



U.S. Department of Justice

Civil Rights Division

Office of Special Counsel for Immigration-Related
Unfair Employment Practices - NYA
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August 20, 2013

BY EMAIL

Lesley A. Carr
[Lesley A Carr@Progressive.com](mailto:Lesley_A_Carr@Progressive.com)

Dear Lesley Carr:

This letter responds to your e-mail dated June 18, 2013, to the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC). In your email, you ask whether "pre-population of employee information in Section 1 of the I-9 form by electronic I-9 programs" is permissible. You mention that Immigration and Customs Enforcement ("ICE") has told the American Immigration Lawyers Association ("AILA") that pre-population of Section 1 is impermissible.

Please note that OSC cannot provide an advisory opinion on any set of facts involving a particular individual or entity. However, we can provide some general guidelines regarding employer compliance with the anti-discrimination provision of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b, enforced by OSC, and employer actions under that provision. The anti-discrimination provision prohibits four types of employment-related discrimination: citizenship or immigration status discrimination; national origin discrimination; unfair documentary practices during the employment eligibility verification (I-9 and E-Verify) process ("document abuse"); and retaliation for filing a charge, assisting in an investigation or asserting rights under the anti-discrimination provision. 8 U.S.C. § 1324b.

Pursuant to federal law, a person or other entity that hires, recruits or refers an individual for employment must verify the identity and employment authorization of each person hired, recruited or referred. 8 U.S.C. § 1324a(b)(1)(a). The form designated for that purpose is the Form I-9. 8 CFR § 274a.2; U.S. Citizenship and Immigration Service (USCIS) Handbook for Employers, Guidance for Completing Form I-9 (M-274) (Rev. 03/08/13). The Form I-9 specifies that Section 1 is to be completed by the employee. As the instructions accompanying the form make clear, "Newly hired employees must complete and sign Section 1 of Form I-9 no later than the first day of employment." Form I-9 Instructions, page 1, *available at* <http://www.uscis.gov/files/form/i-9.pdf>. Section 1 of the form itself contains the employee's attestation that "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" and further highlights that the attestation for citizenship status is under penalty of perjury. *Id.* If an individual is unable to complete the Form I-9 or needs it translated, someone may assist him or her (preparer or translator). The preparer or translator must read the Form I-9 to the individual, assist him or her in completing Section 1 and have the individual sign or mark the

Form I-9 by a handwritten signature, or an electronic signature affixed at the time of the transaction. 8 C.F.R. 274a.2(b)(1)(i).

We assume that the practice of pre-population of Section 1 you refer to involves an employer relying on previously obtained employee information to complete Section 1 (i.e., information obtained from a job application or information obtained from an interview) and not to information obtained for Section 1 directly from an employee who is aware that the employer is entering information in Section 1 of Form I-9 as their preparer or translator.

From the perspective of the anti-discrimination provision, OSC discourages the practice of an employer pre-populating Section 1 with previously obtained employee information. This practice increases the likelihood of including inaccurate or outdated information in Section 1 (for instance, from changes in legal name, address, or immigration or citizenship status). Outdated or inaccurate information in Section 1 may lead an employer to reject documents presented or demand specific documents for Section 2 purposes. This is particularly true if an employer does not provide an opportunity for the employee to review the information that was pre-populated and does not build in a method for making corrections. Further, if an employer uses the outdated or inaccurate information to submit an E-Verify query, a mismatch may result because the status or name in government databases conflicts with the employer's outdated information.

Moreover, employers relying on previously gathered employee information may be more likely to overlook that a particular employee has limited English proficiency ("LEP") because Section 1 has been pre-populated by the employer. As a result, the employer may fail to provide that employee with translation or interpretation assistance in order to ensure the accuracy of Section 1 and in order to assist the employee in understanding the request for documents relating to Section 2.

If you have further questions that pertain to the anti-discrimination provision of the INA, please contact OSC's employer hotline, 800-255-8155, or visit OSC's website at www.justice.gov/crt/about/osc.

We hope this information is helpful. Thank you for contacting OSC.

Sincerely,

A handwritten signature in black ink, appearing to read "Seema Nanda", written over a horizontal line.

Seema Nanda
Deputy Special Counsel