U.S. Department of Justice
Civil Rights Division

Office of Special Counsel for Immigration-Related
Unfair Employment Practices - NYA
950 Pennsylvania Ave, NW
Washington, DC 20530
Main (202) 616-5594
Fax (202) 616-5509

April 15, 2015

BY EMAIL (jmonty@montyramirezlaw.com)
Jacob Monty, Esq.
Monty & Ramirez LLP
150 W. Parker Road, Third Floor
Houston, TX 77076

Dear Mr. Monty:

This is in response to your email dated March 30, 2015, to the Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC" or "Office"). In your email, you express concerns about the possible conflict between the obligations that Texas state contractors and certain Texas state agencies have under federal E-Verify rules, on the one hand, and their obligations pursuant to Texas Executive Order RP-80, issued in December 2014, on the other hand. You also raise a concern about a potential violation of the anti-discrimination provision of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1324b, which this office enforces.

First, you express concern that RP-80's requirement that state contractors use E-Verify for "all persons employed during the contract term to perform duties within Texas" conflicts with federal E-Verify rules. As you point out, as a general matter, federal E-Verify rules require that E-Verify users create E-Verify cases only for newly-hired employees, whereas "RP-80 requires Texas contractors to use E-Verify on all their current employees performing duties in Texas, whenever hired." Second, you raise concerns about RP-80's requirement that certain Texas state agencies use E-Verify for "all current and prospective agency employees." As you also correctly observe, besides prohibiting employers from creating E-Verify cases for current employees, federal E-Verify rules bar all employers from creating E-Verify cases for an individual before the individual accepts a job offer and completes a Form I-9. Finally, you express concern that under RP-80, a nationwide employer may seek "to root out employees" by "transferring some complainers into Texas after winning a Texas project" and running them through E-Verify, potentially violating the anti-discrimination provision of the INA.

You seek clarification on the following two issues:

1. Whether "Texas state contractors (who are not federal contractors) may disregard the terms of Executive Order RP-80 by choosing to E-Verify only new hires;" and
2. Whether "a Texas state agency may E-Verify current and prospective employees."

OSC cannot provide an advisory opinion on any set of facts involving a particular individual or entity. However, we can provide some general guidelines regarding employer compliance with the anti-discrimination provision of the INA. The anti-discrimination provision prohibits four types of employment-related discrimination: (1) citizenship or immigration status discrimination; (2) national origin discrimination; (3) unfair documentary practices during the employment eligibility verification (Form I-9 and E-Verify) process ("document abuse"); and (4) retaliation for filing a charge, assisting in an investigation, or asserting rights under the anti-discrimination provision. 8 U.S.C. § 1324b. For more information about OSC, please visit our website at: http://www.justice.gov/crt/about/osc.

Regarding the apparent conflict between federal E-Verify rules and the provisions of RP-80, we note that U.S. Citizenship and Immigration Services ("USCIS"), the agency that administers the E-Verify program and issues guidance on proper E-Verify procedures, has advised employers in Texas that federal E-Verify requirements *are in effect at all times*. Under federal E-Verify rules, most employers using E-Verify may only create E-Verify cases for new hires. *See* E-Verify Memorandum of Understanding ("MOU") Art. I.A, paras.10-11, available at http://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify_Native_Documents/MOU_for_E-Verify_Employer.pdf; *see also* 8 U.S.C. § 1324a note, Sec. 403(a)(3)(A) (providing that an employer enrolled in E-Verify should create a case for an individual "by not later than the end of 3 working days" after hiring the individual). However, federal E-Verify rules provide an exception for employers enrolled in E-Verify as *federal* contractors. These federal contractors must create cases in E-Verify for new hires and for existing employees performing work under the federal contract (if the employer has not already created a case for the employee), and may choose an option to create cases in E-Verify for all employees of the contractor. *See* E-Verify MOU, Art. I.B, para. 2; E.O. 13465 (June 11, 2008).

Federal E-Verify rules also prohibit all employers from creating an E-Verify case for an individual who has not yet accepted a job offer and completed a Form I-9. *See* E-Verify MOU, Art. 1.A, para. 10; 8 U.S.C. § 1324a note, Sec. 404(d)(4)(B) (providing that E-Verify shall have reasonable safeguards to prevent unlawful discriminatory practices based on national origin or citizenship status including, among other things, creating an E-Verify case prior to a job offer).

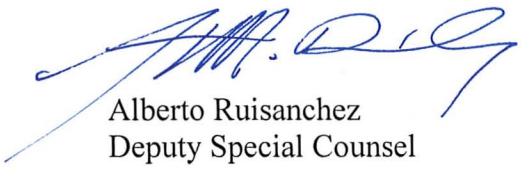
Consequently, employers using E-Verify for prospective employees or using E-Verify for current employees when not enrolled in E-Verify as federal contractors would violate federal E-Verify program rules – the same rules that the employers agreed to comply with in their MOU with USCIS. Failure to comply with E-Verify program rules could lead to possible termination or suspension from the E-Verify program. For further information regarding these potential MOU violations and their consequences, we recommend that you seek information directly from USCIS. Employers and their representatives may call E-Verify's employer hotline at 888-464-4218 and may submit written inquiries to E-Verify@dhs.gov.

Regarding your concern that an employer may violate the anti-discrimination provision of the INA when it uses E-Verify to improperly "root out employees," the anti-discrimination provision prohibits discrimination on the basis of citizenship, immigration status, and national origin in the employment eligibility verification (Form I-9 and E-Verify) process. Under the INA, an employer commits unfair documentary practices when it rejects valid Form I-9 documentation, demands more or different Form I-9 documentation, or requests specific Form I-9 documentation based on an employment-authorized individual's citizenship, immigration

status, or national origin. An employer that uses RP-80 to assign an employee to work in Texas for the purpose of reverifying the employee's employment authorization may raise concerns that it is treating that employee differently in the employment eligibility verification process based on perceived citizenship status or national origin. These concerns are heightened where an employer requires an existing employee to provide new Form I-9 documentation to run the existing employee through E-Verify when not permitted to do so under federal E-Verify requirements.[1]

We hope this information is helpful. Thank you for contacting OSC.

Sincerely,



Alberto Ruisanchez
Deputy Special Counsel

[1] Federal contractors must update Form I-9 information and/or complete a new Form I-9 to run existing employees through E-Verify in accordance with federal E-Verify requirements. *See* E-Verify MOU, Art. 2.B, para. 2.e-f. As stated above, employers not enrolled in E-Verify as federal contractors may not run existing employees through E-Verify.