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A Short Aside on Work Eligibility for Non-U.S. Citizens

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A Short Aside on Work Eligibility for Non-U.S. Citizens
By Attorney Daniel D. Crean

Prefatory Note: This paper should not be viewed as an in-depth analysis of issues related to eligibility for work or employment discrimination against non-U.S. citizens. Its purpose is solely to provide an overview of the electronic process available to verify work eligibility status for job applicants. In that vein, it will provide "guidance" and resources from federal government and other websites regarding U.S. citizenship requirements as conditions of employment. As such, the paper should not be construed as constituting research conducted by the author nor as legal guidance or advice. The paper then provides descriptions of the E-verify program established by the federal government which (as of the date of this paper) has not been mandated for local government employers by federal law, though some states have imposed mandatory e-verification for all employers. The question of its mandatory use has been the subject of litigation, though it does not appear that any decisions have finally invalidated such requirements, at least as of the date of this paper. As a final component, the paper provides a brief review of applicability of federal labor laws to undocumented workers.

U.S. Citizenship as a Requirement for Eligibility for Local Government Employment. Title VII of the U.S. Civil Rights Act and provisions of the Immigration and Nationality Act are said by federal agencies (including the EEOC, the Department of Labor, and the Department of Justice) to limit employers who may seek to require that employees and applicants for employment be citizens of the United States.

In its most basic terms, Title VII prohibits discrimination on the basis of national origin. In relation to citizenship status, the prohibition is described by the U.S. Citizenship and Immigration Services agency in the following terms[1]:

> As noted above, Title VII also prohibits employment discrimination on the basis of national origin, as well as race, color, religion, and sex. Title VII covers employers that employ 15 or more employees for 20 or more weeks in the preceding or current calendar year, and prohibits discrimination in any aspect of employment, including: hiring and firing; compensation, assignment, or classification of employees; transfer, promotion, layoff, or recall; job advertisements; recruitment; testing; use of company facilities; training and apprenticeship programs; fringe benefits; pay, retirement plans, and leave; or other terms and conditions of employment.

In addition to these Title VII requirements, the INA also contains anti-discrimination provisions. A summary can be found in the on-line **Handbook for Employers,** Instructions for Completing Form I-9 (see note 1). Part Four of the Handbook details Unlawful Discrimination and Penalties for Prohibited Practices.

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[1] Taken from **Handbook for Employers,** Instructions for Completing Form I-9 (Employment Eligibility Verification Form) on-line at: http://www.uscis.gov/files/nativedocuments/m-274.pdf.

A further example of federal agency guidance appears on the U.S. Department of Justice, Civil Rights Division website.[2] Included in that guidance are "FAQs" as follows:

- **What is the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC)?**
- **What is the Immigration and Nationality Act (INA)?**
- **What type of discrimination is prohibited by the INA?**
- **How can employers verify their employees' employment eligibility in a non-discriminatory manner?**
- **How can I contact the Office of Special Counsel?**
- **What documents may employees show employers to establish identity and employment eligibility?**
- **What is the receipt rule?**
- **How can employers get up-to-date and accurate information?**
- **What questions are frequently asked on OSC's Employer Hotline?**
- **What are the 10 steps to take to avoid immigration related employment discrimination?**

As described the U.S. Department of Justice Civil Rights Division in the second FAQ at that website:

> The Immigration and Nationality Act (INA) is the federal law governing almost all immigration matters. It prohibits employers from knowingly hiring undocumented workers and requires employers to verify their employees' work eligibility as specified on the I-9 Form. In turn, employees must present documentation to their employers to establish both identity and employment eligibility. There are several combinations of legally acceptable documents from which they can choose. The I-9 Form must be completed for every employee, regardless of national origin, and whether or not a U.S. citizen. An employer's failure to verify the identity and employment eligibility of new employees by completing the I-9 Form violates federal immigration law. Congress established the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) to enforce the antidiscrimination provisions of the INA and to educate the public about immigration-related employment discrimination.

