Restrictions on the Use of Form I-9 Information

Question: Are there any restrictions on use of Form I-9 or the information contained therein?

Response & Analysis: Yes, 8 U.S.C. § 1324a(b)(5) limits the use of the information contained or appended to Form I-9.

For many employers, tracking the type of employment authorization an employee uses is essential for workforce planning purposes, especially in a world full of talent shortages.

Knowing the immigration history of your employees enables you to determine if they could be eligible for an extension of their current work authorization document. It also allows you to analyze whether they have exhausted renewals of a particular visa type and must seek a new visa classification to remain in the United States.

The Form I-9 and accompanying document scans or photocopies, if retained, facially solves this dilemma. The Form I-9 has the employee's work authorization end date, allowing employers to track if and when an employee must complete reverification, as well as the specific document the employee used. The scans/photocopies of the documents would include the type of document, the class of admission (if they used a Form I-94) or the category code (if they used an EAD, Form I-766), and their expiration dates.

CONTACT US:
Business Information Group, Inc.
bigreport.com
800.369.2612

This is all great information for planning ahead, but can this data be mined from the Form I-9 and accompanying documents?

There is no direct authority on this point, however an important prohibition lives in the Form I-9 statute. 8 U.S.C. § 1324a(b)(5) states:

> A form designated or established by the Attorney General [Form I-9] under this subsection and any information contained in or appended to such form, may not be used for purposes other than enforcement of this chapter and sections 1001 (relating to false statements), 1028 (fraud), 1546 (relating to visa fraud), and 1621 (perjury) of title 18.

U.S. Courts have consistently relied on this prohibition to vacate convictions where Form I-9 or appended documents were used as evidence of a crime if the defendant was not charged with one of the specific statutes.[1] The United States Supreme Court has historically stated that "Congress has made clear … that any information employees submit to indicate their work status 'may not be used' for purposes other than prosecution under specified criminal statutes… ."[2]

In 2020, the Supreme Court had occasion to apply section 1324a(b)(5)'s prohibition to a criminal prosecution.[3] While decided in the criminal context, the Court's decision

CONTACT US:
Business Information Group, Inc.
bigreport.com
800.369.2612

1 *State v. Prieto-Lozoya*, 488 P.3d 715 (N.M. App. 2021); *State v. Lopez-Navarrete*, No. 111, 190, 2014 WL 7566851, at *3 (Kan. App. 2014).
2 *Arizona v. U.S.*, 567 U.S. 387, 406 (2012). *See also Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 589 (2011) (quoting the statute).
3 *United States v. Garcia*, 140 S.Ct. 791 (2020).

impacts employers who seek to track an employee's work authorization status using information from Form I-9 or appended documents. The Court held that section 1324a(b)(5) "broadly restricts ***any use*** of an I-9, information contained in an I-9, and any documents appended to an I-9."[4] The Court also stated that the restriction applies to State Governments, "the Federal Government, and all private actors."[5] Employers are considered private actors and, as such, are also excluded from using such information.

Can we still keep track of an employee's immigration history as employers?

Not all hope is lost. The Court's decision ***does not*** mean that you cannot obtain the information from other sources and compile a tracking sheet that works for you.[6] For many employees with finite work authorization, you may know their immigration history, or current visa type, because you have petitioned for them. Working with your immigration counsel, whether in-house or outside, can assist with this. Employers are also able to ask the individual; however, employers are cautioned that an impacted employee or advantageous regulator can use even innocuous misstatements to argue discrimination. Employers should keep in mind the high legal fees and regulatory penalties accompanying such action.

CONTACT US:

Business Information Group, Inc.
bigreport.com
800.369.2612

4 *Id.* at 802 (emphasis in original).
5 *Id.*
6 *Id.* (comparing a tangible object that can be "contained in" only one place at a time with a piece of information, which may be "contained in" many places at once).