I Can't Ask That? - Taking a Closer Look at Citizenship and National Origin Discrimination

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When seeking a qualified candidate for an open position, Human Resources professionals are aware that it is generally impermissible to inquire about or consider an applicant?s race, sex, religion, or disability during the interview and application process. However, many Human Resources professionals may be unaware that certain questions regarding an individual?s citizenship or immigration status are also prohibited and may expose an employer to liability.

Under the Immigration and Nationality Act (?INA?), as amended by the Immigration Reform and Control Act of 1986 (?IRCA?), it is illegal for employers to discriminate against an applicant for employment or an employee because of his or her status as a U.S. citizen, lawful permanent resident, asylee, or refugee (?IRCA-protected Individuals?). Specifically, IRCA-protected Individuals cannot be discriminated against with respect to hiring, firing, recruitment, or referral for a fee based on their citizenship or immigration status.

The INA (as amended) also protects all work-authorized individuals, including individuals who are not IRCA-protected Individuals, from document abuse and national origin discrimination. That is, during the Form I-9 process, an employer cannot refuse to accept supporting documents from an employee that relate to the employee and appear genuine, ask an employee to provide more supporting documentation than is legally required, or ask an employee to provide a specific type of documentation. For example, an employer cannot ask a U.S. permanent resident to provide his or her permanent resident card to complete Section 2 of the Form I-9. Such employee may present any acceptable List A or List B and List C document. Employers also are prohibited from discriminating against an applicant or employee because of his or her actual or perceived national origin; for example, not hiring someone because he or she has a Hispanic or Latino accent.

This, however, does not mean that all citizenship and immigration status inquiries are off limits. An employer may ask any candidate for employment if he or she is legally authorized to work in the United

States, and an employer may also ask a candidate for employment if he or she will require sponsorship for employment authorization now or in the future. For example, an applicant for employment who is present in the United States in H-1B status pursuant to a valid H-1B visa generally will require a new employer to file a new H-1B petition with the U.S. Citizenship and Immigration Services (?USCIS?) to work for the new employer. That is, this applicant will require *sponsorship* to work for the new employer lawfully in the United States. Moreover, such individual also may require sponsorship to obtain a green card in the future. Yet, employers must be careful not to inquire about the impending expiration of an individual?s employment authorization document or reject a document based on a future expiration date, as this may constitute a form of document abuse. Employers also are permitted to have a policy of only hiring IRCA-protected Individuals; provided, however, that it is applied consistently to all job applicants.

In light of the foregoing, employers, Human Resources professionals, and recruiters should carefully analyze their current employment and hiring policies, as well as their pre-employment inquiry practices during the hiring and employment verification processes to ensure that they are compliant with the INA.

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