



OSC UPDATE

Office of Special Counsel for Immigration-Related Unfair Employment Practices

Fall 2008

The Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) investigates and prosecutes allegations of national origin and citizenship status discrimination in hiring, firing, and recruitment or referral for a fee, as well as unfair documentary practices during the employment eligibility verification process and retaliation under the anti-discrimination provision of the Immigration and Nationality Act (INA). In addition, OSC conducts outreach aimed at educating employers, workers, and the general public about their rights and responsibilities under the INA's anti-discrimination provision.

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A Message from the Special Counsel Defining OSC's Role in the Current Enforcement Environment

By Patrick Shen

We are in the midst of significant developments in immigration enforcement at the worksite. The incorporation of cutting-edge technology combined with increased efforts by federal and even state governments to sanction employers who hire unauthorized workers have heightened the awareness of immigration compliance in the hiring process. With this awareness, however, employers must not overlook their obligations not to discriminate against authorized workers in the hiring, employment eligibility verification or termination process.

With the proliferation of state-imposed employment eligibility verification requirements, rapid growth in E-Verify (the U.S. Department of Homeland Security-administered electronic employment eligibility verification system formerly known as the Basic Pilot Program) enrollment, and increased enforcement actions by federal immigration officials, it is imperative for employers to understand how, in light of the new technology and a new enforcement environment, they can verify the work authorization of new employees while avoiding discrimination. Likewise, it is more important than ever for authorized workers and their advocates to know how to protect their rights today.

One effective way to become familiar with these rights and obligations is to take advantage of OSC's public education and outreach resources. OSC has been working closely with U.S. Department of Homeland Security officials to develop training materials for enforcement officials and the public, and to conduct joint public education ventures. Furthermore, in collaboration with its grantees, OSC conducts hundreds of outreach presentations each year for workers and employers across the country.

(Continued on page 8)

Employer Hotline:

1-800-255-8155
1-800-237-2515(TDD)

Worker Hotline:

1-800-255-7688
1-800-237-2515(TDD)



OSC's Telephone Interventions

OSC's telephone intervention program is an innovative form of alternative dispute resolution. It allows a caller to OSC's worker or employer hotline to work informally with OSC's staff to resolve potential immigration-related employment disputes within hours or minutes, rather than weeks or months, without contested litigation. Employers love the program because it saves them time and money. Workers love the program because it keeps them on the job. (See page 6 for a sample E-Verify telephone intervention).

OSC Selects 2008 Grant Recipients

On July 21, 2008, the Department of Justice announced the award of \$724,500 in grants to eleven groups serving communities throughout the country, to conduct public education programs for workers and employers about immigration-related job discrimination.

The grants, which range from \$40,000 to \$100,000, were awarded by the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) of the Civil Rights Division. Recipients will assist discrimination victims; conduct seminars for workers, employers and immigration service providers; distribute educational materials in various languages; and place advertisements in local communities through both mainstream and ethnic media.

The 2008 OSC grant recipients are: Asian Pacific American Legal Center of Southern California; Catholic Charities of Dallas; Catholic Charities of the Diocese of Palm Beach; City of Phoenix Equal Opportunity Department; Colorado Legal Services; League of United Latin-American Citizens (LULAC); Legal Aid Foundation of Los Angeles (LAFLA); Lutheran Children and Family Services of Eastern Pennsylvania; Nachman & Associates; National Immigration Law Center (NILC); and New York City Human Rights Commission.

OSC Issues Guidance on Social Security “No-match” Letters

The U.S. Department of

Homeland Security’s (DHS’s) Safe-Harbor Procedures for Employers Who Receive a No-Match Letter (“no-match rule”), published in August 2007, and modified by a Proposed Supplemental Rule announced by DHS on March 21, 2008, offers employers who receive no-match letters from the Social Security Administration (SSA) a safe-harbor in a related immigration enforcement action if those employers follow the series of steps set forth in the no-match rule. The no-match rule provides that an employer may terminate an employee whose work eligibility could not be confirmed after the employer has followed the procedures that the rule sets forth to ensure that the information provided by affected employees to confirm their work eligibility is genuine.

