

Lawyer Insights

DOJ Bias Case Shows Risks Of I-9 Noncompliance

By Natalie S. Tynan and Elizabeth G. Oliver
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On July 30, the U.S. Department of Justice announced a settlement agreement with United General Bakery Inc., a baked goods supplier based in Phoenix, Arizona. The agreement resolved a DOJ investigation into whether the company discriminated against authorized workers based on their citizenship status when verifying work authorization.

United General Bakery was fined \$45,000 for this and other violations. While anti-discrimination laws extend beyond immigration issues, this enforcement action began as an immigration-related matter and turned on how the bakery completed employment eligibility verification of employees.

In recent years, companies have seen an increase in immigration enforcement actions focused on curbing illegal immigration and punishing those who facilitate it. Work site investigations, I-9 audits, and criminal and administrative workplace arrests surged by up to 750% in fiscal year 2018 over the previous year.

To protect their businesses, employers must take a holistic approach to I-9 compliance, including understanding the different but overlapping roles of the diverse government agencies with authority over workplace compliance. Knowledge is power, and it will help companies survive government audits.

What government agencies are involved?

Under the Immigration and Nationality Act, all employers must verify the employment eligibility and identity of new hires through the I-9 process. U.S. Immigration and Customs Enforcement has primary jurisdiction over enforcement of the I-9 rules and work site compliance in general.

However, other agencies, including the Social Security Administration, U.S. Department of Labor and Internal Revenue Service, have jurisdiction over some elements of work site enforcement. The Immigrant and Employee Rights Section of the DOJ's Civil Rights Division plays a significant role when it comes to investigating and prosecuting cases of I-9 discrimination and took the lead in the United General Bakery investigation and settlement.

What is I-9 discrimination?

This settlement focused on the bakery's disparate treatment of and requirements for individuals completing I-9s. The INA prohibits discrimination¹ against foreign nationals, provisions that play a crucial part in I-9 enforcement. Specifically, employers may not have I-9 policies that result in unequal treatment

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of employees based on their citizenship, immigration status or national origin.

The INA also prohibits employers from making unnecessary requests for documentation when verifying employment authorization and identity, having unfair documentary practices, or engaging in intimidating or retaliatory behavior. The INA's prohibition on discriminatory documentation practices applies to businesses that have at least four or more employees.²

The investigation into United General Bakery serves as a case study of discriminatory behavior in multiple aspects of the I-9 process.

What are examples of practices that can result in penalties?

Unfair documentary practices include requesting specific documents based on citizenship or immigration status or rejecting valid documents in favor of others. This often occurs because companies are eager to comply with the law prohibiting them from knowingly employing unauthorized workers; however, regardless of intent, it is discrimination. The IER penalizes companies quite often for rejecting valid documents, such as state identification cards, birth certificates, driver's licenses and unrestricted Social Security cards, in favor of an employment authorization document, especially when the individual "appears" to be a foreign national.

In the investigation into United General Bakery, the DOJ found an established practice of requesting that lawful permanent residents provide "additional, unnecessary"³ documents when their permanent resident cards expired. This is a major source of confusion for many companies. Since permanent residents are permanently authorized to work in the United States, in addition to discrimination, it is a substantive I-9 violation to reverify their employment eligibility.

Under the INA, employers must provide employees with the Lists of Acceptable Documents and allow them to select which documents to present in order to demonstrate their work authorization and identity. It is a statutory and regulatory violation when an employer mandates that employees provide specific documents from the lists, and it is discrimination when an employer requires foreign nationals to provide specific documents while holding U.S. workers to a different standard.

United General Bakery ran afoul of the anti-discrimination provisions by requiring non-U.S. citizens to present specific forms of documentation as proof of their employment authorization, rejecting other equally valid and legally acceptable documents.

In addition, the company required additional documentation from foreign nationals only, while setting a different standard for U.S. citizen workers, further compounding the discrimination. The bakery was also fined for retaliation and intimidation of workers.

What are the penalties for I-9 violations?

Potential penalties can include civil fines of up to \$2,000 for each individual who is discriminated against. In addition to the imposed monetary penalty, the bakery must train their human resources department on the INA requirements regarding anti-discrimination and are subject to compliance monitoring by the DOJ during a two-year period.

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What if my business is served with a notice of inspection?

ICE's first step in an administrative inspection is to serve a notice of inspection compelling the business to produce Forms I-9 within at least three days or by the date scheduled in the NOI. ICE also typically requests the company's articles of incorporation, business license, list of current employees and payroll copy.

The boilerplate language of the NOI states that if a company utilizes software for the electronic generation and storage of Forms I-9, it must also present "the name of the software and vendor utilized; the internal business practices/protocols related to the generation of, use of, storage of, security of, and inspection and quality assurance programs for your electronically generated Forms I-9." In addition, ICE requests documentation of internal business practices related to the completion of Forms I-9.

How can U.S. employers avoid discrimination in the I-9 process?

When an employer presents employees with a Form I-9, that form must always be accompanied by the official I-9 Lists of Acceptable Documents. Employers may not specify which documents are preferred, nor may they accept only a limited subset of documents. Likewise, when reverifying employment, employers may not specify what documents the employee should provide.

It behooves employers to conduct a line-by-line review of any I-9 standard operating procedures or instruction manuals in order to ensure that policies are in line with the INA. Employers should avoid potentially discriminatory language in their procedures and instructions for HR personnel who complete Section 2 of Form I-9.

Employers must also hire without preference to citizenship status and must treat each new employee the same as others in regard to keeping copies of employment eligibility documents. Once such policies are reviewed and in place, it is important to make certain that all HR personnel and managers who administer the I-9 process are aware of the anti-discrimination policies, especially those who complete and sign Section 2 of the form, "Employer Authorized Representative Review and Verification."

Employers also need to keep in mind that posting jobs with language such as "only open to U.S. citizens" or "must present U.S. birth certificate" risks violation of the INA. Some jobs — most commonly, government positions, or positions with government contractors and subcontractors — require security clearance for which only U.S. citizens can be considered. Only if citizenship status is a legitimate bona fide occupational qualification may an employer discriminate against other protected individuals.

What types of companies are the target of work site enforcement actions?

Federal agencies that have jurisdiction over work site compliance are examining businesses with heightened scrutiny of their hiring practices. No business is immune. ICE and the DOJ continue to expand their enforcement efforts beyond industries that have traditionally relied on large numbers of low-skilled foreign workers, such as agricultural, manufacturing and retail, to those that have not previously been the targets of investigation, such as information technology and telecommunications, and even to those that have only a handful of foreign workers.

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Notes

¹ 8 U.S.C. §1324b

² United States Citizenship and Immigration Services' Handbook for Employers (Form M-274), Section 11.2.1, "Unfair Documentary Practices," <https://www.uscis.gov/i-9-central/1121-unfair-documentary-practices>.

³ DOJ Press Release, "Justice Department Settles Immigration-Related Discrimination Claim Against Arizona Baked Goods Supplier," <https://www.justice.gov/opa/pr/justice-department-settles-immigration-related-discrimination-claim-against-arizona-baked>.

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