



GUIDANCE FOR ILLINOIS RESIDENTS:
IMPACT OF IMMIGRATION STATUS ON EMPLOYEES’
RIGHTS IN THE WORKPLACE

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Executive Summary

In light of the recent national debates regarding authorized and unauthorized workers and the on-going litigation concerning the status of the Deferred Action for Childhood Arrivals (“DACA”) program, many workers and employers in Illinois are trying to better understand the intersection between their rights and obligations under federal immigration law and the protections offered to employees by state and federal workplace laws.

The following guidance discusses the law as it relates to (1) employment authorization for non-citizen workers, (2) the rights that employees—no matter their immigration status or employment authorization—retain in the workplace, and (3) various issues regarding enforcement of immigration laws in the workplace.

- Federal law requires employers to verify every employee’s authorization to work within the United States at the time of hire. Employers must ask for certain documentation regarding employment authorization when an employee is hired. If the employment authorization the employee initially provides has an expiration date, an employer must re-verify employment authorization prior to that expiration date to ensure that authorization has been renewed or re-issued. Employees who provide employment authorization documentation that is not genuine or that does not belong to them may be subject to fines or criminal penalties.
- Once hired, all employees—regardless of immigration status or employment authorization—have certain legal rights. These rights include the right to minimum wage, overtime wages for hours worked in excess of 40 in a week, safe and healthy working conditions, compensation for injuries suffered on the job, and freedom from unlawful discrimination in their workplace, among other protections. Any employee who has experienced a workplace violation can file a complaint with the relevant governmental agencies and, in some instances, in court, regardless of his or her immigration status or employment authorization.
- In certain circumstances, Immigration and Customs Enforcement agents can come into a workplace and question employees regarding their immigration status and employment authorization. However, employees are under no obligation to answer an agent’s questions, may choose to remain silent, and can consult an attorney before answering any questions or providing or signing any documents.

This guidance is intended to provide greater detail on these obligations and protections for workers, employers, workers’ advocates, and immigration attorneys but is not intended to be a substitute for legal advice from a competent and licensed attorney.

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Under federal immigration law, both employers and employees have certain obligations and rights with respect to the verification of employment authorization. However, once hired, an employee's immigration status or employment authorization should not affect certain other rights in the workplace—including an employee's right to be paid a minimum wage for all hours worked, the right to a safe and healthy workplace, the right to compensation for job-related injuries, and the right to act collectively or join a union or labor organization.

The Office of the Attorney General provides this guidance in order to help workers, employers, advocates, and immigration attorneys in Illinois better understand the interaction of immigration law with other rights and responsibilities in the workplace. An appendix follows which provides contact information for the federal and state agencies that enforce the various laws discussed and for attorney referral services and advocacy organizations.

For the purposes of this Guidance, the term "immigration status" refers to an individual's legal authority to reside in the United States.¹ "Employment authorization," in contrast, refers to an individual's legal authority to work in the United States, which is not necessarily conferred by immigration status.²

I. Federal Immigration Law And Employment Authorization

a. Employers' Obligations

Federal law requires any person or entity that hires, recruits, or refers an individual for employment to verify the employment authorization of that individual worker within three days of their hire.³ This obligation is met by having the individual complete an Employment Eligibility Verification Form I-9 ("I-9") and provide one or a combination of the acceptable proofs of identity and employment authorization, such as a United States passport, social security card, driver's license, proof of lawful permanent residence (Green Card), or an Employment Authorization Document ("EAD").⁴ If the documentation provided by the individual employee meets the requirements and reasonably appears to be genuine, employers may not ask for additional

¹ See 8 U.S.C. §§ 1101(a)(15), (16), (26).

² See 8 C.F.R. § 274a.12(c); *Bokhari v. Holder*, 622 F.3d 357, 360 (5th Cir. 2010); see also *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 637 & n.5 (2011) (Sotomayor, J., dissenting).

³ 8 U.S.C. § 1324a(a)(1)(B)(i); 8 C.F.R. § 274a.2(b)(1).

⁴ 8 C.F.R. § 274a.2(b).

documents.⁵ Employers may make and keep copies of the documents and verification form, but only for the purpose of complying with employment verification requirements.⁶

After an employer has verified the employment authorization of an employee at the time of hire, they may seek “re-verification” only if the original employment document the employee provided was set to expire on a certain date.⁷ In that instance the employer may ask for proof that the employment authorization has been renewed or re-issued no later than the date that the authorization was set to expire.⁸ Because it is the obligation of the employer to verify and re-verify an employee’s employment authorization, employees are not required to update their employer regarding any changes in their employment authorization unless asked as part of a lawful re-verification.⁹

Employees who submit documents that are forged, counterfeit, altered, otherwise false, or which are lawfully issued to someone else could be subject to fines and criminal prosecution.¹⁰

b. E-Verify

E-Verify is an internet-based program that employers can use to verify employment authorization.¹¹ E-Verify seeks to verify an employee’s identity and employment authorization by comparing the information an employee provides on the Form I-9 to records from the U.S. Social Security Administration (SSA) and the U.S. Department of Homeland Security (DHS).¹² With limited exceptions, employers’ use of E-Verify is voluntary under federal law.¹³ Some states have chosen to mandate employers’ use of E-Verify¹⁴; however, Illinois is not one of them.

⁵ 8 U.S.C. §§ 1324a(b)(1)(A); 1324b(a)(6).

⁶ 8 U.S.C. § 1324a(b)(3)-(5).

⁷ 8 C.F.R. § 274a.2(b)(1)(vii).

⁸ *Id.*

⁹ *See* 8 U.S.C. § 1324a(a)-(b); 8 C.F.R. § 274a.2(b)(1).

¹⁰ 8 U.S.C. §§ 1324c(a)(1)-(3), 18 U.S.C. § 1546(b); *see also Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 148 (2002).

