MODRALL SPERLING

LAWYERS

# Employment Law Alert

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## Employment Law at Modrall Sperling

New Mexico presents unique challenges in employment law, and for more than 75 years, the experience of Modrall Sperling has spoken directly to the needs of private and public sector employers across our state. We represent them in a wide variety of matters before federal and state courts, administrative bodies, and the courts of the Navajo Nation.

While we are prepared to litigate as necessary, we use our experience to guide clients in developing stronger policies, trainings and employee handbooks that help prevent litigation in the first place.

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## Tips for New Mexico Employers: What Can We Legally Ask Foreign Workers During the Pre-Employment Process?

Employers, both in New Mexico and throughout the United States, often have questions regarding what they can ask an applicant in connection with citizenship status and whether they can make hiring decisions based on the applicant's status. Fortunately, the U.S. Equal Employment Opportunity Commission ("EEOC") and U.S. Department of Justice Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC") have provided employers with some guidelines regarding these matters.

In considering all jobs applicants, employers must be careful in striking a balance between verifying a worker's employment eligibility while also not engaging in discrimination against such individuals. On the one hand, the federal Immigration Reform and Control Act of 1986 ("IRCA") requires employers to verify that all workers have eligibility to work in the United States (i.e., complete the Form I-9 verification process). On the other hand, the federal Immigration and Nationality Act ("INA"), as amended by IRCA, prohibits employers from engaging in discrimination with respect to hiring based on an individual's real or perceived citizenship or immigration status.

How should employers strike this balance? To generally avoid discrimination claims, the EEOC recommends that the information obtained and requested through the pre-employment process should be limited to those essential for determining if a person is qualified for the job; accordingly, information regarding race, sex, national origin, age, and religion are irrelevant in such determinations.

As noted above, however, one of the essential inquiries in whether an applicant is qualified for a position must be whether an applicant is authorized to work in the United States. As such, the OSC, which enforces the anti-discrimination provision of the INA,[1] has advised that employers who ask the following questions of job applicants are unlikely to face citizenship and immigration status discrimination claims:

- *Are you legally authorized to work in the United States for our Company?*

- *Do you now, or will you in the future, require sponsorship for employment visa status (e.g., H-1B visa status, etc.) to work legally for our Company in the United States?*

Such questions are generally permissible as they are designed to provide the employer information as to whether the applicant is permitted to work in the U.S., as employers are required by law to do, and also to inform the employer of whether it would be required to sponsor the applicant, which it has no legal requirement to do.

If employers elect to ask the above questions, they must ask both questions to all job applicants, even if the applicant responds "yes" as to the first question, so as to treat all applicants fairly and in a nondiscriminatory manner. Moreover, it is important that employers ask the second question because the decision not to hire individuals based solely on their need for visa sponsorship, either now or in the future, would generally not be actionable under the INA's antidiscrimination provision.

During the hiring process, employers should not ask a job applicant to prove his or her citizenship status (*i.e.*, by requiring an applicant to present documents); such should wait until after the employer has hired the applicant.

Similarly, it is not recommended that employers ask job applicants if they are authorized to work in the United States on an "unrestricted basis" because employers should not ask applicants to specify their citizenship status at the application stage, and such a question may be misleading for individuals who have authorization to work, but such authorization will need to be periodically renewed by the individual (such as refugees).

What about applicants who have temporary authorization to work in the United States? Indeed, there are various individuals who may be legally present and authorized to work in the United States—including H-1B visa holders (person in a specialty occupation), O-1 visa holders, F-1 OPT visa holders (students engaging in Optional Practical Training), among others—but such authorization is temporary in nature. The INA's anti-discrimination provision only prohibits discrimination against "protected individuals," which are defined by the act to include (1) U.S. citizens and nationals; (2) recent lawful permanent residents (sometimes called "green card" holders); (3) refugees; and (4) asylees. This protection does not extend, however, to temporary visa holders. Thus, an employer who decides not to hire a temporary visa holder would likely not subject an employer to claims of unlawful citizenship and/or immigration status discrimination so long as that employment decision is made exclusively on the basis of an individual's status as a temporary visa holder.

While following this guidance will likely help an employer avoid immigration status and citizenship discrimination claims, employers must remember that all applicants, including those with temporary visas, could file a national origin discrimination claim if an applicant thinks he or she was not hired based on country of origin, accent or appearance. As such, the best practice is for employers to be thoughtful and careful in describing the reasons for not hiring a given applicant.

Contact Alana De Young by emailing her at alana.deyoung@modrall.com or calling (505) 848-1800 for further information.

[1] The OSC has jurisdiction over national origin discrimination claims involving entities with between 4-14 employees; the EEOC has jurisdiction over such claims involving employers with 15 or more employees.