

U.S. Department of Justice Civil Rights Division



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

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.



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 is not work-authorized
- ⦿ Where required by law, regulation, executive order, or government contract
- ⦿ Where the individual 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 and 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 people with “native English skills”
- 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:

- 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.

Department of Homeland Security
U.S. Citizenship and Immigration Services

OMB No. 1615-0047, Expires 08/31/12
Form I-9, Employment Eligibility Verification

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 documents have a future expiration date may also constitute illegal discrimination.

Section 1. Employee Information and Verification (To be completed and signed by employee at the time employment begins.)

Print Name: Last First Middle Initial Maiden Name

Address (Street Name and Number) Apt. # Date of Birth (month/day/year)

City State Zip Code Social Security #

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 #)
- An alien authorized to work (Alien # or Admission #) until (expiration date, if applicable - month/day/year)

Employee's Signature Date (month/day/year)

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.

Preparer's/Translator's Signature Print Name

Address (Street Name and Number, City, State, Zip Code) Date (month/day/year)

Section 2. Employer Review and Verification (To be completed and signed by employer. Examine one document from List A OR examine one document from List B and one from List C, as listed on the reverse of this form, and record the title, number, and expiration date, if any, of the document(s).)

List A	OR	List B	AND	List C
Document title:				
Issuing authority:				
Document #:				
Expiration Date (if any):				
Document #:				
Expiration Date (if any):				

CERTIFICATION: I attest, under penalty of perjury, that I have examined the document(s) presented by the above-named employee, that the above-listed document(s) appear to be genuine and to relate to the employee named, that the employee began employment on (month/day/year) and that to the best of my knowledge the employee is authorized to work in the United States. (State employment agencies may omit the date the employee began employment.)

Signature of Employer or Authorized Representative Print Name Title

Business or Organization Name and Address (Street Name and Number, City, State, Zip Code) Date (month/day/year)

Section 3. Updating and Reverification (To be completed and signed by employer.)

A. New Name (if applicable) B. Date of Rehire (month/day/year) (if applicable)

C. If employee's previous grant of work authorization has expired, provide the information below for the document that establishes current employment authorization.

Document Title	Document #	Expiration Date (if any)

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 (month/day/year)

Form I-9 (Rev. 08/07/09) V Page 4



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



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 what document you want the employee to present. An employee must be given a choice of what 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:
 - “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 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 what 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 Example

- ⦿ 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 undocumented workers has his hours reduced
- ⦿ A worker who threatens to file a charge with OSC about pay discrimination is demoted





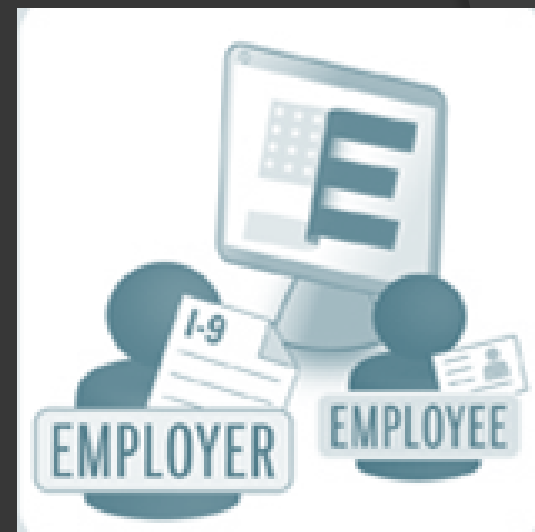
Employment Eligibility Verification

- ◎ 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



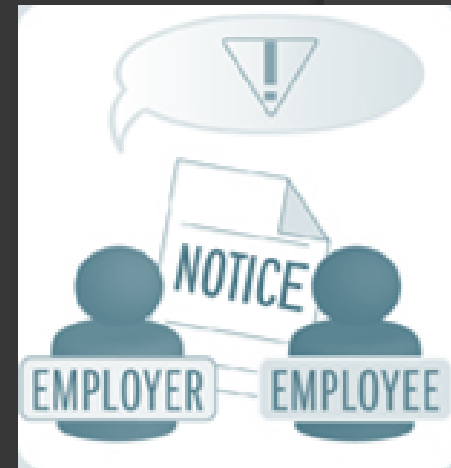
Proper Use of E-Verify

- ⦿ An individual can only be run through E-Verify after hire and completion of the I-9 Form.
- ⦿ Employers who use E-Verify must use it for all new hires
- ⦿ Only employers required by federal contract and enrolled in E-Verify as a federal contractor may run existing employees through E-Verify



Proper Handling of a TNC

- ⦿ A “tentative nonconfirmation” (TNC) issues when the Form I-9 information doesn’t match government databases
- ⦿ The employer must promptly tell the employee about a TNC and provide the TNC notice
- ⦿ An employee who wants to “contest” the TNC must inform the employer and sign the TNC notice
- ⦿ The employer must then 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 non-confirmation”



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

- Review no-match guidance available on OSC's website
- 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



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



Question & Answer

Employer Hotline: 1-800-255-8155



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

OSC Resources

- Contact OSC for printed materials
- Attend or set up 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