¹¹ 8 U.S.C. § 1324a note, Pilot Programs for Employment Eligibility Confirmation (Authorizing the E-Verify pilot program, later enacted by Pub.L. 104-208, div. C, title IV, subtitle A § 404, and subsequently re-authorized).

¹² *Id.* at § 1324a note, Sec. 403(a)(2)-(3).

¹³ *Id.* at § 1324a note, Sec. 402(a).

¹⁴ Alabama, Arizona, North Carolina, South Carolina, Tennessee, and Utah require use of e-verify for public and private employers; other states require public employers and state contractors to use e-verify, including: Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Carolina, Oklahoma, Pennsylvania, Utah, Virginia, and West Virginia. *See* Table: States Requiring E-Verify, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/immigration/everify-faq.aspx#Table:States Requiring E Verify> (last visited Dec. 12, 2018).

In order to participate in E-Verify, an employer must sign a Memorandum of Understanding (MOU) with DHS.¹⁵ While employers in Illinois are not required to use E-Verify, those that choose to do so must comply with all E-Verify procedures.¹⁶ For instance, participating employers are prohibited from using E-Verify to pre-screen job applicants and cannot use E-Verify before an employee has been hired and has filled out the Form I-9.¹⁷

Under the E-Verify system, if information an employee provides on the Form I-9 differs from the records available to SSA or DHS, the responsible agency will send a notice of tentative nonconfirmation (TNC) to the employer.¹⁸ The employer must notify the employee of the TNC in private; provide a copy of the TNC, including a translation if necessary; and refer the employee to either the SSA or DHS as appropriate.¹⁹ A worker may contest the TNC to the SSA or DHS depending on which agency issued the TNC.²⁰ Employers cannot take any adverse employment action against an employee contesting a TNC until and unless the nonconfirmation becomes final.²¹

As is true with the employment verification process generally, if an employee provides documents in response to the TNC that are forged, counterfeit, altered, otherwise false, or which are lawfully issued to someone else, the employee could be subject to fines and criminal prosecution.²² If the relevant agency issues a final nonconfirmation, the employer must determine whether to terminate the employee.²³

c. Discrimination in Employment Eligibility Verification

Employers cannot discriminate based on race or national origin in verifying employment authorization. They cannot act with respect to a worker's race or national origin in choosing whether to verify a worker's employment authorization, refusing to accept documents that reasonably appear to be genuine, requesting more or different documents than required by federal law to establish employment authorization, or, if participating in the E-Verify Program, in complying with the attendant E-Verify procedures.²⁴ For example, an employer cannot choose to

¹⁵ See Dep't of Homeland Security, The E-Verify Memorandum of Understanding for Employers [hereinafter "MOU"], available at http://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify_Native_Documents/MOU_for_E-Verify_Employer.pdf.

¹⁶ 8 U.S.C. § 1324a note, Sec. 403(a); 820 ILCS § 55/12(a); E-Verify Fact Sheet, Ill. Dep't of Labor, available at <https://www.illinois.gov/idol/Laws-Rules/legal/Documents/everify.pdf>.

¹⁷ 8 U.S.C. § 1324a note, Sec. 404(d)(4)(B); MOU Art. II.A.9-10; 820 ILCS § 55/12(c)(4).

¹⁸ 8 U.S.C. § 1324a note, Sec. 403(a)(4)(B)(i).

¹⁹ *Id.* at Sec. 403(a)(4)(B)(i)-(iii); MOU Art. III.A.1, B.1; 820 ILCS § 55/12(c)(6).

²⁰ 8 U.S.C. § 1324a note, Sec. 403(a)(4)(B)(iii); MOU Art. III.A.1, B.1.

²¹ 8 U.S.C. § 1324a note, Sec. 403(a)(4)(B)(iii); MOU Art. II.A.13; *see also* 820 ILCS § 55/12(c)(5).

²² 8 U.S.C. §§ 1324c(a)(1)-(3), 18 U.S.C. § 1546(b); *see also Hoffman Plastic Compounds, Inc.*, 535 U.S. at 148.

²³ 8 U.S.C. § 1324a note, Sec. 403(a)(4)(C)(i); MOU Art. II.A.13.

²⁴ 8 U.S.C. § 1324b(a)(6); 775 ILCS § 5/2-102(G)(1).

only verify the employment authorization of those employees who appear to be of Hispanic or Latino descent.²⁵

Employees who believe that their employer may have violated or abused the employment authorization verification process can complain to the Illinois Department of Labor (IDOL) or the Immigrant and Employee Rights Section of the U.S. Department of Justice (formerly known as the Office of Special Counsel for Immigration-Related Unfair Employment Practices), as is discussed further in the Appendix.

II. All Employees Who Perform Work In Illinois Have Rights And Protections In The Workplace

a. Impact of Employment Authorization Laws on Workplace Protections Generally

Federal immigration law does not address, and was not intended to impact, state and federal labor laws that regulate the wages, hours, and working conditions of employees.

The current restrictions on the employment of persons without authorization under the immigration laws derive from the Immigration Reform and Control Act (“IRCA”), Pub. L. 99-603.²⁶ The legislative history of IRCA, which was enacted well after most federal and state workplace protection laws, makes clear that the law was not meant to “undermine or diminish in any way labor protections in existing law.”²⁷ Courts’ interpretations of the relevant laws are also consistent with this legislative history.²⁸ Thus, as a general rule, once employees are hired and begin performing work, their immigration status or work authorization should not affect the terms or conditions of their employment or the legal protections afforded to them as employees.

²⁵ 8 U.S.C. § 1324b(a)(6); 775 ILCS § 5/2-102(G)(1).

²⁶ See *Hoffman Plastic Compounds*, 535 U.S. at 147 (discussing employment authorization verification system established by IRCA and stating that the law ‘forcefully’ made combatting the employment of’ workers without authorization “central to [t]he policy of immigration law.”) (quoting *INS v. Nat’l Ctr. for Immigrants’ Rights, Inc.*, 502 U.S. 183, 194 (1991)).

