Office of Special Counsel's Antidiscrimination Guidance for Employers Following the DHS Safe-Harbor Procedures

The Department of Homeland Security's (DHS's) Safe-Harbor Procedures for Employers Who Receive a No-Match Letter ("no-match rule"), as published in August 2007 and as modified by a Proposed Supplemental Rule that was announced by DHS on March 21, 2008, offers employers who receive no-match letters from the Social Security Administration (SSA) a safe-harbor in a related immigration enforcement action if those employers follow the series of steps set forth in the no-match rule to ensure that the information provided by affected employees to confirm their work eligibility is genuine. The no-match rule provides that an employer may terminate an employee whose work eligibility could not be confirmed after the employer has followed the procedures that the rule sets forth.

Employers in the United States have inquired and sought information regarding any anti-discrimination implications for employers who follow these safe harbor procedures; specifically, when the SSA notifies the employer that certain employees' names and Social Security numbers do not match in the SSA's records, the employer follows the procedures in DHS's no-match rule, the employees cannot resolve the mismatch or successfully complete a new employment eligibility verification, and the employer dismisses those employees. The Department of Justice (the Department) issues the instant notice to clarify when the Department, through the Civil Rights Division's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), may find reasonable cause to believe that employers following the safe-harbor procedures have engaged in unlawful discrimination in violation of the antidiscrimination provisions of the Immigration and Nationality Act, Section 274B, which are codified in 8 U.S.C. § 1324b.

OSC enforces the antidiscrimination provisions found at 8 U.S.C. § 1324b (corresponding regulations appear in 28 C.F.R. Parts 44, 68). Section 1324b protects United States citizens and certain work-authorized persons from intentional employment discrimination based upon citizenship or immigration status, national origin, and unfair documentary practices relating to the employment eligibility verification process. The law further prohibits retaliation against individuals who file charges with OSC, who cooperate with an investigation, or who otherwise assert their rights under section 1324b.

OSC is required to investigate charges of discrimination alleging a violation of section 1324b and determine whether or not there is reasonable cause to believe that the charge is true. OSC may, on its own initiative, also conduct investigations respecting unfair immigration-related employment practices. It is OSC's longstanding practice to examine the totality of relevant circumstances in determining whether there is reasonable cause to believe that an employer has engaged in unlawful discrimination. Based upon the outcome of its investigation, OSC may bring a complaint before an administrative law

judge seeking remedial relief for victims, injunctive relief to prevent future violations, and/or civil penalties. Section 1324b also provides a private right of action.

As a threshold matter, if OSC receives an allegation of discrimination by an employer in applying the safe harbor procedures, it will first ascertain whether the alleged victim is an authorized worker who is protected from discrimination under section 1324b. If it concludes that the alleged victim is protected, OSC will initiate an investigation to determine whether there is reasonable cause to believe that the employer has engaged in unlawful discrimination.

An employer that receives an SSA no-match letter and terminates employees without attempting to resolve the mismatches, or who treats employees differently or otherwise acts with the purpose or intent to discriminate based upon national origin or other prohibited characteristics, may be found by OSC to have engaged in unlawful discrimination. However, if an employer follows all of the safe harbor procedures outlined in DHS's no-match rule but cannot determine that an employee is authorized to work in the United States, and therefore terminates that employee, and if that employer applied the same procedures to all employees referenced in the no-match letter(s) uniformly and without the purpose or intent to discriminate on the basis of actual or perceived citizenship status or national origin, then OSC will not find reasonable cause to believe that the employer has violated section 1324b's anti-discrimination provision, and that employer will not be subject to suit by the United States under that provision.

Employers and employees who desire additional guidance regarding their specific circumstances are encouraged to further explore OSC's website. Employer and employees also may call OSC for guidance. Employers may call 1-800-255-8155, or 1-800-237-2515 for the hearing impaired. The numbers for employees are 1-800-255-7688 or (202) 616-5525, and 1-800-237-2515 for the hearing impaired. Finally, OSC has an extensive public education program to inform employers and employees regarding their rights and duties under section 1324b. Speakers may be available nationwide for groups of 50 or more attendees for public affairs events, conferences, class seminars, and workshops. To request a speaker, please call OSC's Public Affairs staff at (202) 616-5594 or fax your request to (202) 616-5509.