The OSC guidance then describes the type of discrimination prohibited by the INA as follows:

> The Immigration and Nationality Act (INA) prohibits:
>
> - Citizenship or immigration status discrimination with respect to hiring, firing, and recruitment or referral for a fee, by employers with four or more employees, subject to certain exceptions. Employers may not treat individuals differently because they are, or are not, U.S. citizens or work authorized individuals. U. S. citizens, recent permanent residents, temporary residents, asylees, and refugees are protected from citizenship

[2] http://www.justice.gov/crt/osc/htm/facts.php#steps.

status discrimination. Exceptions: permanent residents who do not apply for naturalization within six months of eligibility are not protected from citizenship status discrimination. Citizenship status discrimination which is otherwise required to comply with law, regulation, executive order, or government contract is permissible by law.

- National origin discrimination with respect to hiring, firing, and recruitment or referral for a fee, by employers with more than three and fewer than 15 employees. Employers may not treat individuals differently because of their place of birth, country of origin, ancestry, native language, accent or because they are perceived as looking or sounding "foreign." U.S. citizens and all work authorized individuals are protected from national origin discrimination. The Equal Employment Opportunity Commission has national origin jurisdiction over employers with 15 or more employees.

- Unfair documentary practices related to verifying the employment eligibility of employees. Employers may not, on the basis of citizenship status or national origin, request more or different documents than are required to verify employment eligibility and identity, reject reasonably genuine-looking documents or specify certain documents over others. U.S. citizens and all work authorized immigrants are protected from document abuse.

- Retaliation. Individuals who file charges with OSC, who cooperate with an OSC investigation, who contest action that may constitute unfair documentary practices or discrimination based upon citizenship status or national origin, or who otherwise assert their rights under the INA's anti-discrimination provision are protected from retaliation.

The final bullet point in the OSC FAQ list provides "10 steps" to take to avoid immigration related employment discrimination:

1. Treat all people the same when announcing a job, taking applications, interviewing, offering a job, verifying eligibility to work, and in hiring and firing.

2. Accept documentation presented by an employee if it establishes identity and employment eligibility; is included in the list of acceptable documents; and reasonably appears to be genuine and to relate to the person.

3. Accept documents that appear to be genuine. You are not expected to be a document expert, and establishing the authenticity of a document is not your responsibility.

4. Avoid "citizen-only" or "permanent resident-only" hiring policies unless required by law, regulation or government contract. In most cases, it is illegal to require job applicants to be U.S. citizens or have a particular immigration status.

5. Give out the same job information over the telephone to all callers, and use the same application form for all applicants.

6. Base all decisions about firing on job performance and/or behavior, not on the appearance, accent, name, or citizenship status of your employees.

7. Complete the I-9 Form and keep it on file for at least 3 years from the date of employment or for 1 year after the employee leaves the job, whichever is later. This means that you must keep I-9s on file for all current employees. You must also make the forms available to government inspectors upon request.

8. On the I-9 Form, verify that you have seen documents establishing identity and work authorization for all employees hired after November 6, 1986, including U.S. citizens.

9. Remember that many work authorization documents (I-9 Form lists A and C) must be renewed. On the expiration date, you must reverify employment authorization and record the new evidence of continued work authorization on the I-9 Form. You must accept any valid document your employee chooses to present, whether or not it is the same document provided initially. Individuals may present an unrestricted Social Security card to establish continuing employment eligibility.

Note:
• Permanent resident cards should not be reverified
• Identity documents should not be reverified

10. Be aware that U.S. citizenship, or nationality, belongs not only to persons born in the United States but also to all individuals born to a U.S. citizen, and those born in Puerto Rico, Guam, the Virgin Islands, the Commonwealth of Northern Mariana Islands, American Samoa, and Swains Island. Citizenship is granted to legal immigrants after they complete the naturalization process.

Verification of Eligibility to Work in the United States. At the same time that employment discrimination is prohibited, employers to whom these laws apply are under an obligation to verify that all employees are eligible to work in the United States.

The Employer Handbook cited in Note 1 describes the purpose and general verification requirement at Part One:

> In 1986, Congress reformed U.S. immigration laws. These reforms, the result of a bipartisan effort, preserved the tradition of legal immigration while seeking to close the door to illegal entry. The employer sanctions provisions, found in section 274A of the Immigration and Nationality Act (INA), were added by the Immigration Reform and Control Act of 1986 (IRCA). These provisions further changed with the passage of the Immigration Act of 1990 and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996.
>
> The purpose of the employer sanctions law is to remove this magnet by requiring employers to hire only individuals who may legally work here: citizens and nationals of the United States, lawful permanent residents, and aliens authorized

to work. To comply with the law, you must verify the identity and employment authorization of each person you hire, complete and retain a Form I-9 for each employee, and refrain from discriminating against individuals on the basis of national origin or citizenship.

