



Compliance and Business Conduct

Be 3M

Code of Conduct Global Handbook



3M Iberia



3M Singapore



3M Mexico



3M Canada



3M Italy



3M Center,
St. Paul, Minnesota

Table of Contents

Messages from 3M's Leadership		
Regarding Our Code of Conduct	2	
3M's Code of Conduct	4	
About 3M's Code of Conduct	5	
What is the Code?	5	
Why does 3M have a Code?	5	
Who must follow the Code?	5	
What does the Code require me to do?	5	
What does the Code require from leaders?	6	
Resources	7	
What do I do if I learn about or suspect misconduct?	7	
Where do I go to ask a business conduct question or report misconduct or potential misconduct?	7	
How will 3M respond to a report?	7	
Regarding 3M's Code of Conduct: Be 3M	9	
▶ BE GOOD:		
Obey the law and 3M's Code of Conduct	10	
Compliance	11	
Ethical Business Conduct	12	
Employee Obligations and Reporting	13	
▶ BE HONEST:		
Act with uncompromising honesty and integrity	14	
Anti-Bribery	15	
Gifts, Entertainment, and Travel	17	
Antitrust and Competition Law	18	
Export, Import, and Trade Compliance	19	
Securities Trading and Insider Information	20	
Advertising and Product Representation	21	
Anti-Money Laundering	22	
▶ BE FAIR:		
Play by the rules, whether working with government, customers, or suppliers	24	
Lobbying and Political Activities	25	
Doing Business With Government Agencies and Contractors	26	
▶ BE LOYAL:		
Protect 3M's interests, assets, and information	28	
Conflict of Interest	29	
Information Security, Trade Secrets, and Confidential Information	30	
Electronic Resources	31	
Data Privacy	32	
▶ BE ACCURATE:		
Keep complete and accurate business records	34	
Internal Controls, Financial Reporting, Document Retention, and Auditing	35	
▶ BE RESPECTFUL:		
Respect one another and our social and physical environment around the world	36	
Respectful Workplace	37	
Workplace Environmental, Health, and Safety	38	
Product Safety, Quality, and Stewardship	39	
Index of Business Conduct Principles	40	



Message from Inge G. Thulin

3M's excellent reputation defines who we are as a company. At the same time it strengthens our competitive position in the global marketplace. It is imperative that each of us remains fully committed to upholding and advancing 3M's reputation, in every decision we make, and in every action we take.

As 3M employees, we embody 3M values and guard 3M's reputation. I know that you take this as seriously as I do, and I appreciate your ongoing commitment to the highest standards, every day and everywhere.

Our personal integrity, our shared values and our ethical business practices form the basis of 3M's reputation around the world. While our commitment to ethical business practices will remain unchanged, new challenges will always arise. These changing dynamics are one reason that we are consolidating the elements of business practice into a Code of Conduct for all 3Mers. When combined with the quality and performance of our products, those elements create an incredibly powerful platform for business success for the company and professional growth for all of us.

By always living the Code of Conduct, I know that we can move closer to realizing our Vision:

- ▶ **3M Technology Advancing Every Company**
- ▶ **3M Products Enhancing Every Home**
- ▶ **3M Innovation Improving Every Life**

I thank you for always applying the high standards others expect of us and that we expect of ourselves.

A handwritten signature in black ink, appearing to read 'Inge G. Thulin'.

Inge G. Thulin
Chairman, President and CEO



Message from Ivan Fong

For over 114 years, 3M has built an extraordinary reputation for integrity and doing business the right way. Every day, you have the challenge, opportunity, and responsibility to maintain and enhance that reputation.

This responsibility is paramount: Nothing — not a request from a customer or a direct order from your manager, “making your operating plan” or personal loyalty — can or should justify compromising our collective commitment to integrity.

In addition, if you are a leader, you are responsible for creating a culture of compliance; for being a role model; for providing sufficient resources and training for compliance; for ensuring there are multiple channels to raise compliance concerns without fear of retaliation; and for promptly taking appropriate responsive actions when such issues are raised.

Perhaps most important, whether you are a supervisor or not, you do not shoulder this responsibility alone. This handbook, for example, can help you spot issues and guide your decision-making under our Code of Conduct. Your manager, your Human Resources contacts, your assigned 3M Counsel, and our Compliance & Business Conduct Department are among the many resources available to assist you.

Thank you in advance for your personal commitment to our Code of Conduct.

A handwritten signature in black ink, appearing to read 'Ivan Fong'.

Ivan K. Fong

Senior Vice President, Legal Affairs & General Counsel



Message from Kristen Ludgate

Integrity, ethics, and compliance. These are at the core of who we are as a company and how we as 3M employees get things done. Together, we all help enhance and protect 3M's reputation every day and everywhere: by knowing the rules, by making the right decisions, and by asking questions or raising concerns when we are not sure what to do.

3M's Code of Conduct tells us how to act with integrity in challenging business situations. Our Code is part of the 3M playbook; it's how we win for 3M in the right way.

The Code is comprised of the 3M Business Conduct Principles, which are summarized in this global handbook. The handbook provides you with short, easy to understand guidance on what each 3M Business Conduct Principle means and clear statements on what to do and what not to do. It also provides a map to other resources that can help you understand the Principles and make good decisions for 3M.

Thank you for protecting and enhancing 3M's reputation by living our Code of Conduct every day in the work you do for our great company!

A handwritten signature in black ink, appearing to read 'Kristen Ludgate'.

Kristen M. Ludgate

Vice President, Chief Compliance Officer, 3M Compliance & Business Conduct

3M's Code of Conduct

Be Good

Obey the law and 3M's Code of Conduct.

Be Honest

Act with uncompromising honesty and integrity.

Be Fair

Play by the rules, whether working with government, customers, or suppliers.

Be Loyal

Protect 3M's interests, assets, and information.

Be Accurate

Keep complete and accurate business records.

Be Respectful

Respect one another and our social and physical environment around the world.

About 3M's Code of Conduct

What is the Code?

▶ 3M's Code of Conduct is comprised of our core business conduct principles that set forth global corporate expectations for all 3M employees and certain third parties who act on 3M's behalf.

Why does 3M have a Code?

▶ 3M has long had business conduct principles based on the company's core values. Those values have not changed over time. The principles in this Code remain consistent with 3M's longstanding business conduct principles, its values, and our shared ethical standards for conducting business with uncompromising honesty and integrity. This Code is your guide for answering questions or solving ethical problems when the right choice may not be clear.

▶ 3M's Code summarizes key compliance principles, highlights issues that can have significant legal and ethical consequences if handled improperly, and provides guidelines for appropriate action.

▶ 3M's Code provides rules and guidelines to help 3M People make

good decisions every day, in ways that advance 3M's business and honor 3M's tradition of ethical business conduct.

Who must follow the Code?

▶ 3M's Code of Conduct applies to all "3M People." 3M People are 3M's employees and may include others who act on 3M's behalf. 3M People are expected to live 3M Values. All 3M People are partners in complying with 3M's Code of Conduct and supporting others' compliance. Together, 3M People ensure the continued success of 3M Company and protect 3M's longstanding reputation for doing the right thing, always and everywhere.

What does the Code require me to do?

▶ All 3M People are expected to be familiar with and to follow 3M's Code of Conduct. You must exercise good judgment in your decisions for 3M, always in a way that is consistent with the Code.

▶ You are also expected to support others' compliance with the Code,

which means that you must report suspected Code violations.

▶ Employees who fail to comply with 3M's Code may face discipline, up to and including termination of employment.

▶ Third parties who are required to comply with 3M's Code, but fail to do so, may be barred from acting on behalf of 3M in the future.

▶ The core expectations of 3M People are as follows:

- Understand and comply with the law and 3M's Code of Conduct.
- Help build 3M's ethical culture:
 - Live 3M Values
 - Report suspected violations of the law or this Code
 - Get help with tough decisions
- Fully cooperate in company investigations.
- Never retaliate against anyone who reports a business conduct concern.
- No sale or business advantage is worth sacrificing our corporate reputation.

What does the Code require from leaders?

Supervisors and managers set the tone for their teams. They are often the first place employees turn with questions. Supervisors and managers are therefore required to:

- ▶ Set a strong example of ethical conduct.
- ▶ Provide training, education, and resources to support employees in complying with the Code.
- ▶ Require their employees to take their business conduct courses and certify compliance with the Code of Conduct.
- ▶ Prevent and prohibit retaliation.
- ▶ Encourage employees to speak up if they have questions or concerns.
- ▶ Discipline misconduct and reward good behavior.
- ▶ Follow 3M's escalation requirements and be aware that some issues have mandatory escalation requirements.

To learn more, please see the Compliance Principle in our Code of Conduct.



Resources

Reporting suspected misconduct or even asking a compliance question can take courage, but it is the right thing to do. 3M does not tolerate retaliation against anyone who raises a concern, asks a question, or cooperates with a company investigation. Employees who intentionally make false accusations or provide false information will be disciplined, because such actions violate 3M's business conduct principles and are inconsistent with 3M Values.

What do I do if I learn about or suspect misconduct?

- ▶ Unless prohibited by your country's law, employees have an obligation to report any suspected violation of the law or 3M's Code and may do so anonymously in most countries.
- ▶ If you are a supervisor or manager, you must be aware of and follow 3M's Employee Obligations and Reporting Principle, which requires you to report all suspected violations of the law or 3M's Code of Conduct to your business unit's assigned legal counsel, the Compliance & Business Conduct Department, or your business management.

Where do I go to ask a business conduct question or report misconduct or potential misconduct?

Use any of these options below to ask a question or report a concern:

- ▶ **Your management**
- ▶ **3M's Compliance & Business Conduct Department**
3M Company
3M Center, Building 220-11-W-09
Saint Paul, MN 55144-1000
- ▶ **3M Legal Counsel**
- ▶ **3M-Ethics.com**
3M-Ethics.com is operated by a third-party vendor, EthicsPoint. EthicsPoint is an independent professional reporting service retained by 3M to assist with the receipt of questions or business conduct concerns. In most countries, you may use this system to report your concerns anonymously.
- ▶ **Assigned Human Resources Manager**
- ▶ **Audit Committee of the Board of Directors**
Deputy General Counsel & Secretary
3M Legal Affairs
3M Center, Building 220-09-E-02
Saint Paul, MN 55144-1000
- ▶ **3M Corporate Audit Department**
General Auditor
3M Corporate Auditing Department
3M Center, Building 224-06-N-11
Saint Paul, MN 55144-1000

How will 3M respond to a report?

3M will review every report. As necessary, 3M may investigate. The information in your report will be handled discreetly and respectfully.



