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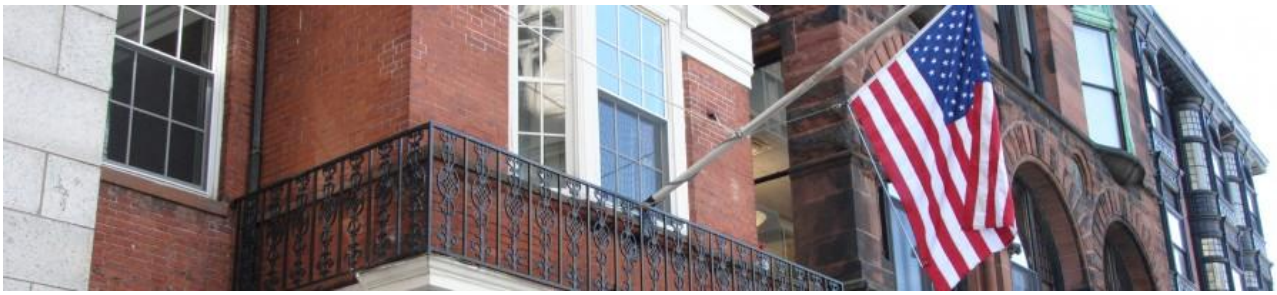

Avoiding Immigration-Related Employment Discrimination: Tips for Employers

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By Anjali Waikar

Practice Tips

As the national debate concerning immigration reform continues, the federal government has turned its attention to cracking down on employers who hire unauthorized workers. Such efforts were highlighted in the federal immigration raid of the Michael Bianco, Inc. factory in New Bedford in 2007, where nearly 350 individuals were rounded up and placed in deportation proceedings. The company ultimately pled guilty to 22 counts relating to the hiring of unauthorized workers and paid a $1.5 million fine. To respond to such increased scrutiny, the government has offered employers various tools to check employees' work authorization. For example, the Town of Milford recently became the first municipality in New England to sign up for IMAGE, a federal program providing employers with education and training on hiring procedures, fraudulent document protection, and use of employment screening tools like E-Verify that allows employers to check an applicant's work eligibility.

Illegal immigration is fueled by job opportunities. Accordingly, many well-intentioned employers, in the face of increasing scrutiny, are concerned about what they can and should be doing to ensure they are

not violating federal immigration laws by hiring unauthorized workers. There are myriad considerations employers face, including how to correctly fill out the I-9 Form, how to respond to Social Security "no match" letters, and whether to enroll in E-Verify, to name a few. What, then, are some of an employer's obligations with respect to ensuring that it is not employing unauthorized workers? What risks does an employer face by terminating an employee whom the employer believes has submitted false documents? What are best practices an employer may follow to avoid immigration-related employment discrimination? This article provides an introduction to these issues and practical tips for lawyers who advise employers that are seeking to comply with the law without running afoul of immigration-related antidiscrimination laws.

Immigration Laws in the Workplace

The federal Immigration Reform and Control Act of 1986 (IRCA) prohibits knowingly hiring undocumented workers and imposes affirmative obligations on employers to verify a new employee's identity and work authorization. IRCA also prohibits employers from discriminating against employees who look or sound "foreign." IRCA prohibits national origin discrimination against all work-authorized individuals in hiring, recruitment, referrals and discharge practices, as well as discrimination based on citizenship status for certain categories of workers, unless such discrimination is otherwise required by law or government contract. The antidiscrimination provisions of IRCA apply to all employers with at least four employees. In addition, employers are subject to the antidiscrimination provisions of Title VII of the Civil Rights act of 1964 as well as Massachusetts' antidiscrimination laws, particularly General Laws Chapter 151B.

To enforce its antidiscrimination provisions, IRCA created the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), located within the Civil Rights Division of the Department of Justice. It is the only governmental office specifically designed and empowered to protect the civil rights of immigrant workers.

