

U.S. Department of Justice Civil Rights Division



Office of Special Counsel For Immigration-Related Unfair Employment Practices

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

Employer Hotline: 1-800-255-8155



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Unfair Employment Practices: www.justice.gov/crt/osc

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 employer believed the worker is not a U.S. citizen
- Preferring temporary work visa holders
- Unequal application of “dishonesty” policies

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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

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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.*

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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:

- ⦿ **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

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Document Abuse Examples

When completing the Form I-9:

- 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
- Requiring certain U.S. citizens to produce a certificate of naturalization
- Rejecting documents that are valid based on citizenship status or national origin

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Document Abuse & Form I-9

- The Form I-9's purpose is to establish a worker's **identity and work authorization**
- All employees hired after November 6, 1986, and working in the United States must complete an I-9 Form
- The form has 3 sections

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Form I-9: Section 1

Employee Completes Section 1 after accepting a job offer and by the first day of work

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) _____

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Form I-9: Section 1 (cont.)

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)

- Some “aliens authorized to work,” such as refugees and asylees, are authorized to work indefinitely
- If no expiration date, the employee may write: “N/A”
- An employee is not required to show documents proving the selected status

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Form I-9: Section 2

Complete Section 2 within 3 business days of the first day of work. (If job begins Monday, Section 2 must be completed by Thursday)

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

I, _____, certify 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)

- List A (Both Identity & Employment Eligibility)
- OR
- List B (Identity) + List C (Employment Eligibility)

Worker Hotline: 1-800-255-7688



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Form I-9: Section 2 (cont.) Preventing Discrimination

- An employer must allow the employee to present his or her choice of documentation to complete the I-9 Form
- An employer may not ask for specific or more documents, or reject a valid document

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Form I-9: Section 2 (cont.) Documents with Expiration Dates

- 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

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Form I-9: Section 2 (cont.) Acceptable Receipts

- 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)

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Form I-9: Section 2 Common Problems

- Requiring non-U.S. citizens to produce a List A document but allowing U.S. citizens to produce any document they choose
- Requiring non-U.S. citizens to produce documents from Lists A, B, and C
- Failing to consult the current version of the Handbook for Employers or USCIS's I-9 Central website, and rejecting less common I-9 documents, such as receipts

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Form I-9: Section 3 (Updating and Reverification)

Section 3. Updating and Reverification (To be completed and signed by employer.)		
A. New Name (if applicable)		B. Date of Hire (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)

- U.S. citizens, Permanent Resident Cards (I-551), and List B documents should not be reverified!
- Employer must accept a List A or List C document (e.g. unrestricted social security card)

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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 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 threatens to file a charge of citizenship status discrimination with OSC and is demoted

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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

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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

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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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Employment Eligibility Verification

- An electronic program that verifies an individual's permission to work in the U.S.
- Run by the Department of Homeland Security, in partnership with the Social Security Administration
- OSC investigates discriminatory use of E-Verify

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How E-Verify Works

- 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 and only in certain cases are permitted by MOU to use E-Verify on current employees
- E-Verify compares the employee's I-9 Form information to information in SSA and DHS records



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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



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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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E-Verify: Special Issues

- 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
- Federal Contractor Requirements – only employers required by federal contract and enrolled in E-Verify as a federal contractor may run existing employees through E-Verify

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E-Verify: Self Check

- Service that allows an employee to check his or her information through E-Verify for free
- Employers **cannot** require or ask applicants or employees to use Self Check or provide a Self Check print-out

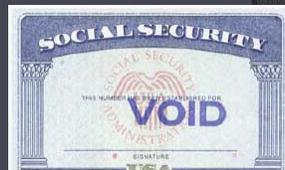
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Social Security Number No-Match

- A notice that the employee name and Social Security Number (SSN) submitted by employer do not match agency records
- **No-Match notices alone say nothing about immigration status or work authorization**



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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

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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 is 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

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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/osc
- Employers can email OSC at oscrt@usdoj.gov

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Please feel free to contact me!

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