Regarding 3M's Code of Conduct:

Be 3M

This handbook summarizes 3M's Code of Conduct and our 20 Business Conduct Principles. The full text of the Principles and many other resources are located at go.3M.com/C&BC. Compliance with the Code and our Principles is required of 3Mers everywhere. It's how we do business. Be 3M.

Be Good

**Obey the law and
3M's Code of Conduct.**

3M has a longstanding and well-deserved reputation for doing business with uncompromising honesty and integrity because 3M People obey the law and 3M's Code of Conduct.

- ▶ **Compliance**
- ▶ **Ethical Business Conduct**
- ▶ **Employee Obligations
and Reporting**

Compliance

- ▶ 3M enjoys a global reputation as an ethical and law-abiding company, meaning that 3M People comply with the law, wherever they live and work.
- ▶ 3M's Code of Conduct often sets an even higher standard than what the law requires. 3M People comply with 3M's Code of Conduct, in addition to the law.
- ▶ Unless prohibited by local country law, 3M employees must promptly report all suspected violations of the law or 3M's Code by bringing their concerns to the attention of 3M management or by reporting through 3M-Ethics.com.
- ▶ 3M does not tolerate retaliation of any kind for reporting a business conduct concern or cooperating with an investigation.
 - 3M expects such reports to be made in good faith. This does not mean you have all the facts; you should feel free to ask questions and to report any issue that causes you concern without fear of retaliation. Reports or allegations that are false or malicious, however, are not in good faith and may be grounds for discipline.
- ▶ 3M can be held responsible for the wrongdoing of others acting on its behalf. 3M employees must not knowingly allow a business partner or a third party to engage in illegal activities and should ask questions and take steps to prevent such wrongful conduct.
- ▶ 3M People must use the reporting procedure outlined in this Principle.

Who are "3M People"? 3M People are 3M's employees and may include others who act on 3M's behalf. 3M People are expected to live 3M Values. All 3M People are partners in complying with 3M's Code of Conduct and supporting others' compliance. Together, 3M People ensure the continued success of 3M Company and protect 3M's longstanding reputation for doing the right thing, always and everywhere.

Additional Guidance

- When there seems to be a conflict between, or confusion about, the laws or rules that apply to a particular situation, check with your 3M business unit's assigned legal counsel before proceeding.
- When there seems to be a conflict between the 3M Code of Conduct and the law, always obey the law. But, if 3M's Code sets a higher standard than the law requires, 3M's Code should be the standard for behavior. Check with your business unit's assigned legal counsel before proceeding.
- Examples of individuals who are not 3M employees but who may act on behalf of 3M include sales agents, representatives, consultants, contract laborers, joint venture partners, distributors, converters, and outside counsel. 3M's business relationship with a third party will determine if a third party acts on behalf of 3M. Where that is the case, that third party should be considered 3M People and should follow the relevant policies in 3M's Code of Conduct. 3M expects third parties it works with will always follow the law.
- If you suspect wrongdoing by any 3M employee or a business partner, be sure to raise your concerns with your manager, your business unit's assigned legal counsel, your assigned Human Resources manager, 3M's Compliance & Business Conduct Department, or through 3M-Ethics.com.

Ethical Business Conduct

Ethical business conduct requires more than just following the law. 3M's Code of Conduct and 3M Values often set a higher standard. Sometimes, however, there are no written rules. Even when there is no specific policy to follow, 3M People are expected to use their best judgment and must do the right thing. In other words, 3M People are expected to make good, ethical decisions based on 3M's values of honesty, integrity, promise keeping, fairness, respect, concern for others, and personal accountability.

When faced with a decision about the right action to take, be sure you can answer "yes" to these three questions:



Is this action consistent with 3M's core values of uncompromising honesty and integrity?



Can this action withstand public scrutiny?



Will this action protect 3M's reputation as an ethical company?

If you cannot answer "yes" to all three questions, but still believe the proposed action is lawful and ethical, review your plans with your supervisor, your business unit's assigned legal counsel, or with 3M's Compliance & Business Conduct Department before proceeding. Moving forward without additional advice could hurt 3M and be a bad decision for you.

Additional Guidance

Ethical decision-making requires thinking carefully about alternative courses of conduct in light of the following guiding principles:

- Acting with uncompromising honesty and integrity in all 3M activities and relationships.
- Avoiding conflicts of interest between work and personal life.
- Respecting the dignity and worth of all people.
- Encouraging individual initiative and innovation in an atmosphere of flexibility, cooperation, and trust.
- Promoting a culture where promise keeping, fairness, respect, and personal accountability are valued, encouraged, and recognized.
- Maintaining a safe workplace.
- Protecting the environment.

Employee Obligations and Reporting

- ▶ 3M employees are expected to know 3M's Code of Conduct and to comply with it. Unless prohibited by local country law, 3M employees also are expected to promptly report any suspected violations of the law or 3M's Code of Conduct.
- ▶ 3M People are expected to fully cooperate with investigations of compliance issues.
- ▶ 3M employees should communicate any report to 3M management, 3M legal counsel, 3M's Compliance & Business Conduct Department, assigned Human Resources manager, or through 3M-Ethics.com. Reports through 3M-Ethics.com can be anonymous in most countries.
- ▶ Supervisors and managers are expected to promptly report all suspected violations of the law and 3M's Code of Conduct to their business unit's assigned legal counsel, the Compliance & Business Conduct Department, or their business management.
- ▶ 3M People must not retaliate against anyone for reporting a business conduct concern or cooperating with an investigation. 3M does not tolerate retaliation for reporting violations, or suspected violations, of the law or 3M's Code of Conduct.
- ▶ Employees are expected to complete all required business conduct courses and certifications.

Additional Guidance

- Supervisors and managers who learn that 3M or a business partner (for example, a distributor) offered a bribe, was offered a bribe or may have been offered a bribe must report this to their assigned legal counsel and the Compliance & Business Conduct Department.
- For more information about bribery, and the definition of a bribe, see page 15 of this Handbook.
- 3M's Code of Conduct is posted on 3M's internal and external websites. For 3M People without internet access, management will provide printed copies of the Code of Conduct, either directly or in convenient locations, such as in employee break areas or attached to employee bulletin boards.
- Posters describing how to report a business conduct concern using 3M's helpline and 3M-Ethics.com are posted in employee break areas and other suitable locations.
- There may be legitimate reasons for performance management or other disciplinary actions to be taken by a supervisor regarding an employee who has raised a business conduct concern. To avoid creating the appearance of retaliation, supervisors in such situations should consult with their assigned Human Resources manager.

Be Honest

Act with uncompromising honesty and integrity.

3M competes for business based on 3M product quality, innovative solutions, customer service, and 3M's reputation for integrity — doing business the right way, always and everywhere. 3M People comply with all laws and with 3M policies that protect the integrity and fairness of the marketplace. Some examples of these laws are the U.S. Foreign Corrupt Practices Act (FCPA), the U.K. Bribery Act (UKBA), and antitrust and competition laws throughout the world, but there are many others.

- ▶ Anti-Bribery
- ▶ Gifts, Entertainment, and Travel
- ▶ Antitrust and Competition Law
- ▶ Export, Import, and Trade Compliance
- ▶ Securities Trading and Insider Information
- ▶ Advertising and Product Representation
- ▶ Anti-Money Laundering

The full text of this principle can be found at [3Msource.mmm.com/businessconduct](https://www.3Msource.mmm.com/businessconduct).

Report a concern at www.3M-Ethics.com or call 1-877-3M-ETHICS (1-877-363-8442) in the United States.

Anti-Bribery

- ▶ 3M People must never offer, make, or accept bribes of any kind, regardless of local business customs.
- ▶ Violating this Principle can get an employee fired; it can mean going to jail for the people involved and huge fines for both 3M and the individual. Bribery convictions can also mean the loss of other business and lasting damage to 3M's reputation.
- ▶ Bribery is a crime everywhere 3M does business. Bribery of both private individuals and government officials is against the law and 3M's Code of Conduct. 3M People must comply with all anti-bribery laws, including, but not limited to, the U.S. Foreign Corrupt Practices Act, the U.K. Bribery Act, and all applicable local laws where 3M operates.
- ▶ Bribes can take many forms, such as gifts, kickbacks, political or charitable contributions, entertainment, travel, or even small facilitating or "grease" payments. Even the promise or offer of a bribe is wrong. All of these examples of bribes violate this Principle, whether they are paid, offered, or accepted by a 3M employee or by someone else acting on 3M's behalf.

Facilitation payments are small payments made to speed up non-discretionary government actions, like getting electrical power turned on or phones installed. But even though they are small and very common in some countries, facilitation payments are prohibited.

- ▶ Remember, even favors or promises, such as offers to hire a government official's relative or provide a discount not available to others, violate this Principle.
- ▶ 3M must accurately reflect all transactions in 3M's books and records.

Additional Guidance

- A bribe is a direct or indirect offer to give or receive something of value to or from an individual or entity with the intent to gain an improper advantage or corruptly influence a decision. “Gaining an improper advantage” means obtaining something of value to which 3M is not already or otherwise clearly entitled, based on playing by the rules that every other bidder must follow.
- Special rules apply to government officials. The U.S. Foreign Corrupt Practices Act (FCPA) prohibits bribes to government officials in other countries. “Government officials” include government employees, appointed and elected officials and others, including but not limited to, political parties and high ranking party members, professors and health care professionals who work at public universities and healthcare programs, and employees of government-owned or government-controlled companies, or public international organizations like the Red Cross and the United Nations. Determining whether someone is a “government official” can be difficult, so consult your business unit’s assigned legal counsel or 3M’s Compliance & Business Conduct Department if you have questions.
- Bribes may be concealed as commissions, charitable or political contributions, gifts, meals, and travel expenses. Be careful in deciding whether to make these payments or incur such expenses, and follow all policies and procedures for making such payments.
- Remember, bribes can take many forms. A political candidate or public official may ask you to make a contribution to a charity. This could be a bribe.
- 3M can be responsible for the actions of anyone acting on its behalf, regardless of whether or not that person is a 3M employee. Some examples include suppliers, sales agents, representatives, consultants, joint venture partners, distributors, converters, and outside counsel.
- Use care in choosing 3M’s business partners. Perform due diligence on all third parties as required by our Integrity Assessment procedures. Always be alert to any conduct that causes you concern during the course of the business relationship. Often, your sense that something is wrong is a sign of trouble. For more information on Integrity Assessments, see the Compliance & Business Conduct Website at <http://3msource.mmm.com/businessconduct>.
- Never permit third parties to offer or accept a bribe; you and 3M may be held responsible for their actions.

