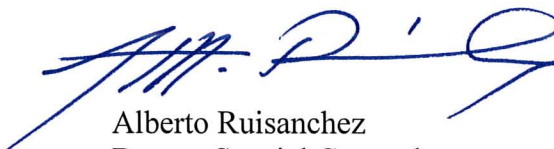
Similarly, an employee who is terminated in this context may also allege national origin discrimination. National origin discrimination under 8 U.S.C. § 1324b occurs when an employer treats employment-authorized individuals differently during hire or termination on the basis of

foreign birth, ancestry, or the appearance of foreign birth or ancestry. All employment-authorized individuals are protected from this type of discrimination; however, this Office only has national origin jurisdiction over employers with four to 14 employees, whereas another federal agency, the Equal Employment Opportunity Commission, has national origin jurisdiction over employers with 15 or more employees.

Unfair documentary practices, also known as “document abuse,” may also be implicated in the scenario you describe. An unfair documentary practice occurs when an employer rejects valid Form I-9 documentation, demands more or different Form I-9 documentation, or requests specific Form I-9 documentation based on an employment-authorized individual’s citizenship status or national origin. All employment-authorized individuals are protected from this type of discrimination. Accordingly, an employer that treats individuals differently when updating Form I-9 information because of citizenship status or national origin may violate the anti-discrimination provision.

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

Sincerely,

A handwritten signature in blue ink, appearing to read 'A. Ruisanchez', with a stylized flourish at the end.

Alberto Ruisanchez
Deputy Special Counsel