Overview

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

Employer Hotline: 1-800-255-8155
Office of Special Counsel for Immigration-Related Unfair Employment Practices: www.justice.gov/crt/about/osc
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

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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

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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

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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

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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.

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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”

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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.

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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
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

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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)

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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

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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

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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
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

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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.”
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.

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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

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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

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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