Small courtesies, such as a cup of coffee, a token gift of nominal value, or a reasonably priced lunch or dinner, are not bribes. When providing such courtesies to government officials, you must comply with the gift laws and monetary limits applicable to those government officials, as well as all applicable 3M policies or local policies that apply to your 3M business unit. See the Gifts, Entertainment, and Travel Principle for more information.

Gifts, Entertainment, and Travel

- ▶ Exchanging appropriate business gifts, entertaining customers at meals and events, and providing business travel are customary ways to strengthen business relationships, to educate customers about 3M and its products, and to support 3M business. When managed correctly, these are lawful business practices, consistent with 3M's Code of Conduct. But it is important that all applicable rules are followed and that accurate books and records are kept reflecting these expenses.
- ▶ Any business gifts or entertainment, whether given or received by a 3M employee or someone acting on 3M's behalf, must be infrequent and reasonable in cost and quantity.
- ▶ Bribery is always illegal, so avoid situations in which gifts, meals, entertainment, and similar courtesies could affect or even appear to affect your own or someone else's business judgment or objectivity. Comply with all applicable laws, this Principle, and 3M's due diligence procedures.

Special laws and rules apply to government officials. Business gifts, meals, entertainment, travel, and even small courtesies to government employees are strictly regulated under many countries' laws, including the U.S. Foreign Corrupt Practices Act. Never offer something of value to government officials unless it is clear that applicable laws and regulations permit it and you have followed the appropriate due diligence and approval procedures. Such gifts could violate the law, even if paid for with personal funds. Always comply with 3M's policies as well as with the gift laws and monetary limits applicable to government officials. Remember that a local 3M policy may set a value limit lower than that of the country laws; follow the more stringent rule.

Additional Guidance

- Small courtesies, like a cup of coffee or a reasonably priced lunch or dinner, are usually fine. Gifts of modest value, such as a 3M branded mouse pad or ball point pen, are also usually okay. But, never give or receive expensive or extravagant gifts, including gifts that might be considered extravagant by others.
- Avoid gifts, meals, entertainment, and courtesies that coincide with business decisions because the timing could appear to be an attempt to improperly influence business judgment.
- Giving or receiving cash or cash equivalents such as gift cards, gift certificates, or vouchers almost always violates this Principle. In very rare, limited, and defined circumstances, within special conditions, 3M policies and procedures may permit such gifts, but it is important to check with your business unit's assigned legal counsel before acting. When in doubt, play it safe and avoid giving or receiving such gifts.
- Remember to carefully consider proposed gifts, entertainment, and meals from the perspective of an objective third person. Get the opinion of others, like your manager or your business unit's assigned legal counsel, if the answer is not clear.

Antitrust and Competition Law

- ▶ 3M engages in fair competition and complies with all antitrust and competition laws and regulations globally. Certain business activities, such as agreements between competitors to fix prices, always violate these laws. Many other business activities, such as certain restrictive supply or distribution agreements or unfair use of a strong market position to harm competition, may violate these laws.
- ▶ Antitrust and competition laws vary from country to country and are complex. Always obtain assistance from your business unit's assigned legal counsel whenever business activities might be regulated by antitrust and competition laws.

Additional Guidance

- Do not agree with competitors or potential competitors about prices, terms of sale, sales plans, bidding, costs, profits, production, volumes, or any other aspect of competition. Do not even discuss or exchange information with competitors or potential competitors about these topics.
- Do not divide customers, markets, or territories with competitors or potential competitors.
- Do not discuss or agree with others to stop doing business with certain customers or suppliers or to limit production.
- Be careful when interacting with competitors at industry events, such as trade shows, trade association meetings, benchmarking meetings, or similar events. Consult with your business unit's assigned legal counsel before participating in such organizations or events to identify risks and get any necessary approvals. Follow the required steps in the Standard for Membership and Participation in a Trade Association or Standard-Setting Organization before joining or participating in such organizations.
- Consult with your business unit's assigned legal counsel about arrangements for exclusive purchases or sales, distributor relations including termination of a distributor relationship, pricing, rebate, bundled rebate or discount programs, or other conduct that potentially restricts the resale of products or services, and any conduct or program designed to gain or maintain a strong market position.
- Failure to comply with antitrust and competition laws could harm 3M's reputation and lead to criminal and civil penalties and significant business disruptions. Always work with your business unit's assigned legal counsel to address any questions.

Export, Import, and Trade Compliance

- ▶ 3M complies with all applicable export, import, and trade compliance laws wherever 3M does business, including embargoes, economic sanctions, export control, antiboycott, cargo security, import classification and valuation, country of origin representations, and free trade agreements.
- ▶ When conducting business across borders, 3M People must comply with all laws, regulations, and company policies, standards, and procedures. These laws are complex and change frequently. 3M People must engage 3M's Global Trade Compliance Department with any questions or when doing business across borders.
- ▶ Should 3M's policies conflict with local law, employees must always obey the law.

Additional Guidance

- Trade embargoes and economic sanctions prohibit or restrict business activities with certain countries and their nationals, as well as business activities with specifically listed entities and persons.
- Export control regulations impose restrictions on the transfer of certain articles and technology to foreign destinations or persons.
- Antiboycott regulations prohibit U.S. companies and their foreign subsidiaries from participating in unsanctioned boycotts against countries friendly to the United States. Some other countries and jurisdictions also maintain laws that prohibit compliance with unsanctioned foreign boycotts or embargoes.
- Customs regulations govern the many aspects involved in the importation of goods into countries. In most countries, this includes complex regulations concerning the classification, valuation, country of origin and marking of the imported goods. Customs regulations may also include the enforcement of partner government agencies' regulations on imported goods, such as health care products, chemicals, or other regulated articles.
- Government procurement and various advertising regulations define rules for making certain country of origin representations.
- Tax regulations influence sales terms and the obligations of parties in transactions.
- Cargo security laws provide minimal security standards for ensuring the physical security of cross-border shipments.
- Free trade agreements are two-country or multi-country international agreements that provide for trade preferences and benefits to the participating countries.
- Failure to comply with export, import, and trade compliance laws could harm 3M's reputation and lead to criminal and civil penalties and significant business disruptions.

Securities Trading and Insider Information

- ▶ 3M People must comply with all of the securities and insider trading laws of the countries where 3M does business.
- ▶ Insider trading is illegal and is prohibited by this Principle.
- ▶ Do not disclose material, nonpublic information about 3M.
- ▶ Do not disclose material, non-public information about another company; for example, a business partner or an acquisition target.
- ▶ Senior executives must strictly comply with Securities and Exchange Commission rules restricting their ability to trade 3M stock.
- ▶ People who violate insider trading laws can go to jail. 3M could suffer civil fines and criminal penalties for violations of the law and this Principle.

Additional Guidance

- In the course of your 3M work, you may become aware of “inside information” about 3M or other companies. “Inside information” is information that has not been disclosed to the public. Such information is “material” if it is not available to the general public and could influence someone to buy, sell, or hold securities. Examples of material, nonpublic information include:
 - Financial results from the company or a business unit in the company.
 - Earnings per share.
 - Dividend actions.
 - Mergers, acquisitions, divestitures, joint ventures.
 - Major claims, litigation, or other legal proceedings, or government investigation.
 - Major management changes.
 - Significant new product development or advances in research.
- “Insider trading” is buying or selling 3M stock or another company’s stock while in possession of material, nonpublic information about the company. Insider trading also includes providing material, nonpublic information to others who might buy or sell a company’s stock or pass the information along to others.
- If you disclose material, nonpublic information, you may be personally liable for insider trading even if you did not make the trade or gain anything from making the disclosure.
- When you or a family member possesses material, nonpublic information:
 - Never engage in transactions involving the stock about which you have material, nonpublic information.
 - Never give others “tips” or information about a company that could influence their decisions to buy or sell the company stock.
 - Wait until the third full trading day after the information is publicly disclosed before making any transaction.
- It may not be clear whether certain information is “material,” so seek the advice of your business unit’s assigned legal counsel.
- When in doubt, play it safe: Do not share information with anyone if you think it might be material, and do not buy or sell stock if you know something you think might be material, nonpublic information.

Advertising and Product Representation

Trust is the foundation of 3M's business relationships with its customers, business partners, and end users. 3M People must communicate honestly and accurately about 3M's products and services. 3M People must comply with all advertising laws of the countries where 3M does business and must not engage in unfair or deceptive acts or practices.

Additional Guidance

- Always represent 3M products and services truthfully, fairly, accurately, and in a professional manner, including in sales materials, advertising, packaging, promotions, contracts, emails, conversations, and any other communication.
- Only make product claims that have been appropriately substantiated through testing based on sound statistical and scientific principles or approved through the 3M business unit's claims approval process.
- Do not unfairly criticize or discredit a competitor or its products or services.

Anti-Money Laundering

- ▶ 3M is committed to complying fully with all anti-money laundering and anti-terrorism laws throughout the world. 3M conducts business only with reputable customers involved in legitimate business activities, with funds derived from legitimate sources.
- ▶ 3M People must comply with all laws, regulations and company policies, guidelines, standards, and other procedures to ensure compliance with this Principle.

Additional Guidance

- Compliance with anti-money laundering and anti-terrorism laws and regulations requires 3M People to be alert to possible “red flags” that may appear in the course of business and signal a problem. If “red flags” are identified, an appropriate level of additional due diligence is needed.
- Know your business partners: Conduct Integrity Assessments and be familiar with their business practices.
- Monitor financial activity: Observe and record all payments and transactions. Follow Global Financial Standards for acceptable forms of payment.
- Keep complete records: Keep current, complete, and accurate records of every business transaction.
- Report any suspicious activity: Promptly alert your business unit’s assigned legal counsel or 3M’s Compliance & Business Conduct Department of any suspicious activity.
- Be aware of and follow 3M and legal requirements for the reporting of cash transactions.
- Cooperate fully with legal and regulatory authorities charged with enforcing anti-money laundering laws: This includes cooperating with 3M Internal Audit, 3M Compliance & Business Conduct, and all law enforcement and regulatory agencies.
- Be sure also to comply with other relevant Policies and Standards, such as 3M’s Compliance Principle, Ethical Business Conduct Principle, and Anti-Bribery Principle.