Also on March 21, OSC published on its website guidance to employers to clarify when OSC may find reasonable cause to believe that employers following the safe-harbor procedures have engaged in unlawful employment discrimination in violation of the Immigration and Nationality Act.

In sum, it is OSC’s long-standing practice to examine the totality of relevant circumstances in determining whether there is reasonable cause to believe that an employer has engaged in unlawful discrimination. An employer that receives a SSA no-match letter and terminates employees without attempting to resolve the mismatches, or who treats employees differently or otherwise acts with the purpose or intent to discriminate based upon actual or perceived national origin or citizenship status may be found by OSC to have engaged in unlawful discrimination. How-

ever, if an employer follows all of the safe harbor procedures outlined in DHS’s no-match rule, but cannot determine that an employee is authorized to work in the United States, and therefore terminates that employee, and if that employer applied the same procedures to all employees referenced in the no-match letter(s) uniformly and without the purpose or intent to discriminate on the basis of actual or perceived citizenship status or national origin, then OSC will not find reasonable cause to believe that the employer has violated section 1324b’s anti-discrimination provision, and the employer will not be subject to suit by the United States under that provision.

For the full text of the OSC guidance, please visit <http://www.usdoj.gov/crt/osc/htm/No-match032008.htm>.

Temporary Protected Status Updates

Temporary Protected Status (TPS) is granted by the Secretary of Homeland Security to foreign nationals in the United States who are nationals of countries subject to environmental disaster, armed conflict, or other extraordinary and temporary conditions. The Secretary may terminate TPS designation when the condition ceases to exist. Frequently, TPS designations and extensions can be a source of confusion for employers when determining whether an employee is authorized to work. Extensions of work authorization for TPS beneficiaries are published in the *Federal Register*, and in some cases, beneficiaries do not receive a new employment authorization card before the previously issued card’s expiration date. The fol-

lowing is the latest report on TPS designations:

Somalia

On March 12, 2008, the U.S. Department of Homeland Security (DHS) announced an 18-month extension of TPS for eligible Somalian nationals from March 17, 2008, through September 17, 2009. Eligible TPS Somalians were required to re-register with USCIS by May 12, 2008.

Upon processing these applications, DHS will issue new EADs to these individuals.

Burundi

On October 29, 2007, DHS announced the termination of TPS for eligible Burundi nationals effective May 2, 2009. EADs with a November 2, 2007, expiration date were automatically extended via a Federal Register notice until May 2, 2008.

Liberia

On September 12, 2007, President George W. Bush issued a Memorandum directing the Secretary of Homeland Security, Michael Chertoff, to defer the enforced departure (DED) for 18 months, through March 31, 2009, of any qualified Liberian national (or person without nationality who last habitually resided in Liberia) who is under TPS as of September 30, 2007. Employment authorization for Liberian TPS recipients who received EADs on a form I-776 that bears an expiration date of September 30, 2007 are automatically extended to March 31, 2009.

Through March 31, 2009, Liberians (and persons having no nationality who last habitually resided in Liberia) who are eligible for DED, may present for em-

ployment eligibility verification or re-verification a copy of the *Federal Register* notice regarding the automatic extension of employment authorization documentation, along with their Form I-766 (EAD) bearing the notation "A-12" or "C-19" on the face of the card under "Category," and having an expiration date of September 30, 2007, on the face of the card.

El Salvador

On September 24, 2008, DHS announced an 18-month extension of TPS for nationals of El Salvador from March 10, 2009, through September 9, 2010. Eligible TPS Salvadorans are required to re-register with USCIS. Upon processing these applications, USCIS will issue new EADs for these individuals.