²⁷ H.R.Rep. No. 99-682 (I), at 58 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5662. Indeed, a Congressional committee explicitly stated that “the committee does not intend that any provision of this Act would limit the powers of State or Federal labor standards agencies such as the Occupational Safety and Health Administration, the Wage and Hour Division of the Department of Labor, the Equal Employment Opportunity Commission, the National Labor Relations Board, or Labor arbitrators, in conformity with existing law, to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by these agencies.” H.R.Rep. No. 99-682(II) at 8-9 (1986), reprinted in 1986 U.S.C.C.A.N. 5757, 5758.

²⁸ See, e.g., *Lucas v. Jerusalem Cafe, LLC*, 721 F.3d 927, 936-37 (8th Cir. 2013) (“[P]rohibiting employers from hiring unauthorized aliens is in harmony with requiring employers—including those who break immigration laws by hiring unauthorized workers—to provide fair working conditions and wages.”).

In keeping with this traditional separation between immigration enforcement and other forms of workplace rights enforcement, the United States Department of Labor (US DOL) has a memorandum of understanding with DHS which documents that U.S. Immigration and Customs Enforcement (ICE) will not engage in civil worksite enforcement of immigration laws where there is an ongoing dispute regarding an employee's right to be paid minimum or contracted wages; to receive other employment benefits to which the worker is entitled; to have a safe workplace and receive compensation for workplace-related injuries; to be free from unlawful discrimination; to form, join, or assist a labor organization; or to be free from retaliation in exercising those rights.²⁹ It should be noted that, while currently effective, a memorandum of understanding does not have the force of a law and could be revoked by the President or signatory executive agencies at any time.

b. Workplace Protections that Apply Regardless of Employment Authorization

Many workplace laws apply to employees who are working regardless of their employment authorization or immigration status. This section provides a brief overview of those laws. Contact information for the agencies responsible for enforcing the laws discussed is provided in the Appendix.

1. State and Federal Wage and Hour Laws

All employees who have performed work in Illinois must be paid in accordance with State and federal law and have a right to recover unpaid and underpaid wages if they are not properly compensated for that work. The federal Fair Labor Standards Act (FLSA) establishes an employee's right to be paid for all of the time worked and to be paid minimum wage and overtime for hours worked in excess of 40 in one week.³⁰ In addition, state wage laws may set minimum wages above the federal minimum and may include additional requirements for how frequently and in what form employees are compensated.³¹ At the time of the publication of this guidance, the Illinois minimum wage is \$8.25 per hour for employees over the age of 18,³² and the minimum wage in the City of Chicago is \$12.00 per hour.³³ Courts have consistently held that the right to be paid earned wages extends to all employees regardless of work authorization or immigration

²⁹ See Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites, U.S. Dep't of Labor (Dec. 7, 2011), *available at* <https://www.dol.gov/asp/media/reports/DHS-DOL-MOU.pdf>. This MOU was originally between US DOL and DHS, however in 2016 it was updated to include the Equal Employment Opportunity Commission (EEOC) and the National Labor Relations Board (NLRB). Addendum to the Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites, *available at*: https://www.nlr.gov/sites/default/files/attachments/basic-page/node-4684/dol-ice_mou-addendum_w.nlrb_osh.pdf

³⁰ 29 U.S.C. § 201, *et seq.*

³¹ *Id.* at § 218(a); *see also* 820 ILCS § 115/1 *et seq.*

³² 820 ILCS § 105/4(a)(1).

³³ CITY OF CHICAGO MUN. CODE § 1-24-020.

status.³⁴ In Illinois, employees seeking to recover unpaid or underpaid wages can file a private lawsuit³⁵ or a complaint with the Illinois Department of Labor (IDOL) or US DOL.³⁶

2. Occupational Safety and Health

The federal Occupational Safety and Health Act (OSH Act) requires that an employer provide a safe workplace to its employees.³⁷ These provisions apply to all workers regardless of their immigration status.³⁸ The Occupational Safety and Health Administration (OSHA) of US DOL enforces the Act. OSHA sets health and safety requirements for protective equipment, equipment standards, chemical hazards, and other health and safety issues relating to all employees in the workplace.

3. Workers' Compensation

Employers in Illinois are required by State law to maintain workers' compensation insurance for their employees so that employees who sustain accidental injuries arising out of and in the course of their employment may be entitled to partial or total disability benefits.³⁹ Illinois courts have found that individuals who are hired and perform work are "employees" within the meaning of the Illinois Workers' Compensation Act regardless of their work authorization or immigration status, and therefore are entitled to receive workers compensation benefits, including medical disability benefits, if they otherwise qualify.⁴⁰ The Illinois Workers Compensation Commission is responsible for administering the Act.⁴¹ Employees who are denied workers' compensation can appeal to the Workers' Compensation Commission, as is detailed in the Appendix.

³⁴ *Lucas*, 721 F. 3d at 933; *Lamonica v. Safe Hurrican Shutters, Inc.*, 711 F. 3d 1299, 1306-07 (11th Cir.2013); *Patel v. Quality Inn S.*, 846 F. 2d 700, 706 (11th Cir. 1988) ; *Colon v. Major Perry Street Corp.*, 987 F. Supp. 2d 451, 455 (S.D. N.Y. 2013); *Jing-Ming Lin v. Chinatown Restaurant Corp.*, 771 F. Supp. 2d 185, 190 (D. Mass. 2011).

³⁵ 29 U.S.C. § 216(b); 820 ILCS § 105/12; 820 ILCS § 115/14.

³⁶ 29 U.S.C. § 216(c); 820 ILCS § 105/12(a); 820 ILCS § 115/11.

³⁷ See 29 U.S.C. § 654(a).

