How to Avoid Immigration-Related Employment Discrimination

NCAE 2020 Annual Meeting

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Presentation Overview

1. Prohibited discrimination under the INA (8 U.S.C. § 1324b)

2. Case Studies in avoiding citizenship status discrimination

3. How to avoid discrimination in the Form I-9 and E-Verify processes

4. IER enforcement

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Prohibited Discrimination under the INA
8 U.S.C. § 1324b

1. Citizenship/Immigration Status Discrimination
2. National Origin Discrimination
3. Unfair Documentary Practices
4. Retaliation

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Citizenship Status Discrimination

» Hiring
» Firing
» Recruitment or referral for a fee

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IER’s Protecting U.S. Workers Initiative

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Avoid Blanket Assumptions and Group Treatment Based on Citizenship Status

*Counter Example*: A grower tells a U.S. worker from the prior season that there is no work for him this year because the grower wants to use H-2A workers from now on.
Case Study: Example from a Recent IER Settlement

Sam Williamson Farms (2019): IER’s investigation determined:

» Farm informed existing U.S. workers that it preferred to hire H-2A visa holders to harvest the strawberry crop for the next season

» Retained farm labor contractor for express purpose of getting H-2A workers

» Filled picking positions with 300 H-2A workers and no U.S. workers.

Settlement: $60,000 in civil penalties, $85,000 back pay fund; required enhanced recruiting efforts for U.S. workers

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Best Practices: Recruiting

1. Advertising in multiple types of media
2. Recruitment beyond required time frame
3. Allowing multiple application methods
4. Responding promptly to interested applicants (e.g., within 3 days)
5. Requiring third party recruiters (e.g., FLCs) to first consider U.S. workers

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Recruiting Remedies in *Sam Williamson Farms* Settlement

Follow DOL recruitment requirements, plus additional advertising:

- In local areas
- English and Spanish ads
- For period starting at least 4 weeks prior to start through first half of season
- Listing phone # and physical address to apply and/or get more info

"Everyone with permission to work in the United States is welcome to apply."

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Recruiting Remedies in 
*Sam Williamson Farms Settlement* (2)

Additional recruitment obligations if using FLC or recruiter:

- Ads must provide FLC contact information and direct applicants to apply through FLC/recruiter

- Ensure that FLC/recruiter incorporate recruitment practices from Settlement Agreement or Farm must still place ads with FLC/recruiter contact information

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Apply same qualifications and pre-employment requirements to visa workers and U.S. workers

*Counter Example:* Employer’s job posting for harvester positions requires that applicants speak English fluently, submit formal applications, and pass drug tests before arriving on site to start work. The employer does not enforce those requirements for H-2A workers.

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Offer all types of available positions to all categories of qualified workers regardless of citizenship status

*Counter example:* An employer typically hires U.S. workers for its permanent year-round jobs, which are mainly in a warehouse, but fills seasonal, outdoor harvesting jobs with temporary visa workers. A U.S. worker inquiring about a seasonal job is directed to apply for a year-round job.
Red Flags When Using a Recruiter or Contractor to Obtain Seasonal Agricultural Labor

“H-2As R Us” contractor

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Under federal law, employers generally cannot make hiring, firing, or recruitment or referral decisions based on a worker’s citizenship status. This flyer provides information on how to avoid citizenship status discrimination under the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b(a)(1), and does not address other types of prohibited employment discrimination. You may contact the Immigrant and Employee Rights Section (IER) for more information. IER enforces the INA’s anti-discrimination provision found at 8 U.S.C. § 1324b. The regulations for this law are at 28 C.F.R. Part 44.

1. What is employment discrimination based on citizenship status?

Citizenship status discrimination generally occurs when an employer refuses to recruit/refer or hire someone, or fires someone, because of the person’s citizenship or immigration status. One example of citizenship status discrimination is when employers limit jobs to U.S. citizens without legal justification. Another example is when employers reject U.S. worker applicants because of a preference for temporary visa workers. Employers may prefer to hire an equally-qualified U.S. citizen or national after fully considering other applicants, including non-U.S. citizens. This exception is found at 8 U.S.C. § 1324b(a)(4).

2. Who is protected from citizenship status discrimination in hiring, firing, and recruitment/referral for a fee?

The INA protects U.S. citizens, U.S. nationals, refugees, asylees, and recent lawful permanent residents from citizenship status discrimination in hiring, firing and recruitment or referral for a fee. You can get more information on which workers are protected from citizenship status discrimination by contacting IER and at 8 U.S.C. §§ 1324b(a)(1), (3).