Be aware of the following money laundering “red flags”

- ▶ Payments made in cash or cash equivalents, such as money orders, travelers checks, or prepaid cash cards. This is the easiest way for someone to achieve money laundering and put 3M at risk. Know and follow 3M and legal requirements for reporting cash transactions and avoid receiving payment in cash.
- ▶ Customers named as a Designated Party, Specially Designated National (SDN), or appearing on other similar lists, or connected to countries identified as non-cooperative by the Financial Action Task Force (FATF) with international efforts against money laundering.
- ▶ Customers or suppliers who are reluctant to provide complete information and/or provide insufficient, false, or suspicious information.
- ▶ Customers or suppliers who appear to be acting as an agent for an undisclosed principal, but decline or are reluctant to provide information regarding that principal or entity.
- ▶ Customers or suppliers who express concern about, or want to avoid, reporting or record-keeping requirements.
- ▶ Customers who structure payments to avoid the relevant government reporting requirements for cash and cash equivalent payments above a certain dollar amount; for example, by making multiple smaller payments or payments from multiple sources.
- ▶ The purchase of products, or a larger volume purchase, that appears to be inconsistent with a customer’s normal ordering pattern, without any legitimate business reason, such as a special price promotion.
- ▶ Complex deal structures or payment patterns that reflect no real business purpose.
- ▶ Requests for payment to be made through an unrelated country to an unrelated third party.
- ▶ Multiple partial payments from various parties on behalf of a single customer and/or multiple partial payments from various locations.
- ▶ Customers or suppliers whose address is not a physical site.
- ▶ Customers making a deposit of funds followed by an immediate request that the money be wired out or transferred to a third party, or to another firm, without any apparent business purpose.
- ▶ Customers making one form of payment and then requesting a refund of the payment in another form; for example, paying by cash and then requesting a refund by wire transfer.

Be Fair

Play by the rules, whether working with government, customers, or suppliers.

As a law-abiding corporate citizen, 3M values its reputation and working relationships with government officials and entities throughout the world. Governments regulate 3M's activities, are 3M customers, and enact laws that affect 3M's interests. For these reasons, 3M People must carefully follow the laws, rules, and regulations that govern 3M's government interactions.

- ▶ **Lobbying and Political Activities**
- ▶ **Doing Business With Government Agencies and Contractors**

Lobbying and Political Activities

- ▶ 3M respects our employees' right to participate in the political process and to communicate with their elected representatives using their own time and resources. However, 3M resources and facilities must not be used for private, political, or lobbying activity.
 - Examples of 3M resources include our facilities, email, computers, telephones, and work time.
 - Examples of political activities include campaigning, distributing literature, fundraising, and hosting events on 3M premises or on 3M time.
- ▶ Do not give the impression that 3M sponsors or endorses (or, alternatively, opposes) any candidate, referendum, or ballot initiative.
- ▶ Do not give the impression that your support of a position or candidate is equivalent to 3M supporting that position or candidate.
- ▶ Some governments in the U.S. have enacted "pay-to-play" laws, which require reporting or, in some instances, prohibit entities from making political contributions to government officials if they also hold or seek to obtain government contracts. In order to ensure 3M's compliance with pay-to-play laws, officers and directors and certain employees may be required to consult with 3M legal counsel before making political contributions to candidates and political organizations in certain states and localities.
- ▶ "Lobbying" means communicating with lawmakers and other public officials to help shape public policy on issues. Lobbying is highly regulated and often contain detailed reporting requirements. 3M, its employees, and anyone acting on its behalf must comply with all lobbying laws, wherever 3M does business. If your job involves interactions with any government body or public official, be sure you know the lobbying laws of the area in which you do business and regularly check for changes.
- ▶ 3M Government Affairs manages 3M's lobbying activities. Before hiring a lobbyist, engaging in direct lobbying, or communicating with public officials on 3M's behalf, 3M People must consult 3M Government Affairs.
- ▶ All employees interacting with government or engaging lobbyists are responsible for understanding and complying with the lobbying laws that affect their business activities, including registration, reporting, and record-keeping requirements.

Additional Guidance

- The use of corporate resources to influence the political process is strictly regulated to protect and promote the integrity of the political processes of governments around the world. 3M supports and complies with these regulations and expects 3M People, in the course of their 3M work, to comply as well.
- The Lobbying and Political Activities Principle does not prohibit lawful activities and the use of 3M resources by 3M and the 3M Political Action Committee (3M PAC), nor does it limit the lawful activities of 3M's Government Affairs organization. The 3M PAC is a nonpartisan fund used to make contributions to U.S. federal, state, and local candidates as permitted by law.
- Contact 3M's Government Affairs for assistance.

Doing Business with Government Agencies and Contractors

- ▶ Business with government units throughout the world, including business through government contractors and subcontractors, is subject to complex requirements that are often stricter than those for commercial customers.
- ▶ 3M People must comply with all applicable laws and regulations when doing business with any government entity.
- ▶ Be honest and accurate in all dealings with government officials, agencies, contractors, and subcontractors.
- ▶ Making inaccurate or incomplete statements to government entities may result in serious legal consequences for you and 3M, and may affect 3M's ability to do business with government customers in the future.
- ▶ Before entering into any agreement related to a government customer, be sure to consult your business unit's assigned legal counsel or 3M's Government Contract Compliance Department.

Additional Guidance

- If you work on government contracts and bids, be sure you understand the rules that apply. Check with the Government Contract Compliance Department or your business unit's assigned legal counsel.
- We may be required to provide detailed information about our company and shareholders, including political contributions, lobbying, gifts to government officials, and communications with government officials. Even sales-related communications may fall within the scope of these disclosure requirements.
- There are specific negotiation rules for government contracts. Know and comply with all of those rules. Never seek confidential information about a government purchase or contract, including information about a competitor's bid or proposal or the agency's selection process before award of the contract.
- Do not deviate from government contracting or subcontracting requirements or the terms of any government contract. For example:
 - Comply with all country of origin requirements.
 - Always perform required quality control.
- Be sure to comply also with 3M's Anti-Bribery Principle and 3M's Gifts, Entertainment, and Travel Principle.



Be Loyal

**Protect 3M's interests,
assets, and information.**

3M's reputation and its success are built on the loyalty of its people who put 3M's interests first when doing their jobs; who do not allow personal activities to conflict with 3M's business; and who carefully protect 3M's information, assets, and interests.

- ▶ **Conflict of Interest**
- ▶ **Information Security, Trade Secrets, and Confidential Information**
- ▶ **Electronic Resources**
- ▶ **Data Privacy**

The full text of this principle can be found at 3Msource.mmm.com/businessconduct.

Report a concern at www.3M-Ethics.com or call 1-877-3M-ETHICS (1-877-363-8442) in the United States.

Conflict of Interest

- ▶ Avoid situations where your personal interests could inappropriately influence, or appear to influence, your business judgment. This is called a “conflict of interest.”
- ▶ Even the perception that personal interests influence business judgment can hurt 3M’s reputation and business.
- ▶ Local policies and procedures require timely and complete conflict of interest certifications.

Additional Guidance

- 3M People must disclose any outside activity, financial interest, or relationship that may pose a real, potential, or perceived conflict of interest. Disclosures may be to a supervisor, next level manager, your business unit’s assigned legal counsel, your assigned Human Resources manager, 3M’s Compliance & Business Conduct Department, or through 3M-Ethics.com.
- Employees who have friends, relatives, or other personal or business relationships with people who are government officials shall carefully consider whether those relationships create conflicts of interest with their 3M jobs. If so, the conflicts or potential conflicts should be disclosed to their manager or their business unit’s assigned Human Resources staff.
 - “Government officials” include government employees, appointed and elected officials and others, including but not limited to, political parties and high ranking party members, professors and health care professionals who work at public universities and healthcare programs, and employees of government-owned or government-controlled companies, or public international organizations like the Red Cross and the United Nations. Determining whether someone is a “government official” can be difficult, so consult your business unit’s assigned legal counsel or 3M’s Compliance & Business Conduct Department if you have questions.
- Obtain management approval before accepting any position as an officer or director of an outside business.
- Notify management before serving on the board of a charitable, educational, or other nonprofit organization.
- Do not accept outside employment that is inconsistent with 3M’s interests, such as working for a competitor or starting your own business that competes or does business with 3M.
- Avoid mixing personal relationships and business — for example, hiring a family member as an employee or vendor; buying goods or services from a family business on 3M’s behalf; or selling 3M goods to a family business on any basis for which others might compete.
- Do not accept gifts, meals, or entertainment that could appear to affect your objectivity and judgment. Turn down expensive dinners or gifts that would be considered extravagant by others.

Information Security, Trade Secrets, and Confidential Information

- ▶ Protect 3M's confidential information, including 3M's trade secrets, from unauthorized disclosure.
- ▶ Never disclose confidential information to anyone outside the company without explicit approval. Use appropriate confidential disclosure agreements.
- ▶ Even inside 3M, do not share confidential information with people who lack a business "need to know."
- ▶ Know the classification of 3M information you create and to which you have access, the security precautions that apply to the information, how long to retain the information, and how properly to dispose of it.

Additional Guidance

- 3M information is classified as Public, Internal, Confidential, or Regulated. All information other than Public must be protected.
- When receiving confidential information from another party, be sure first to have a written, signed confidential disclosure agreement.
- Never accept or use confidential information that you know or suspect has been illegally or unethically obtained. Do not disclose confidential information when hiring an outside consultant without a confidential disclosure agreement. Consult with your business unit's assigned legal counsel if you have questions.

Trade secrets are a form of intellectual property. They are valuable and must be protected by keeping them confidential. Trade secrets have the following characteristics: (1) they have economic value, (2) they are not known outside 3M, and (3) 3M is making efforts to keep that information confidential.

Electronic Resources

- ▶ 3M's electronic resources are for 3M business. These resources include 3M office and mobile phones, computers, tablets, software, systems, and networks.
- ▶ Use 3M's electronic resources lawfully and in a manner that complies with 3M's Code of Conduct and 3M's Information Security, Trade Secrets, and Confidential Information Principle.
- ▶ Comply with 3M's Social Media Standard.
- ▶ Protect 3M's electronic resources from unauthorized uses and security threats.
- ▶ Do not use 3M's electronic resources for outside business ventures or personal financial gain.
- ▶ Personal use of electronic resources must be reasonable and limited and shall not interfere with 3M's normal business or your ability to meet job expectations.

Additional Guidance

3M electronic resources transmit, receive, process, or store 3M information or data by use of:

- Electronic devices, like mobile phones, tablets, and computers.
- Software.
- Systems and networks, like email, voice mail, databases, servers, and internet connectivity.

How you can protect 3M electronic resources:

- Protect user IDs and passwords; never post them near your computer; record them in a secure manner.
- Lock work stations when unattended.
- Be cautious when downloading or opening attachments or software from unknown sources. When in doubt, contact your local IT Helpdesk.

