DOJ Deals Showcase Job Ad Bias Enforcement Trends

By **Timothy D'Arduini, Amanda Collins and Caitlin Barden** (September 29, 2022)

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The Immigrant and Employee Rights Section of the U.S. Department of Justice, which is tasked with enforcing anti-discrimination laws, has steadily increased the number of investigations of employers over the past several years.[1] And, as a result of the COVID-19 pandemic, employers are particularly vulnerable to investigations due to gaps in their employment practices created through remote work.

As such, employers must keep anti-discrimination practices top of mind as they craft recruiting strategies and onboarding protocols and manage right-to-work processes for their workforces.

Additionally, on Aug. 18, the U.S. Department of Homeland Security published a notice of proposed rulemaking, addressing concerns arising from the sudden burden placed on employers by remote work during the pandemic.[2]

The proposed rule would provide alternatives to strict in-person document review requirements and implement limitations on employers seeking to use those alternatives.

The following discusses the relevant anti-discrimination laws and regulations affecting employers' hiring and recruiting practices, current trends in IER investigations, penalties for discrimination violations, and proactive tips for avoiding and responding to investigations. It also covers the new employment authorization rules on the horizon.

Relevant Anti-discrimination Laws and Regulations

The Immigration and Nationality Act, at Title 8 of the U.S. Code, Section 1324b, prohibits discrimination based on national origin or citizenship in hiring and recruiting. Specifically, the INA prohibits employers from discriminating against citizens or nationals of the United States, legal permanent residents, refugees and asylees. The INA further prohibits unfair documentary practices during the employment eligibility verification process.

The IER enforces these provisions of the INA, specifically by investigating charges of discrimination brought by individuals or initiating independent investigations. The IER initiates investigations when it has reason to believe an entity has previously engaged in or continues to engage in unfair immigration-related employment practices, including by posting discriminatory job advertisements, participating in discriminatory hiring practices, or engaging in unfair documentary practices relating to employment authorization — i.e., I-9 and E-Verify processes.

Once it initiates an investigation, the IER may:

- Close the investigation without any action;

- Issue letters of resolution to conclude an independent investigation where no victims were found and an employer corrected its practices; or

- Issue letters of resolution to conclude an investigation prompted by an individual's discrimination charges — where an employer has voluntarily resolved those charges with the individual.

However, if it determines it has reasonable cause to believe an employer engaged in unfair immigration-related practices, the IER may enter into a settlement agreement to resolve the issue with the employer, instead of filing a complaint with the Office of the Chief Administrative Hearing Officer.

In addition to monetary penalties, lost wages or back pay for aggrieved parties, and/or attorney fees, the settlement agreement may contain clauses related to mandatory trainings, modification of recruitment procedures, or any other terms to which the parties agree. If no settlement is reached, the IER may file a complaint with Office of the Chief Administrative Hearing Officer seeking civil penalties and other remedies.

Trends in IER Enforcement

Under the prior presidential administration, the IER primarily prosecuted employers who posted job advertisements expressing a preference for non-U.S. citizens. In February 2017, the IER launched the Protecting U.S. Workers Initiative aimed at targeting, investigating and bringing enforcement actions against companies that discriminated against U.S. workers in favor of foreign nationals.

Significantly, this initiative became the impetus for numerous settlement agreements with employers who posted job advertisements specifying a preference for applicants with temporary work visas. As a result, employers paid over $1 million in back pay to affected U.S. workers and civil penalties to the United States. By contrast, during that time, the IER levied small or no penalties for preferences for U.S. workers.

This initiative was consistent with other enforcement actions that the prior presidential administration conducted to target and penalize employers who hired unauthorized workers. Those enforcement actions included both announced and unannounced raids by U.S. Immigration and Customs Enforcement of employer work sites to arrest unauthorized workers and investigate and/or prosecute companies that were perceived as turning a blind eye to or knowingly employing unauthorized workers.

While the IER continued to prosecute employers who discriminated against U.S. workers in favor of temporary visa holders during the first year of the current presidential administration, that trend has recently shifted. Today, the IER is increasing its prosecution efforts against companies that have posted job advertisements requiring applicants to be U.S. citizens.

Specifically, the IER has been focusing its efforts on employers discriminating against other classes of people, including lawful permanent residents, asylees, refugees and foreign workers — rather than U.S. workers.

Since June, the IER announced 20 settlement agreements with employers relating to discriminatory job advertisements. Most recently, on Sept. 21, the DOJ **announced** four

settlements resolving citizenship discrimination claims for job postings on college recruiting sites. In each settlement, the employer agreed to pay $4,144 in civil penalties per posting, resulting in more than $1.1 million in total civil penalties across the 20 employers.

