

U.S. Department of Justice Civil Rights Division



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

Overview

- OSC History
- 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**



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 worker appears to be an immigrant
- ⦿ Preferring temporary work visa holders
- ⦿ Unequal application of “dishonesty” policies



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 applicant rejected requires sponsorship



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
- Only hiring “native English speakers”
- Not hiring someone because s/he has a foreign accent



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 & 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
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

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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) 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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Document Abuse & Form I-9

- ⦿ Mistakes in completing the Form I-9 may lead to document abuse
- ⦿ Proper Form I-9 practices will ensure compliance with both the employer sanctions provision and the anti-discrimination provision
- ⦿ Documents requests for non-employment eligibility verification purposes should take place outside of the Form I-9 context



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



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 2

Valid Documents (cont.)

Receipts are acceptable under circumstances

- Receipt for the replacement of a document that was lost, stolen or damaged (valid 90 days)
- Arrival portion of Form I-94/I-94A with a temporary I-551 stamp and the individual's photograph (valid for 1 year from issuance if no expiration date)
- Departure portion of Form I-94/I-94A with a refugee admission stamp (valid for 90 days)



Form I-9: Section 2

Recap of Common Problems

- ⦿ 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
- ⦿ Rejecting documents that are valid, including less common I-9 documents, such as receipts
- ⦿ Failing to consult the current version of the Handbook for Employers or USCIS's I-9 Central website



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 (I-551)



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



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 has his hours reduced
- ⦿ A worker who threatens to file a charge with OSC is demoted





Employment Eligibility Verification

- ◎ Run by the Department of Homeland Security (DHS), in partnership with the Social Security Administration (SSA)
- ◎ Provides an employer with information on an employee's employment eligibility by comparing the employee's I-9 Form information to information in DHS and SSA records.
- ◎ OSC investigates discriminatory use of E-Verify



Proper Use of E-Verify

- ⦿ An individual can only be run through E-Verify after hire and completion of the Form I-9
- ⦿ In general, employers who use E-Verify must use it for all new hires
- ⦿ Federal contractor employers also have to run certain existing employees
- ⦿ A subset of federal contractor employers may elect to run only new hires and existing employees assigned to a federal contract



Proper Handling of a TNC

- ⦿ A “tentative non-confirmation” (TNC) issues when the Form I-9 information doesn’t match government databases
- ⦿ The employer must promptly tell an employee about a TNC
- ⦿ An employee who wants to “contest” the TNC must inform the employer and sign the TNC notice
- ⦿ The employer must give the employee a referral letter with instructions for resolving the TNC and the deadline for contacting DHS or SSA



Proper Handling of a TNC

- ◎ While an employee is in the process of resolving a TNC, the employer **may not take any adverse action**, such as:
 - Termination or Suspension
 - Delaying a start date, training, etc.
 - Encouraging the employee to quit
 - Cutting work hours or withholding pay
 - Requesting additional documentation



Proper Handling of a TNC

- ⦿ Employees who contest a TNC have 8 federal work days to initiate contact with the appropriate federal agency to begin resolving the TNC
- ⦿ A TNC does **not** have to be resolved within 8 federal work days
 - ⦿ SSA has the ability to put a TNC into continuance for up to 120 days
- ⦿ Permitted to terminate when TNC becomes either a “No Show” or a “final nonconfirmation”



E-Verify: Special Issues

- ⦿ An employer who believes a “final nonconfirmation” is in error should contact E-Verify: 1-888-464-4218
- ⦿ Employees who have not yet received a Social Security Number should be run through E-Verify once they receive their SSN



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



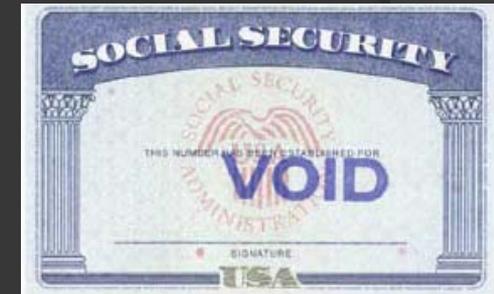
Avoiding Discrimination

- ⦿ 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



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



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 or to attend a webinar
- 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