



INA: Immigration's Double-Edged Sword

Growers must fight tough laws

BY JARED W. ALLEN

Most employers are undoubtedly familiar with the documentation requirements of the Immigration and Nationality Act, which precludes the hiring of persons not authorized to work in the United States.

Employers are required to document the identity and work authorization of each individual hired on a Form I-9. They must keep the form on file for three years, or one year after the employee is terminated, whichever period is longer.

Penalties for knowingly hiring unauthorized workers range from \$275-\$2,200 per worker for a first offense to \$2,200-\$5,500 per worker for a second offense to \$3,300-\$11,000 per worker for each offense after the second offense.

Hiring unauthorized workers results in a "pattern or practice" and possible criminal sanctions in addition to these civil penalties.

In addition to hiring penalties, an employer can be penalized for "paperwork" violations including a failure to keep I-9 records or making mistakes on those records. Paperwork penalties range from \$110-\$11,000.

DOCUMENT IDENTITY

The penalty provisions of the INA should motivate employers to document the identity and authority of their workers. The injudicious employer, attempting to avoid I-9 penalties, can unwittingly walk into a separate and potentially more expensive category of civil liability for workplace discrimination.

Because the sanctions imposed for failing to document workers could have the undesired effect of discouraging employers from hiring workers that look or sound foreign, the INA prohibits discrimination on the basis of citizenship status or national origin.

In other words, an employer cannot avoid liability under the INA by adopting

"Employers must treat all applicants and employees equally, without consideration of national origin or citizenship, and carefully document worker identity and authorization."

a citizen-only employment policy. In hiring, firing and recruiting employees, an employer must treat all job applicants and employees equally, whether they be citizens or non-citizens.

Congress was so concerned that the penalties for hiring undocumented workers would result in discrimination that it established the Office of Special Counsel for Immigration-Related Unfair Employment Practices to investigate and prosecute charges of national origin and citizenship status discrimination. The OSC investigates three distinct forms of discrimination: citizenship status discrimination, national origin discrimination, and document-abuse discrimination.

Citizenship status discrimination, as its name implies, involves rejecting applicants or terminating employees because they are or are not U.S. citizens, because of their immigration status, or based upon their type of work authorization.

AVOIDING DISCRIMINATION

Suppose, for example, that you need to reduce your labor force. If, in deciding which employees to release and which to retain, you favor citizens over immigrants with temporary work permits, you have engaged in unlawful citizenship status discrimination.

National origin discrimination, also prohibited by Title VII of the Human Rights Act and enforced by the Equal Employment Opportunity

Commission, is enforced by the OSC as to smaller employers not subject to Title VII and the EEOC's jurisdiction. It involves rejecting applicants or terminating employees based on their place of birth, country of origin, ancestry, native language, accent or because they are perceived as looking or sounding "foreign."

Suppose, for example, you pass over an otherwise qualified applicant when reviewing resumes because his name is Amir, which you perceive to be Arabic. This is national origin discrimination prohibited by both Title VII and the INA.

Finally, document abuse discrimination involves requesting or requiring more documents than are required for identity and work authorization, rejecting reasonably genuine-looking documents or specifying certain documents over others.

For example, suppose you know a new hire has previously lived and worked in Mexico, but when asked for I-9 documentation he provides an Idaho driver's license and an unrestricted Social Security card. You cannot request additional documentation or require verification of eligibility through INS documents. To do so would be document abuse discrimination.

CARE NEEDED

The INA is a double-edge sword. It was created to reduce the stream of undocumented workers entering our country. Employers can be severely penalized for knowingly hiring such workers.

However, avoiding liability by avoiding foreign workers exposes the employer to the sword's other edge. Employers must treat all applicants and employees equally, without consideration of national origin or citizenship, and carefully document worker identity and authorization.

Penalties and civil liability exist, but can be easily avoided by the employer who is objectively fair and neutral in hiring and firing and who carefully and consistently maintains I-9 forms on all employees. 🍌

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