



U.S. Department of Justice
Civil Rights Division

*Office of Special Counsel for Immigration-Related
Unfair Employment Practices - NYA
950 Pennsylvania Ave, NW
Washington, DC 20530
Main (202) 616-5594
Fax (202) 616-5509*

September 12, 2016

BY EMAIL (dmetzger@lowenbaumlaw.com)

Diane Metzger, Esq.
Lowenbaum Law
222 S. Central, Suite 900
St. Louis, MO 63105

Dear Ms. Metzger:

This is in response to your email dated June 30, 2016, to the Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC"). In your email, you express concerns about the possible conflict between the obligations that Missouri state contractors and certain Missouri state agencies have under Section 285.530 of the Revised Statutes of Missouri, on the one hand, and their obligations pursuant to federal E-Verify rules, on the other hand. You also express concern that allowing Missouri state entities to run E-Verify cases on current employees in violation of E-Verify rules may encourage those entities to "terminate certain employees for reasons which may" violate the anti-discrimination provision of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1324b, or other labor or employment laws.

As you point out, Missouri law requires that Missouri state contractors "affirm enrollment and participation in" E-Verify "with respect to the employees working in connection with the contracted services." You express concern that the law appears to contradict federal E-Verify rules by requiring state contractors to create an E-Verify case for all employees working on a state contract, even employees already working for the employer at the time it enrolled in E-Verify. As you also note in your letter, as a general matter E-Verify allows employers to run only new hires through E-Verify, except for federal contractors with an E-Verify clause in their federal contract.

You ask the following four questions:

1. May a Missouri state contractor (who is not also a federal contractor) disregard the obligations and requirements of section 285.530.2 RSMo. by choosing to create E-Verify cases only for new employees hired after the state contractor enrolls in the federal E-Verify program?
2. Will a Missouri state contractor (who is not also a federal contractor) violate federal E-Verify laws if, in compliance with section 285.530.2 RSMo., such state contractor creates an E-Verify case for a current employee who was hired by the state contractor

prior to the state contractor enrolling in the federal E-Verify program, even if such employee is “working in connection with the contracted services” of a Missouri state contract or grant governed by section 285.530.2 RSMo.?

3. May the state of Missouri (or any political subdivision of the state of Missouri) E-Verify a current employee if such employee was hired by the state of Missouri (or any political subdivision of the state of Missouri) prior to enrolling in the federal E-Verify program?
4. May the state of Missouri (or any political subdivision of the state of Missouri) E-Verify current and/or prospective employees?

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 INA. The anti-discrimination provision prohibits four types of employment-related discrimination: (1) citizenship or immigration status discrimination in hiring, firing, and recruiting; (2) national origin discrimination in hiring, firing, and recruiting; (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>.

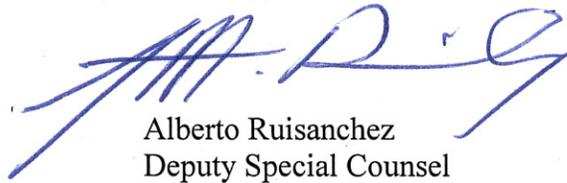
Regarding the apparent conflict between federal E-Verify rules and Section 285.530 of the Revised Statutes of Missouri, we note that U.S. Citizenship and Immigration Services (“USCIS”) — the agency that administers the E-Verify program, ensures compliance with its rules, and issues guidance on proper E-Verify procedures — has advised employers enrolled in E-Verify that they are responsible for complying with the terms of their Memorandum of Understanding (“MOU”), including (but not limited to) verifying all new hires through E-Verify procedures.

Failure to comply with E-Verify program rules could lead to possible termination or suspension from the E-Verify program. For general information about E-Verify, employers and their representatives may call E-Verify’s employer hotline at 888-464-4218 and may submit written inquiries to E-Verify@dhs.gov. However, USCIS cannot provide guidance on state or local laws that require employer participation in E-Verify and typically refers callers with these types of inquiries to state officials or local Chambers of Commerce. Unfortunately, OSC is also unable to comment on whether any of the actions you describe would violate Missouri state law.

We also note that under the INA, an employer commits unfair documentary practices when it rejects valid Form I-9 documentation, demands more or different Form I-9 documentation, or requests specific Form I-9 documentation based on an employment-authorized individual’s citizenship, immigration status, or national origin. Furthermore, the INA prohibits terminating an employee based on citizenship or immigration status. To the extent a state contractor terminates certain employees based on their citizenship or immigration status, the employer 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