3. May I ask applicants for citizenship or immigration status information?

Generally, an employer may ask job applicants if they have the legal right to work in the United States and if they will need sponsorship for an employment visa. Asking for specific citizenship status information for purposes unrelated to any recruitment, hiring, or firing decision is unlikely to violate the law IER enforces. However, unsuccessful applicants who are subjected to these types of questions may believe that the employer based its decision on the applicant’s citizenship status (which includes immigration status). Therefore, it is a best practice to avoid asking applicants for this information.
National Origin Discrimination

» Hiring
» Firing
» Recruitment or referral for a fee

IER investigates national origin claims that fall outside of the EEOC’s jurisdiction

» Generally, 4-14 employees

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Unfair Documentary Practices

» Form I-9
» E-Verify

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Employers may not:

- **Request** more or different documents
- **Reject** reasonably genuine-looking documents
- **Specify** certain documents

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The Form I-9 is used to verify identity and permission to work.

The purpose of the Form I-9 is **not** to verify a particular immigration status.

[www.uscis.gov/i-9-central](http://www.uscis.gov/i-9-central)

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DHS Form I-9;  Lists of Acceptable Documents

Worker must show employer *worker’s choice* of either a List A document or a combination of List B and List C documents.

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### Lists of Acceptable Documents

All documents must be UNEXPIRED

Employees may present one selection from List A or a combination of one selection from List B and one selection from List C.

<table>
<thead>
<tr>
<th>LIST A</th>
<th>LIST B</th>
<th>LIST C</th>
</tr>
</thead>
<tbody>
<tr>
<td>Documents that Establish Both Identity and Employment Authorization</td>
<td>OR</td>
<td>Documents that Establish Identity AND Employment Authorization</td>
</tr>
<tr>
<td>1. U.S. Passport or U.S. Passport Card</td>
<td>1. Driver’s license or ID card issued by a State or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address.</td>
<td>1. A Social Security Account Number card, unless the card includes one of the following restrictions: (1) NOT VALID FOR EMPLOYMENT</td>
</tr>
<tr>
<td>2. Permanent Resident Card or Alien Registration Receipt Card (Form I-551)</td>
<td>2. ID card issued by federal, state or local government agencies or entities, provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address.</td>
<td>(2) VALID FOR WORK ONLY WITH INS AUTHORIZATION</td>
</tr>
<tr>
<td>3. Foreign passport that contains a temporary I-551 stamp or temporary I-551 printed notation on a machine-readable immigrant visa</td>
<td>3. Certification of report of birth issued by the Department of State (Forms DS-1350, FS-545, FS-240)</td>
<td>(3) VALID FOR WORK ONLY WITH DHS AUTHORIZATION</td>
</tr>
<tr>
<td>4. Employment Authorization Document that contains a photograph (Form I-760)</td>
<td>4. School ID card with a photograph</td>
<td></td>
</tr>
<tr>
<td>5. For a nonimmigrant alien authorized to work for a specific employer because of his or her status: a. Foreign passport; and b. Form I-94 or Form I-94A that has the following: (1) The same name as the passport; and (2) An endorsement of the alien’s nonimmigrant status as long as that period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the form.</td>
<td>5. U.S. Military card or draft record</td>
<td>3. Original or certified copy of birth certificate issued by a State, county, municipal authority, or territory of the United States bearing an official seal</td>
</tr>
<tr>
<td>6. Passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI</td>
<td>6. Military dependent’s ID card</td>
<td>4. Native American tribal document</td>
</tr>
<tr>
<td>7. U.S. Coast Guard Merchant Mariner Card</td>
<td>7. Native American tribal document</td>
<td>5. U.S. Citizen ID Card (Form I-197)</td>
</tr>
<tr>
<td>9. For persons under age 18 who are unable to present a document listed above:</td>
<td>9. For persons under age 18 who are unable to present a document listed above:</td>
<td>7. Employment authorization document issued by the Department of Homeland Security</td>
</tr>
<tr>
<td>10. School record or report card</td>
<td>10. School record or report card</td>
<td></td>
</tr>
<tr>
<td>11. Clinic, doctor, or hospital record</td>
<td>11. Clinic, doctor, or hospital record</td>
<td></td>
</tr>
<tr>
<td>12. Day-care or nursery school record</td>
<td>12. Day-care or nursery school record</td>
<td></td>
</tr>
</tbody>
</table>

Examples of many of these documents appear in Part 13 of the Handbook for Employers (M-274).