Form I-9 helps employers to verify individuals who are authorized to work in the United States. You should complete a Form I-9 for every new employee you hire after November 6, 1986.

This Handbook provides guidance on how to properly complete Form I-9, and answers frequently asked questions about the law as it relates to Form I-9.

The Homeland Security Act
The Homeland Security Act of 2002 created an executive department combining numerous federal agencies with a mission dedicated to homeland security. On March 1, 2003, the authorities of the former Immigration and Naturalization Service (INS) were transferred to three new agencies in the U.S. Department of Homeland Security (DHS): U.S. Citizenship and Immigration Services (USCIS), U.S. Customs and Border Protection (CBP), and U.S. Immigration and Customs Enforcement (ICE). The two DHS immigration components most involved with the matters discussed in this Handbook are USCIS and ICE. USCIS is responsible for most documentation of alien employment authorization, for Form I-9 itself, and for the E-Verify employment eligibility verification program. ICE is responsible for enforcement of the penalty provisions of section 274A of the INA, and for other immigration enforcement within the United States.

Part Six of the Handbook then provides the following overview of the E-Verify program:

Since verification of the employment authorization and identity of new hires became law in 1986, Form I-9 has been the foundation of the verification process. To improve the accuracy and integrity of this process, USCIS operates an electronic employment verification system called E-Verify.

E-Verify provides an automated link to federal databases to help employers determine the employment authorization of new hires. E-Verify is free to employers and is available in all 50 states, as well as U.S. territories except for American Samoa and the Commonwealth of the Northern Mariana Islands.

Employers who participate in the E-Verify Program must complete Form I-9 for each newly hired employee in the United States. E-Verify employers may accept any document or combination of documents on Form I-9, but if the employee chooses to present a List B and C combination, the List B (identity only) document must have a photograph.

After completing a Form I-9 for a new employee, E-Verify employers submit an electronic query that includes information from Sections 1 and 2 of Form I-9. After submitting the query, you will receive an automated response from the E-Verify system regarding the employment authorization of the individual. In some cases, E-Verify will provide a response indicating a tentative nonconfirmation of the employee's employment authorization. This does not

> mean that the employee is necessarily unauthorized to work in the United States. Rather, it means that the system is unable to instantaneously confirm that employee's authorization to work. In the case of a tentative nonconfirmation, both you and the employee must take steps specified by E-Verify to resolve the status of the query within the prescribed time period.
>
> You must also follow certain procedures when using E-Verify that were designed to protect employees from unfair employment actions. You must verify all new hires, both U.S. citizens and noncitizens, and may not verify selectively. You may not prescreen applicants for employment, check employees hired before the company became a participant in E-Verify, or reverify employees who have temporary employment authorization. You may not terminate or take other adverse action against an employee based on a tentative nonconfirmation. E-Verify, along with Form I-9, protects jobs for authorized U.S. workers, improves the accuracy of wage and tax reporting, and helps U.S. employers maintain a legal workforce.
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> You can register online for E-Verify at https://www.dhs.gov/E-Verify, which provides instructions for completing the registration process.For more information about E-Verify, please contact USCIS at 1-888-464-4218, or visit the Web site listed above.

As noted at the outset of this paper, its purpose is not to provide analysis or guidance on the viability or legal issues associated with citizenship status and employment. It is provided for local government advisors who may seek additional information or resources about the I-9 documentation process and the procedures for E-verification.

E-Verify Litigation. Although E-Verify has not been made mandatory for local government by federal rules or laws as of the date of this paper, challenges have been lodged regarding mandatory use in certain private sector situations. These challenges do not appear, as of this date, to have resulted in federal requirements being invalidated. In addition. some states have imposed state laws mandating use of E-verify. Similar challenges to those laws also do not appear to have invalidated mandates for their use. As the validity of mandatory E-verify is beyond the scope of this topic, further discussion and analysis is reserved for another day.[3]

Undocumented Worker – Recourse under Federal Labor Laws. Despite good intentions, an employer may hire someone who does not possesses properly documented ability to work in this country. The U.S. Department of Labor has issued FLSA Fact Sheet #48, entitled *Application of U.S. Labor Laws to*

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[3] See, e.g., decision of U.S. District Court for the District of Maryland, Southern Division, dismissing challenge filed by the Chamber of Commerce of the U.S. and others at: http://www.mdd.uscourts.gov/Opinions/Opinions/chamber082509.pdf and a review of state and federal litigation at Ice Miller website: *http://www.icemiller.com/enewsletter/InformedEmployerBriefing/Update_Everif_FormI9_SocSecNoMatch.htm*.

