



U.S. Department of Justice

Civil Rights Division

*Office of Special Counsel for Immigration-Related
Unfair Employment Practices - NYA
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Washington, DC 20530
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October 23, 2015

BY EMAIL (ssimon@wildesweinberg.com)

Stacey A. Simon, Esq.
Senior Associate
Wildes & Weinberg P.C.
90 West Palisade Avenue
Englewood, NJ 07631

Dear Ms. Simon:

This is in response to your email dated July 27, 2015, to the Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC" or "Office"). We apologize for the delay in responding.

You request guidance on how to advise a client following an internal audit of the client's Forms I-9. First, you seek guidance on what steps your client should take with respect to Permanent Resident Cards (Forms I-551) that you doubt the veracity of. You state that your firm's inclination is to advise the client to meet with the employees whose documentation you believe is doubtful and request the employee to present different documentation. You are concerned, however, that this post-employment request for different documentation could result in possible discrimination complaints because, you state, the affected employees share the same national origin. Second, you ask whether your firm has an "obligation to train" this client in "what to look for in a valid green card" or whether that training is "outside the scope of what their HR should be trained to do since that would take them beyond the 'reasonable person' standard?"

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"). The anti-discrimination provision prohibits four types of employment-related conduct: (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>.

The issues raised in your email implicate both an employer's obligations to avoid discrimination in violation of the anti-discrimination provision and an employer's obligations to

comply with the employer sanctions provisions at 8 U.S.C. § 1324a. For guidance about 8 U.S.C. § 1324a's prohibition against knowingly employing an individual who is not authorized to work in the United States, we direct you to Immigration and Customs Enforcement ("ICE") within the Department of Homeland Security. Information about ICE's worksite enforcement activities can be found at www.ice.gov/worksite, and contact information for Special Agent in Charge field offices can be found at www.ice.gov/contact.

To prevent discrimination in violation of the anti-discrimination provision, an employer (or its representative) conducting an internal Form I-9 audit should conduct the audit in a consistent manner – treating similarly-situated employees in a similar manner – and should not treat employees differently based on citizenship status or national origin. For example, an employer should not base its selection of which Forms I-9 to review on employees' citizenship status or national origin. In addition, employers should apply the same level of scrutiny to Form I-9 documentation and not apply different levels of scrutiny based on citizenship status or national origin. If, after following these principles during an audit, an employer identifies documentation that does not reasonably appear to be genuine or relate to the employee and requests that the employee present alternative documentation, the request for alternative documentation is unlikely to violate the anti-discrimination provision. If the employer requests alternative documentation, the employer should not request specific documents (though the employer may state that the particular document called into question by the internal audit may not be used again for Form I-9 purposes). The employee should be permitted to present his or her choice of other documents, as long as they are acceptable for employment eligibility verification purposes.

We direct you to ICE regarding your question on whether your firm is obligated to train your client on "what to look for in a valid green card." We reiterate, however, that an employer that subjects documentation to additional scrutiny based on the citizenship or national origin of the employee presenting the documentation 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