



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*

June 10, 2010

**By First Class Mail
and E-Mail (luried@gtlaw.com)**

Dawn M. Lurie
Greenberg Traurig, LLP
1750 Tysons Boulevard, Suite 1200
McLean, VA 22102

Dear Ms. Lurie:

This is in response to the request for technical assistance received by the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) on January 21, 2010. We apologize for the delay in responding.

As you know, OSC enforces the anti-discrimination provision of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324b. The anti-discrimination provision prohibits four types of unlawful conduct: (1) citizenship or immigration status discrimination; (2) national origin discrimination; (3) unfair 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. Although OSC cannot give you an advisory opinion on any set of facts involving a particular individual or company, we are pleased to provide some general guidelines regarding compliance with the anti-discrimination provision of the INA.

Your letter contains four questions related to an employer conducting an internal I-9 audit that involves reviewing employees' Forms I-9 and the attached photocopies of the documentation presented for initial employment eligibility verification. First, you ask whether an employer may question an employee who has previously misrepresented his legal status, in order to ensure the legitimacy of the newly claimed status. You state that Immigration and Customs Enforcement (ICE) suggests that the employer is under an obligation to ask the employee to explain his or her new basis for work eligibility. You also inquire as to what an employer may ask and discuss during an I-9 re-verification meeting when the genuineness of documents initially presented at the time of hire is in question.

OSC is not aware of any written guidance published by ICE that requires employers to question employees who present new documentation following an acknowledgement or discovery that the employee was previously unauthorized to work. However, in order to avoid violating the anti-discrimination provision of the INA, OSC strongly encourages employers conducting internal I-9 audits to devise procedures that treat all employees consistently regardless of national origin or citizenship or immigration status. OSC cannot identify any discrimination concerns with respect to an employer choosing to accept new documents from an

audited employee where the newly presented documents appear to be genuine and to relate to that employee.

Second, you ask whether the employer may run an employee's Social Security number through the Social Security Number Verification System (SSNVS) if the employee presented a new Social Security card during the re-verification process, and whether it is possible to request any information to reconcile any discrepancies. According to the SSNVS Handbook, "SSA will verify SSNs and names solely to ensure that the records of current or former employees are correct for the purpose of completing Internal Revenue Service (IRS) Form W-2 (Wage and Tax Statement)." In other words, SSNVS is not intended to be used to verify employment authorization in connection with the I-9 process. For further information about the proper use of SSNVS, please see the SSNVS Handbook at http://www.ssa.gov/employer/ssnvshandbk/ssnvs_bso.htm. Employers seeking to verify an employee's employment eligibility beyond the I-9 Form process may enroll in E-Verify, the electronic employment eligibility verification system administered by the Department of Homeland Security. However, an employer may only use E-Verify for current employees if the employer has enrolled in E-Verify as a federal contractor subject to certain limitations. For more information about E-Verify, please visit the website at www.uscis.gov/e-verify.

Third, you ask whether an employer faced with the situation described in question one should retain the original Form I-9 and complete an entirely new Form I-9. According to the instructions accompanying the Form I-9, employees must complete Section 3 when updating and/or reverifying Form I-9. For further information about updating an employee's I-9 information, contact U.S. Citizenship and Immigration Services at 1-800-357-2099, or visit the website at www.uscis.gov/i-9.

Finally, you ask whether an employer may terminate an employee who was not initially authorized to work but is now authorized to work, based upon a company's honesty policy. Employers risk violating the anti-discrimination provision of the INA when terminating an employee in this context unless they can demonstrate that they have a previously established honesty policy that is consistently applied to employees who make false representations on their application or other forms without regard to citizenship status or national origin. Accordingly, if an employer applies an existing honesty policy in a fair and consistent manner irrespective of citizenship or national origin, the employer is not likely to violate the anti-discrimination provision.

We hope this information is helpful.

Sincerely,



Katherine A. Baldwin
Deputy Special Counsel