³⁸ See *Chao v. Occupational Safety & Health Review Comm'n*, 401 F.3d 355, 359-60, 363 (5th Cir. 2005) (affirming order for violation of OSHA standards against employer employing workers without employment authorization); see also Fact Sheet: Retaliation Based on Exercise of Workplace Rights Is Unlawful, U.S. Equal Opportunity Comm'n, https://www.eeoc.gov/eeoc/interagency/fs_retaliation.cfm (last visited Dec. 14, 2018).

³⁹ 820 ILCS § 305/1 *et seq.*

⁴⁰ *Economy Packing Co. v. Illinois Workers' Compensation Com'n*, 387 Ill.App.3d 283, 289 (2008).

⁴¹ 820 ILCS § 305/13.

4. *Right to Join a Union or Workers' Center*

The National Labor Relations Act (NLRA) provides employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”⁴² This includes activities by employees such as forming or attempting to form a union or going together to speak with their employer about improving pay or working conditions.⁴³ The National Labor Relations Board (NLRB) is responsible for enforcing the NLRA.⁴⁴ Although the protections of the Act apply to all workers in a workplace, certain remedies for violations of the NLRA, such as back pay, are not available to workers who do not have employment authorization, as discussed below in section (d).⁴⁵

c. Retaliation

In addition to providing substantive protections, each of the relevant laws discussed above prohibits employers from retaliating against employees who exercise the rights provided by those laws. Generally, it is illegal for employers to take adverse actions against employees for complaining to them about wages or work conditions, filing a complaint, or cooperating with an investigation regarding the laws discussed above.⁴⁶ Examples of retaliation may include firing an employee, giving them less work/pay, threatening to call immigration authorities or the police, or actually making a report to law enforcement.⁴⁷

Claims of retaliation can be filed with the agency that administers the substantive protections of the law at issue, as discussed in the Appendix. For example, if an employee has already filed a claim with US DOL about unpaid overtime wages and then is fired, she could add a retaliation claim to her initial complaint or file a new claim based on the retaliation.

d. Potential Limitations on Recovery for Workers Without Employment Authorization

⁴² 29 U.S.C. § 157.

⁴³ See Employee Rights, NAT'L LABOR RELATIONS BD., <https://www.nlr.gov/rights-we-protect/employee-rights> (last visited Oct. 4, 2017).

⁴⁴ 29 U.S.C. § 153.

⁴⁵ See *Hoffman Plastic Compounds*, 535 U.S. at 151-52; *Agri Processor Co. v. N.L.R.B.*, 514 F.3d 1, 7-8 (D.C. Cir. 2008).

⁴⁶ See 29 U.S.C. § 213(a)(3) (Fair Labor Standards Act); 820 ILCS §§ 105/11, 115/14(c) (Illinois Minimum Wage Law and Illinois Wage Payment and Collection Act); 29 U.S.C. § 660(c)(1) (Occupational Safety and Health Act); 5 ILCS § 5/6-101(A); 29 U.S.C. § 158(a)(1) (National Labor Relations Act); 775 ILCS § 5/6-101(A) (Illinois Human Rights Act); 8 U.S.C. § 1324b(a)(5) (employment authorization verification).

⁴⁷ Fact Sheet: Retaliation Based on Exercise of Workplace Rights Is Unlawful, U.S. EQUAL OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/interagency/fs_retaliation.cfm (last visited Dec. 14, 2018).

Although all workers are protected by provisions of the above statutes, in some instances an employee's right to remedies for violations of those statutes may be limited if the employee does not have employment authorization. In *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, the United States Supreme Court held that employees who are not authorized to work under the immigration laws may not recover back pay—earnings they would have otherwise received from working but for the employer's illegal actions—when they were fired in violation of the NLRA.⁴⁸ Although an employer may still be sanctioned for the retaliatory conduct towards employees regardless of those employees' employment authorization,⁴⁹ the court reasoned that employees without employment authorization themselves cannot recover prospective wages based on a theory that they would have earned those wages, since they were not legally entitled to work in the first place. Although not definitively settled by courts, it is possible that this principle limiting the kinds of damages available to unauthorized workers may extend to other areas of the law outside of the NLRA. However, *Hoffman Plastics* should not affect employees' right to wages they have already earned or the other protections discussed above that apply when already working.⁵⁰

III. Anti-Discrimination Provisions Apply To All Workers In Illinois

a. General Principles

State and federal law protect all employees in Illinois from unlawful employment discrimination.⁵¹ The Illinois Human Rights Act is a state law that prohibits employers from discriminating against employees or applicants in the terms and conditions of employment (including hiring, selection, promotion, pay, discharge, and discipline) on the basis of an employee's race, color, religion, sex, national origin, ancestry, age, marital status, order of protection status, sexual orientation, gender identity, pregnancy, unfavorable discharge from military service, certain arrest records,⁵² or legal citizenship status.⁵³ Title VII of the Civil Rights Act of 1964 provides employees with similar federal protections from employment discrimination on the basis of their race, color, religion, sex, or national origin.⁵⁴ Title VII also specifically

⁴⁸ See *Hoffman Plastic Compounds*, 535 U.S. at 151-52.

⁴⁹ *Id.* at 152.

⁵⁰ See, e.g., *Agri Processor Co.*, 514 F.3d at 7-8 (discussing the NLRA); *Lamonica.*, 711 F.3d at 1307 (discussing the FLSA); *Economy Packing Co.*, 387 Ill.App.3d at 289 (2008) (discussing Illinois workers' compensation).

⁵¹ See Illinois Human Rights Act, 775 ILCS § 5/1-101 *et seq.*; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

⁵² The statute specifically bars discrimination on the basis of an arrest or criminal history record information that has been ordered expunged, sealed or impounded.

⁵³ 775 ILCS §§ 5/1-102, 2-102 to 103. The Illinois Human Rights Act defines "citizenship status" to mean "(1) a born U.S. citizen; (2) a naturalized U.S. citizen; (3) a U.S. national; or (4) a person born outside the United States and not a U.S. citizen who is not an unauthorized alien and who is protected from discrimination under the provisions of Section 1324b of Title 8 of the United States Code" 775 ILCS 5/2(101)(K).

