U.S. Department of Justice

Civil Rights Division

Office of Special Counsel for Immigration Related Unfair Employment Practices - NYA
950 Pennsylvania Avenue, NW
Washington, DC 20530

Via E-Mail dfazio@wsfb.com

JUN 22 2010

Dan Fazio
Director of Employer Services
Washington Farm Bureau
975 Carpenter Road NE
Lacey, WA 98516

Dear Mr. Fazio:

Thank you for contacting the Office of Special Counsel for Immigration-Related Unfair Employment Practices. This e-mail is in response to your letter, dated April 16, 2010. In your letter, you state that during a recent training of seasonal employers, an employer asked about its employment eligibility verification obligations for seasonal workers who are laid off every year in November and who return to work the following February. The employer does not consider the employees to have been terminated each November and does not reverify the employees' employment eligibility each February, unless an employee's employment authorization document has expired. Accordingly, you ask "how long of a layoff can a business impose on an employee before the employer would be required to complete a new I-9 or I-9 Section 3?"

The Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC") enforces the anti-discrimination provision of the Immigration and Nationality Act ("INA").[1] OSC's mission is to protect work-authorized individuals from employment discrimination based on citizenship status, national origin, over documentation in the employment eligibility verification (Form I-9) process (document abuse), or retaliation for filing a charge or asserting their rights under the anti-discrimination provision.

This Office cannot give you an advisory opinion on any set of facts involving a particular individual or company. However, we can provide some general guidelines regarding compliance with the anti-discrimination provision of the INA.

Please note that the U.S. Department of Homeland Security ("DHS"), U.S. Citizenship and Immigration Services ("USCIS") administers the rules and regulations regarding employment eligibility verification. In general, federal regulations require employers to complete an I-9 form for any individual the employer "hires or recruits or refers for a fee."[2] However, "[a]n employer will not be deemed to have hired an individual for employment if the

[1] 8 U.S.C. § 1324b.
[2] 8 C.F.R. § 274a.2(b).

individual is continuing in his or her employment and has a reasonable expectation of employment at all times."[3] Whether an employee is considered to have been rehired or continuing in employment depends upon the particular facts. The regulations enumerate examples of when an employee is continuing in his or her employment, including when "an individual is engaged in seasonal employment"[4] or when "[a]n individual is laid off for lack of work."[5] An employer should consult its counsel for assistance in determining whether an employee had a reasonable expectation of employment at all times.

Federal regulations impose different employment eligibility verification obligations for individuals previously employed by the employer than for new hires.[6] According to the USCIS Handbook for Employers: Instructions for Completing Form I-9 ("Handbook for Employers"): "[w]hen you rehire an employee, you must ensure that he or she is still authorized to work. You may do this by completing a new Form I-9 or you may reverify or update the original form by completing Section 3."[7] The instructions on the Form I-9 state:

> If you rehire an employee who has previously completed a Form I-9, you may reverify on the employee's original Form I-9 (or on a new Form I-9 if Section 3 of the original has already been used) if:
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> 1. You rehire the employee within three years of the initial date of hire; and
>
> 2. The employee's previous grant of employment authorization has expired, but he or she is now eligible to work under a new grant of employment authorization; or
>
> 3. The employee is still eligible to work on the same basis as when Form I-9 was completed.[8]

For more information on reverification and updating in this context, please see the Handbook for Employers.

Finally, please note that to prevent discrimination in violation of the anti-discrimination provision of the INA during the employment eligibility verification process, an employer must treat all employees similarly, regardless of their citizenship or immigration status, or their national origin. Accordingly, any procedure an employer uses to determine when an employee's employment authorization must be reverified should be applied consistently, regardless of an employee's citizenship or immigration status, or national origin. Additionally, an employer reverifying an employee's employment authorization must not request a specific document or

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[3] 8 C.F.R. § 274a.2(b)(1)(viii).
4 8 C.F.R. § 274a.2(b)(1)(viii)(A)(8).
[5] 8 C.F.R. § 274a.2(b)(1)(viii)(A)(3).
[6] 8 C.F.R. § 274a.2(c).
[7] Handbook for Employers: Instructions for Completing the Form I-9, (Employment Eligibility Verification Form), Page 12, U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, M-274 (Rev. 7/31/09), available at http://www.uscis.gov/files/nativedocuments/m-274.pdf. *See also* Form I-9 Instructions § 3 (Rev. 02/02/09).
[8] *Id. See also* Form I-9 Instructions § 3 (Rev. 02/02/09).

combination of documents, but must allow the employee to present either a List A document or a List C document.[9]

We hope that this information is of assistance to you.

Sincerely,

Katherine A. Baldwin
Deputy Special Counsel

[9] *Id.* at 20.