Call for Commentary to Office of Special Counsel for Immigration-Related Unfair Employment Practices on Employer I-9 Self-Audits

The Office of Special Counsel for Immigration-Related Unfair Employment Practices of the U.S. Department of Justice—Civil Rights Division is accepting comments as it prepares to develop guidelines on the topic of employer self-audits of I-9 forms. Comments can be submitted by email to: Osc.Engagement@usdoj.gov, and must be received by **Friday, November 9, 2012.**

The Dolores Street Community Services, Impact Fund, Lawyers' Committee for Civil Rights of the San Francisco Bay Area, Legal Aid Society-Employment Law Project, National Employment Law Project, National Immigration Law Center, and Women's Employment Law Clinic of Golden Gate University School of Law encourage advocates for low-wage immigrant workers to timely submit comments to the OSC.

Background:

The OSC is responsible for enforcing the anti-discrimination provision of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b, which prohibits discrimination in hiring, firing, or recruitment or referral for a fee that is based on an individual's national origin or citizenship status. The statute also prohibits unfair documentary practices during the employment eligibility verification process (I-9 verification process) on the basis of citizenship status or national origin, and retaliation or intimidation on these grounds.

Employers may reverify, or ask workers to produce their I-9 work authorization documentation after initial verification at time of hire, in limited circumstances. These circumstances include situations where work authorization documents had an expiration date at the time of hire (except for documentation of legal permanent residents (LPRs), whose authorization does not expire), an ICE I-9 audit, or if an employer discovers that I-9 forms or accompanying documents for some employers are missing or incomplete during the course of conducting a self-audit of all I-9 forms in a non-discriminatory manner.

Some employers, however, may use the opportunity to conduct I-9 self-audits in a retaliatory fashion after employees have filed workplace-based complaints, or in the midst of labor disputes or collective bargaining. Employers may also provide little to no notice to workers about the reason for the I-9 reverification, and fail to provide a reasonable period of time for employees to respond to the self-audit. Through suggested comments, we urge OSC to fulfill its core mission of protecting workers' rights by supporting the robust protection of labor standards.

Key Points to Raise with OSC:

- **OSC should warn employers of the labor and employment law consequences of self-initiated I-9 audits in response to employee complaints or organizing.** Employer retaliation through the use of I-9 reverification may often occur in workplaces involving other forms of workplace violations and abuse. Federal and state labor and employment statutes prohibit retaliation by employers against employees for engaging in protected

activity. One additional way that OSC can do so is by incorporating questions into hotline intake that would elicit from employers whether or not the workplace is currently the site of an employment dispute or worker complaint.

- **OSC should warn employers against verifying the entire workplace to avoid liability for anti-discrimination complaints under INA or other federal or state civil rights protections, particularly if there is an underlying employment dispute.**
- OSC should warn employers that asking for forms of documentation other than those required by law, specifying which documents are acceptable, asking for documentation when it has already done so, or refusing to accept documentation that is legitimate on its face, may be considered discrimination and/or document abuse under 8 U.S.C. § 1324b.
- **OSC should engage in multi-agency collaboration to protect the rights of all workers.** OSC should thus adopt a multi-agency approach to combating employer retaliation, and work in collaboration other federal agencies, including the U.S. Department of Labor, Equal Employment Opportunity Commission, the National Labor Relations Board, and Immigration and Customs Enforcement, which recognize the importance of enforcing labor standards for all workers regardless of immigration status. *See* Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites (Dec. 7, 2011), *available at* http://www.dol.gov/asp/media/reports/DHS-DOL-MOU.pdf; Immigration and Customs Enforcement, Operating Instruction 287.3a, "Questioning Persons during Labor Disputes," *available at:* http://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0- 0-53690/0-0-0-61072/0-0-0-61097.html.
- **OSC should advise employers to provide employees with sufficient notice and opportunity to inspect and correct I-9 forms in question.** Consistent with safe harbor regulations adopted by the EEOC and Social Security Administration for no-match letters, OSC should recommend that employers provide a 90-day period for employees to correct I-9 forms in question. *Aramark Facility Servs. v. Serv. Empl. Int'l Union*, 530 F.3d 817 (9th Cir. 2008); *Id.* at 829, n.8 (citing EEOC policy recommendation to provide 90-day deadline for employees to 'collect, organize, deliver documentation, and perhaps meet with the relevant federal agency and/or seek legal advice while maintaining their work hours."). The safe harbor period should begin after employers have provided employees with the following information in a language spoke by the worker(s):
    1) basis of inaccuracy,
    2) a true and complete copy of the I-9 documents in question,
    3) the employer's reason for the I-9 audit, and
    4) whether the audit is the result of a self-initiated audit or by ICE.
- **OSC should clearly state that re-verification following reinstatement is prohibited.**
- **OSC should warn employers about the questionable validity of I-9 screening information provided by third party auditors**. Employers have increasingly turned to third-party auditors to conduct internal audits, which may raise concerns about the origin and accuracy of data used for audits.

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