

U.S. Department of Justice Civil Rights Division



**OFFICE OF SPECIAL COUNSEL
FOR IMMIGRATION-RELATED
UNFAIR EMPLOYMENT PRACTICES**

Overview

- OSC History
- IMAGE-specific considerations
- Types of Discrimination
- E-Verify /No-Match Issues
- OSC Enforcement
- Resources



Historical Overview

Immigration Reform and Control Act of 1986 (IRCA)

- Initiated Employer Sanctions for Knowingly Hiring Undocumented Workers
- Established Form I-9 Employment Eligibility Verification Process
- **Created OSC to Enforce Anti-Discrimination Provision**



IMAGE Best Practice

Establish and maintain appropriate policies, practices and safeguards to ensure that authorized workers are not treated differently with respect to hiring, firing, or recruitment or referral for a fee or during the Form I-9, E-Verify or SSNVS processes because of citizenship status or national origin.



IMAGE Membership and the Anti-Discrimination Provision

- Membership in IMAGE does not absolve an employer of its responsibilities under the anti-discrimination provision.
- Following I-9 and E-Verify rules goes a long way toward complying with the anti-discrimination provision.
- If in doubt, call OSC for guidance before taking action that could violate the anti-discrimination provision.



Prohibited Conduct Under the INA's Anti-Discrimination Provision

(8 U.S.C. 1324b)

- Citizenship/Immigration status discrimination
- National origin discrimination
- Document abuse
- Retaliation or Intimidation



Citizenship/Immigration Status Discrimination

- Treating individuals who are eligible to work differently because they are, or are not, U.S. citizens, or based on their immigration status
- With respect to Hiring, Firing, and Recruitment or Referral for a Fee
- Employers with more than 3 workers covered



Citizenship Status Discrimination Examples

- ⦿ “U.S. citizens only” hiring policy
- ⦿ Refusing to hire a worker because the employer believed the worker is not a U.S. citizen
- ⦿ Preferring temporary work visa holders
- ⦿ Policy of hiring only U.S. citizens and lawful permanent residents



Is Preference in Hiring Based on Citizenship Status Ever Permissible?

- ◉ Where the individual rejected is not work-authorized
- ◉ Where required by law, regulation, executive order, or government contract
- ◉ Where the individual rejected requires sponsorship



Hypothetical

- ◎ An employer does not wish to sponsor individuals for employment visas. The employer decides to include in job postings “U.S. citizens only”. An applicant who is a lawful permanent resident points out that the employer cannot include this language in its postings and the employer changes its postings to read “U.S. citizens and lawful permanent residents only.”



National Origin Discrimination

- ⦿ Treating employees differently based on:
 - Country of origin/ancestry
 - Accent
 - Appearing to be from a certain country
- ⦿ With respect to Hiring, Firing, and Recruitment or Referral for a Fee
- ⦿ Employers with 4 to 14 workers covered*

**The EEOC has jurisdiction over employers with more than 14 employees.*



National Origin Discrimination Examples

- Preferring people from a particular country
- Not considering workers with foreign surnames
- Not hiring someone because s/he has a foreign accent



Job Postings Best Practices

- ⦿ Treat work-authorized job applicants equally in recruiting and hiring without regard to their citizenship status or national origin unless required by the government
- ⦿ If not legally required, avoid unjustified discriminatory language in job postings (i.e., “U.S. Citizens Only,” “Only U.S. Citizens or Green Card Holders”)
- ⦿ Avoid job requirements related to an individual’s national origin (i.e., language fluency requirements) unless they are necessary to perform the job effectively



Document Abuse

⦿ Employers may not, for the purpose of verifying a worker's employment eligibility (i.e. Form I-9/E-Verify):

- request more or different documents
- reject reasonably genuine-looking documents,
- specify certain documents

based on citizenship status or national origin

⦿ Employers with more than 3 workers covered



Document Abuse Examples

- ⦿ Requiring non-U.S. citizens to produce a List A document but allowing U.S. citizens to produce any document(s) they choose
- ⦿ Requiring only non-U.S. citizens to produce documents from Lists A, B, and C
- ⦿ Requiring non-citizens to show documentation proving their status, such as requiring lawful permanent residents to show a Permanent Resident Card
- ⦿ Requiring specific documents based on national origin



Document Abuse & Form I-9

- ⦿ The Form I-9's purpose is to establish a worker's **identity and work authorization**
- ⦿ The Form I-9 is not used to verify an employee's immigration status



Employment Eligibility Verification
Department of Homeland Security
U.S. Citizenship and Immigration Services

USCIS
Form I-9
OMB No. 1615-0047
Expires 03/31/2016

▶ **START HERE.** Read instructions carefully before completing this form. The instructions must be available during completion of this form. **ANTI-DISCRIMINATION NOTICE:** It is illegal to discriminate against work-authorized individuals. Employers **CANNOT** specify which document(s) they will accept from an employee. The refusal to hire an individual because the documentation presented has a future expiration date may also constitute illegal discrimination.

