

Immigration-Related Employment Discrimination and HR Software Programs



1

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2



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3

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4



U.S. Department of Justice
Civil Rights Division
Immigrant and Employee Rights Section

Employer Hotline: 1-800-255-8155

Worker Hotline: 1-800-255-7688

Calls can be anonymous and language services are available.

www.justice.gov/ier | www.justice.gov/crt-espanol/ier

TTY: 1-800-237-2515

5

Agenda

- What does the Immigrant and Employee Rights Section (IER) do?
- How HR software programs can contribute to discrimination
- How investigations are initiated

6

What does IER Do?

- Enforcement of the INA's anti-discrimination provision. This law prohibits intentional discrimination in employment based on citizenship, immigration status, and national origin.
- Policy work with other government agencies
- Public education on the law IER enforces

7

IER Jurisdiction

8 U.S.C. § 1324b

Citizenship Status Discrimination

Employers cannot discriminate in hiring, firing, recruitment or referral for a fee based on citizenship or immigration status.

Note: Other federal and state laws might provide workers additional protections from discrimination based on citizenship or immigration status.

8

Who is protected from citizenship status discrimination under the INA?

- U.S. citizens
- U.S. nationals
- Recent lawful permanent residents
- Asylees
- Refugees

9

Examples of Citizenship Status Discrimination

- Refusing to hire unless U.S. citizen
- Refusing to hire unless U.S. citizen or lawful permanent resident
- Refusing to hire asylees or refugees
- Refusing to consider non-U.S. citizens who do not have a "green card"
- Preferring Temporary Visa Workers
 - Recruiting in a way that prefers workers on temporary visas over U.S. workers. U.S. workers include non-U.S. citizens protected from citizenship status discrimination, along with U.S. citizens.
 - Only hiring H-2Bs, H-2As, or H-1Bs without considering U.S. workers
 - Imposing more or different qualifications

10

HR Software Programs

Considerations when used for Recruiting

- Online job applications
- Requiring specific immigration status information
- Using dropdown menus that limit who can apply
- Blocking applications based on immigration status
- Also be aware of third party sites posting job ads

11

IER Case (1)

Multiple Employers using Georgia Tech Recruiting Platform (\$1.1 million +)

IER settled with 20 employers for posting ads on Georgia Tech's Career Services platform that limited positions to U.S. citizens, or U.S. citizens and lawful permanent residents, without legal justification. Job platforms also often prevented non-U.S. citizens from applying.

September 2022 [Press Release](#)

12

HR Recruiting Practices

Be cautious about including any language on citizenship or immigration status in job ads.

You may be thinking that you want to broaden the net of who can apply by naming people who need sponsorship, but is that the result?

13

IER Case (2)

In July of this year, IER settled with an IT recruiter after IER's investigation determined that at least three times an IT recruiter excluded asylees, refugees and U.S. nationals when advertising vacancies for only U.S. citizens and lawful permanent residents. IER further concluded that on at least one occasion the recruiter discriminated against U.S. citizens and non-U.S. citizens protected from citizenship status discrimination when it advertised a job seeking only H-1B visa workers.

14

IER Jurisdiction Continued ⁽²⁾

National Origin Discrimination

Employers cannot discriminate in hiring, firing, recruitment or referral for a fee because of national origin. E.g., place of birth, ancestry, native language, accent, perception as looking or sounding "foreign."

15

Examples of National Origin Discrimination

- Refusing to hire someone because of the country they are from
- Refusing to hire someone based on a foreign language accent

16

IER Jurisdiction Continued ⁽³⁾

Unfair Documentary Practices

When verifying employment eligibility, employers cannot ask for more or different documents than necessary, request specific documents, or reject reasonably genuine-looking documents based on citizenship status or national origin.

17

Examples of Unfair Documentary Practices

- Asking workers who select Lawful Permanent Resident in Section 1 of the Form I-9 to show a "green card" or other proof of their immigration status
- E-Verify users asking workers for specific documents based on their citizenship status to trigger the photo match feature
- Requesting that worker present a "green card" or Employment Authorization Document (EAD)

18

Unfair Documentary Practices

Hypothetical: Documents with expiration dates

- Can I refuse to hire someone whose document has an upcoming expiration date?
- Many non-U.S. citizens' work authorization doesn't expire, even if their documentation expires.
- Documents showing temporary work authorization are often renewed.
- Many documents may be valid past the listed expiration date.
- Call IER with questions about acceptable Form I-9 documentation.

19

HR Software Programs

Electronic Form I-9 software programs can contribute to possible discrimination.

Be wary of a software program that collects more data than is required to complete the Form I-9. For example, country of birth or citizenship status.

Also be wary of software programs prompting document requests when not required.

20

IER Case (3)

Staffing firm paid a \$67,778 penalty because employer, after prompt from electronic Form I-9 software, reverified work authorization based on citizenship status.

Should have been based on whether a temporary work authorization documentation subject to reverification presented for Form I-9 Section 2 was expiring.

21

E-Verify-Related Discrimination

IER investigates discriminatory use of E-Verify

- Under a 2010 Memorandum of Agreement, USCIS can refer potential E-Verify-related discrimination to IER.
- IER can refer potential E-Verify misuse USCIS.

22

Social Security Numbers

Working While Waiting to Receive SSN

An employee waiting to receive their Social Security number (SSN) can start working as long as they are authorized to work and have Form I-9 documentation.

Employers can find more information on hiring and paying employees waiting for their SSN from the [Internal Revenue Service](#), [Social Security Administration](#), and the [Department of Homeland Security](#).

23

IER Jurisdiction Continued ⁽⁴⁾

Retaliation or Intimidation

Employers cannot intimidate or take adverse action against individuals for filing a charge with IER, cooperating with an IER investigation, or raising concern about actions that may constitute discrimination.

24

IER Investigations

- Charge-based
- Independent investigation

25

IER Settlements

Know the rules to prevent violations.

- Remedies include injunctive relief, back pay and reinstatement, civil penalties for each person discriminated against.
- In pattern or practice investigations, civil penalties can accumulate quickly.

IER settlements: www.justice.gov/crt/settlements-and-lawsuits

26

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28



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29



30



31