



U.S. Department of Justice
Civil Rights Division

*Office of Special Counsel for Immigration Related
Unfair Employment Practices - NYA
950 Pennsylvania Avenue, NW
Washington, DC 20530*

MAR 23 2010

Sent by First Class Mail and Electronic Mail (Richard.Galvan@domail.maricopa.edu)

Rick Galván, Esquire
Assistant General Counsel
Legal Department
Maricopa Community Colleges
2411 W. 14th St.
Tempe, AZ 85281

Re: Employers' Obligations to Reverify Employees' Employment Eligibility

Dear Mr. Galván:

Thank you for contacting the Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC"). In your email of March 2, 2010, you ask for guidance on an employers' responsibilities with respect to employees who present temporary evidence of employment authorization in the employment eligibility verification (Form I-9) process. You also ask if employers operating in Phoenix, Arizona, have a safe harbor from liability under the anti-discrimination provision of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1324b.

This office cannot give you an advisory opinion on any set of facts involving a particular individual or company. However, we can provide some general guidelines regarding compliance with the anti-discrimination provision of the INA.

As you know, OSC enforces the anti-discrimination provision of the INA. The anti-discrimination provision prohibits four types of unlawful conduct: (1) citizenship or immigration status discrimination with respect to hiring, firing, and recruitment or referral for a fee; (2) national origin discrimination with respect to hiring, firing, and recruitment or referral for a fee; (3) discriminatory documentary practices during the employment eligibility verification (Form I-9) process ("document abuse"); and (4) retaliation for filing a charge or asserting rights under the anti-discrimination provision.

Your email seeks information about an employer's obligations with respect to employees who present temporary evidence of employment authorization in the Form I-9 process. The U.S. Department of Homeland Security ("DHS"), U.S. Citizenship and Immigration Services

("USCIS") administers the rules and regulations regarding employment eligibility verification. USCIS's Handbook for Employers: Instructions for Completing the Form I-9 (Form M-274) discusses reverification of an employee's employment authorization on page 12:

When an employee's employment authorization expires, you must reverify his or her employment authorization. You may use Section 3 of Form I-9, or, if Section 3 has already been used for a previous reverification or update, use a new Form I-9. If you use a new form, write the employee's name in Section 1, complete Section 3, and retain the new form with the original. The employee must present a document that shows either an extension of his or her initial employment authorization or new employment authorization. If the employee cannot provide you with proof of current employment authorization (e.g., any document from List A or List C, including an unrestricted Social Security card), you cannot continue to employ that person.

NOTE: Do not reverify an expired U.S. passport or passport card, an Alien Registration Receipt Card/Permanent Resident Card, or a List B document that has expired.

To maintain continuous employment authorization, an employee with temporary employment authorization should timely file for new employment authorization or an extension of stay prior to the expiration of his or her current document or authorized period of stay. If the employee is authorized to work for a specific employer and has filed an application for an extension of stay, he or she may continue employment with the same employer for up to 240 days from the date the authorized period of stay expires.

If an employee has timely filed for new employment authorization document (Form I-766) and USCIS fails to adjudicate that application within 90 days, the employee will be granted an employment authorization document for a period up to 240 days.

NOTE: You must reverify an employee's employment authorization on Form I-9 not later than the date the employee's employment authorization expires.

The Handbook for Employers may be downloaded for free through USCIS's website, www.uscis.gov.

To prevent discrimination in violation of an anti-discrimination provision of the INA, an employer must treat all employees the same in the employment eligibility verification process, regardless of their citizenship or immigration status, or their national origin. Accordingly, any procedure an employer uses to implement its obligations to reverify employees whose employment authorization documents expire must be applied consistently, regardless of an employee's citizenship or immigration status, or national origin. Additionally, an employer reverifying an employee's employment authorization must not request a specific document or

combination of documents, but must allow the employee to present his or her choice of document(s).

Finally, your email asks whether there is a safe harbor from liability under the anti-discrimination provision of the INA for employers operating in Phoenix, Arizona. The anti-discrimination provision contains no safe harbor. All employers operating in the United States are required to comply with the anti-discrimination provision.

I hope that this information is helpful. For further information on the INA's anti-discrimination provision, please feel free to consult OSC's website at <http://www.justice.gov/crt/osc/>.

Sincerely,

A handwritten signature in black ink, appearing to read 'Katherine A. Baldwin', with a long horizontal flourish extending to the right.

Katherine A. Baldwin
Deputy Special Counsel