⁵⁴ 42 U.S.C. § 2000e-2(a).

prohibits an employer or employment agency from using employment advertising that indicates “any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin.”⁵⁵

b. Protections from Discrimination under the Immigration Laws

As discussed previously in Section I.a, within three days of hire, employers are obligated to verify that an employee is authorized to work in the United States.⁵⁶ If an employer determines through the I-9 verification process that an employee does not have employment authorization, the employer is obligated to refuse to hire the employee on that basis and such refusal is not unlawful discrimination.⁵⁷ An employer may also lawfully terminate an employee because they lack employment authorization.⁵⁸ For example, an employer may lawfully terminate an employee who previously had employment authorization but whose authorization has lapsed or has been denied; indeed, the employer would be required to do so by the immigration laws.⁵⁹

If an employee has legal authorization to work, federal and state laws prohibit employers from discriminating against that employee on the basis of their citizenship or legal immigration status.⁶⁰ For example, an employer cannot fire, refuse to hire, or otherwise discriminate against or treat differently any individual because of their status as a non-citizen with employment authorization, such as Lawful Permanent Residents, Temporary Residents, DACA recipients, Refugees, or Asylees.⁶¹

c. Other Protections From Discrimination

Although employees are not protected from discrimination on the basis of their lack of lawful immigration status or employment authorization,⁶² all employees are protected from other forms of employment discrimination—such as discrimination based on sex, race, color, religion, ancestry, or age—regardless of their employment authorization or legal immigration status.⁶³ For example:

⁵⁵ *Id.* § 2000e-3(b).

⁵⁶ 8 U.S.C. § 1324a(a)(1)(B)(i); 8 C.F.R. § 274a.2(b)(1).

⁵⁷ 8 U.S.C. §§ 1324a(a)(1)(A), 1324b(a)(1).

⁵⁸ 8 U.S.C. §§ 1324a(a)(2).

⁵⁹ *Id.*; 8 U.S.C. § 1324a note, Sec. 403(a)(4)(C)(i).

⁶⁰ 8 U.S.C. § 1324b; 775 ILCS § 5/2-102.

⁶¹ 8 U.S.C. § 1324b(a)(1), (a)(3); 8 C.F.R. § 274a.12; 775 ILCS §§ 5/2-101(K), 5/2-102; *see also* *Juarez v. Northwestern Mut. Life Ins. Co.*, 69 F.Supp.3d 364, 369 (S.D.N.Y. Nov. 14, 2014) (“The protection of § 1981, like that of the Fourteenth Amendment, extends to all lawfully present aliens, whether or not they have a green card.”).

⁶² *Cortezano v. Salin Bank & Trust Co.*, 680 F.3d 936, 940 (7th Cir. 2012) (affirming that Title VII does not protect against “alienage-based discrimination”).

⁶³ *E.E.O.C. v. Switching Sys. Div. of Rockwell Int’l Corp.*, 783 F. Supp. 369, 374 (N.D. Ill. 1992) (“Title VII’s protections extend to aliens who may be in this country either legally or illegally.”); *E.E.O.C. v. Tortilleria La*

- A female employee who is paid less than a similarly-situated male employee may have experienced unlawful employment discrimination on the basis of her sex, whether she has employment authorization or not.
- An employee who is fired at the age of 65 because his employer tells him he is “too old” may have experienced unlawful discrimination on the basis of his age, whether he has employment authorization or not.
- A Muslim employee whose supervisor routinely makes disparaging comments about Islam and refuses to accommodate her request for a day off for a religious holiday may have experienced unlawful discrimination on the basis of her religion, whether she has employment authorization or not.

It is also important to note that what may appear at first glance to be citizenship-based discrimination may result in, or may be pretextual for, other forms of unlawful discrimination based on race or national origin.⁶⁴ For example, an employer who refuses to interview or hire qualified individuals because they appear to be “Chinese” and he has heard that some Chinese immigrants are undocumented, is likely engaging in discrimination on the basis of national origin or race. In this example the employer appears to be using race or national origin (Chinese) as a proxy for unlawful immigration status and making employment decisions on this basis, rather than determining which candidates to interview or hire based on their qualifications and then reviewing the work authorization of selected individual candidates as the law requires.

Any employee who is discriminated against on the basis of one or more of the protected categories discussed above can bring a claim of discrimination with the relevant agencies as detailed in the Appendix.

IV. Law Enforcement and Immigration Enforcement in the Workplace

a. Immigration and Customs Enforcement Raids

Mejor, 758 F. Supp. 585 (E.D. Cal. 1991); *see also Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004). *But see Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184 (4th Cir. 1998) (holding that worker with expired employment authorization was “unqualified” to work and thus, not entitled to equitable relief sought under Title VII, e.g., being hired).

⁶⁴ *Switching Sys.*, 783 F. Supp. at 373 (citing *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973)) (holding that citizenship-based discrimination is prohibited when it has the purpose or effect of discriminating on the basis of national origin).