- Be sure that your work station and mobile devices meet 3M security standards; never uninstall or disable anti-virus tools, firewalls, or password protected screensavers.
- When using 3M's electronic resources in public, protect confidential information, for example, by using a privacy screen and being aware of your surroundings.
- Do not download, copy, or use software or other materials in violation of copyright laws or license restrictions.
- Report possible information security incidents or violations of this Principle through the IT helpline or 3M-Ethics.com.

Data Privacy

- ▶ 3M complies with all applicable privacy and data protection laws, wherever it does business.
- ▶ 3M respects the privacy of its employees, customers, business partners, and others who share their personal information with us. Any personal information 3M collects is treated with care, protected, and used lawfully and properly.

“Personal information” is any information that alone, or in combination, identifies an individual.

Additional Guidance

- Consult your business unit’s assigned legal counsel and 3M’s data privacy experts in Legal Affairs to be sure your activities are permitted by applicable law and 3M policies:
 - Before transferring personal information from one country to another, even among 3M affiliates.
 - Before disclosing personal information about 3M employees, customers, and business partners to third parties.
 - Before collecting, using, or disclosing personal information without the knowledge and consent of the individual whose data you are handling.
 - For guidance on how to address web-based cookies, tracking software, and making data more anonymous.
- Data privacy laws vary by jurisdiction. Be sure to consult your business unit’s assigned legal counsel.



Be Accurate

Keep complete and accurate business records.

3M must have accurate business records. Because 3M is a publicly traded company, the law requires many kinds of records so that 3M Management, its Board of Directors, financial institutions, rating agencies, the investing public, and governments around the world can rely on the accuracy of the information 3M provides.

► Internal Controls, Financial Reporting, Document Retention, and Auditing

Internal Controls, Financial Reporting, Document Retention, and Auditing

3M employees are responsible and accountable for maintaining the integrity of 3M's business documents and financial reporting.

- ▶ 3M generates countless business and financial records every day, including but not limited to purchase orders, contracts, manufacturing records, expense reports, invoices, manufacturing and laboratory data, regulatory reports to government entities, emails, timesheets, telephone logs, and many others.
- ▶ All 3M employees must ensure that the records they create and use reflect the true nature of 3M's transactions.
- ▶ Follow all review and approval procedures.
- ▶ Comply with 3M internal controls.
- ▶ Follow document retention requirements.
- ▶ Any failure to create and maintain correct and accurate business and financial records can pose legal and business risks for 3M.
- ▶ All employees are required to cooperate fully and provide full and complete information when requested by 3M Corporate Auditors, 3M's independent external auditors, 3M Security, or 3M Legal Affairs, including the Compliance & Business Conduct Department.

Additional Guidance

- Truthful and accurate records are critical for making sound business decisions and maintaining the integrity of our tax returns, government-required financial disclosures, and other financial statements.
- Because 3M is a U.S. company, employees everywhere must comply with U.S. laws and regulations governing the accuracy of 3M's business records.
- As a publicly traded U.S. company, 3M must comply with the Sarbanes-Oxley Act (SOX) requirements. Consult your assigned 3M Finance Department staff with questions.
- Refer to 3M's Global Financial Standards and your business unit's assigned 3M Finance Department staff.
- Compliance with 3M's global Sourcing Policy is expected.

Be Respectful

Respect one another and our social and physical environment around the world.

3M People treat each other with respect and conduct business activities in a manner that protects health, safety, and the environment.

- ▶ **Respectful Workplace**
- ▶ **Workplace Environmental, Health, and Safety**
- ▶ **Product Safety, Quality, and Stewardship**

The full text of this principle can be found at 3Msource.mmm.com/businessconduct.

Report a concern at www.3M-Ethics.com or call 1-877-3M-ETHICS (1-877-363-8442) in the United States.

Respectful Workplace

- ▶ 3M values its workers. We strive to have a work environment that reflects and values the best in all of us, where we treat each other respectfully and professionally, and where individual differences are valued.
- ▶ Any harassment or unprofessional or inappropriate behavior, even if not illegal, interferes with that goal and will not be tolerated. Unlawful discrimination is also prohibited. This Principle applies whenever you are at work and to work events and other 3M-sponsored activities.
- ▶ Employees must be free to report concerns and raise questions, free from fear of retaliation. Retaliation is not tolerated at 3M and is prohibited.
- ▶ Managers and supervisors are responsible for ensuring that 3M provides a fair and respectful workplace and that complaints are handled promptly and effectively.

Additional Guidance

- Harassment is unwelcome conduct toward an individual that creates an intimidating, hostile, or offensive work environment and that: (1) is due to personal traits such as age, disability, marital status, national origin, race or color, religion, sex, sexual orientation, or gender identity; and (2) causes work performance to suffer or negatively affects job opportunities. Harassment is against the law in the United States and many other countries.
- For information on how to report a concern, see page 7 of this handbook.

Workplace Environmental, Health, and Safety

- ▶ 3M provides safe and healthy workplaces, and strives to minimize the impact of our operations on the environment.
- ▶ 3M employees must know and follow all applicable environmental, health and safety (EHS) laws and 3M's EHS policies and standards.
- ▶ 3M management is responsible for addressing reported concerns and ensuring that 3M employees are properly trained in applicable EHS laws and regulations and 3M EHS policies and standards.
- ▶ 3M employees must report any EHS concerns and respond to them in a diligent manner.

Additional Guidance

- 3M strives to improve every life. 3M strives to reduce the environmental impact of our operations, conserve natural resources, and conduct all business activities in a manner that protects the health and safety of our employees, visitors, and communities.
- Contact your assigned division, facility or country EHS professionals for help in identifying and complying with applicable laws and policies.
- Choose suppliers, outsourced manufacturers and service providers who share 3M's EHS values.
- You can find 3M's EHS policies and standards in the Policy Center under the Environmental, Health, and Safety link.

The full text of this principle can be found at 3Msource.mmm.com/businessconduct.



Product Safety, Quality, and Stewardship

- ▶ 3M is committed to product safety, quality, and stewardship.
- ▶ Product safety, quality, and stewardship must always be primary considerations during design, manufacture, marketing, and sales of 3M products.
- ▶ 3M employees must know and follow all applicable laws, regulations, and 3M policies, standards, and procedures for product safety, quality, and stewardship and must report and respond to concerns in a diligent manner.
- ▶ 3M management is responsible for addressing reported concerns and ensuring that 3M employees are properly trained in applicable laws and regulations and 3M policies, standards, and procedures.

Additional Guidance

- 3M strives to improve every life. 3M provides our customers with quality products that are safe for their intended uses and understands that providing products that consistently meet customer, community, and our own high expectations is fundamental to our success.
- 3M works to produce products with superior environmental performance across their entire life-cycle. We also work with our suppliers and business partners so that their operations support these same objectives.
- These efforts together help define, protect, and ensure the long-term success of our company.
- Assess outsourced products with the same degree of review for product-related environmental, health, safety, regulatory, and potential liability attributes as those manufactured by 3M.
- Employees should contact their assigned division, facility, or country environmental, health, and safety professionals or quality leaders for help in identifying and complying with applicable laws and policies.
- 3M commitments to safety, quality and stewardship apply equally to services. Services provided by 3M must be conducted in a manner that is safe; complies with applicable laws and regulations; meets quality requirements; and conforms with 3M policies, standards and procedures.

Index of Business Conduct Principles

Advertising and Product Representation	21
Anti-Bribery	15
Anti-Money Laundering	22
Antitrust and Competition Law	18
Compliance	11
Conflict of Interest	29
Data Privacy	32
Doing Business With Government Agencies and Contractors	26
Electronic Resources	31
Employee Obligations and Reporting	13
Ethical Business Conduct	12
Export, Import, and Trade Compliance	19
Gifts, Entertainment, and Travel	17
Information Security, Trade Secrets, and Confidential Information	30
Internal Controls, Financial Reporting, Document Retention, and Auditing	35
Lobbying and Political Activities	25
Product Safety, Quality, and Stewardship	39
Respectful Workplace	37
Securities Trading and Insider Information	20
Workplace Environmental, Health, and Safety	38



3M Germany



3M China



3M United Kingdom



3M South Africa



3M Poland



3M Brazil



3M Compliance and Business Conduct

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New 24-Month STEM Extension Put Heavy Burden on Employers

Every international student is eligible for optional practical training (OPT) for 12 months. Students in the STEM fields (Science, Technology, Engineering, and Mathematics) may apply for an additional 17 months of OPT, if their employers participate in E-Verify. A lawsuit challenged the validity of the STEM 17-month OPT extension. As a result of that and other changes, USCIS has revised the rules substantially on STEM OPT extension. Beginning May 10, 2016, STEM students will be able to apply for OPT extension for 24 months (not 17 months).

While the additional time is most welcome, it comes with heavy baggage. In the past, the employer's responsibility in a student's STEM OPT extension was minimal and required only providing the company's E-Verify number to the students. The students would take care of the application themselves. However this is all going to change.

The changes were closely related to the reason for the lawsuit. The lawsuit partly alleged that the additional 17 months of STEM OPT extension was harmful to US workers. As a result, although USCIS extended the time, it put a heavy burden on employers to attest that the STEM OPT extension will be used only to provide training to international students and not to replace US workers. Thus, as the government likes to do, a new 7-page form, Form I-983, has been created.

The I-983 form is designed to be completed by both the employer and the student. The form obligates the employer to comply with many items, including but not limited to the following:

- Create and follow a training plan for the student that will address the following four key areas: (1) Student Role, (2) Goals and Objectives, (3) Employer Oversight, and (4) Measures and Assessments.
- Notify the student's "DSO", designated school official, of any material changes of the training plan
- Notify the DSO within 5 days of the student's departure or termination
- Ensure that the student's training is directly related to the STEM degree
- Ensure that the student will receive onsite supervision and evaluation
- Ensure the employer has sufficient resources to follow through with the training plan

The government may conduct onsite inspections to verify if the employer follows through the plan. It's not very clear what punishment the government would levy on the employers and students for non-compliance, but the details are forthcoming for sure.

Consideration for the employer with the new I-983 form

First, who is going to sign this form for the employer? Should an employer centralize processing of the I-983 form through a single point of contact? Should individual managers of student employees be allowed to sign the forms? We advise that the I-983 form should be treated as a serious government document, similar to other immigration forms or the I-9. An employer should designate specific signatory for this form, someone who can verify the training

plan and has access to the student employee and his/her manager to obtain updates of the training.