Section 1. Employee Information and Attestation *(Employees must complete and sign Section 1 of Form I-9 no later than the first day of employment, but not before accepting a job offer.)*

Last Name (Family Name)		First Name (Given Name)		Middle Initial	Other Names Used (if any)	
Address (Street Number and Name)			Apt. Number	City or Town	State	Zip Code
Date of Birth (mm/dd/yyyy)	U.S. Social Security Number	E-mail Address		Telephone Number		

I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.

I attest, under penalty of perjury, that I am (check one of the following):

A citizen of the United States

A noncitizen national of the United States (See instructions)

A lawful permanent resident (Alien Registration Number/USCIS Number): _____

An alien authorized to work until (expiration date, if applicable, mm/dd/yyyy) _____. Some aliens may write "N/A" in this field. (See instructions)

For aliens authorized to work, provide your Alien Registration Number/USCIS Number OR Form I-94 Admission Number:

1. Alien Registration Number/USCIS Number: _____

OR

2. Form I-94 Admission Number: _____

3-D Barcode
Do Not Write in This Space

If you obtained your admission number from CBP in connection with your arrival in the United States, include the following:

Foreign Passport Number: _____

Country of Issuance: _____

Some aliens may write "N/A" on the Foreign Passport Number and Country of Issuance fields. (See instructions)

Signature of Employee: _____ Date (mm/dd/yyyy): _____

Preparer and/or Translator Certification *(To be completed and signed if Section 1 is prepared by a person other than the employee.)*

I attest, under penalty of perjury, that I have assisted in the completion of this form and that to the best of my knowledge the information is true and correct.

Signature of Preparer or Translator: _____ Date (mm/dd/yyyy): _____

Last Name (Family Name) _____ First Name (Given Name) _____

Address (Street Number and Name) _____ City or Town _____ State _____ Zip Code _____

STEP
Employer Completes Next Page
STEP

Form I-9 03/08/13 N Page 7 of 9

I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.

Signature of Employer or Authorized Representative: _____ Date (mm/dd/yyyy): _____ Print Name of Employer or Authorized Representative: _____

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Form I-9: Section 1

What Not to Do

- ⦿ Request document(s) to verify an employee's attestation of citizenship status
- ⦿ Require a Social Security number be provided unless you use E-Verify
- ⦿ Demand an expiration date to be specified if employee selects "alien authorized to work"



Form I-9: Section 2

What Not to Do

- Specify which document you want the employee to present. An employee must be given a choice of which documentation to present
- Ask for more than a List A or a combination of a List B and List C document
- Reject valid documents that reasonably appear to be genuine and relate to the individual
- Reject valid receipts



Form I-9: Section 2 (cont.)

Valid Documents

- There are exceptions to the general rule that documents must be unexpired:
 - Example - “Temporary Protected Status” or “TPS”: EAD with A-12 or C-19 category may be subject to an “automatic extension”
- Generally, documents without an expiration date are unexpired:
 - INS-issued Resident Alien card with no expiration date



Form I-9: Section 3

What Not to Do

- ◎ Specify which document you want the employee to present or demand the worker present the same document that was presented for section 2
 - An employee must be given a choice of presenting any List A or List C document
- ◎ Reverify U.S. citizens or lawful permanent residents who presented a Permanent Resident Card (green cards)



Form I-9: Section 3

What Not to Do (cont.)

- Reverify List B identity document
- Demand an unexpired EAD or proof of re-registration from TPS recipients whose EAD has been extended by Federal Register Notice



Hypothetical

- An employee marks in Section 1 that she is an “alien authorized to work” and writes in “N/A” for the expiration date. She presents an Employment Authorization Document. When the EAD expires, the employee presents an unrestricted Social Security card for reverification.



Who is Protected from Discrimination?

Protected:

- ⦿ All work-authorized individuals (but certain categories of noncitizens are not protected from citizenship status discrimination)

Not Protected:

- ⦿ Undocumented individuals



Retaliation or Intimidation

Protects all individuals who :

- file charges with OSC
- cooperate with an OSC investigation
- contest action that may constitute unfair documentary practice
- assert their own or others' rights under the INA's anti-discrimination provision

Protects from what?