Honduras and Nicaragua

On September 26, 2008, DHS announced an 18-month extension of TPS for nationals of Honduras and Nicaragua from January 6, 2009 through July 5, 2010. Eligible TPS Hondurans and Nicaraguans were required to re-register with USCIS. All applicants seeking an extension of employment authorization through July 5, 2010, must submit the required application filing fee with Form I-765.

Sudan

On August 14, 2008, the USCIS announced an extension of TPS for eligible Sudan nationals for eighteen months, until May 2, 2010. Eligible Sudanese were required to re-register with USCIS. USCIS also automatically extended the validity of employment authorization documents (EADs) held by Sudanese nationals in current TPS status from Nov. 2, 2008, to May 2, 2009.

This six-month extension will allow sufficient time for eligible TPS beneficiaries to receive their new EADs without a lapse. Upon processing these applications, USCIS will issue new EADs for these individuals.

For more information about TPS, please visit OSC's website at www.usdoj.gov/crt/osc/.

State Workforce Agencies Now Charged with Employment Eligibility Verification

On November 14, 2007, the Department of Labor's Employment and Training Administration (ETA) re-issued Training and Employment Guidance Letter (TEGL) No. 11-07, directing State Workforce Agencies (SWAs) to verify that workers referred to an agricultural employer are "able, willing and eligible" to take the job." The TEGL defines "eligible" worker as "not an unauthorized alien." This means that the SWAs must complete a Form I-9 for each referred worker. In addition, though not required, ETA encourages the SWAs to use E-Verify, the electronic program that checks Social Security Administration and U.S. Department of Homeland Security records to determine employment eligibility of referred workers.

Participation in E-Verify is voluntary generally, but some states have made it mandatory. Whether mandatory or voluntary, employers, recruiters and now SWAs that use E-Verify must comply with a set of rules governing its use. A comprehensive list of E-Verify "Dos and Don'ts" is provided on page 7 of this newsletter.

Furthermore, because prior guidance on E-Verify only covered employers and recruiters, DHS had to issue additional instructions to address the unique nature of the SWAs. For example, while employers and recruiters may not query the system until the worker is “hired,” SWAs may verify the employment eligibility of a worker who is only “referred” to an employer who still has the prerogative to decline to hire the worker. Nevertheless, some general guidelines remain the same whether for employers, recruiters or SWAs. For example, just as an employer may not use E-Verify to pre-screen workers and may not take adverse personnel action against an employee because of a “tentative non-confirmation” response from the system, SWAs may not delay referral to a jobsite because of a tentative non-confirmation. To avoid discrimination, SWAs, just like employers, must not selectively run workers through the system, but must have one consistent policy that requires verification of all new hires. Selective verification based on national origin or citizenship status is a violation of the anti-discrimination provisions that OSC enforces.

Farm workers and agricultural employers are encouraged to contact OSC with questions and concerns regarding how these new requirements impact such rights and obligations. For more information about SWA participation in the E-Verify program, please visit <http://www.uscis.gov/files/nativedocuments/e-verify-swa-ref-guide.pdf> to download E-Verify’s “Quick Reference Guide for State Workforce Agencies.”

Federal Acquisition Regulations Amendment Proposed to Include E-Verify Requirement

On June 12, 2008, the Department of Defense, the General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA) jointly published proposed amendments to the Federal Acquisition Regulations (FAR). The proposed amendments would require public and private contractors to use the E-Verify program to verify the employment eligibility of all employees hired after the a government contract is signed. In addition, it would require contractors to use E-Verify to re-verify the work authorization of all existing employees who are assigned to contracts covered by the mandate.

The public comment period on the proposed regulation closed on August 11, 2008. Employees and employers with questions about how the proposed amendment affects their rights and obligations under the anti-discrimination provisions under the INA should call the OSC for guidance.