“Perfect Storm” in combination with H1B lottery

Over 236,000 H1B applications were submitted between April 1 to April 6 this year to compete for the 85000 H1B quotas. Nearly 2/3 of the applicants will not be selected, and many of them will be STEM graduates. Their only choice now is to apply for their OPT and if eligible, their STEM OPT extension. This will put a tremendous burden on employers almost immediately to create training plans in compliance with the I-983 form. Some students whose OPT STEM extension is pending and caught during this transition period will have a very short window (some as little as 3 days) to apply for their 24-month STEM OPT extension. These requests will be coming in almost right away from affected students. As such, employers are advised to have a plan for at least the following as soon as possible:

- Know about the new 24-month OPT STEM extension and make a decision on how to approach it uniformly, so that there is no issue with discrimination
- Download a copy of the I-983 form and be familiar with it
- Decide who will complete the training plan, and who will evaluate it for compliance purposes
- Decide who will sign the I-983 form for the employer
- Decide where to keep the I-983 copies, and who will keep track of the I-983 and the student-employee's records

This is completely new territory for both employers and students. This is a new area of immigration law as well, but many elements of the I-983 are found in other immigration processes. An experienced immigration attorney should be able to provide valuable guidance to employers to prepare for this.

If you have any question, please don't hesitate to contact us. Thank you very much.

Employment Eligibility Verification

by Patrick Shen, Bruce Buchanan, and Amy Peck

Patrick Shen is a partner in Fragomen's Washington, DC office and works with employers of all sizes across many sectors to establish and maintain compliant corporate immigration programs. Before rejoining Fragomen, Mr. Shen was appointed by the President and confirmed unanimously by the United States Senate as special counsel for immigration-related Unfair Employment Practices in the U.S. Justice Department. He previously served as policy and planning director of U.S. Immigration and Customs Enforcement and chief immigration counsel of the Senate Judiciary Committee. Mr. Shen also was an adjunct associate professor at American University Washington College of Law. For more information about Patrick Shen, please visit <http://www.fragomen.com/ourprofessionals>.

Bruce E. Buchanan is an attorney at the Nashville and Atlanta offices of Sebelist Buchanan Law PLLC, where he primarily represents employers in all aspects of immigration law, with a special emphasis on employer immigration compliance, as well as employment/labor law matters. Mr. Buchanan received his law degree from Vanderbilt University School of Law in 1982. He served as senior trial specialist for the National Labor Relations Board for 20 years. Mr. Buchanan also served for 12 years as an adjunct professor at William H. Bowen UALR School of Law. After going into private practice in 2003, he worked at two law firms, including Siskind Susser P.C., before forming his own law firm in late 2015. Mr. Buchanan authors his own blog on employer immigration compliance for *ilw.com*, located at www.EmployerImmigration.com, and is a guest blogger for LawLogix. He is also the editor of the Tennessee Bar Association's *Immigration Law Section Newsletter and Labor & Employment Law Newsletter*, and AILA's *Georgia-Alabama and Central Florida Chapters Newsletter on 11th Circuit decisions*. Mr. Buchanan recently served on the AILAILA's National Verification Liaison Committee. He is past-Chair of the TBA's Immigration Law Section and Arkansas Bar Association's Labor and Employment Section. Mr. Buchanan currently serves on the Board of Directors for the United Cerebral Palsy of Middle Tennessee, the Lupus Foundation – Mid-South, and Be About Change. Mr. Buchanan is admitted to practice in Tennessee, Georgia, Florida, and Arkansas, and before the U.S. Court of Appeals for the Fifth, Sixth, Eighth, and DC Circuit. He may be contacted at bbuchanan@sbllimmigration.com.

Amy L. Peck is a principal and co-leader of the immigration practice group of Jackson Lewis, P.C. Ms. Peck is an elected member of the AILA Board of Governors (2008-present) and a trustee of the American Immigration Council. Ms. Peck is a member of the AILA National Verification Committee, and is past Chair of the EOIR and ICE AILA national committees. She is a Great Plains Super Lawyer, American Lawyer Best Lawyer, Martindale-Hubbell Preeminent Woman Lawyer, The Legal 500 U.S., and Best Lawyers' Omaha Immigration Law Lawyer of the Year.

TRENDS IN OCAHO CASES AND I-9 FINES

In calendar year 2015, the Office of Chief Administrative Hearing Officer (OCAHO) issued 13 substantive decisions against employers in I-9 penalty cases. This number has dropped from previous years; in 2014, there were 17 Form I-9 penalty decisions and 30 decisions in 2013.

OCAHO Decisions in 2015

These are the cases in 2015 along with penalties sought by U.S. Immigration and Customs Enforcement (ICE) and penalties assessed by OCAHO:

Employer's Name	Penalty Sought By ICE	OCAHO's Decision
Foothill Packing	\$168,455	\$21,560

Employer Solutions Staffing Group (ESSG II)	\$227,252	\$227,252
Speedy Gonzalez Construction	\$186,860	\$97,000
Liberty Packaging	\$19,354	\$11,700
Horno MSJ, Ltd.	\$30,575	\$14,600
Kenneth McPeck Racing Stables	\$64,795	\$35,900
Niche, Inc.	\$157,220	\$63,850
Homestead Metal Recycling	\$5,890	\$2,450
PM Packaging, Inc.	\$53,762	\$27,200
Hartmann Studios	\$812,665	\$605,250
7-Eleven	\$34,408	\$15,450
Beyond Cleaning Services	\$6,600	\$0
Buffalo Transportation	\$110,000	\$75,600

An analysis of the above numbers demonstrates OCAHO lowered ICE's proposed penalties on average by 32.8%. ICE sought \$1,877,796 while OCAHO ordered \$1,200,772. These reductions were substantially less than in 2014 and 2013, where the reductions were 35.25% and 46.50%, respectively. One reason for the lower reductions is there was no reduction in two large penalties in *U.S. v. ESSG II*, 11 OCAHO no. 1242 (2015), and only a 25% reduction in the largest penalty case – *U.S. v. Hartmann Studios, Inc.*, 11 OCAHO no. 1255 (2015).

Even though the number of decisions is dropping, ICE is consistently collecting about \$16 million per year in cases with final orders, which includes litigated and non-litigated cases. The largest penalty assessed in 2015 by ICE was to Broetje Orchards. In Broetje Orchards, ICE reached an agreement whereby the company agreed to pay a \$2.25 million civil fine for employing almost 950 undocumented workers and acknowledged that it continued to employ unauthorized workers after being advised by ICE those employees did not have permission to work in the United States. Under the settlement agreement, Broetje Orchards did not admit to any criminal wrongdoing. It appears the reason that Broetje Orchards was willing to enter a settlement agreement paying \$2.25 million was to avoid criminal sanctions.

Significant Decisions

There were a number of significant holdings by OCAHO in 2015. In *U.S. v. Homestead Metal Recycling Corp.*, 11 OCAHO no. 1251 (2015), OCAHO found two minority-share owners were legally considered employees because the individuals did not have any control of the company.¹ In *U.S. v. Saidabror Siddikov d/b/a Beyond Cleaning Services*, 11 OCAHO no. 1257 (2015), OCAHO applied the regulatory factors at 8 C.F.R. §274a.1(j),² and found the workers performed those jobs independent of any supervision or control by Beyond Cleaning Services, they worked for other companies at the same time, and the services of at least two were available generally in the market.

¹ This holding is consistent with *U.S. v. Santiago's Restaurant*, 10 OCAHO no. 1153 (2012), where OCAHO found a partner must have meaningful control of a company in order to not have to complete an I-9 form.

² Independent contractors are defined to include "individuals or entities that carry on independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results." Among the factors to be considered are whether the individual supplies the tools or materials, makes services available to the public, works for different clients at the same time, directs the order or sequence in which the work is to be done, and determines the hours in which the work will be done."

In *U.S. v. ESSG II, supra*, the employer failed to have the individual, who reviewed the original employee documents, sign Section 2; rather, an individual at the corporate office reviewed copies of the documents, not the original documents and signed the Section 2 certification, contrary to the instructions. This led to a penalty of over \$225,000.

OCAHO held *U.S. v. Buffalo Transportation, Inc.*, 11 OCAHO no. 1263 (2015), the employer's argument - that ICE should be estopped from assessing fines on the 138 substantive violations because it waived its right to do so by failing to reference these employees in the previously served "Notice of Technical or Procedural Failures" on BTI - was found to be without merit. OCAHO cited a provision in the "Notice of Technical or Procedural Failures" which states "Additional failures to meet the employment verification requirements of section 274A(b) of the Immigration and Nationality Act (INA) may have been discovered. These failures are not included in this notification and may result in the issuance of a Notice of Intent to Fine." [*Id.* at 7.]

OCAHO also rejected a unique defense in *U.S. v. Holtsville 811 Inc. d/b/a 7-Eleven*, 11 OCAHO no. 1258 (2015). Specifically, 7-Eleven argued it did not need to complete I-9 forms for all employees and demonstrate through the I-9 forms that employees were authorized for employment because the franchisee was required by 7-Eleven to submit information and data concerning new hires into a centralized information system, which determined employee's work eligibility. As OCAHO stated, "no other scheme or system an employer wishes to use to circumvent or replace the Form I-9 completion and retention requirements" [*Id.* at 9.]

Reduction in Penalties

The main reasons for the reduction in penalties was OCAHO's findings that the penalties should be adjusted to the mid-range of penalties, not be disproportionate to the employer's resources, and not excessive under the Small Business Regulatory Enforcement Fairness Act. Plus, on three occasions, OCAHO found the penalties were higher than the company's ability to pay.

STRATEGIC CONSIDERATIONS FOR NEGOTIATING I-9 SETTLEMENTS/FINES

After ICE issues a Notice of Intent to Fine (NIF), what should an employer do? Just pay the fine and have the matter concluded or negotiate with ICE for a lower fine, and possible payment plan? Since there is so much room for discretion by the ICE attorneys, auditors, and agents, most of the time it behooves you to negotiate with ICE. The reduction can vary from ICE office to ICE office; thus, it is important to how the local office handles negotiations. Don't be afraid to reach out to your fellow AILA members, especially those who practice worksite enforcement.

After ICE issues a NIF finding substantive errors, uncorrected technical errors, and/or the employer knowingly hired or continued to employ unauthorized workers, one must provide the ICE attorney with a written request for a hearing within 30 days of service of the NIF. This protects your client's right to litigate, absent settlement.