In 2000, OSC and the Massachusetts Commission Against Discrimination entered into a memorandum of agreement whereby each entity would support the other's missions and notify complainants of their right, if applicable, to file a complaint with the other agency. See **http://www.justice.gov/crt/about/osc/pdf/Massachusetts.pdf**. Accordingly, for the purpose of satisfying the statute of limitations, complaints under IRCA may also be filed with the MCAD. Since 2006, OCS has issued at least ten letters of resolution to Massachusetts employers, either concluding independent investigations or memorializing voluntary settlement agreements with the charging parties. For example, on January 31, 2012, OSC issued a letter of resolution resolving an investigation into allegations that a Massachusetts company discriminated on the basis of national origin by demanding that a lawful permanent resident present a green card. The resolution included full back pay of $900 and company training on the antidiscrimination provisions of IRCA.

Tips for Avoiding Immigration-Related Discrimination

With this background, lawyers should be aware of the following tips for avoiding immigration-related employment discrimination:

Citizenship Requirements. Employers may violate IRCA, as well as Title VII based on national origin discrimination, by imposing citizenship requirements or giving preference to U.S. citizens, in the absence of a legal requirement to do so (e.g., pursuant to law or government contract).

I-9 Form. The I-9 Form is required of all employees upon hire, regardless of the employee's national origin or citizenship. Employees are required to present documentation to their employers to establish both identity and employment eligibility. Failing to verify new employees' identity and employment eligibility by completing the I-9 Form violates federal immigration law. The I-9 Form provides for several combinations of legally acceptable documents. Employers should maintain consistent procedures relating to I-9 Forms or face potential discrimination claims under IRCA. For example, employers should not:

- Request more or different documents than the I-9 Form requires to validate a candidate's legal status, as doing so may violate IRCA. Likewise, employers must not selectively request proof of permanent residency or other work authorization from an applicant based on his or her national origin. Instead, employers should ask all applicants for acceptable documents indicated on List A or B and C on the I-9 Form;
- Reject government-issued documents that reasonably appear to be genuine and to relate to the employee presenting them. However, if the document does not reasonably appear to be genuine or to relate to the individual, the employer may ask the employee for additional documentation and should not employ the person if he or she is unable to comply.

Timing. Employers who ask to see a job candidate's documents before making a hiring decision may face discrimination claims if the candidate is not offered the job. Instead, employers should request proof of work authorization after making a contingent offer of employment.

Expiring Documents. Employers must not refuse to hire a qualified worker whose employment authorization expires in the future. Instead, employers must complete the hire with the understanding that the employee must provide evidence of continuing employment authorization before the document's expiration date.

Re-verification of Current Employees. Employers must not require an employee to "re-verify" his/her employment eligibility after s/he has already done so. Employers are also prohibited from re-verifying employment eligibility in many other situations, such as when a worker returns from approved leave or is reinstated after an unlawful suspension or termination. See 8 C.F.R. 274a.2(b)(1)(viii)(A). Only in limited circumstances may an employer require "re-verification," such as when an employment authorization

document presented has expired or is about to expire or when the employer has "constructive knowledge" that the worker is not authorized. An employer has "constructive knowledge" – and thus a duty to investigate – where it has knowledge that would lead a reasonable person to believe that an individual is not authorized to work in the United States, such as when ICE notifies the employer that the employee may have presented false documents.

Contacting Federal Authorities. Some employers may be tempted to contact federal authorities to "verify" a worker's work eligibility or social security number. Because such a "verification" effort is likely to be ineffective due to extensive inaccuracies in the information maintained by the federal government, employers should accept documents that reasonably appear to be genuine and to relate to the employee presenting them. Further, employers should not routinely investigate documents without reason to believe such documents are false.

Conclusion

The antidiscrimination provisions of IRCA prohibit unfair, immigration-related employment practices. It is possible to comply with the federal laws governing employment verification without triggering exposure to claims of discrimination. Employers should be advised to treat all employees consistently regardless of citizenship status or national origin and to create and implement uniform policies and procedures relating to employment verification in order to avoid claims of immigration-related discrimination.

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