Significant Developments of 2008

Staffing Company Offers Back Pay to Permanent Resident Following Improper Termination

In August, OSC issued a letter of resolution resolving a charge that a lawful permanent resident (LPR) filed against his employer, an Illinois staffing company. The LPR alleged that his employer committed document abuse when it terminated the LPR’s employment because his permanent resident card, com-

monly known as a “green card,” did not contain an expiration date. However, with or without an expiration date on his card, a permanent resident has indefinite work authorization, and termination was therefore improper. In response to OSC’s investigation, the parties reached a bilateral agreement resolving the charge. Pursuant to the agreement, the LPR received \$3,500 in back pay, but declined reinstatement because he had found work with another employer.

Giant Meat Processor Agrees to Back Pay After Rejecting Valid Documents

In July, following an OSC charge investigation, a Colorado-based meat processor voluntarily provided \$1,000 in back pay to an employee who was terminated even though she produced an unrestricted Social Security Card and valid driver’s license. The employee was offered, but declined, reinstatement.

IT Company Agrees to Pay Civil Penalties and Remove Discriminatory Advertising

In April, OSC entered into a formal settlement agreement resolving a charge of citizenship status discrimination alleging that a Pennsylvania-based software company that had published 30 advertisements that excluded U.S. workers from consideration for programmer jobs. In response to OSC’s investigation, the company immediately withdrew all of its discriminatory advertisements, and agreed not to discriminate in recruitment on the basis of citizenship status. It also agreed to post on its website a notice stating that it will not seek applicants with a specific immigration status unless required by

law, and to provide training to recruitment personnel concerning the anti-discrimination provision of the INA. Finally, the company agreed to pay \$45,000 in civil penalties.

National Chain Store Reinstates TPS Beneficiary with Back Pay After Failing to Note Extension of Status

In April, OSC issued a letter of resolution after a national retail chain voluntarily paid nearly \$6,000 in lost wages and reinstated an employee at its Colma, CA store, thereby fully resolving the employee's allegations of discrimination. The employee, a Salvadoran national on temporary protected status (TPS), was terminated when the date on his employment authorization card expired, because the employer failed to realize that employment authorization for Salvadoran TPS recipients was extended and announced in the *Federal Register*.

Global Delivery Company Reinstates U.S. Citizen with Back Pay Following Termination Based on Tentative Non-Confirmation from E-Verify

In February, OSC resolved a charge filed by a naturalized U.S. citizen who was terminated after verification of his employment authorization produced a "tentative non-confirmation" from E-Verify. The employer, a global delivery service, participates in the E-Verify program. When the system is unable to immediately confirm employment authorization, it provides a "tentative non-confirmation" notice. The law requires the employer to provide the employee with a copy of the notice and an opportunity to re-

solve any errors if the employee believes he or she is authorized to work. Nevertheless, the employee was terminated immediately from his position at the employer's Los Angeles, CA operation without adequate opportunity to correct the error in the government's database. The employer paid approximately \$3,600 in back pay and reinstated the employee, following notice that OSC planned to conduct a charge investigation. OSC dismissed the matter upon learning that the parties had directly reached a settlement.

National Chain Retailer Offers Asylee Reinstatement with Back Pay for Termination Notwithstanding Unrestricted Social Security Card

In January, following notice of OSC's investigation, a national chain retail outlet offered to reinstate with back pay an employee who is an asylee. Although asylees are permitted to work indefinitely and possess unrestricted Social Security cards, the employer terminated the employee from its Corte Madera, CA location because of an expired employment authorization document. In response to OSC's charge investigation, the employer offered the asylee reinstatement with \$4,000 in back pay. OSC issued a letter of resolution and dismissed the charge following the parties' agreement.

