

Unfair Immigration-Related Employment Practices (Anti-Discrimination Provisions)

By Dan Kowalski

What Does Discrimination Have To Do With I-9s?

The statute, Sec. 274B of the Immigration and Nationality Act (INA,) 8 U.S.C. § 1324b, is relatively short, and is reproduced at Appendix B.

The key points are as follows:¹

- **Citizenship or immigration status discrimination with respect to hiring, firing, and recruitment or referral for a fee, by employers with four or more employees, subject to certain exceptions:** Employers may not treat individuals differently because they are, or are not, U.S. citizens or work authorized individuals. U. S. citizens, recent permanent residents, temporary residents, asylees, and refugees are protected from citizenship status discrimination. **Exceptions:** permanent residents who do not apply for naturalization within six months of eligibility are not protected from citizenship status discrimination. Citizenship status discrimination which is otherwise required to comply with law, regulation, executive order, or government contract is permissible by law.
- **National origin discrimination with respect to hiring, firing, and recruitment or referral for a fee, by employers with more than three and fewer than 15 employees:** Employers may not treat individuals differently because of their place of birth, country of origin, ancestry, native language, accent or because they are perceived as looking or sounding "foreign." U.S. citizens and all work authorized individuals are protected from national origin discrimination. The Equal Employment Opportunity Commission has national origin jurisdiction over employers with 15 or more employees.
- **Unfair documentary practices related to verifying the employment eligibility of employees:** Employers may not, on the basis of citizenship status or national origin, request more or different documents than are required to verify employment eligibility and identity, reject reasonably genuine-looking documents or specify certain documents over others. U.S. citizens and all work authorized immigrants are protected from document abuse.

¹ These four "bullet points" are quoted verbatim from the official U.S. government website, <http://www.usdoj.gov/crt/osc/htm/facts.htm#rights>, last viewed April 2008.

- **Retaliation:** Individuals who file charges with OSC, who cooperate with an OSC investigation, who contest action that may constitute unfair documentary practices or discrimination based upon citizenship status or national origin, or who otherwise assert their rights under the INA's anti-discrimination provision are protected from retaliation.

What Do The Regulations Say?

The regulations, at 28 C.F.R. § 44 and 28 C.F.R. § 68.4, are also relatively short, and are reproduced at Appendices C and D.

The regulations provide definitions and procedures for investigating complaints.

What Can We Learn From The Court Cases?

There are two levels of court cases dealing with unfair immigration-related employment practices - agency cases and federal court cases.

Level One: OCAHO: The first level of cases comes from the agency, the Office of the Chief Administrative Hearing Officer ("OCAHO,") part of the Department of Justice. All 1,124 OCAHO cases, from 1988 to the present, are online at:

<http://www.usdoj.gov/eoir/OcahoMain/ocahosibpage.htm>

These cases, however, are not indexed or searchable for free other than through Google or a similar search engine, and significant skill would be required to find cases pertinent to your research. Accurate and current searching would require accessing one of the fee-based online legal research services, such as LEXIS.

Example: *Martinez v. Ray's Bar-B-Que* - citizenship status discrimination

In this 2005 OCAHO case,² the owner of a Texas restaurant favored an undocumented cook, in terms of hours (more) and wages (less) than a similarly-qualified U.S. citizen employee. The Administrative Law Judge ("ALJ") ruled, on page 5:

"[The IRCA] permits, but does not require, an employer to prefer a citizen or national of the United States over an alien who is equally qualified. It does not permit an employer to give preferential treatment to an undocumented alien, regardless of whether or not the relative qualifications are equal. No exception is made based on the number of United States citizen children the alien has. Considering the record as a whole, it is evident that Ray's gave preferential treatment to Ricardo Ramirez, an undocumented worker, and gave less favorable treatment to

² 9 OCAHO 1120 (Dec. 19, 2005), online here:
<http://www.usdoj.gov/eoir/OcahoMain/publisheddecisions/Looseleaf/Volume9/1120.pdf>.

Martinez [the U.S. citizen] and other lawful workers, and this was one of the principal factors leading to Martinez' discharge."

The ALJ ordered the restaurant to pay nearly \$30,000 in back pay to the U.S. citizen, Martinez.

Level Two: Federal Court: By law, a party receiving an adverse OCAHO decision may appeal to the second level, the federal circuit courts of appeal. Most recent circuit court cases are online for free on the circuits' respective websites, but as with OCAHO cases, they are not indexed or searchable in any meaningful way other than through the fee-based online legal research services.

Example 1: *Robison Fruit Ranch, Inc. v. U.S.* - document abuse

In this 1998 Ninth Circuit case,³ the OSC charged an Idaho fruit farm with unlawfully asking employees to present *specific* documentation to satisfy Form I-9 requirements, rather than asking for any permissible combination of documents, found the farm liable, and imposed a \$60,000 fine, even though all workers were hired, and no worker was rejected for lack of documentation. On appeal, the Ninth Circuit reversed, saying:

"In this case ... the alien applicants were not specially burdened by the employer's requests. Robison simply requested documents the aliens were already using to complete the top portion of Form I-9 as well as the accompanying Treasury Form W-4, which requires a social security number."

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³ 147 F.3d 798 (9th Cir. 1998).