Avoid Costly Mistakes Through Compliance with INA's Anti-Discrimination Provisions

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Introduction

Since 2009, the 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.[1]

Over the past six years, employers across the country have paid collectively millions of dollars to settle discrimination allegations. To illustrate the increase, OSC collected no monetary penalties from employers in 2007, $45,000 in 2008, and $1,150,000 in 2013.[2]

However, many of the behaviors that OSC sought to penalize are not intuitively "discriminatory" to most employers. Consequently, many of the largest and most sophisticated U.S. employers inadvertently "discriminate" – in the eyes of OSC – in their hiring or verification process. Complicating the situation is the Department of Homeland Security's (DHS) escalating 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.

Employers can meet their verification and anti-discrimination obligations with a keen awareness of the regulations and enforcement trends, and with clear policies and procedures to ensure compliance with both obligations.

The Enforcement Scheme

A. Prohibited Practices and Protected Persons

National origin discrimination. 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."[3] This applies only to employers with four to 14 employees. This provision complements the jurisdiction of the Equal Opportunity Employment Commission (EEOC) over larger employers.[4]

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.[5] Unless mandated by law, employers may not limit hiring to applicants of certain immigration status, such as U.S. citizens or nonimmigrant visa holders, 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.[6] One does not need to be a protected person, only eligible to work, to allege document abuse.[7]

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.[8] The protection extends to any person, not only employees and not only protected persons.[9]

B. 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 and suggests possible discrimination; 3) a referral from another government agency, such as EEOC;[10] 4) an "independent investigation" on its own initiative 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 10 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.[11]

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.[12] 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.

C. Areas of recent OSC enforcement focus:

Over-documentation at the time of initial verification. This occurs most often when the employer mistakenly believes that a noncitizen 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.[13]

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 nonimmigrant visa holders over U.S. workers, mostly in the technology sector.

D. 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 a violating IRCA's anti-discrimination 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

Document nondiscriminatory reasons for employment decision. 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 rebut an allegation of discrimination. At a minimum, it will shift the burden back to the OSC to prove discriminatory intent.[14]

*Have a clear policy and training protocol in place to refute allegation of company-wide discriminatory policy or 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 that 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 costly a 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

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TMT Year Ahead

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So, if you want to download or upload video content at a faster speed, you're going to need a quicker, higher-capacity Internet connection.

Recently, the FCC and the president have also said that they will make municipal broadband a priority in the coming year.

MCC: What is municipal broadband, and what are your predictions for 2015?

Mohr: "Municipal broadband" refers to broadband infrastructure and Internet access services that are provided by local governments. Municipal broadband networks are somewhat controversial because several states currently have laws that prohibit local governments from building these types of networks. However, municipal networks appear to be gaining some momentum. Recently, President Obama unveiled a number of broadband expansion plans. He also spoke about the need for faster, more affordable Internet access in his State of the Union address. These announcements are timely as the FCC is set to consider petitions from Chattanooga's Electric Power Board and the City of Wilson, North Carolina, seeking FCC pre-emption of state law prohibiting municipal broadband.

MCC: Do you expect any additional activity from the FCC this year?

Dover: Yes. The FCC is said to be considering whether it should raise the definition of "broadband" to 25 Mbps downstream and 3 Mbps upstream from its current definition. Under the Telecommunications Act of 1996, the FCC has the power to define what speeds qualify as "broadband" Internet service. The last time the FCC updated its definition of broadband was in 2010 when it raised the speed from 200 Kbps to the current standard. The new definition could impact what broadband projects get funding from various FCC programs like the Connect America Fund or the E-rate program.

We also expect the FCC to clarify the Commission's *USF/ICC Transformation Order* relating to transitional intercarrier compensation for Voice over IP (VoIP) traffic originating or terminating through a competitive LEC and its VoIP partner. In recent years, certain interexchange carriers have refused to pay end office switched access compensation or even tandem switched access compensation on this traffic despite clear indications from the FCC that these carriers should pay compensation for each of the individual functions that are equivalent to the individual services provided in the traditional time-division multiplexing format. The FCC's clarification on this matter will further the Commission's IP-transition goals and provide clarity on the numerous compensation disputes relating to VoIP-originated traffic.

Finally, net neutrality will be a big FCC focus in the coming months. In February, the chairman is expected to circulate a draft order outlining proposed net neutrality rules. Among these rules will likely be variations on a no-blocking or anti-discrimination rule with regard to how Internet service providers can treat traffic from various websites. At the heart of the issue is whether the chairman's proposal will change the regulatory classification of broadband providers to what is known as a "common carrier." This "Title II" approach is the regulatory scheme applied to traditional telephone service and would subject broadband providers to a number of statutory restrictions. It's also possible that the Commission will decide to regulate broadband as a Title II service but will forbear from applying many of the law's more onerous obligations. It looks like 2015 is going to be a busy year for the Commission.