OSC Outreach Activities

OSC's outreach and education program is aimed at helping employers and employees understand the anti-discrimination provision under the law. OSC's staff is available to participate in seminars and conferences. For the remainder of 2008, OSC has out-

reach activities in Atlanta, Chicago, Charlotte, Columbia (SC), Detroit, Houston, Milwaukee (WI), New York City, Salt Lake City, Seattle, Wenatchee (WA), and Washington, DC. To find out if there will be any seminars or conferences near you, or if you would like to organize your own event featuring an OSC speaker, please contact Mr. Terry Scott, OSC's public affairs specialist. He can be reached by telephone at (202) 616-5594.

OSC Hotline Calls

In 2007, OSC received nearly 30,000 inquiries through its employer and employee hotline numbers, and is on pace to receive approximately the same number of calls in 2008. The hotlines act as "early intervention" programs, providing a cost-effective means of resolving workplace problems before employees file charges. Through the hotline, OSC's staff resolves questions concerning proper employment eligibility verification procedures, and ensures that legally authorized workers do not lose their jobs because of a misunderstanding of the law. Frequently, OSC staff members resolve potential immigration-related employment disputes within hours rather than weeks or months, without costly litigation. Employers benefit from the program because it saves them time and money. Workers benefit from it because it keeps them on the job.

The number for workers to call is 1-800-255-7688, (202) 616-5525 or 1-800-237-2515 (TDD for hearing impaired). Employers may call 1-800-255-8155, or 1-800-237-2515 (TDD for hearing impaired).

What is it?

E-VERIFY PROGRAM

How Does it Affect Me?

E-Verify is an electronic employment eligibility verification system that the U.S. Department of Homeland Security (DHS) administers. It relies on Social Security Administration and DHS records to determine whether the person whose name is submitted through the system is eligible to work in the United States. Except in some rare circumstances where participation is mandatory, employer enrollment is voluntary. However, once enrolled, there are clear guidelines that govern *how* an employer may use the system. Work-authorized individuals who believe they were denied a job or terminated from a job without adequate opportunity to resolve an error in the databases may call the OSC for guidance or intervention. The hypothetical telephone conversation below represents a typical call that OSC receives from work-authorized individuals who are terminated from their jobs prematurely because of E-Verify.

Sample E-Verify Hotline Call

Employee: [*Speaking with OSC attorney in Spanish*] Do you speak Spanish?

OSC Attorney: If you stay on the line, I will get a Spanish interpreter to help us. Please hold [*After accessing telephonic interpreter*] I have an interpreter now. How can I help you?

Employee: I just received a notice from my employer that says that my Social Security number is not good and I saw your number on the notice. My employer says that the notice came from a computer program run by “immigration.” I am a U.S. citizen – I became one just last year – but my employer is threatening to fire me because he now thinks I am illegal. Can you help me?

OSC Attorney: The program your employer is referring to is called E-Verify, which allows a participating employer to verify a new employee’s employment eligibility through the Internet. This web-based system first checks the Social Security Administration’s, otherwise known as SSA, database to make sure the individual’s name is on record with the SSA as matching the Social Security number provided to the employer. If the employee is a U.S. citizen, the SSA database can also confirm that the employee is authorized to work in the U.S. as a citizen. However, when an employee’s name or Social Security number does not match the information in SSA’s records and/or the SSA database cannot confirm the employee’s U.S. citizenship, the employer is required to give the employee a “notice of tentative nonconfirmation,” which is what it sounds like you received.

Employee: So what should I do at this point?

OSC Attorney: You can choose whether or not to “contest” the tentative nonconfirmation by indicating that on the notice form itself and returning it to the employer. If you contest, the employer must promptly provide you with a referral notice, which explains that you must visit an SSA office within eight federal government work days to begin the process of correcting any errors that exist in the SSA database. Your employer cannot terminate you while you are still in tentative nonconfirmation status, that is, while you are resolving the problem. While I am not sure why you received the tentative nonconfirmation, database errors can be fixed and it is important that you follow the directions provided to you in the referral notice.

If you would like, I would be happy to contact your employer to discuss the E-Verify program rules. What is your employer’s telephone number, and do you have the name of the person I should speak with?



