New Jersey Law Journal

VOL. 204 - NO 3 MONDAY, APRIL 18, 2011 An ALM Publication

EMPLOYMENT & IMMIGRATION LAW

Recruiting Do's and Don'ts for Job Applicants Requiring Visas

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Employers often have legitimate business reasons for not wanting to hire employees who will require some kind of visa sponsorship. However, the current law makes it difficult to screen out these potential employees in the hiring process. Until recently the following two questions, sanctioned by the Office of Special Counsel for Immigration-Related Unfair Employment Practices, Civil Rights Division, U.S. Department of Justice (hereinafter OSC), were the only real accepted means for prehire screening: (1) Are you authorized to work in the U.S.? and (2) Will you now or in the future require sponsorship for employment visa status (e.g., H-1B visa status)?

While these questions ensure the employer is not in violation of the antidiscrimination provisions of the Immigration and Nationality Act (INA), they often fail to uncover all the situations that would potentially require the employer's involvement to ensure the employee's continued work authorization. OSC has indicated employers should now be able to go beyond these two questions in the course of recruitment to implement a more robust screening process while still adhering to the law. In fact, they have set forth additional permissible screening practices that employers should feel comfortable incorporating into their standard hiring process.

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Verification Required Under the Immigration and Nationality Act

After the Immigration Reform and Control Act (IRCA) of 1986 became effective, employers must verify that their new hires are authorized to work in the U.S. by complying with what is commonly known as the I-9 process. This requires the employer and the employee to attest that the employee is authorized to work in the U.S. on Form I-9. In order to make this attestation, the employer must first review one or more of the approved documents furnished by the employee that establish the employee's identity and work authorization. Such documents include a U.S. passport, permanent residence card (green card), Social Security card or driver's license. The employer must retain the Form I-9 for inspection and update it as necessary. Noncompliance can lead to an investigation and costly penalties. As evidence of the government's continued commitment to the program, on Feb. 18, Immigration and Customs Enforcement (ICE) stated that it will be significantly expanding audits of these records.

While employers are required to verify that their employees are authorized workers, they are not permitted to discriminate. Specifically, employers cannot discriminate on the basis of national origin or the citizenship of protected persons, which include U.S. citizens, recent lawful permanent residents, those who apply for naturalization within six months of eligibility, refugees and asylees. Employers are also prohibited from engaging in document discrimination during the verification process when done with discriminatory intent. Thus, employers are not permitted to ask for more documents than required on Form I-9, request specific documents or refuse documents that appear valid on their face. Discriminatory hiring practices can also result in investigations and penalties.

Can Employers Screen Out Individuals Who Will Require Visa Sponsorship?

Employers may have many legitimate and legal reasons for not wanting

to hire employees who will require visa sponsorship or are in a pending visa process and, consequently, want to screen out such individuals during the hiring process.

Some of these reasons include: the cost of attorney and government filing fees, the chance that employment might be cut short by a denied petition, the potential waste of training costs if an employee's renewal or work permission is refused, the employer's lack of access to an application of the employee, the desire to avoid export control issues that arise when controlled technology or technical data is provided to certain foreign nationals, and because the employer prefers to hire American citizens and other U.S. workers.

The law allows employers to screen out those individuals who are not U.S. citizens, recent lawful permanent residents and those that apply for naturalization within six months of eligibility, refugees and asylees. However employers still must not discriminate on the basis of national origin. So what questions can an employer ask to effectively weed out undesired applicants while not engaging in discrimination?

The Reverence for Two Questions

It was in 1998 that OSC blessed two questions that employers could pose to screen potential hires for issues surrounding work authorization:

- Are you legally authorized to work in the United States?
- Will you now or in the future require sponsorship for employment visa status (e.g., H-1B visa status)?

Employers now routinely ask these two questions in the hiring process. However, these questions do not identify every instance that would require the employer's own action to ensure the potential hire's continued lawful employment, so employers have persisted in their a desire to gather additional information.

Moving Beyond the Two Questions

It is possible to move beyond the two questions to screen out additional applicants and still comply with the INA. In response to inquiries from various practitioners, the OSC has approved the following additional questions that may provide employers with more useful information about potential hires:

- Will you now or in the future require sponsorship for an employment visa? If you have a visa, how much time remains on your current visa?
- Will you now or in the future require sponsorship for an immigration-related employment benefit? For purposes of this question "sponsorship for an immigration-related employment benefit" means "an H-1B visa petition, an O-1 visa petition, an E-3 visa petition, TN status and 'job flexibility benefits' (also known as I-140 portability or Adjustment of Status portability) for long-delayed adjustment of status applications that have been pending for 180 days or longer." (Please ask us if you are uncertain whether you may need immigration sponsorship or desire clarification.)

The OSC has also suggested that employers state their hiring policies directly on a job application. For example, "This employer will not sponsor applicants for the following work visas:_____." However, the employer must not ask applicants to indicate their status or choose their status from a list of specific visa statuses.

The OSC's additional suggestions are permissible because none implicate national origin discrimination, nor do they refer to protected individuals with respect to citizenship status. Moreover, they are useful because they are explicit about time constraints, force applicants to think about sponsorship more broadly and provide an opportunity for the employer to state his hiring policy at the outset.

Questions NOT To Ask

Through its advisory letters, the OSC has stated that the following questions are impermissible as indicative of discriminatory hiring practices:

- If hired, can you provide proof that you are legally able to work in the U.S. for at least 12 months?
- Are you prevented from lawfully becoming employed in this country because of your visa or immigration status? (Proof of citizenship will be required upon employment.)
- Please specify your citizenship or immigration status.
- Do you now or at any time in the future require the filing of any application or petition with U.S. Citizenship & Immigration Services (e.g., Form I-765, application for employment authorization)?

Now that employers are required to make an attestation with regard to export control directly on Form I-129 for foreign nationals in H, L or O status, they are reminded that they may need to seek export licenses to employ these foreign nationals. As such, issues regarding national origin and citizenship status may be essential in the hiring process. It is not entirely clear under what circumstances an employer can ask a question, as part of prehire screening, to determine the potential need for an export license.

General Practices

As a general rule, employers should treat all people the same when announcing a job, taking applications and interviewing applicants. Also, employers should give out the same job information over the telephone to all callers, and use the same application form for all applicants. By making the process as uniform as possible, employers can protect themselves from claims of national origin and citizen status discrimination.

Furthermore, employers should always avoid "citizen-only" or "permanent resident/green card-only" hiring policies unless required by law, regulation or government contract. In most cases, it is illegal to require applicants to be U.S. citizens or have a particular immigration status.

Employers should keep in mind that U.S. citizenship, or nationality, belongs not only to persons born in the U.S., 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. Furthermore, the U.S. government grants citizenship to legal immigrants after they complete the naturalization process. Therefore, employers should avoid job advertisements that

say "only U.S. citizens," "citizen requirement," "only U.S. citizens or green card holders" and any other similar language unless U.S. citizenship is required by law, regulation, executive order or government contract.

Although an employer has the legal right to choose not to hire an applicant that would require visa sponsorship, employers must still be careful not to engage in national origin discrimination. The best way to remain compliant with the INA, yet still screen out applicants that potentially require employer involvement to maintain the applicant's work authorization, is for an employer to implement the questions suggested above into a standard job application form that all employees must complete. In addition, an employer must ensure that it does not ask its job applicants any of the "illegal" questions (or their equivalents) discussed above. By making the hiring process as uniform as possible, the employer can lawfully screen out nonimmigrant applicants prior to performing the required employment authorization verification. ■