There are a number of items to review in the NIF to determine whether ICE committed any errors. These possible errors are related to alleged substantive errors:

- Failure to accurately count the three business days for the employer signing Section 2;
- Timeliness violations (Section 1 must be completed by first day of employment and Section 2 within three business days of employment commencing) which are beyond the five-year statute of limitations;³
- An employee was hired but worked less than three days and the alleged violation concerned Section 2;⁴
- Are there duplicate entries for a single employee?;
- Was the error a technical, not substantive, error? If so, was the opportunity to correct it provided?;⁵
- An individual is an owner, with meaningful authority; thus, he does not have to complete I-9 form?;⁶
- Are any of the I-9s subject to the NIF beyond the scope of the audit because they were terminated employees?;⁷
- Did ICE aggravate all I-9 forms by 5% due to a finding that there were some unauthorized employees; by law, ICE is only allowed to aggravate 5% for the unauthorized employees' I-9s.⁸
- Employee is grandfathered in - hired before November 7, 1986 - and does not require an I-9 form;⁹ and
- An individual is not an employee, rather independent contractor.¹⁰

Additionally, if ICE is charging your client with hiring/employment of employees with unauthorized status, review the facts to determine whether the employer had knowledge of their undocumented status. Many times ICE fails to meet their burden of proof on this issue.¹¹

Finding errors can be doubly helpful – first, it eliminates a number of violations and second, it may cause the percentage of errors to drop into a lower category. As an example, if ICE charged 80 of the 200 Form I-9 had substantive errors, the baseline penalty is \$770 per violation according to this grid. If one found 20 mistakes by ICE, there initially would be a savings of \$15,400 (\$770 x 20), plus it reduces the penalty to \$605 per violation on the grid. This would be an additional savings of \$9,900 (\$770 - \$605 x \$600), for a total savings of \$25,300.

After this review for errors, one should review the five mitigating/aggravating factors: size of business, good faith, seriousness of violations, whether any employees were unauthorized, and history of previous violations, to determine whether ICE appropriately applied them. Each factor is worth 5%, plus or minus. Using these factors, one can argue for a reduction of the penalties if ICE declined to mitigate the penalties or erroneously aggravated the penalties.

³ See 28 USC §2462; *U.S. v. WSC Plumbing*, 9 OCAHO no. 1261 at 11-12 (2000), and *U.S. v. Curran Engineering, Inc.*, 7 OCAHO no. 975 at 897 (2000).

⁴ See *U.S. v. Two for Seven d/b/a Black and Blue Restaurant*, 10 OCAHO no. 1208 at 4 (2012).

⁵ See *U.S. v. Forsch Polymer Corp.*, 10 OCAHO no. 1156 at 3 (2012).

⁶ See *U.S. v. Santiago's Corp.*, *supra*.

⁷ See *Leed Construction*, 11 OCAHO no. 1237 (2014).

⁸ See *U.S. v. Hernandez*, 8 OCAHO no. 1043 at 668-69 (2000).

⁹ See 8 C.F.R. §274a.1(c).

¹⁰ See *U.S. v. Saidabror Siddikov d/b/a Beyond Cleaning Services*, *supra*.

¹¹ See *U.S. v. Liberty Packaging*, 11 OCAHO no. 1245 (2015).

Concerning size of the employer, ICE may not be aware of how many employees are currently employed or the company's revenues. Often, there may be hundreds of I-9 forms presented but only a small number of employees employed at any one time due to high turnover. Thus, if one can establish a small number of employees, usually fewer than 100 employees, one can assert small size as a 5% mitigating factor.¹²

ICE often argues bad faith based upon a poor rate of I-9 compliance. However, OCAHO has consistently rejected this argument.¹³ Thus, if ICE aggravated the penalties by 5% due to bad faith, one should attempt to refute this argument by showing negligence, not bad faith.

In negotiating the amount of the fine, the attorney should review your client's financial situation. If the client states it has been operating at a loss, the attorney should request financial records, preferably audited, to substantiate the poor financial condition and provide the records to ICE. If one can establish this poor financial condition, the attorney can argue for a reduction of the penalties based on this consideration and a payment plan—three to five years.¹⁴

Finally, one can argue the fines are punitive, which is contrary to the purpose of the penalties, which is to act as a deterrent against future violations.¹⁵

Besides the amount of the fine and any payment plan, there are other areas of negotiation with ICE. These include: (1) whether ICE is requiring an admission of liability as a requirement of settlement; (2) whether ICE seeks mandatory enrollment in E-Verify as a requirement of settlement; and (3) whether ICE will issue a press release, and if so, may the attorney review it and recommend specific wording.

IMMIGRATION-RELATED EMPLOYMENT DISCRIMINATION

Recent Enforcement Trends

Since 2009, the U.S. Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) has been increasing steadily its enforcement of the anti-discriminatory provisions under the Immigration and Nationality Act. Created by the Immigration Reform and Control Act of 1986 (IRCA), the purpose of the OSC is to be a countermeasure to IRCA's introduction of employer sanctions for hiring unauthorized workers and the obligation to verify eligibility to work on Form I-9.¹⁶

Over the past six years, employers across the country have paid collectively millions of dollars to settle discrimination allegations. To illustrate the increase, in 2007, OSC collected no monetary

¹² *U.S. v. Niche*, 11 OCAHO no. 1250 at 10 (2015).

¹³ *U.S. v. Horno MSJ, Ltd.*, 11 OCAHO no. 1247 at 11 (2015).

¹⁴ *U.S. v. Buffalo Transportation*, *supra*.

¹⁵ *U.S. v. Niche*, *supra*.

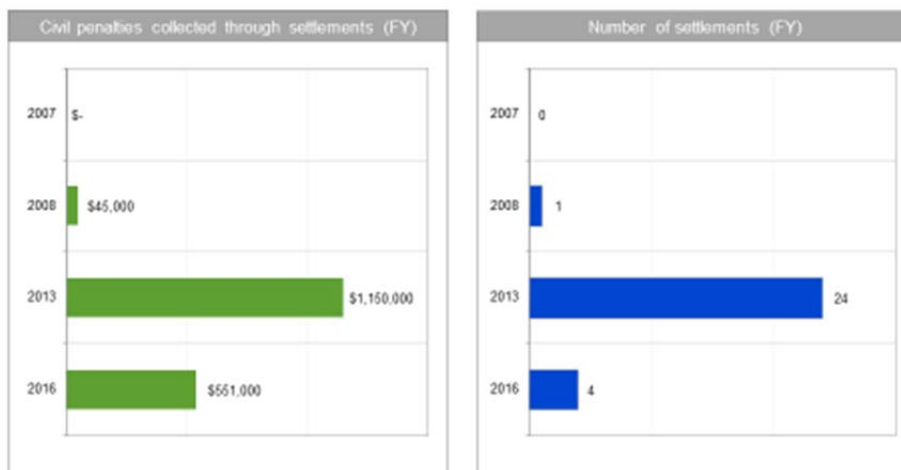
¹⁶ Immigration Reform and Control Act (IRCA) of 1986, [Pub.L. 99-603](#), 100 [Stat. 3445](#), (Nov. 6, 1986), codified in 8 USC §§1324a, 1324b.

penalties from employers, in 2007, \$45,000 in 2008, and a record \$1,150,000 in 2013.¹⁷ Thus far in 2016, OSC already has exceeded half of the 2013 figures. (See Table below).

Many of the behaviors that OSC sought to penalize are not intuitively “discriminatory” to most employers. Consequently, some of the largest and most sophisticated U.S. employers have inadvertently stepped into pitfalls and were charged with “discrimination” – in the eyes of OSC – in their hiring or verification process. Complicating the situation is, as discussed in the previous section, DHS’s escalation enforcement against unauthorized employment and focus on paperwork errors in the employment eligibility process (on Form I-9). Employers with lax verification policies received very hefty civil penalties from DHS, but some who are *too cautious* were charged with “discrimination” by OSC.

Notwithstanding this dilemma, employers can meet their verification and antidiscrimination obligations, but only with a keen awareness of the regulations and enforcement trends, and with clear policies and procedures to ensure compliance with both obligations.

Impact on Employers – Increase in Enforcement



* Current as of January 2016

FRAGOMEN
DANIELSON & KAY

35

Prohibited Practices and Protected Persons

National Origin Discrimination

¹⁷ “OSC’s Record Breaking Year.” Office of Special Counsel for Immigration-Related Unfair Employment Practices Spring 2014 Newsletter. Available at <http://www.justice.gov/crt/about/osc/htm/Spring2014.html#4>. This figure includes back wages OSC collected.

Employers may not discriminate when hiring or firing based on place of birth, country of origin, ancestry, native language, accent, or because they are perceived to be “foreign.”¹⁸ This applies only to employers with four to fourteen (14) employees. This provision complements the jurisdiction of the Equal Opportunity Employment Commission (EEOC) over larger employers.¹⁹

Citizenship Status Discrimination

Employers further may not discriminate when hiring or firing based on citizenship status. Only specifically protected persons have standing to allege citizenship (immigration) status discrimination. They are U.S. citizens, lawful permanent residents who applied for naturalization within six months of eligibility, asylees and refugees, and beneficiaries of IRCA's legalization programs.²⁰ Unless mandated by law, employers may not limit hiring to applicants of certain immigration status, such as U.S. citizens or nonimmigrant visa holder, to the exclusion of others protected workers.

Document Abuse

While completing or updating the Form I-9, an employer may not demand more or different documents from the employee so long as the employee presents documents that are legally acceptable. The lists of acceptable documents are attached to the Form I-9 itself. Demanding a DHS-issued “immigration” document because the employee is not a citizen is an example of document abuse. A 1996 amendment clarified that OSC must demonstrate that an employer had discriminatory intent as an element of document abuse.²¹ One does not need to be a protected person, only eligible work, to allege document abuse.²²

Retaliation and Intimidation

There is also a prohibition against retaliation, intimidation, coercion or threats against a person who asserts his or her rights under IRCA's anti-discrimination provisions.²³ The protection extends to any person, not only employees and not only protected persons.²⁴

OSC's Investigative Process

OSC may initiate an investigation based on: 1) a charge by an individual party or an organization representing workers' interests; 2) a referral from DHS's E-Verify Monitoring and Compliance Unit which monitors employees' pattern of usage suggests possible discrimination; 3) a referral from another government agency, such as EEOC;²⁵ 4) an “independent investigation” on its own initiative

¹⁸ *Id.* at §1324b(a)(1)(A).

¹⁹ Title VII of the Civil Rights Act of 1964, 78 Stat. 252, Pub. L. 88-352 (Jul. 2, 1964), codified in 42 USC §2000e. *See also Curuta v. U.S. Water Conservation Lab.*, 3 OCAHO 459 (OCAHO 1992) (legislative history makes clear that IRCA's national original discrimination bar complements Title VII).

²⁰ 8 USC §1324b(a)(3).

²¹ 8 USC §1324b(a)(1), (6).