Notably, in its press release, the IER revealed that its investigations into employer postings to one college career fair site began after a student, a lawful permanent resident at the time, filed a discrimination complaint against one employer based on language in job postings restricting applicants to only U.S. citizens.

According to the press release, this single investigation led the IER to "dozens of other facially discriminatory advertisements" on the career fair site as well as other college career platforms across the United States. The IER further indicated that it "continues to investigate additional employers" — a clear indication of the investigatory focus.

Of the 20 settlements announced thus far, 17 involved job advertisements that required applicants to be U.S. citizens. Seven of the settlement agreements related to only a single job advertisement. IER's focus could not be clearer.

Practical Guidance for Employers

The key takeaway to protect your company: Step back and review your recruiting and hiring processes. Implement policies and procedures that prohibit discrimination based on citizenship status or national origin. Some best practices include:

- Ensure that job advertisements do not specify or require particular citizenship and/or visa status.
- Provide training materials to all employees and new hires involved in posting job advertisements. The material should focus on avoiding discrimination in recruiting, referring, hiring and onboarding candidates.
- Screen all advertisements posted by contractor recruiters.
- Provide all new hires with the list of acceptable documents for the I-9 process.
- Prohibit language that requires or demands specific documents be used for Form I-9 completion.
- Provide continual I-9 guidance and training to human resources staff.
- Swiftly remediate any identified issue during investigations and develop a plan for future compliance.
- Demonstrate a commitment to compliance and willingness to cooperate with investigatory processes.
- Review comparator information that describes how IER has resolved similar issues in the past.

New Rules for I-9 Employment Authorization

In addition, employers should monitor current changes to I-9 employment verification requirements the government is considering.

Specifically, Section 1324a of the INA and its implementing regulations require employers to verify their U.S. employees' identity and employment authorization by completing Form I-9 within three days of an employee's start date. When completing this form, employers must physically inspect documents that verify an employee's identity and U.S. employment authorization.

However, in March 2020, DHS announced they would temporarily defer physical examination requirements for employers completing Form I-9 due to the COVID-19 pandemic. Under this guidance, employers were permitted to inspect Form I-9 documents remotely though video, email and fax.

This policy only remains in effect until Oct. 31. Because the temporary policy is ending soon, DHS is now considering adopting a permanent rule allowing for more flexible inspection of I-9 documents because remote work is a more prevalent, permanent fixture of the workplace.

Specifically, in August, DHS issued a notice of proposed rulemaking that would amend the relevant regulations to give the DHS secretary the authority to implement alternatives to physical examination of identity and employment authorization documents. The proposed rule also mandates that employers follow modified procedures when completing the Form I-9 for new hires, rehires and those requiring reverification of their time-limited work authorization.

Those procedures must offer an equal level of security or be employed to address a public health emergency. While no alternate procedures were specified, DHS suggested making permanent the flexibilities implemented during the COVID-19 pandemic.

In addition, DHS may update requirements for the retention of copies of identity and employment verification documents. The rule also proposes that Form I-9 be revised to provide space for employers to indicate where they used alternative procedures for inspection.

DHS indicated that it may limit eligibility to participate in the alternate inspection program. Some of the restrictions DHS is considering include:

- A requirement for participating employers to complete a 30- to 60-minute online training on anti-discrimination and the detection of fraudulent documents;

- Limiting participating employers to those who are enrolled in E-Verify; and
- Restricting from participation certain employers that have been subject to fines, settlements or convictions related to employment eligibility practices.

Conclusion

The current presidential administration has made it clear that it will continue to target discriminatory practices and enforce INA anti-discrimination laws. Employers should pay

close attention to recruiting practices that may be interpreted as restricting applications to U.S. citizens.

In light of the IER's recent actions, employers should review and, if necessary, update their recruiting, hiring and onboarding procedures to ensure compliance with anti-discrimination laws and regulations. Failure to do so could result in costly consequences.

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[1] See Settlements and Lawsuits, U.S. Dept of Justice, https://www.justice.gov/crt/settlements-and-lawsuits (last updated Sept. 2, 2022) (evidencing clear uptick in settlements over last two years as compared to the four prior years).

[2] Optional Alternatives to the Physical Document Examination Associated with Employment Eligibility Verification (Form I-9), 87 Fed. Reg. 50786 (proposed Aug. 18, 2022) (available at: https://www.govinfo.gov/content/pkg/FR-2022-08-18/pdf/2022-17737.pdf).