- intimidation, threats, coercion, and retaliation



Retaliation/Intimidation Examples

- ⦿ A lawful permanent resident who explains he is not required to present his “green card” for the Form I-9 is terminated
- ⦿ A worker who complains that an employer is preferring non-immigrant visa holders is threatened
- ⦿ A worker calls the OSC hotline and his or her hours are reduced



Avoiding Discrimination in the Use of E-Verify

- ⦿ Do not use E-Verify or Self-Check to pre-screen employees in any way
- ⦿ Follow the correct procedures for handling a TNC
- ⦿ Treat all employees the same regardless of citizenship status or national origin
- ⦿ Delay the use of E-Verify for employees who have not yet received a Social Security number and run through E-Verify only after they receive their SSN
- ⦿ Do not run current employees, unless required by a federal contract



E-Verify Self Check

- ⦿ Service that allows an employee to check his or her information through E-Verify for free
- ⦿ Employers **cannot** ask applicants or employees to use Self Check or provide a Self Check print-out



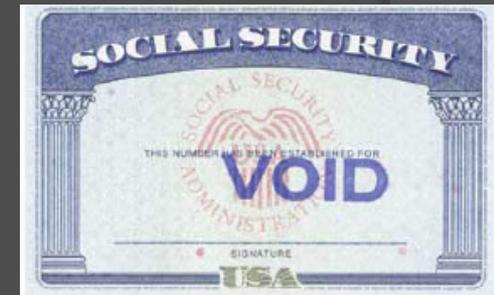
Hypothetical

- ◎ An employer creates an E-Verify case for a new hire and a TNC issues. The employee contests. The employer checks E-Verify for case updates and after 8 government work days, the case status changes to “case in continuance.” A week goes by and the case remains “in continuance.”



Social Security Name/Number No-Matches

- ⦿ A notice that the employee name and Social Security number (SSN) submitted by employer do not match agency records
- ⦿ Notices of a no-match come from variety of sources, including official Social Security No-Match letters
- ⦿ **No-Match notices alone say nothing about immigration status or work authorization**



Responding to SSN No-Matches

- ⦿ Do NOT assume no-match notice is evidence of undocumented status or lack of work authorization
- ⦿ Follow same procedures for all employees, regardless of citizenship status or national origin
- ⦿ Give the employees a reasonable period of time to resolve any discrepancy in the employee's records
- ⦿ **No-match guidance available on OSC's website**



Social Security Number Verification Service: SSNVS

- SSNVS is not a substitute for E-Verify
- May be used only for wage reporting (W-2) purposes
- Illegal to use before hiring a worker
- Must apply consistently to all workers



Worksite Enforcement Audit Best Practices

- Tell employees that you are subject to an audit
- Give all affected employees a reasonable amount of time to correct discrepancies in their records before taking any adverse action
- Do not ask employees for evidence beyond what ICE requires
- Do not treat employees differently because they look or sound foreign, or based on assumptions on whether they are work authorized



OSC Enforcement

◎ Charge-Based

- OSC investigates charges of discrimination filed by injured parties or their representatives

◎ OSC-Initiated

- OSC has authority to open an investigation based on reasonable belief that an employer has committed a violation



Possible Outcomes of Charge

- The charge is dismissed if OSC finds no reasonable cause to believe the employer engaged in discrimination/no jurisdiction
- If OSC determines there was discrimination, settlement attempts are made before a complaint is filed in court
- If settlement fails, a complaint is filed and the matter is litigated before an Administrative Law Judge (ALJ)
- Charging Party may file own complaint



Remedies

- Hire or rehire
- Back pay
- Injunctive Relief
 - Training
 - Monitoring
- Civil penalties



Civil Penalties

Assessed per Individual Discriminated Against

Citizenship Status Discrimination, National Origin Discrimination, and Retaliation:

- 1st Violation → \$375 - \$3,200
- 2nd Violation → \$3,200 - \$6,500
- Subsequent Violations → \$4,300 - \$16,000

Document Abuse Violations:

- \$110 - \$1,100



OSC Resources

- Contact OSC for printed materials
- Sign up for a free webinar at:
<http://www.justice.gov/crt/about/osc/webinars.php>
- Call **OSC's Employer Hotline 1-800-255-8155** to speak with an OSC representative
- Calls can be anonymous
- Educational materials are also available on OSC's website: www.justice.gov/crt/about/osc
- Employers can email OSC at osc crt@usdoj.gov



Question & Answer



Employer Hotline: 1-800-255-8155

Office of Special Counsel for Immigration-Related Unfair
Employment Practices: www.justice.gov/crt/about/osc