²² *United States v. Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148 (OCAHO 2012).

²³ *Id.* at §1324b(a)(5).

²⁴ *United States v. Hotel Martha Washington Corp.*, 6 OCAHO No. 847 (OCAHO 1996).

²⁵ 8 USC §1324b(b)(2). *See also* 63 Fed. Reg. 5518, 5519 (Feb. 3, 1998) (describing procedures for referring charges for the purpose of allowing charging parties to satisfy statutory deadlines).

or as a follow-up to a previous individual charge. Usually, the independent investigations target “pattern or practice” of discrimination.

An individual may file a charge with the OSC within 180 days of the alleged discriminatory act. OSC has ten days from accepting the charge to advise the employer in writing of the investigation. It has 120 days from receiving the charge to decide whether to file a complaint with Office of the Chief Administrative Hearing Officer (OCAHO), or dismiss the charge. If OSC cannot make a decision on or before the 120th day, it must provide the charging party of the right to bring a private action against the employer even while OSC's investigation continues.²⁶

The statute of limitations for an “independent” investigation is 180 days from the time OSC files the complaint with OCAHO. OSC often tries to tie the most recent discriminatory act to prior violations by arguing that the acts are part of a “pattern” or “continuing violation.” It is also very common for OSC to request a “tolling” agreement with the employer which stops the clock from running on the statute of limitations.

During the investigative period, OSC often will engage the employer in informal discovery, where OSC would make informational, documentary and witness interview requests.²⁷ The OCAHO has given OSC broad investigative discretion, and this portion of the OSC process can often be the most expensive and disruptive. Some practitioners observe that OSC has weak liability case law on its side, but strong investigative case law, and thus uses the latter as leverage to force settlements out of employers that do not believe their actions are prohibited by the applicable law.

In cases where OSC charges discrimination against an individual, it has the initial burden to show by the preponderance of the evidence a prima facie case of discrimination. Then, the burden shifts to the employer “to articulate some legitimate, nondiscriminatory reason for the employee's rejection.” Finally, if the employer is able to do so, OSC then must show by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.²⁸

In recent years, employers are seeing an increasing number of “pattern or practice” investigations by OSC where the potential for penalty is much higher. The paradigm for burden of proof in such cases requires OSC to present evidence showing that the employer regularly and purposefully treated a protected group less favorably than another preferred group as a standard operating procedure. If OSC satisfies that initial burden, the employer then has the burden of production to defeat any prima facie showing of a pattern or practice. The employer may defeat a prima facie showing by demonstrating that the complainant's proof is either inaccurate or that the employers had a nondiscriminatory reason for its actions.²⁹

Areas of Recent OSC Enforcement Focus

²⁶ See generally 8 USC §1324b(d).

²⁷ 28 CFR. §44.302.

²⁸ *Salazar-Castro v. Cincinnati Pub. Sch.*, 2 OCAHO 86, 93 (OCAHO 1992), citing *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 802-04 (1973).

²⁹ *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 360-62 (1977).

Over-documentation at the Time of Initial Verification

This occurs most often when the employer mistakenly believes that a non-citizen employee must produce a DHS-issued immigration document, such as a green card or an employment authorization document. OSC often looks at a disproportionately high percentage of noncitizens producing DHS-issued documents to complete the Form I-9 as evidence of such discriminatory pattern, and recent case law held that discriminatory intent may be inferred by statistics.³⁰

Unnecessary Reverification

Some employers confuse the concept of expiring document with expiring work authorization and ask permanent residents to update their I-9 forms when a green card expires -- even though they are authorized to work indefinitely. OSC considers this to be intentional discrimination or disparate treatment based on citizenship status if U.S. citizens are not also asked to update the I-9 when their passports expire.

OSC often receives data of such improper (or unnecessary) reverification from E-Verify data and uses this information to conduct independent investigations.

Improper Citizenship (Immigration Status) Requirement or Preference

One common violation is limiting hiring to U.S. citizens when no law or government contract requires such limitation. Conversely, OSC also examines job opening announcements for preference of non-immigrant visa holders over U.S. workers, mostly in the technology sector.

Collaboration with Other Agencies

E-Verify Monitoring and Compliance

E-Verify monitors and detects employer misuse through USCIS's Monitoring and Compliance (M&C) Branch. M&C usually communicates its concerns to employers through telephone calls or emails, but also makes site visits and conducts "desk reviews" with the employers if M&C finds the employer's misunderstanding or misuse is significant. Because there is no specific penalty scheme for E-Verify violations, M&C role is primarily educational.³¹

However, in addition to educating employers, M&C also refers cases to ICE and OSC. OSC does not disclose the number of referrals it has received from M&C. According to available USCIS figures, the number of cases that M&C referred to OSC and ICE combined rose from 86 in 2011 and 180 in 2012 to 965 in 2015.³²

Once it receives a referral, OSC does not limit its investigation to only E-Verify related activities. Rather, OSC's practice is to look broadly into an employer's hiring and verification processes for any

³⁰ *United States v. Life Generations Healthcare, LLC*, 11 OCAHO no. 1227 (OCAHO 2014).

³¹ Role of the E-Verify Monitoring and Compliance Branch, available at *AILA InfoNet Doc. No. 13041941*. (Posted 8/20/13).

³² USCIS E-Verify Compliance Activities 2012 through 2015, available at www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify_Native_Documents/MC/E-Verify_Compliance_Activities_FY12-FY15.pdf.

evidence of immigration-related employment discrimination, and frequently asks for voluminous document production well outside the scope of an employer's E-Verify practices.

OSC/ICE Joint Policy Statement

On December 14, 2015, OSC and ICE jointly released the "Guidance for Employers Conducting Internal Employment Eligibility Verification Form I-9 Audits."³³ While the guidance does not create any new policy and certainly does not resolve all the tension created by the verification and anti-discrimination provisions under federal immigration law, it does signal a positive signal that the two agencies recognize the "Catch-22" for employers and are attempting to reconcile each-other's enforcement actions.

Specifically, the take-away from the anti-discrimination angle includes the following:

- The employer may conduct an I-9 audit for only a portion of the workforce, but may not select the audit pool based on employees' citizenship status or national origin;
- The employer should not request documentation from an employee if the only reason is that the photocopies of the documents presented to complete the I-9 are not clear.
- If the employer discovers that it failed to run an E-Verify query for any employee as required, the employer should immediately submit a query and note in the system that the initial failure was an oversight. The general rule is that the employer may not run a query on an existing employee unless required by the Federal Acquisition Regulation (FAR). *See* 48 C.F.R. § 52.222-54; and
- An employer who hires a third party to conduct an internal Form I-9 audit is liable for any discriminatory action by such third party.

Penalties and Other Terms of Settlement

The civil monetary penalty for intentional discrimination can be as low as \$375 or as high as \$16,000 per person, depending on the violation history of the employer and the severity of the offense. The penalty for document abuse is comparable to that of an I-9 paperwork error, which is between \$110 and \$1,100 per person. There is no criminal penalty for violating IRCA's antidiscrimination laws.

In addition to monetary penalties, employers also may be liable for back wages and other non-monetary remedies, such as mandatory training and reporting.

Recommendations for Defensive Strategy

Employers may have many legitimate reasons for making personnel decisions that are unrelated to immigration status. A well-documented memorandum for the employer's action may be sufficient to

³³ See www.justice.gov/crt/file/798276/download.

rebut an allegation of discrimination. At a minimum, it will shift the burden back to the OSC to prove discriminatory intent.³⁴

It is important for employers to have a clear policy and training protocol in place to refute allegation of company-wide discriminatory policy or practice. [Add footnote on pattern/practice]. The penalty for a singular violation may not be significant, but OSC always looks deeper into a company's practices to identify a broader pattern of practice which would result in much more costly penalties. If the employer has a clear policy of nondiscrimination and keeps records on staff training, OSC will find it more difficult to establish an institutional intent to discriminate.

“Discrimination” in OSC's view does not have to be animus towards a particular group. Instead, OSC argues, any disparate treatment at all may be deemed discriminatory. This underscores the importance of a well-articulated and implemented company policy.

Establish a Protocol for Legal Counsel to Review Job Opening Announcements

In several instances during recent years, American companies with workforces that consist overwhelmingly of U.S. workers had to settle charges of preferential hiring in favor of foreign visa holders over protected workers. Quite often, an investigation into the circumstances showed that the problem was not discriminatory hiring, but poor choice of words in the recruitment process. Employers must draft their job opening announcements carefully, and avoid language that could be misconstrued as such improper preference. Any advertisement to fill open positions should be reviewed by the employer's in-house or external counsel to avoid such a costly misunderstanding.

Narrow the Scope of Investigation

OSC usually begins its investigation with an extensive list of informal interrogatories and discovery requests. Although OSC does not share a copy of the charging document, employers generally are able to determine the theory of OSC's case from its questions and document requests. In many cases, employers are able to narrow the scope of OSC's request by showing cooperation with the investigation. More often than not, employers who cooperate are able to satisfy OSC that no discrimination occurred after a round or two of document production and witness interviews.

There are times when the parties cannot agree and OSC will subpoena the information or witness. OSC can enforce the subpoena in federal district court, at which time the employer may attempt to quash the subpoena. Employers also have an additional avenue of redress by asking OCAHO to revoke or modify subpoena.³⁵ Keep in mind that unless the employer can show good faith cooperation earlier in the process and the unreasonableness of OSC's request, most U.S. District Court judges have been reluctant to limit the government's efforts to collect information.

Assert Jurisdictional Defenses

OSC must have subject matter jurisdiction and the charging party must have standing. However, it is equally important to understand the process and identify other areas where the employer still may be vulnerable. The defensive strategy must include ways to minimize risk of further investigation by OSC or another agency through other avenues. For example, an employer may move to dismiss a

³⁴ *McDonnell Douglas Corporation v. Green*, 411 U.S. at 807.

³⁵ 28 CFR §68.25(c).

national origin claim because of the employer's size, but OSC can refer the charge to EEOC, and the employer may in effect trade one lengthy investigation for an even lengthier one. In addition, an employer may assert lack of standing if a charging party does not have standing as a protected person, but OSC can use that individual's charge as a vehicle to look into a broader pattern or practice of discriminatory behavior. In such an instance, dismissing that one charge will not be very helpful to the employer. Therefore, when asserting jurisdictional defenses, be aware of other actions that can be taken against the employer.

CONCLUSION

OSC has steadily enhanced its enforcement efforts over recent years. There has been increased attention by this office on larger corporations. Through robust internal training and well-developed policies and procedures, employers can protect themselves against most allegations of immigration-related employment discrimination.