



U.S. Department of Justice

Civil Rights Division

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

BY EMAIL (bgibson@fragomen.com)

Bonnie Gibson
Fragomen, Del Ray, Bernsen and Loewry, LLP
3003 N. Central Ave. Suite 1200
Phoenix, AZ 85012

Dear Ms. Gibson:

This is in response to your letter dated September 17, 2013. Your letter expands upon the limited question presented earlier this year to OSC by Diana Forbush, resulting in OSC's Technical Assistance letter dated May 30, 2013 (Forbush letter), available at <http://www.justice.gov/crt/about/osc/pdf/publications/TAletters/FY2013/166.pdf>. In your letter, you seek clarification as to OSC's authority to enforce 8 U.S.C. § 1324a(b)(5), and question that provision's applicability to entities other than the federal government in connection with its enforcement role.¹ You further explain the reasons why private payroll card vendors rely on Form I-9 information to comply with banking laws and regulations. Based on your explanation, we understand that vendors using an electronic payroll card system will only view employer Forms I-9 in limited instances (such as an audit), and primarily rely on "employer representations to the bank that the employer has valid Forms I-9 on file for all the employees enrolling in the payroll card program."

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. For more information about OSC, please visit our website at: <http://www.justice.gov/crt/about/osc>.

¹ We note that you do not mention related provisions, such as 8 U.S.C. § 1324a(d)(2)(C), entitled "Limited use of system." This provision of law states, "Any personal information utilized by the system may not be made available to Government agencies, *employers, and other persons* except to the extent necessary to verify that an individual is not an unauthorized alien." (Emphasis added.)

We use this opportunity to clarify that OSC does not enforce 8 U.S.C. § 1324a(b)(5), or its related provision, 8 U.S.C. § 1324a(d)(2)(C). Furthermore, we cannot comment on whether the practice in question complies with the Bank Secrecy Act or other banking regulations mentioned in your letter.

However, as OSC noted in the Forbush letter, there are practical considerations as to why providing Forms I-9 to other entities (which may occur in limited instances in the context at issue here) may be problematic and could result in possible 1324b violations, such as if a third party asks an employer to request additional or different documents based on the third party's review of Forms I-9. Additionally, there may be issues in relying on potentially stale or incorrect information recorded on the Form I-9 if an employer (or third party) relies on identity information for a particular employee at a later date, by which time the employee's address, legal name, or other identifying information may have changed.

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

Sincerely,

A handwritten signature in blue ink, appearing to read 'Seema Nanda', written in a cursive style.

Seema Nanda
Deputy Special Counsel