The U.S. Immigration and Customs Enforcement (“ICE”) conducts civil and criminal enforcement of federal immigration-related laws.⁶⁵ In carrying out its authority, ICE may conduct searches of a workplace for the purposes of enforcing immigration law.⁶⁶ ICE agents may rely on any of three types of warrants to enter and search a workplace, however these warrants differ in their scope and what areas of the workplace may legally be searched without an employer’s consent:

1. Judicial Search Warrant. A valid judicial search warrant is signed by a judge, identifies the specific premises that law enforcement officers are authorized to search, specifies items that may be seized, and specifies a time limit by which the search must be executed.⁶⁷ Of these three types of warrants only a valid judicial search warrant may authorize ICE agents to search the non-public areas of the workplace (e.g., any areas behind closed doors or otherwise marked as “private” or “employees only”).⁶⁸

2. Judicial Arrest Warrant. A judicial arrest warrant is also signed by a judge, but its purpose is to authorize ICE agents to enter an employer’s premises for the purpose of arresting a specified person(s) based on probable cause that the person has violated immigration laws.⁶⁹ An arrest warrant does not allow agents to enter private areas of the workplace without an employer’s consent.⁷⁰

3. Administrative Immigration Warrant (or “ICE warrant”). An administrative immigration warrant (or “ICE warrant”) is signed by a DHS immigration officer, not a judge, and authorizes agents to search premises or arrest persons suspected of violating immigration laws.⁷¹ This type of warrant also authorizes agents to search only public workplace areas.⁷²

Accordingly, if law enforcement comes to a workplace, the employer and any employees on site may inquire whether the agents are ICE agents, whether the agents have a valid warrant, and ask to inspect the warrant to confirm the scope of any authorized actions. If ICE does not

⁶⁵ U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, WORKSITE ENFORCEMENT, <https://www.ice.gov/history>. (last visited Dec. 13, 2018).

⁶⁶ 8 C.F.R. 287.8(f)(2).

⁶⁷ See *U.S. v. Leon*, 468 U.S. 897, 923 (1984) (“[A] warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.”)

⁶⁸ 8 C.F.R. 287.8(f)(2); *Pearl Meadows Mushroom Farm, Inc. v. Nelson*, 723 F. Supp. 432, 439 (N.D. Cal. 1989).

⁶⁹ See *Fulgencio v. City of L.A.*, 131 Fed. Appx. 96, 97-98 (9th Cir. 2005). An ICE agent may also arrest individuals without a warrant if the agent has a sufficient basis to believe that the individual is unlawful present and likely to escape before an arrest warrant may be obtained. 8 U.S.C. 1357(a)(2); 8 C.F.R. 287.3.

⁷⁰ See 8 C.F.R. 287.8(f)(2); *Pearl Meadows*, 723 F. Supp. at 439.

⁷¹ 8 U.S.C. § 1357; 8 C.F.R. 287.5(d)-(e); *City of El Cenizo, Tex. v. Tex.*, 890 F.3d 164, 187 (5th Cir. 2018) (“It is undisputed that federal immigration officers may seize aliens based on an administrative warrant attesting to probable cause of removability.”).

⁷² See 8 C.F.R. 287.8(f)(2); *Pearl Meadows*, 723 F. Supp. at 439.

have a valid judicial search warrant, an employer may choose to give ICE agents consent to search private areas of the workplace but the employer is not obligated to do so and may refuse ICE agents entry to such private areas.⁷³ If they are lawfully on the property, ICE agents have the right to question employees, including asking employees for their name, date of birth, and immigration status.⁷⁴

However, employees may ask agents if they are free to leave.⁷⁵ An employee who is not free to leave has a right to know why they are being detained, the right to refuse to answer an agent's questions, and to talk to an attorney before answering any questions or signing any documents, although ICE will not provide an attorney.⁷⁶ A failure to answer an agent's questions, by itself, does not create suspicion of a violation of the law.⁷⁷ Employees can also refuse to give non-verbal answers to questions: for instance, if agents ask employees to stand in a group according to immigration status, employees are not legally required to move.⁷⁸ Employees should not attempt to run away from or otherwise avoid ICE agents, as this could provide the agents with reasonable suspicion to conduct a stop.⁷⁹

Every Illinois resident has constitutional rights regardless of their citizenship or immigration status, including the right against unreasonable searches and seizures under the Fourth Amendment of the U.S. Constitution. Employees may refuse an ICE agent's request to conduct an unlawful search of their person or property or to provide documents to an agent, and this refusal alone does not provide officers with suspicion of a violation of the law.⁸⁰ Bear in mind, however, that federal immigration laws require every registered alien over the age of 18 who has been issued immigration papers to carry those immigration papers with them at all times.⁸¹ Accordingly, if an employee has employment authorization and valid immigration papers, it may be a crime not to show these documents to an ICE agent if the agent requests them.⁸² Employees should never provide someone else's documents or falsified documents to law enforcement agents, as doing so could itself be a crime.⁸³

⁷³ 8 C.F.R. 287.8(f)(2); *see also* *U.S. v. Ziegler*, 474 F.3d 1184, 1191 (9th Cir. 2007 (an employer can always provide consent to a search of the premises which it owns) (citing *Mancusi v. DeForte*, 392 U.S. 364 (1968))).

⁷⁴ *See* 8 C.F.R. § 287.8(b)(1); *INS v. Delgado*, 466 U.S. 210, 216-17 (1984).

⁷⁵ 8 C.F.R. § 287.8(b)(1).

⁷⁶ *See* 8 C.F.R. §§ 287.8(c)(2)(iv), 287.3(c); *De Rodriguez-Echeverria v. Mukasey*, 534 F.3d 1047, 1050 (9th Cir. 2008)(remanding based on claims that alien arrested at border was unlawfully interrogated without notice that she had a right to counsel and that her statements could be used against her). But aliens, absent an arrest or removal or criminal proceedings, may not have a constitutional right to access to an attorney during a workplace raid. *United Food and Commercial Workers Int'l Union v. U.S. Immigration & Customs Enforcement*, No. 2:07-CV-188, 2011 WL 856937 at *9. (N.D. Tex. March 11, 2011)

⁷⁷ *INS v. Delgado*, 466 U.S. 210, 216-17 & n.5 (1984); *Murillo v. Musegades*, 809 F. Supp. 487, 498 (W.D. Tex. 1992); *cf. Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County*, 542 U.S. 177, 187 (2004).

⁷⁸ *See supra* n. 77.

⁷⁹ *See Illinois v. Wardlow*, 528 U.S. 119, 125 (2000).

⁸⁰ *See United States v. Moreno*, 233 F.3d 937, 940-41 (7th Cir. 2000) (summarizing cases).

