



U.S. Department of Justice

Civil Rights Division

Office of Special Counsel for Immigration-Related
Unfair Employment Practices - NYA
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By First Class Mail and E-mail (cluini@hansonbridgett.com)

Christina Luini
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Dear Ms. Luini:

This is in response to your email dated July 21, 2011. In your email, you inquired whether an employer who wants to “insource” its custodial services by making offers of employment “to the individuals employed by the independent contractor who previously performed custodial work” on the employer’s property must require these individuals to complete Forms I-9, or whether the employer can rely on the Forms I-9 prepared by the independent contractor. You also asked whether it would be considered document abuse to request that these individuals complete Forms I-9 when they have already completed Forms I-9 for the independent contractor.

The Office of Special Counsel for Immigration-Related Unfair Employment Practices (“OSC”) investigates and prosecutes employers charged with national origin and citizenship status discrimination, as well as over-documentation in the employment eligibility verification process (“document abuse”) and retaliation under the anti-discrimination provision of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1324b. For more information on OSC, please visit our website at: <http://www.justice.gov/crt/about/osc/>.

Please note that OSC cannot provide an advisory opinion on any specific case or set of facts. However, we can provide general guidelines as to the coverage of the statute and the legality of various pre-employment inquiries under the anti-discrimination provision of the INA, 8 U.S.C. § 1324b.

An employer must complete the Form I-9 each time it hires any person to perform labor or services in the United States in return for wages or other remuneration. See 8 U.S.C. § 1324a(a)(1)(B); 8 C.F.R. §§ 274a.2(b)(1)(i) and (ii). However, an employer will not be deemed to have hired an individual for employment, and thus not required to complete a Form I-9, if the individual is continuing in his or her employment and has a reasonable expectation of employment at all times. See 8 C.F.R. §§ 274a.2(b)(1)(viii). Situations in which an individual is considered “continuing in his or her employment,” include when an individual continues his or

her employment with a “related, successor, or reorganized employer.” See 8 C.F.R. § 274a.2(b)(1)(viii)(A)(7). A “related, successor, or reorganized employer” has been interpreted as limited to employers who: (1) are the same employer but at another location; (2) continue to employ some or all of a previous employer's workforce in cases involving a corporate reorganization, merger, or sale of stock or assets; or (3) continue to employ any employee of another employer's workforce where both employers belong to the same multi-employer association and the employee continues to work in the same bargaining unit under the same collective bargaining agreement. 8 C.F.R. § 274a.2(b)(1)(viii)(A)(7)(i)-(iii). See also U.S. v. Marnul, 3 OCAHO 441 (1992). OSC is not able to opine on whether the employer you describe would be considered a “related, successor, or reorganized employer,” as this falls outside the purview of our jurisdiction. For more information on when a company is considered a “related successor or reorganized employer,” you may wish to contact USCIS.

Document abuse occurs when, in order to satisfy the employment eligibility verification provisions of 8 U.S.C. § 1324a(b), an employer either requests from an individual more or different employment eligibility verification documents than are required for employment eligibility verification purposes, or rejects documents that on their face reasonably appeared genuine and with discriminatory intent. 8 U.S.C. § 1324b(a)(6).

To the extent that the employer to which you referred decides to request that the “insourced” employees complete new I-9 Forms, the employer would unlikely be deemed to have violated the anti-discrimination provision of the INA if all of the “insourced” employees are treated consistently during the I-9 process, without regard to their citizenship status or national origin.

We hope you find this information helpful.

Sincerely,



Seema Nanda
Acting Deputy Special Counsel