Global Citizens: Employ Them Well, Treat Them Right

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Can Employers Require Citizenship For Any Job?

- Federal government
  - Restrictions found in appropriations legislation
  - US funds cannot be used to pay employee compensation for officers or employees of US government (or agency if the government owns stock) for duty in continental US unless:
    - Citizen, or
    - Lawfully admitted for permanent residence and seeking citizenship, or
    - Refugee or granted asylum AND declaration of intention to become lawful permanent resident and then citizen, or
    - A person who owes allegiance to the United States
Most other employers
- May not require citizenship if the candidate has valid identity and work authorization documents
- There are occasional state law citizenship requirements such as law enforcement

The “Buy American and Hire American” Executive Order does not (yet) create new preferences
- “it shall be the policy of the executive branch to rigorously enforce and administer the Laws governing entry into the United States of workers from abroad”
Is Citizenship Discrimination Always Unlawful?

- Federal law allows a citizenship preference between equally qualified candidates
  - 8 USC 1324b
- Federal law does not prohibit citizenship status discrimination in the case of a permanent resident who does not apply for naturalization within 6 months of eligibility, or an alien who has timely applied but not been naturalized within 2 years
  - 8 USC 1324b
- The INA’s provision against citizenship or immigration status discrimination applies to employers with four or more employees
  - 8 USC 1324b
42 USC 2000e-2(g)

...It shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.
Employment Eligibility Verification & I-9

- I-9 establishes employment authorization and identity
- USCIS form, updated July 17, 2017
  - Check the date on your forms!
  - www.uscis.gov/i-9
- Bookmark the instructions
  - Handbook for Employers M-274
  - Latest update 01/11/2018
  - Now online YAY!
  - https://www.uscis.gov/i-9-central/handbook-employers-m-274
I-9 Requirements

- It is illegal to discriminate based on citizenship status (most of the time), immigration status, national origin
- Employer is not permitted to specify which documents the candidate may present to establish authorization and identity
- Employer must accept the documents if they reasonably appear to be genuine and relate to the candidate
  - If a document does not pass the smell test, employer must give the candidate an opportunity to present other documents
- Employer may, but is not required, to keep copies of the documents
- Required for all new employees hired after November 6, 1986
- Must be completed WITHIN 3 BUSINESS DAYS OF STARTING WORK
  - Not earlier
  - Not later
Retention (Documents, Not Employees)

- As long as the employee is working PLUS
  - 3 years from hire or 1 year from termination (whichever is later)
- I-9 forms are not submitted or filed with government – employer retains
- You should store completed Forms I-9 and any corresponding documentation, such as copies of documents, in a manner that fits your business needs and satisfies the requirement to make Forms I-9 available for inspection
**Inspection (Documents, Not Employees)**

- You get 3 business days to provide them on request to:
  - Department of Homeland Security
  - Immigrant and Employee Rights Section of Department of Justice
  - Department of Labor

- When officials arrive to inspect an employer’s Forms I-9, the employer must:
  - Retrieve and reproduce electronically stored Forms I-9 and any other documents the officer requests;
  - Provide the officer with the necessary hardware and software to inspect electronic documents; and
  - Provide the officer with any existing electronic summary of the information recorded on the employer’s Forms I-9
What Else?

• Don’t forget the widget
  o https://www.uscis.gov/i-9-central/form-i-9-desktop-widget
  o One click gets you to an online fillable form

U.S. Citizenship and Immigration Services
Internet-based system that compares information from Forms I-9 to data from BOTH Homeland Security and Social Security Administration records to confirm eligibility

- E-Verify is presently voluntary with some exceptions
  - Some federal contractors are required to use it
    - Look for FAR 52.222-54 in the contract
  - Some state laws require E-Verify
    - Oregon 2016 initiative to require E-Verify was withdrawn before election
    - 2017 measures would have affected public employment
    - Some Washington counties have required E-Verify for some public works contracts

- Webinars
  - https://www.uscis.gov/e-verify/e-verify-webinars/take-free-webinar
- Current administration proposes to make E-Verify mandatory
Costs of Non-Compliance

- DLS Precision Fab v. USCIS (9th Circuit)
- Penalties for 489 I-9 violations and 15 instances of continuing employment of ineligible workers ($305,050)
- Inability to pay is not a defense
- Good faith is not a defense to substantive violations
- Courts will not overturn agency determination of civil penalty unless it is unwarranted in law or unjustified in facts
- A corporation is responsible for the acts (or failures) of its employees
Here’s What Happened...