⁸¹ 8 U.S.C. §§ 1324c(a)(1)-(3), 18 U.S.C. § 1546(b); *see also Hoffman Plastic Compounds*, 535 U.S. at 148.

⁸² *See* 8 U.S.C. § 1304(e); 8 C.F.R. § 264.1; *Martinez v. Nygaard*, 831 F.2d 822, 828 (9th Cir. 1987).

⁸³ *See* 8 U.S.C. § 1324c(a).

b. Immigration and Customs Enforcement I-9 Audits

U.S. Immigration and Customs Enforcement (“ICE”) may also conduct an audit of an employer’s I-9 records for the purposes of enforcing immigration law.⁸⁴ Employers may receive a Notice of Inspection (“NOI”) from ICE or other federal agencies requiring the employer to produce copies of its I-9 Forms (records that every employer is required to maintain), and other employment and payroll records for an audit within a three-day period.⁸⁵ During the audit, ICE or other federal agencies will seek to confirm the employment authorization of the employer’s employees.⁸⁶ If the audit finds that the employer has violated the law by employing unauthorized employees, ICE may, depending on the circumstances, issue a Warning Notice to the employer containing a statement of the basis of the alleged violations or issue a Notice of Intent to Fine containing a basis of the charges against the employer, the alleged violations, the penalty to be imposed, and advisories to the employer.⁸⁷

In addition, employers should be aware that an I-9 audit could result in the disclosure of an employee’s residential address or other personal information to the immigration authorities. Employers who receive a NOI may wish to consult with a private attorney regarding their rights and obligations prior to their compliance with the NOI.

c. State or Local Police and the Illinois TRUST Act

In August 2017 the Illinois TRUST Act became law.⁸⁸ The TRUST Act is not specific to workplaces but generally provides Illinois residents with protection from state and local law enforcement activity based on immigration status.⁸⁹ According to the TRUST Act, State and local law enforcement agencies and officials cannot stop, arrest, search, detain, or continue to detain a person solely based on citizenship or immigration status.⁹⁰ State and local law enforcement agencies and officials also cannot detain or continue to detain any person solely on the basis of an immigration detainer or other non-judicial immigration warrant.⁹¹ However, these provisions do not apply if law enforcement possesses a valid, enforceable judicial warrant.⁹² The TRUST Act applies only to State and local law enforcement agents, and does not affect the operations of federal

⁸⁴ 8 C.F.R. §§ 274a.2(b)(2)(i)-(ii), 274a.9(b).

⁸⁵ 8 C.F.R. §§ 274a.2(b)(2)(ii).

⁸⁶ “Employers are required to produce their company’s I-9s within three business days, after which ICE will conduct an an [sic] inspection for compliance.” U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, WORKSITE ENFORCEMENT, <https://www.ice.gov/worksitesite>. (last visited Dec. 13, 2018)

⁸⁷ 8 C.F.R. 274a.9(c)-(d)(1); U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, WORKSITE ENFORCEMENT, <https://www.ice.gov/factsheets/i9-inspection>. (last visited Dec. 13, 2018)

⁸⁸ 5 ILCS § 805/1 *et seq.*

⁸⁹ *Id.*

⁹⁰ *Id.* § 15(b).

⁹¹ *Id.* § 15(a).

⁹² *Id.* § 15(c).

law enforcement officials such as ICE agents.⁹³ In addition, the TRUST Act permits, but does not require, state and local law enforcement officials to share information with federal law enforcement officials.⁹⁴

If you believe that State or local law enforcement has violated this law with respect to you, you can contact an attorney or one of the organizations listed in the Appendix.⁹⁵

IF YOU HAVE QUESTIONS, PLEASE CONTACT OUR OFFICE

The Office of the Illinois Attorney General's Workplace Rights Bureau protects and advances the employment rights of all Illinois residents, particularly the most vulnerable workers and immigrant populations, without regard to immigration status or employment authorization.

- We do not ask for or collect information regarding the immigration status or employment authorization of individuals who contact our Office.
- We do not disclose the identities of individuals who contact us.
- You may also contact our Office anonymously.

OFFICE OF THE ILLINOIS ATTORNEY GENERAL, WORKPLACE RIGHTS BUREAU

- Hotline: (844) 740-5076
- Email: workplacerrights@atg.state.il.us
- Complaint form:
http://www.illinoisattorneygeneral.gov/rights/WorkplaceRights_ComplaintForm.pdf

GUIDANCE FOR ILLINOIS RESIDENTS: IMPACT OF IMMIGRATION STATUS ON THEIR RIGHTS IN THE WORKPLACE

Appendix: State and Federal Resources

⁹³ *Id.* § 10.

⁹⁴ *Id.* § 15(c).

⁹⁵ Although the TRUST Act does not grant remedies for violations of the Act, the legal resources provided in the Appendix may be able to provide individualized legal advice regarding immigration enforcement by State and local law enforcement.

This appendix provides descriptions and contact information for the federal and state agencies responsible for enforcing the various laws discussed in the Guidance, as well as contact information for advocacy organizations and legal referral services. These entities may be able to help you if you have a complaint or question regarding your rights under the laws discussed in the Guidance.

I. Federal Immigration Law And Employment Authorization

U.S. Department of Justice, Immigrant and Employee Rights Section: The Immigrant and Employee Rights section enforces the anti-discrimination and anti-retaliation provisions of U.S. immigration law, specifically with regard to employment eligibility verification.

- Website: <https://www.justice.gov/crt/filing-charge>
- Complaint forms: <https://www.justice.gov/crt/filing-charge>
- Telephone: (800) 255-7688

Illinois Department of Labor: The Illinois Department of Labor enforces the Illinois Right to Privacy in the Workplace Act, which restricts the use of the E-Verify program by employers and prohibits retaliation.