MCC: Do you have any final thoughts to share with our readers?

Dover: As telecommunications, technology and new media companies continue to grow, legal and regulatory issues are sure to arise. 2015 is on pace to be an exciting year for these industries, and we look forward to helping our clients keep pace with the changing legal landscape.

Please email the interviewee at mdover@kelleydrye.com with questions about this interview.

Better SAFE

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York-based investor in a Canadian company, and I'm currently handling a SAFE deal for a New York-based technology company. But all of the investors in my deal are West Coast-based, so I do think the jury is out on how fast and how deep East Coast penetration is likely to be. East Coast investors tend to be more conservative, even in venture capital deals. You can almost always detect an East Coast- versus a West Coast-initiated transaction. Investors remain less risk averse in the West.

Like convertible note deals, SAFEs should be considered and should not automatically be eliminated because of controversy. There will be a fair amount of controversy and debate. Our firm, along with professionals in the accounting, finance, legal and insurance sectors, will be hosting such a debate on SAFEs in February. We are bringing together a group of investors – VCs, angels, high-net-worth individuals – and companies to hear directly from them their perspectives on SAFEs.

MCC: What will we be hearing from investment companies and venture capital firms?

Sorin: I suspect that we will hear that some will happily embrace SAFE transactions, notwithstanding the uncertain dilution. Certain of them will like SAFEs for their simplicity and/or the investor's willingness to rely on later-stage investors to negotiate the right kind of deal in the priced equity round. I suspect that most venture capital firms will not embrace SAFEs and likely will not invest in them; however, one of today's big unanswered questions is whether VCs will be reluctant to invest in companies that completed earlier financing rounds through SAFE transactions.

Remember, there was a lot of debate on convertible note transactions when they were introduced and much of that debate continues to this day. Many venture capitalists don't like convertible note transactions. But even if they won't participate in a convertible note transaction, many, if not most, will invest in companies that have completed convertible note transactions in their past. So my preliminary view is that, while VCs are not likely to be SAFE investors themselves, I don't believe that they will refrain from investing in companies that have undertaken SAFE transactions prior to the priced equity round – because they will miss some really excellent opportunities, which of course they don't want. And protections can be garnered based on the manner in which the priced equity round is undertaken. So the jury is out. The old expression that "time will tell" is very true here. But no one should assume that SAFEs will not gain at least some traction and potentially become a significant tool that can and should be considered, along with all other methods of gaining access to capital available to early-stage companies.

MCC: What should MCC's readers take away from this discussion?

Sorin: The main point is that SAFEs are aptly named. They involve simple four-page documents that comport with the four flavors I mentioned above, meaning that they require very little in the way of negotiation. Certainly, SAFEs are not, nor are they intended to be, the answer for all companies or investors. Once thoroughly vetted, understood and utilized, I suspect them to play a reasonably significant role in funding start-ups, but likely in pre-institutional or pre-venture capital rounds. In an era, such as today, when entrepreneurial activity and new company formation drive innovation, job creation, and wealth accumulation, it is important to at least consider new alternatives that have the potential to increase access to capital and respond to disparate needs of companies and investors.

INA's Provisions

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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 would 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 a subpoena.[15] Keep in mind that unless the employer can show good faith cooperation earlier in the process and the unreasonableness of OSC's request, most 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 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.

1. Immigration Reform and Control Act (IRCA) of 1986, *Pub.L. 99–603*, 100 *Stat. 3445* (Nov. 6, 1986), codified in 8 U.S.C. §§ 1324a, 1324b.
2. "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.
3. *Id. at* § 1324b(a)(1)(A).
4. Title VII of the Civil Rights Act of 1964, 78 Stat. 252, *Pub. L. 88-352 (Jul. 2, 1964), codified in 42 U.S.C.* § 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 is complements Title VII).
5. 8 USC § 1324b(a)(3).
6. 8 USC § 1324b(a)(1), (6).
7. *United States v. Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148 (OCAHO 2012).
8. Id. at § 1324b(a)(5).
9. *United States v. Hotel Martha Washington Corp.*, 6 OCAHO No. 847 (OCAHO 1996).
10. 8 U.S.C. § 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).
11. *See generally* 8 U.S.C. § 1324b(d).
12. 28 C.F.R. § 44.302.
13. *United States v. Life Generations Healthcare, LLC.*, 11 OCAHO no. 1227 (OCAHO 2014).
14. *McDonnell Douglas Corporation v. Green*, 411 U.S.792, 807 (1973).
15. 28 C.F.R § 68.25(c).