

# I-9 Completion: Beware of Discrimination

August 14, 2014

In the process of completing the seemingly simple, two-page I-9 employment eligibility verification form, many employers unwittingly discriminate against certain employees. In recent months, fines imposed by the various U.S. government agencies responsible for ensuring I-9 compliance have been significant—and most have resulted from discriminatory practices in the I-9 completion process.

Requesting specific documents of an employee or requiring over-documentation will lead to charges of discriminatory practices. The Immigration and Nationality Act's (INA) anti-discrimination provision prohibits employers from placing additional documentary burdens on work-authorized employees during the hiring and employment eligibility verification process based on their citizenship status or national origin.

While completing a Form I-9, an employee cannot be asked to present specific documents. Employees are allowed to present a document from List A of Acceptable Documents or one from List B and one from List C. Common pitfalls occur when an employer requires the employee to present a specific document or a combination of documents. Further, requesting that an employee present more or different documents than minimally required for employment verification will lead to charges of discrimination. An employer should not refuse to accept documents that reasonably appear genuine on their face and then request other documents from the employee.

Additionally, an employer cannot request specific documents issued by the U.S. Department of Homeland Security in order to verify the employment eligibility of work-authorized non-U.S. citizens while permitting U.S. citizens to present any of the acceptable documents found on the Form I-9 Lists of Acceptable Documents.

In June, the U.S. Department of Justice and a Colorado-based janitorial services company reached a settlement agreement that resolved claims that the company discriminated against work-authorized non-U.S. citizens by requiring specific documents from them, but not from U.S. citizens, during the Form I-9 completion process. The company agreed to pay more than \$50,000 in civil penalties,

create a \$25,000 back pay fund to compensate individuals who may have lost wages due to the company's discriminatory practices, and be subject to monitoring of its employment eligibility verification practices for one year. In April, a Dallas-based concrete company paid \$115,000 as a result of its similar discriminatory practices.

An employer simply cannot request any specific documents of any employee. Such requests will lead to expensive discrimination charges, monitoring of the Form I-9 completion process by the U.S. government for extended periods, and poor public relations. As an employer, it is critical to know the acceptable documents pursuant to each of the lists, and to have the photos of these documents readily available for the employer's I-9 officer or human resources personnel responsible for I-9 completion and maintenance. Further, all employees who complete the Form I-9 should be able to freely choose which document they will present at the time of employment verification and be given the list of the acceptable documents.

This is also true during the re-verification process that occurs when an employer must update any expired employment authorization document in Section 3 of the Form I-9. Just this month, a New York City nursing home was fined for engaging in a pattern or practice of citizenship discrimination during the employment eligibility re-verification process in violation of the INA. The Justice Department found that the nursing home required lawful permanent residents (green card holders) to present a new green card after their old one expired, even though the Form I-9 rules prohibit this practice. Lawful permanent residents have permanent work authorization in the United States, even after their green cards expire. Further, the nursing home required the green card holders to provide proof of U.S. citizenship if they became naturalized citizens. Again, this practice is prohibited by the INA's anti-discriminatory provisions. The nursing home reached an agreement with the U.S. Department of Justice whereby it agreed to pay \$14,500 in civil penalties, undergo training on the anti-discrimination provision of the INA, establish a back pay fund to compensate potential economic victims, revise its employment re-verification policies, and be subject to monitoring of its employment verification practices for two years.

The prevalence of these discriminatory practices prompted the U.S. Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), which is responsible for the enforcing the anti-discriminatory provisions of the INA, to release a June 2014 update to its "Fact Patterns Flyer." The update illustrated various forms of discrimination by drawing on examples from recent OSC enforcement of the INA's anti-discrimination provision.

For more information on whether your business would benefit from reviewing its employment verification practices, and whether your company is currently in compliance with required I-9 completion and maintenance practices, we refer you to our May 7, 2014 article, [10 Practical Compliance Tips for Growing Companies](#).

*This article was originally published in the GrowFL Weekly Update for April 11, 2014.*

©2024 Carlton Fields, P.A. Carlton Fields practices law in California through Carlton Fields, LLP. Carlton Fields publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information and educational purposes only, and should not be relied on as if it were advice about a particular fact situation. The distribution of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship with Carlton Fields. This publication may not be quoted or referred to in any other publication or proceeding without the prior written consent of the firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our Contact Us form via the link below. The views set forth herein are the personal views of the author and do not necessarily reflect those of the firm. This site may contain hypertext links to information created and maintained by other entities. Carlton Fields does not control or guarantee the accuracy or completeness of this outside information, nor is the inclusion of a link to be intended as an endorsement of those outside sites.