



U.S. Department of Justice

Civil Rights Division

*Office of Special Counsel for Immigration-Related
Unfair Employment Practices - NYA
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DEC 01 2011

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Dear Mr. Cowen:

Thank you for contacting the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). This letter is in response to your September 19, 2011, email in which you asked the following questions:

- 1) Assuming that an employee submitted facially legitimate documents upon initial hiring, under what conditions (other than the impending expiration of the original documents) may an employer later lawfully re-verify or request additional information or documentation from an employee?
- 2) Is it unlawful for an employer to re-verify or request additional information or documentation without cause even if it has no discriminatory motive?
- 3) Is an employer entitled to inquire further if it has "reasonable" or "good" cause to believe the employee may not be authorized to work? What would constitute sufficient cause?

OSC is responsible for enforcing the anti-discrimination provision of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b, which prohibits discrimination in hiring, firing, or recruitment or referral for a fee that is based on an individual's national origin or citizenship status. The statute also prohibits unfair documentary practices during the employment eligibility verification (Form I-9) process on the basis of citizenship status or national origin (document abuse), and retaliation or intimidation. This office cannot give you an advisory opinion on any set of facts. However, we can provide general information regarding compliance with the anti-discrimination provision of the INA.

As you may know, an employer is required to complete an I-9 Form for each new hire within three days of hire. 8 C.F.R. § 274a.2 (b) (ii) (2011). When reviewing documents presented for I-9 purposes an employer's obligation is to accept either one List A document (chosen by the employee) or a combination of one List B document and one List C document (chosen by the employee) as long as the document or documents reasonably appear to be genuine

and to relate to the employee. USCIS's *Handbook for Employers, Instructions for Completing the Form I-9* (Form M-274, Rev.06/01/11) at pp. 4-5.

With respect to your first question, there may be circumstances in which an employer may legitimately reverify or request work authorization documentation from an employee after the initial hiring process. For instance, as you note, an employer is required to re-verify an employee's work authorization at the time of expiration. 8 C.F.R. § 274a.2 (b) (vii) (2011). We note, however, that permanent resident cards (commonly referred to as "green cards") should never be re-verified, nor should U.S. citizens be re-verified. An employer that is re-verifying employment authorization must not request specific documents or combination of documents, but must allow employees to present their choice of documents. When re-verifying employees specifically because their work authorization has expired, employees need only present a List A or List C document of their choice; List B documents (identity documents such as driver's licenses), should never be re-verified. USCIS's *Handbook for Employers, Instructions for Completing the Form I-9* (Form M-274, Rev.06/01/11) at p. 9. Finally, an employer may re-verify employees' documents when it discovers, during the course of conducting an audit of all I-9 forms in a non-discriminatory manner, that the I-9 forms or accompanying documents for some employees are missing or incomplete. *See United States v. Ojiel*, 7 OCAHO 984, 986 (1998) (finding that the government has a considerable interest in encouraging employers to correct mistakes on the I-9 form, and that employers may correct paperwork mistakes at or before government inspection).

If an employer receives notice from Immigration and Customs Enforcement (ICE) that certain documents utilized by employees during the I-9 process are suspect, or that certain employees' I-9 forms were not properly completed, the employer may request additional documentation from those employees pursuant to ICE's instructions. See http://www.ice.gov/sevis/faqs/information_employers_nonimmigrant_students.htm. OSC has recently issued guidance for employers on responding to a worksite enforcement audit, which can be located at http://www.justice.gov/crt/about/osc/pdf/publications/worksite_enforcement. Other circumstances may also exist for an employer to request additional documentation from an employee. *See* two previously issued technical assistance letters, dated October 14, 2011, and October 26, 2011, attached, discussing this issue. In all circumstances, OSC looks at the context in which the employer made the request, including determining whether there is evidence that the request was made for a discriminatory reason on the basis of national origin or citizenship status.

With respect to your second question, OSC recommends that an employer exercise caution to ensure that it only re-verifies employees' documents when it has a proper basis for doing so. An employer that re-verifies or requests additional work authorization documentation from certain employees and not others, without a valid basis, may be viewed as discriminating on the basis of citizenship or immigration status or national origin in the employment eligibility verification process. To the extent the employer has a proper basis for the re-verification, an employer must treat all employees the same in the employment eligibility re-verification process, regardless of their citizenship or immigration status, or their national origin in order to avoid discrimination under the anti-discrimination provision of the INA. This includes providing employees with the same timeframes for responding to similar document requests.

With respect to your third question, employers should also exercise caution in determining what information constitutes “reasonable” or “good cause” to believe an employee is not authorized to work. Attached please find two previously issued technical assistance letters, dated October 14, 2011, and October 26, 2011, discussing this issue.

We hope the information provided above is helpful. If you require any further information, please visit OSC’s website at <http://www.justice.gov/crt/about/osc/> or call our employer hotline at 1-800-255-8155.

Sincerely,



Seema Nanda
Acting Deputy Special Counsel

Enclosures