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OSC "Fact Pattern Flyer" About Discrimination: Accidentally Misleading?

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November 30, 2011

The Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) in the U.S. Department of Justice recently published a three-page "Fact Pattern Flyer," listing examples of immigration status and national origin discrimination in employment. In viewing the set of employer actions purely from the point of view of discrimination, the OSC accidentally gives the false impression that certain actions are appropriate if all workers are treated the same, and employers should be counseled not to take that implication.

Misleading Examples. For instance, the list includes when an employer "rejects valid work authorization documents from non-U.S. citizens but accepts the same documents from U.S. citizens," implying that it would be lawful for an employer to reject Social Security cards as List C documents of work authorization for I-9 purposes for ALL workers, whether they check Section 1 to reflect U.S. citizenship, nationality, permanent residence, or foreign national status. But it is unlawful to refuse a Social Security card as a List C document from ANY worker if the document reasonably appears to be genuine and to relate to the worker.

The list finds unlawful discrimination when an employer "Demands that lawful permanent residents present new 'green cards' when theirs expire but does not ask U.S. citizens to produce new documents when theirs expire," implying that it would be okay if the employer required re-verification of everyone whose documents presented in the I-9 process expire, such as green cards and U.S. passports. But it is always unlawful to require ANYONE with permanent status to present new documents for re-verification.

The list includes several actions "on a selective basis," including when an employer "Terminates or suspends employees for whom it receives TNCs," "Pre-screens using E-Verify," "Pre-screens all applicants using E-Verify," "requires employees who receive TNCs to provide additional documentation establishing their work authorization," and "Re-runs employees through E-Verify when re-verifying Employment Authorization Documents, and then terminates or suspends employees who receive TNCs." But it is NEVER appropriate to do these things, even if they were done with ALL applicants or employees.

We can appreciate that DOJ might use unlawful discrimination as a theoretical basis for pursuing action against employers who do these things, but DOJ should be more careful about the implications of what it says in an environment in which employers are naturally confused and easily mislead.

The Problem of "Coming Clean." The OSC opens a special can of worms with its example of an employer who "Fires work?authorized workers for lying about their prior undocumented status, but does not fire other workers for lying about different aspects of their background." Could an employer have a policy NOT to fire ANY workers for past lies in certain circumstances including when presenting a newly obtained legal status in his real identity?

This whole issue arose out of the 1986 immigration amnesty law. It made little sense for Congress to pass a law legalizing persons who had been in the U.S. unlawfully for certain periods of time, only to have their employers fire them when they presented anew their true identity, and a federal court upheld a discrimination charge against an employer who did that. The old INS used to state on its web site that it was acceptable for

an employer to allow continued employment of a worker who presented a new, valid identity, having legalized his status (but warning employers to be mindful of their general honesty policies).

Ironically, when the Justice Department tried to prosecute Tyson Foods in 2003 for knowing employment of unauthorized workers, the prosecutor included this practice as an example of Tyson's alleged callous indifference to the law prohibiting employment of unauthorized workers. On cross examination, Tyson's lawyer elicited testimony from the company's ethics officer (my client) about the company's reliance on the INS web site, projecting on the wall of the courtroom the web site and a follow up email from an INS "business liaison" officer. The jury was flabbergasted at the government's overreaching and acquitted Tyson as a corporation, despite some other blatant practices of a wayward local manager.

After INS was merged into the Department of Homeland Security in 2003, USCIS continued to include on its web site in various places a statement that it was not unlawful to accept a worker's true identity after previously presenting a false identity:

Discovering False Documentation
False documentation includes documents that are counterfeit or those that belong to someone other than the employee who presented them. It occasionally happens that an employee who initially presented false documentation to gain employment subsequently obtains proper work authorization and presents documentation of this work authorization. In such a case, U.S. immigration law does not require the employer to terminate the employee's services. However, an employer's personnel policies regarding provision of false information to the employer may apply. The employer should correct the relevant information on the Form I-9.

USCIS removed this statement around 2009 without explanation, and it has not included this language or anything close in its Handbook for Employers that guides employers in the I-9 process.

Some ICE investigators have not seemed to appreciate the "Catch 22&" an employer faces when a worker reveals past false identity and newly lawful status. I have seen ICE use evidence of the practice of retaining such employees as grounds for prosecution, even long after the Tyson case. I have used USCIS' former web site as proof to DOJ prosecutors of the government's sanction of the practice and of the pitfalls of prosecution on that basis, with success. I had wondered where the government stood on the issue now, and the new OSC discrimination listing seems to give cover to employers who don't want to lose a good employee who now has become legalized and wants to "come clean."

But this does not mean ICE likes it, and for various reasons employers should consider policies to treat all serious lying as a basis for termination, including resume fraud and false identity. Employers also should consider a policy that prior false statements are not necessarily grounds for termination if revealed in the context of the worker volunteering the truth. And an employer considering a policy to accept newly confirmed authorized identities should consider limiting the policy to employees who volunteer this, not those who come up with a new identity only when confronted with problems about the currently used identity.

Obviously, the Office of Special Counsel is trying to help by publishing examples of what constitutes unlawful discrimination, but employers need to avoid becoming confused by the possible implications of the listing in the "Fact Pattern Flyer."