U.S. Department of Justice
Civil Rights Division

Office of Special Counsel for Immigration-Related
Unfair Employment Practices - NYA
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OCT 14 2011

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Dear Ms. Newport:

Thank you for your e-mail inquiry on June 28, 2011. In your e-mail you ask whether an employer may reverify the work authorization of certain employees for whom it has discovered discrepancies in their Social Security numbers and names. Specifically, although the employer completed I-9 Forms for its employees and accepted "facially valid" documents, it conducted an investigation of the employees' Social Security numbers based on an anonymous tip that some of the employees may be undocumented. The investigation found some discrepancies in names and social security numbers. In your email you also explain that no employees have told the employer that they used fraudulent documents.

Please note that the Office of Special Counsel (OSC) cannot provide an advisory opinion on any particular instance of alleged discrimination or 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, which OSC enforces. The anti-discrimination provision prohibits hiring, firing, recruitment or referral for a fee, and unfair documentary practices during the employment eligibility verification (Form I-9) process (document abuse) on the basis of citizenship or immigration status or national origin. It also prohibits retaliation for filing a charge, assisting in an investigation, or asserting rights under the anti-discrimination provision. For more information about OSC, you may visit our website at www.justice.gov/crt/about/osc.

As you may know, an employer is required to complete an I-9 Form for each new hire within three days of hire. U.S. Citizenship and Immigration Service (USCIS) Handbook for Employers Instructions for Completing Form I-9 (M-274)(Rev. 6/01/11), at 3, available at http://www.uscis.gov/files/nativedocuments/m-274.pdf. (Hereinafter "Employer Handbook"). When reviewing documents presented for I-9 purposes an employer's obligation is to accept either one List A document (chosen by the employee) or a combination of one List B document and one List C document (chosen by the employee) as long as the document or documents reasonably appear to be genuine and to relate to the employee. Employer Handbook, at 5.

OSC cautions employers to respond to anonymous tips with restraint because these tips may be based, in whole or in part, on such factors as an individual's presumed citizenship status, national origin, accent, or cultural customs. Such factors are not relevant in determining whether an individual is authorized to work in the United States. In addition, whether an employer should respond to an anonymous tip depends upon the specific facts at hand, including the credibility and substantive nature of the information provided.

An employer is only under a duty to investigate further if it knows or has knowledge that would lead a reasonable person to believe that an individual is not authorized to work in the United States. *See Mester Mfg. Co. v. INS*, 879 F.2d 561 (9th Cir. 1989); *New El Rey Sausage v. INS*, 925 F.2d 1153 (9th Cir. 1991)(employer that received specific information from INS that certain employees may have committed document fraud was on notice of their potentially unauthorized status; because the employer failed to make further inquiries, it is deemed to have constructive knowledge of the unauthorized status). For example, courts have found that employers had constructive knowledge when they failed to ask for any proof of work authorization or ignored notices about employees' unauthorized status from government authorities. *See, e.g., Café Camino*, 2 OCAHO no. 307, at 39 (1991)(where employer did not request or review employee's work authorization documents, it may be inferred that the employer knew the individual did not have work authorization documents); *U.S. v. Noel Plastering*, 3 OCAHO no. 427, at 320 (violation can be established where employer fails to reverify worker's employment eligibility after receiving "specific and detailed" information from the INS that employees may be ineligible to work). For more information about facts that might rise to the level of "constructive knowledge," we recommend you contact Immigration and Customs Enforcement within the Department of Homeland Security at 1-866-DHS-2ICE or visit http://www.ice.gov.

Likewise, OSC's employer guidance on this topic (available at http://www.justice.gov/crt/about/osc/htm/employer.php) makes clear that there are many possible reasons for why an employee's name and Social Security number may not match. Therefore, employers should not draw conclusions about an employee's work authorization status based solely on information indicating that the employee's name and Social Security number cannot be found in a system of records—whether the records are directly managed by the Social Security Administration or another private or public entity. Furthermore, as OSC's guidance makes clear: "The mere receipt of a no-match letter or other no-match notice does not, standing alone, constitute 'constructive knowledge' on the part of an employer that the referenced employee is not work authorized. Only the Department of Homeland Security (DHS) is legally authorized to conclusively determine an individual's authorization to work." OSC also cautions employers against providing an unreasonably short period of time to clear up a Social Security no-match.

Where an employer treats employees differently in reverifying employment based on their real or perceived immigration status or national origin, or selects employees for reverification based in whole or in part on their real or perceived immigration status or national origin, an employer may run afowl of the anti-discrimination provision.

Further, OSC cautions that work-authorized employees who are terminated for failing to provide work authorization documents within an unreasonably short time frame established by their employer may have a claim under the anti-discrimination provision, depending on the specific circumstances of that case.

Sincerely,

Seema Nanda
Acting Deputy Special Counsel