Office of Special Counsel for Immigration-Related Unfair Employment Practices

U.S. Department of Justice Civil Rights Division

E-Verify

Employer DOs and DON'Ts

DO

- Use program to verify employment eligibility of new hires
- Use program for ***all*** new hires regardless of national origin or citizenship status
- Use program for new employees ***after*** they have completed the I-9 Form
- Provide employee with notice of Tentative Nonconfirmation (TNC) promptly
- Provide employee who chooses to contest a Tentative Nonconfirmation (TNC) promptly with a referral notice to SSA or DHS
- Allow an employee who is contesting a Tentative Nonconfirmation (TNC) to continue to work during that period
- Post required notices of the employer's participation in E-Verify and the anti-discrimination notice issued by OSC
- Secure the privacy of employees' personal information and the password used for access to the program

DON'T

- Use program to verify current employees
- Use program selectively based on a "suspicion" that new employee or current employee may not be authorized to work in the U.S. or based on national origin
- Use program to pre-screen employment applicants
- Influence or coerce an employee's decision whether to contest a tentative nonconfirmation
- Terminate or take adverse action against an employee who is contesting a tentative nonconfirmation unless and until receiving a final nonconfirmation
- Ask an employee to obtain a printout or other written verification from SSA or DHS when referring that employee to either agency
- Ask an employee to provide additional documentation of his or her employment eligibility after obtaining a tentative nonconfirmation for that employee
- Request specific documents in order to use E-Verify's photo tool feature

For more information , call the OSC Employer Hotline 1-800-255-8155;
TDD for the hearing impaired: 1-800-237-2515
www.usdoj.gov/crt/osc

A Message from the Special Counsel

(Continued from front page)

Defining OSC's Role in the Current Enforcement Environment by Patrick Shen

In addition, many employers and employees find OSC's hotlines informative and OSC's intervention useful. During the past decade, the hotline has received as many as 100,000 calls in one year, and averages approximately 30,000 calls per year. The calls have been from both employers seeking guidance on how to avoid discrimination and employees wanting to know how to assert their rights. In many instances, OSC has been able to facilitate agreements between workers and employers which prevented discriminatory practices and/or preserved legal workers' rights.

A keen awareness of modern enforcement technology and strict adherence to employment eligibility verification requirements are not reasons for an employer to disregard the anti-discrimination requirements of the INA. While employers do have to make an effort to ensure a legal workforce and avoid discrimination at the same time, employers do not have to feel as though they are caught "between a rock and a hard place" if they work with the OSC to avert discriminatory practices. Similarly, those who are authorized to work in the United States need not suffer the consequences of an employer's discriminatory practice, whether intentional or out of ignorance, if they know how to call upon the OSC for guidance.

Patrick Shen was confirmed unanimously by the United States Senate on October 4, 2007, to be the Special Counsel for Immigration-Related Unfair Employment Practices.

How to Contact OSC

Mailing Address:

Office of Special Counsel for Immigration-Related
Unfair Employment Practices
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W. (NYA)
Washington, D.C. 20530

Email Address:

oscrt@usdoj.gov

Main Number: (202) 616-5594

Toll Free Information Number and Worker Hotline:

1-800-255-7688/(202) 616-5525 or
1-800-237-2515 (TDD for hearing impaired)
(Language interpretation available)

Employer Hotline: 1-800-255-8155 or
1-800-237-2515 (TDD for hearing impaired)

Fax Number: (202) 616-5509

Website Address: <http://www.usdoj.gov/crt/osc>

Special Counsel
Patrick P. Shen

Deputy Special Counsel
Katherine A. Baldwin

Special Litigation Counsel
Robin M. Stutman

Special Policy Counsel
Margaret Hu

We Value Your Feedback! Is there a topic you would like to read about in our newsletter?

Email us at oscrt@usdoj.gov