



U.S. Department of Justice
Civil Rights Division

*Office of Special Counsel for Immigration Related
Unfair Employment Practices - NYA
950 Pennsylvania Avenue, NW
Washington, DC 20530*

APR 21 2010

Sent by First Class Mail and Electronic Mail (JIm@ebglaw.com)

Jang Im, Esquire
Epstein Becker Green
One California Street
26th Floor
San Francisco, CA 94111

Re: Request for Guidance on E-Verify Tentative Nonconfirmations

Dear Mr. Im:

Thank you for contacting the Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC"). In your email of March 29, 2010, you ask whether an employee's failure to take action upon receipt of an E-Verify Tentative Nonconfirmation ("TNC") by contesting or not contesting and signing the TNC notice is a valid basis for terminating employment.

This office cannot give you an advisory opinion on any set of facts involving a particular individual or company. However, we can provide some general guidelines regarding compliance with the anti-discrimination provision of the Immigration and Nationality Act ("INA").

As you know, OSC enforces the anti-discrimination provision of the INA. The anti-discrimination provision prohibits four types of unlawful conduct: (1) citizenship or immigration status discrimination with respect to hiring, firing, and recruitment or referral for a fee; (2) national origin discrimination with respect to hiring, firing, and recruitment or referral for a fee; (3) discriminatory 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.

Your email seeks clarification about an employer's obligations with respect to an employee who fails to take action following receipt of a TNC notice from the U.S. Department of Homeland Security's ("DHS") electronic employment eligibility verification program ("E-Verify"). As a general matter, the E-Verify Memorandum of Understanding lays out an employer's responsibilities for handling a TNC response. E-Verify MOU, Art. II.C; Art. III.

However, the MOU does not specify a time period within which an employee must take action following receipt of a TNC. Nor does the MOU specify a time period within which an employer must initially provide the employee with the TNC notice. For further assistance on the specific questions in your email, we recommend that you contact E-Verify Customer Support at 1-888-464-4218.

To prevent a violation of the anti-discrimination provision in the use of E-Verify, OSC encourages employers to take steps to ensure that the verification process is implemented in a non-discriminatory manner. Accordingly, an employer should treat employees for whom it receives a TNC consistently, regardless of their national origin or citizenship or immigration status.

For a list of OSC's best practices for employers using E-Verify as well as further information on the INA's anti-discrimination provision, please feel free to consult OSC's website at <http://www.justice.gov/crt/osc/>, or call OSC at 1-800-255-8155.

Sincerely,

A handwritten signature in black ink, appearing to read "Katherine A. Baldwin", with a long horizontal flourish extending to the right.

Katherine A. Baldwin
Deputy Special Counsel