- DLS hired a well-credentialed human resources director
- Unbeknownst to the company, however, he shirked his responsibility to ensure the company’s compliance with the INA
- To the point, as later described by DLS, “of literally stuffing the government’s correspondence in a drawer and never responding”
- “DLS is not the first employer to hire an employee with the expectation that he or she will comply with the law only to be disappointed, nor is it likely to be the last. More broadly, DLS asks us to disregard the company’s responsibility for hiring and supervising its own employees. The HR director was acting as DLS’s agent, and his failure to perform his responsibility may properly be imputed to DLS.”
53-year-old employee had a 32-year history with employer

Employer resolved termination with agreement to reinstate, provided employee could pass e-verify

IRCA has a regulatory exception for employees reinstated following a resolution or settlement
(viii) An employer will not be deemed to have hired an individual for employment if the individual is continuing in his or her employment and has a reasonable expectation of employment at all times.

(A) An individual is continuing in his or her employment in one of the following situations:

\[\ldots\]

(5) An individual is reinstated after disciplinary suspension for wrongful termination, found unjustified by any court, arbitrator, or administrative body, or otherwise resolved through reinstatement or settlement[.]
The penalty provisions set forth in section 274A(e) and (f) of the Act for violations of sections 274A(a)(1)(B) and 274A(a)(2) of the Act shall not apply to employees who were hired prior to November 7, 1986.
Intimidations With Immigration Status

- Cinelease Inc. (NLRB)
- It is a violation of Section 8(a)(1) to threaten employees that engaging in protected activity will lead to scrutiny of their immigration status, even if the employees are not undocumented (i.e. are working lawfully)
- Even documented workers may be intimidated by threatened scrutiny of their immigration status
- New legal residents or citizens may feel intimidated by the prospect of having their immigration history examined in a public proceeding
Did I Hear Somebody Say DACA (Deferred Action For Childhood Arrivals)?

- Congress controls immigration
- In the face of Congressional inaction
- 2012 program introduced by executive order to provide temporary relief for undocumented children brought to US by undocumented parents
- DACA provided temporary but renewable work permits to qualifying applicants
- DACA phase out originally targeted for March 2018, but failed to replace the program by then
As long as a candidate has a still-valid work permit, the candidate is authorized to work.

Once the work permit has expired, the worker is no longer authorized to work and must be laid off or terminated.

The unknowns:
- Will Congress act?
- Will the litigation that was promptly filed have any effect?

If you want to help:
- You can offer help, but
- You should not be asking about DACA status
- Best practice: a generally available list of resources
- Best legal practice: don’t make promises unless you can see into the future
Verification And No-Match: Just Cause Trouble Comes Visiting Doesn't Mean You Have to Offer It a Place to Sit Down
SSA allows verification of accuracy of social security number

Verification for a minor under age 18:
- Obtain appropriate consent from a parent or court appointed guardian
- Obtain proof of relationship, such as child’s birth certificate and parent’s driver’s license or court document showing guardianship and a driver’s license

When can you verify:
- SSA: says “this option is ideal to verify new hires”

E-verify confirms eligibility to work
- Involves Homeland Security
When Do I Do This?

- Federal law prohibits employers from conducting the Forms I-9 and E-Verify processes before the employee has accepted an offer of employment.
  - M-274 (employer handbook) says:
    - “Ensure that the employee completes Section 1 of Form I-9 at the time of hire. ‘Hire’ means the beginning of employment in exchange for wages or other remuneration. The time of hire is noted on the form as the first day of employment. Employees may complete Section 1 before the time of hire, but no earlier than acceptance of the job offer.”
Sometimes downstream SSA may send a letter advising that the identifying number is not a match for a validly issued social security number, or was not issued to that person.

You cannot disregard the information in a No-Match letter:
- If the employee is unauthorized, you may not continue to employ him/her.

BUT
- At the same time you cannot discriminate.

Take steps to resolve the question:
- Check your records to see whether this was your error:
  - Promptly (SSA suggests 30 days)
- If you do not see an error, ask your employee to confirm whether your records are accurate.
- If they are, ask the employee to resolve the issue with SSA.
- [https://www.ssa.gov/employer/ICEinsert.pdf](https://www.ssa.gov/employer/ICEinsert.pdf)
If Your Employee Resolves With SSA

- Check the no-match letter for any instructions
- AND
- Follow them
If You Don’t Resolve In A Reasonable Time (90 Days?)