Refer to the instructions for more information about acceptable receipts.
DHS E-Verify Program

» E-Verify compares Form I-9 data with government records

» IER does not administer E-Verify, but we do investigate discriminatory use of the program

» If the employer uses E-Verify according to its rules, the employer should also be in compliance with the law that IER enforces

  » Do NOT selectively run workers through E-verify based on citizenship status
  » Do NOT treat workers who receive TNCs differently based on citizenship status

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Wespak (2019)

» IER’s investigation determined that this Dinuba, CA agricultural company reverified work authorization of LPRs who had already established permanent work authorization at initial hire

» Settlement: Civil penalty, training of personnel, monitoring

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Unfair Documentary Practices Case Involving Agricultural Employer

Pappas and Sons (2019)

IER’s investigation determined that:

» MD produce distribution company rejected refugee’s sufficient work authorization documents, delaying start of work

» There was a pattern or practice

Settlement: Backpay for charging party; civil penalties

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This document discusses how you, as an employer, can avoid discrimination during the process of verifying an employee’s employment authorization. Employers verify employees’ employment authorization by completing the Form I-9, and, for some employers, by using the E-Verify program. Employees complete Section 1 of the Form I-9. You complete Section 2, and for reverification or rehire, Section 3 as well. Employers that use E-Verify create E-Verify cases after completing the Form I-9 for an employee. Federal law requires you to follow Form I-9 and E-Verify rules consistently, regardless of an employee’s citizenship, immigration status, or national origin. This anti-discrimination law is found at 8 U.S.C. § 1324b. The regulations for this law are at 28 C.F.R. Part 48.

Employee Completes Section 1 of the Form I-9

Employees complete Section 1 of the Form I-9. No documents should be requested or presented as part of completing Section 1.

Some aliens authorized to work (AAWs) have permission to work that does not expire. The Form I-9 instructions tell these AAWs to write “N/A” in the expiration date field in Section 1. If an AAW whose work permission does not expire shows an Employment Authorization Document (EAD) for Section 2, the AAW still writes “N/A” in the expiration date field in Section 1.

The Social Security number (SSN) field is optional unless you use E-Verify. But, even if you use E-Verify, employees who present sufficient documentation for Section 2 but are waiting for their SSN have satisfied the Form I-9 and therefore can begin work for pay while waiting for the SSN.

The Form I-9 instructions have more information on completing Section 1. You can also learn more at 8 U.S.C. § 1324a(b) and 28 C.F.R. Part 274a.2(b).

Employer Completes Section 2 of the Form I-9

Under the Form I-9 instructions, employees can present any documentation from the Lists of Acceptable Documents to prove their work authorization. All employees can choose to present either an unexpired List A document, or an unexpired List B document together with an unexpired List C document.

Employees do not need to prove their citizenship status to employers when they complete the Form I-9. Asking an employee for proof of citizenship or immigration status could violate the law at 8 U.S.C. § 1324b(a)(6). For example, asking an employee who marks “U.S. citizen” to present a naturalization certificate or U.S. passport, or asking a lawful permanent resident (LPR) to present a Permanent Resident Card (PRC) could be unlawful discrimination under this part of the law.

A receipt to replace a lost, damaged or stolen List A, List B, or List C document is valid for 90 days from the first day of work.

A Form I-94 with a temporary I-551 stamp and photograph is valid until the end of the stamp’s expiration date, or if no expiration date, one year from the date of issue.

A Form I-94 with a refugee stamp or notation is good for 90 days from the first day of work. See I-9 Central for more information.

Educational Flyers for Employers on IER’s website (2)

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Retaliation

» Intimidation
» Coercion
» Threats

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IER Enforcement Process

Charge or Independent Investigation

Investigation

- Dismissal
- Settlement
- Lawsuit

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Possible Remedies

- Hire or rehire
- Back pay
- Training
- Monitoring
- Policy changes
- Civil penalties

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Contacting IER

Employer Hotline 1-800-255-8155
Worker Hotline 1-800-255-7688
Mon – Fri  9am-5pm ET

Calls can be anonymous and language services are available.

www.justice.gov/ier
IER Flyers: www.justice.gov/crt/employer-information
www.justice.gov/crt/ier-cases-and-matters
IER@usdoj.gov

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