Immigrant Workers: Effect of Hoffman Plastics decision on laws enforced by the Wage and Hour Division, which reads, in part, as follows[4]:

> . . . the U.S. Supreme Court ruled in *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137 (2002) that the National Labor Relations Board (NLRB) lacked authority to order back pay to an undocumented worker who was laid off from his job because of union activities.
>
> In *Hoffman Plastics*, the Supreme Court decided that providing back pay to the undocumented worker would conflict with policies under U.S. immigration laws. Those laws require employees to present documents establishing their identity and authorization to work at the time they are hired. An employer must check those documents and cannot knowingly hire someone who is not authorized to work. . . the employee presented false documentation when he was hired. He was later laid off for trying to organize a union, in violation of the National Labor Relations Act (NLRA). The NLRB sought back pay for a period of time after the layoff. The Supreme Court concluded that back pay should not be awarded "for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud."
>
> The Supreme Court's decision does not mean that undocumented workers do not have rights under other U.S. labor laws. In *Hoffman Plastics*, the Supreme Court interpreted only one law, the NLRA. The Department of Labor does not enforce that law. The Supreme Court did not address laws the Department of Labor enforces, such as the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), that provide core labor protections for vulnerable workers. The FLSA requires employers to pay covered employees a minimum wage and, in general, time and a half an employee's regular rate of pay for overtime hours. The MSPA requires employers and farm labor contractors to pay the wages owed to migrant or seasonal agricultural workers when the payments are due.
>
> The Department's Wage and Hour Division will continue to enforce the FLSA and MSPA without regard to whether an employee is documented or undocumented. Enforcement of these laws is distinguishable from ordering back pay under the NLRA. In *Hoffman Plastics*, the NLRB sought back pay for time an employee **would** have worked if he had not been illegally discharged, under a law that permitted but did not require back pay as a remedy. Under the FLSA or MSPA, the Department (or an employee) seeks back pay for hours an employee has **actually worked**, under laws that require payment for such work. The Supreme Court's concern with awarding back pay "for years of work not performed, for wages that could not lawfully have been earned," does not apply to work actually performed. Two federal courts already have adopted this approach. See *Flores v. Alberton's, Inc.*, 2002 WL 1163623 (C.D. Cal. 2002); *Liu v. Donna Karan International, Inc.*, 2002 WL 1300260 (S.D.N.Y. 2002).

[4] For full text of fact sheet, see http://www.dol.gov/whd/regs/compliance/whdfs48.htm.

> The Department of Labor is still considering the effect of *Hoffman Plastics* on other labor laws it enforces, including those laws prohibiting retaliation for engaging in protected conduct.
>
> For more information about the effect of the ***Hoffman Plastics*** case or the provisions of the FLSA and MSPA, call the Department of Labor's toll free help line at 1-866-4USWAGE (1-866-487-9243); TTY 1-877-889-5627. Information about the FLSA and MSPA is also available on the internet at www.dol.gov.

Though the foregoing is the U.S. Department of Labor's current position one commentator notes:

> The application of employment law to immigrant workers – especially undocumented workers – and their employers is necessarily evolving as the law and legal institutions struggle to catch up with the rapidly evolving economic and social reality. That reality arises from the presence of more than 12 million undocumented immigrants in the United States . . . , who now are a permanent and integral part of our work force and our communities.

The foregoing comment is from the introduction to a paper by Bill Beardall, *Employment Law Principles Applicable to Claims by Low-Wage Immigrant Workers*, University of Texas School of Law, Transnational Worker Rights Clinic, Labor and Employment Law Clinic, presented on May 20-21, 2010. [5]

Conclusion. Given the uncertainty and potential liability facing employers who hire undocumented workers, understanding and compliance with documentation requirements and use of E-Verify may be sound investments in time and effort.

[5] Introduction available at http://www.utcle.org/eLibrary/preview.php?asset_file_id=25227. Full paper and seminar materials available for fee at: http://www.utcle.org/cart_checkout/order_conference.php?conferenceid=913.