- Website: <https://www.illinois.gov/idol/Laws-Rules/legal/Documents/everify.pdf>
- Complaint form: <https://www.illinois.gov/idol/Laws-Rules/legal/Pages/Right-To-Privacy-In-The-Workplace-Form.aspx>
- Telephone: (312) 793-5366

II. Rights And Protections In The Workplace

a. State and Federal Wage and Hour Laws

Illinois Department of Labor (IDOL): The Illinois Department of Labor investigates claims for unpaid wages and overtime under Illinois law, and also enforces other Illinois statutes such as the Day and Temporary Labor Services Act⁹⁶ and the One Day Rest in Seven Act.⁹⁷

- Website: <https://www.illinois.gov/idol/Pages/Complaints.aspx>
- Wage complaint form:
<https://www.illinois.gov/idol/forms/Documents/Wage%20Complaint%20English%20Form.pdf>
- Telephone: (312) 793-2800

United States Department of Labor (US DOL): The United States Department of Labor is responsible for enforcing the federal minimum wage and overtime laws, as well as other federal laws regulating the workplace.

- Website: <https://www.dol.gov/whd/howtofilecomplaint.htm>
- Wage complaints: Complaints are made through your local Wage and Hour Division office. You can find your local office here: <https://www.dol.gov/whd/america2.htm>
- Telephone: (866) 487-9243 OR 1-866-4-USWAGE
 - Chicago regional office: (312) 596-7230
 - Springfield regional office: (217) 793-5028

b. Workplace Safety and Health

Occupational Safety and Health Administration: The U.S. Occupational Safety and Health Administration sets and enforces health and safety standards in the workplace.

- Website: https://www.osha.gov/workers/file_complaint.html
- Health and Safety Complaint form:
<https://www.osha.gov/pls/osha7/eComplaintForm.html>
- Telephone: (800) 321-6742

⁹⁶ 820 ILCS § 175/1 *et seq.*

⁹⁷ 820 ILCS § 140/1 *et seq.*

c. Workers Compensation

Illinois Workers' Compensation Commission: The Illinois Workers' Compensation Commission administers Illinois's system of workers' compensation for employees injured during and in the course of their employment.

- Website: <https://www2.illinois.gov/sites/iwcc/resources/Pages/Resources-for-Employees.aspx>
- Claim form: <https://www2.illinois.gov/sites/iwcc/Documents/ic01FORM.pdf>
- Telephone: (866) 352-3033
- Letter regarding pro se filing: <https://www2.illinois.gov/sites/iwcc/Documents/proseletter.pdf#search=pro%20se%20letter>
- More information: <https://www.illinoislegalaid.org/legal-information/filing-your-workers-compensation-claim>

d. Right to Join a Union or Workers Center

National Labor Relations Board: The National Labor Relations Board (NLRB) is responsible for enforcing the provisions of the National Labor Relations Act that protected labor organizing and other concerted activity relating to the workplace.

- Website: <https://www.nlr.gov/rights-we-protect/employee-rights>
- Complaint form: <https://apps.nlr.gov/chargeandpetition/#/>
- Telephone: (312) 353-7570 (Regional Office)

III. Anti-Discrimination Laws

Illinois Department of Human Rights: The Illinois Department of Human Rights is in charge of enforcing the Illinois Human Rights Act,⁹⁸ the state law which protects individuals from discrimination on the job.

- Website: <https://www.illinois.gov/dhr/FilingCharge/Pages/Employment.aspx>
- Complaint form: https://www.illinois.gov/dhr/FilingCharge/Documents/CIS_Emp_PA_FC_SHXX.pdf
- Telephone:
 - Chicago Office: (312) 814-6200
 - Springfield Office: (217) 785-5100

⁹⁸ 775 ILCS § 5/101 *et seq.*

United States Equal Employment Opportunity Commission (EEOC): The EEOC is in charge of enforcing Title VII of the Civil Rights Act of 1964, the federal anti-discrimination statute which applies to certain workplace issues.

- Website: <https://www.eeoc.gov/employees/charge.cfm>
- Information about filing a charge: <https://www.eeoc.gov/employees/howtofile.cfm>
- Telephone:
 - EEOC Chicago Office: (800) 669-4000
 - EEOC St. Louis Office (Southern Illinois): (800) 669-4000

IV. Law Enforcement And Immigration Enforcement In The Workplace

American Immigration Lawyers Association (AILA): The AILA is a national association of immigration lawyers and provides a referral service for those seeking legal assistance.

- Website: <http://www.aila.org/>
- Online referral tool: <http://www.ailalawyer.org/>

Illinois Coalition for Immigrant and Refugee Rights (ICIRR): ICIRR is an advocacy organization that provides services and resources to immigrant and refugee communities, including a rapid response network for incidents of workplace raids.

- Website: <https://www.icirr.org/>
- Family Support Hotline (rapid response): (855) 435-7693

Illinois Lawyer Finder: The Illinois State Bar Association also provides a referral service for those seeking legal advice. Callers can receive a 30-minute consultation for no more than \$25. A searchable online directory of lawyers is also available.

- Website: <https://www.isba.org/public/illinoislawyerfinder>
- Online referral tool: <https://www.zeekbeek.com/isba>
- Telephone: (800) 922-8757

Legal Assistance Foundation of Metropolitan Chicago (LAF)

LAF in Chicago provides free legal services to eligible individuals in certain immigration-related areas of the law.

- Website: <https://www.lafchicago.org/get-help/client-services/our-legal-services#immigrants-and-workers-rights>
- Online request for legal consultation: <https://www.illinoislegalaid.org/get-legal-help>
- Telephone: (312) 341-1070

National Immigrant Justice Center

The National Immigrant Justice Center provides legal services to immigrants at no cost in certain situations.

- Website: <http://www.immigrantjustice.org/immigrant-resources>
- Online request for legal consultation: <http://www.immigrantjustice.org/apply-legal-services-0?q=apply-legal-aid>
- Telephone: (312) 660-1370