



# MELTZER HELLRUNG

IMMIGRATION SOLUTIONS

## AVOIDING NATIONAL ORIGIN AND CITIZENSHIP STATUS DISCRIMINATION IN THE HIRING PROCESS

Under the Immigration and Nationality Act, the anti-discrimination provision prohibits discrimination based on national origin and citizenship status. **These are two distinct protections.**

Violations of these protections can open an employer up to liability, with consequences ranging from civil penalties, attorney’s fees, compensatory damages, punitive damages, and other costs. The most expensive liability can be in public perception, as these violations are often well publicized.

NATIONAL ORIGIN DISCRIMINATION	CITIZENSHIP STATUS DISCRIMINATION
<p><b>Applies to all work-authorized individuals</b></p> <p>Discrimination based on:</p> <ul style="list-style-type: none"><li>⇒ Country of origin</li><li>⇒ Accent</li><li>⇒ Appearance</li><li>⇒ and similar features</li></ul>	<p><b>Only applies to the following:</b></p> <ul style="list-style-type: none"><li>⇒ U.S. Citizens and Nationals</li><li>⇒ Refugees</li><li>⇒ Asylees</li><li>⇒ <i>Recent</i> Lawful Permanent Residents</li></ul>
<p><b>Examples of National Origin Discrimination</b></p> <ul style="list-style-type: none"><li>⇒ Refusing to hire an applicant because of their accent</li><li>⇒ Refusing to hire an applicant because they appear “foreign”</li><li>⇒ Requiring specific proof of work authorization from Asians and Latino employees, but not White employees</li></ul>	<p><b>Examples of Citizenship Status Discrimination</b></p> <ul style="list-style-type: none"><li>⇒ Unlawfully restricting positions to U.S. Citizens only<sup>1</sup></li><li>⇒ Refusing to hire an individual because they are a permanent resident or refugee</li></ul>

<sup>1</sup> There are instances where a job may be restricted to only U.S. Citizens, consult your MH attorney if you believe you may be posting one of these positions.

## IN THE HIRING PROCESS

### Paper or Electronic Application Stage

Meltzer Hellrung recommends, based on guidance from the Department of Justice, to ask only two questions of all applicants:

1. ***“Are you authorized to work lawfully in the United States?”***
2. ***“Do you now, or will you in the future, require sponsorship to work in the United States?”***

**Remember:** An employer is not required nor obligated to sponsor an applicant or employee for work authorization or permanent residency. Employers are permitted to reject candidates based on a “no” response to the first question and/or a “yes” response to the second question above.

Employers who ask any additional questions subject themselves to liability. Please note employers are not required to ask these questions at all.

### Special Considerations for OPT Applicants

If attracting OPT applicants, we recommend adding the following two questions to all job applications, per guidance from the Department of Justice:

1. ***“If you will require sponsorship, do you currently hold Optical Practical Training (OPT)?”***
2. ***“If you currently hold OPT, are you eligible for a 24-month extension of your OPT, based upon a degree from a qualifying U.S. institution in Science, Technology, Engineering, or Mathematics (STEM)?”***

If application software allows, employers can have the OPT questions trigger with a “yes” to the question regarding sponsorship.

## DURING THE INTERVIEW

### Consistency in Interviewing is Key

When interviewing every applicant who marks that they will need sponsorship, maintaining consistency in the questioning is important, interviewers should strive to ask the same questions of each applicant.

**Example of Liability Exposure:** If an interviewer only asks those with Asian or Indian last names clarifying questions about their “yes” response but does not ask those with “white” last names, such as those who appear to be Canadian, the employer could be exposed to claims of national origin discrimination.

Example interview questions based on the responses to below:

1. **“Are you authorized to work lawfully in the United States?”**
2. **“Do you now, or will you in the future, require sponsorship to work in the United States?”**

ANSWERS BY APPLICANT	EXAMPLE QUESTIONS TO ASK DURING THE INTERVIEW
1. Yes 2. No	No further questioning is needed or should be pursued. Employers should trust the applicant’s responses.  <b>A note:</b> employers should not ask when a visa or work authorization expires. An applicant could be transitioning to a different visa and maintaining work authorization. Employers are cautioned not to make assumptions based on expiration and avoid such questions.
1. Yes 2. Yes	↳ Please elaborate? ↳ What is your visa status? ↳ What is your country of citizenship? ↳ Do you have an I-140 approval?
1. No 2. Yes	↳ Please elaborate? ↳ What is your visa status? ↳ What is your country of citizenship?

Often when prompted with one of the questions, candidates will provide information that is needed regarding their visa and immigration status. As long as employers maintain consistency and do not act in a discriminatory manner, exposure can be limited.

**Important Reminder:** *Only after* extending a formal offer can an employer request proof of authorization. Up until that point employers must take applicants at their word.

## **OFFER AND ON-BOARDING STAGE**

Meltzer Hellrung also reminds employers to maintain proper I-9 documentation and follow a consistent collection of work authorization documents.

**Remember:** An employer cannot demand specific documents for an I-9, for example, asking for a copy of an applicant's Green Card when the applicant has provided a copy of their driver's license and unrestricted social security card. For more detailed information, please see MH's "I-9 Audit and Compliance Guidance" collateral.

**To answer any questions or have your hiring materials reviewed, please contact your Meltzer Hellrung attorney.**