- Do a new I-9
  - Do not accept a document that uses the questioned SSN
  - But you still don’t get to tell the employee what documents
Make Sure Your Procedures Are Uniform

- Information from SSA alone is not sufficient to make a statement about an employee’s immigration status
- A mismatch is not – in and of itself – a basis to take adverse action against an employee
  - BUT if you have actual knowledge the employee is unauthorized, you are required to act on that information
- Apply policies and procedures uniformly and consistently to all workers
Don’t Yet Have A Number?

- Employers may allow candidates to begin work if they have applied for a social security number but don’t yet have the number.
Some Special Rules Related To H-1B Visas: Check Out The Wage And Hour Division

- **H-1B**: Non-immigrant visa for specialty occupations
- Employers cannot use H-1B as a cheaper workforce
  - Employers must attest they will pay equal wages (or prevailing wages)
- Employers cannot use H-1B if there is an equally qualified US workforce
- US workers in equivalent jobs may not be laid off within 90 days (before or after) of employer’s filing a petition
  - Effective April 2017 USCIS established a tip line to report program abuse
    - There is also a reporting form (WH-4) to report violations
- Employer must pay all expenses for obtaining authorization
**H-1B Activity**

- Employers need to show that the position is a “specialty occupation”
  - Position must be sufficiently complex
- Specialty occupations are thought to command higher pay
  - Employers who are paying entry level may have to explain why
- Workers cannot apply for H-1B; employers need to apply
- There MUST be an employer-employee relationship
  - H-1B workers cannot be classified as independent contractors
Employers are required to verify that the individual they plan to employ or continue to employ is authorized to accept US employment:

- Temporary (Nonimmigrant) Worker
- Permanent (Immigrant) Worker
- Students and Exchange Visitors
- Temporary Visitors for Business
National origin is a protected class under state and federal law.

National origin includes:
- The individual’s or his/her ancestor’s place of origin
- Having the physical, cultural, or linguistic characteristics of a national origin group

Additional concerns include:
- Marriage to or association with persons of a national origin group
- Membership in or association with an organization identified with or seeking to promote the interests of national origin groups
- Attendance at or participation in schools or places of worship generally used by persons of a national origin group
National Origin Differs From Citizenship

- National origin discrimination includes discrimination on the basis of
  - Place of origin
  - Ethnicity or national origin group
  - Physical, linguistic, or cultural traits
“English only” rules are narrowly permitted
- Is English necessary for the safe and efficient performance of the job?

“English fluency” rules are more broadly permissible
- Is fluent English needed to perform the job effectively?

Foreign accent considerations
- Evaluate: does the accent seriously interfere with the employee’s job performance?
National origin may be a bona fide occupational characteristic
  ○ But don’t count on it
Height, weight requirements may exclude some individuals because of their national origin
  ○ Employers need to evaluate these requirements for adverse impact
Ethnic slurs and other verbal or physical conduct relating to an individual’s national origin constitute harassment when this conduct: (1) has the purpose or effect of creating an intimidating, hostile or offensive working environment; (2) has the purpose or effect of unreasonably interfering with an individual’s work performance; or (3) otherwise adversely affects an individual’s employment opportunities.

An employer is responsible for acts of harassment in the workplace on the basis of national origin if it knows or should have known of the conduct, unless the employer took immediate and appropriate corrective action.

An employer may also be responsible for the acts of non-employees if the employer, its agents or supervisory employees, knows or should have known of the conduct and fails to take immediate and appropriate corrective action.
US laws do not always apply extra-territorially
- Title VII 1991 amendment provides the law applies to US citizens employed abroad by US employers
  - But excepts actions if compliance with Title VII would cause the employer to violate the law of the host country
- Benefit plans might not transfer to the new country
- Become familiar with the host country’s payroll and working conditions requirements
- Get good tax advice: you may be filing US tax returns, paying US taxes and doing the same for the host country
  - From the IRS: If you are a US citizen or resident alien living or traveling outside the United States, you generally are required to file income tax returns, estate tax returns, and gift tax returns and pay estimated tax in the same way as those residing in the United States.
~ Thank You ~

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