



U.S. Department of Justice

Civil Rights Division

Office of Special Counsel for Immigration-Related
Unfair Employment Practices - NYA
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OCT 26 2011

BY EMAIL (krobidoux@larabee.com)

Ms. Kimberly Best Robidoux
Larrabee Mehlman Albi Coker LLP
9920 Pacific Heights Blvd., Suite 300
San Diego, CA 92121

Dear Ms. Best Robidoux:

Thank you for your e-mail inquiry dated September 11, 2011. In your email you ask what action, if any, your client must take against an employee where the employee presented a Social Security card (in combination with a List B document) for I-9 purposes that appeared genuine when originally presented but was later identified in an internal review as not appearing to be genuine. In your inquiry, you state that your client initially received a Social Security no-match letter for the employee, in response to which the employee explained that she was previously not authorized to work, but had recently secured work authorization. Your client then asked the employee to complete a new Form I-9, at which time she presented the Social Security card in question. In your email you also explain that all employees for whom your client received Social Security no-match letters were treated subjected to the same no-match letter policy, and we presume this to mean that your client's policy was implemented consistently, regardless of the citizenship status or national origin of the employees affected.

Please note that the Office of Special Counsel (OSC) cannot provide an advisory opinion on any particular instance of alleged discrimination or 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 hiring, firing, recruitment or referral for a fee, and unfair documentary practices during the employment eligibility verification (Form I-9) process (document abuse) on the basis of citizenship or immigration status or national origin. It also prohibits retaliation for filing a charge, assisting in an investigation, or asserting rights under the anti-discrimination provision. For more information about OSC, you may visit our website at www.justice.gov/crt/about/osc.

Under federal law, an employer may violate 8 U.S.C. § 1324a(a) if that employer knows (or has constructive knowledge) that an employee is not authorized to work. Mere suspicion or conjecture is not knowledge. *See, e.g., Collins Food Intl. Inc. v. INS*, 948 F.2d 549 (9th Cir. 1991). At the same time, an employer has a duty to investigate into situations where it has knowledge that would lead a reasonable person to believe that an individual is not authorized to work in the United States. *See Mester Mfg. Co. v. INS*, 879 F.2d 561 (9th Cir. 1989); *New El*

Rey Sausage v. INS, 925 F.2d 1153 (9th Cir. 1991)(employer that received specific information from INS that certain employees may have committed document fraud was on notice of their potentially unauthorized status; because the employer failed to make further inquiries, it is deemed to have constructive knowledge of the unauthorized status). For example, courts have found that employers had constructive knowledge when they failed to ask for any proof of work authorization or ignored notices about employees' unauthorized status from government authorities. See, e.g., *United States v. Café Camino Real*, 2 OCAHO no. 307, at 39 (1991)(where employer did not request or review employee's work authorization documents, it may be inferred that employer knew the individual did not have work authorization documents); *U.S. v. Noel Plastering*, 3 OCAHO no. 427, at 320 (1992)(violation can be established where employer fails to reverify worker employment eligibility after receiving "specific and detailed" information from the INS that employees may be ineligible to work). Because the issue you raise pertains in part to enforcement under 8 U.S.C. § 1324a, OSC cannot state whether an employer has sufficient information to take further action involving a particular employee. For more information about facts that might rise to the level of "constructive knowledge," we recommend you contact Immigration and Customs Enforcement within the Department of Homeland Security at 1-866-DHS-2ICE or visit <http://www.ice.gov>.

However, OSC's authority pertains to equal treatment in the employment eligibility verification process. Therefore, to the extent that an employer rejects an employee's document that does not appear to be genuine, OSC strongly advises that it treat all employees consistently regardless of citizenship status or national origin. This means that immigrants or those who appear to be foreign-born based on appearance, accent, or surname, should not have their documents more closely scrutinized than U.S. citizens or those who do not appear to be foreign-born.

We hope this information is helpful.

Sincerely,



Seema Nanda
Acting Deputy Special Counsel