

U.S. Department of Justice Announces Proposed Rulemaking Revisions to Grounds for and Investigations of Unfair Immigration-Related Employment Practice Allegations

Article By:

Nataliya Binshteyn Dominguez

The U.S. Department of Justice (DOJ) has issued a [notice](#) of proposed rulemaking seeking to incorporate the intent requirement found in Section 274B(a)(6) of the Immigration and Nationality Act (INA), which sets forth the prohibition on unfair documentary practices during the hiring and recruitment or referral for a fee process, into the Code of Federal Regulations, namely 28 CFR Part 44. The proposed revisions would also impact the DOJ's Office of Special Counsel's (OSC) investigation of unfair immigration-related employment practices, as part of the office's mandate to enforce the anti-discrimination provision of the INA, as well as cases adjudicated under 8 U.S.C. 1324b by the DOJ's Executive Office for Immigration Review (EOIR), Office of the Chief Administrative Hearing Officer (OCAHO). Members of the public may submit comments regarding the proposed changes by Sept. 14, 2016.

Importantly, the proposed revisions would substantively and, according to certain stakeholders, controversially, increase the DOJ's capacity to investigate allegations of unfair immigration-related wrongdoing, most notably by increasing the maximum period of time for filing such claims from 180 days to five (5) years. Furthermore, the new changes would permit intentionally treating an individual differently based on national original or citizenship status to demonstrate discriminatory intent under the statute, thereby subjecting employers to possible penalties, irrespective of the explanation for the discriminatory practice or the presence of any animus or hostility by an employer. The proposed revisions, which also seek to clarify that employers may be found to have committed impermissibly discriminatory conduct at any stage of the employment eligibility verification and recruitment or referral for a fee processes, appear to noticeably expand the breadth of the agency's investigative capacity and may pose important new challenges for employers. Accordingly, employers should monitor the outcome of these proposed revisions closely and, in collaboration with experienced counsel, proactively review their internal immigration compliance programs as well as their recruitment, on-boarding, and employment verification procedures and training materials.

By way of background, subsection (a)(6), as referenced above, was introduced as part of the Immigration Act of 1990 and amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which characterized unfair documentary practices as unlawful if they were done "for the purpose of or with the intent of discriminating against an individual in

violation of” 8 U.S.C. 1324b(a)(1). According to the agency’s release, the proposed revisions seek to incorporate the statutory intent requirement into 28 CFR Part 44; update how charges of discrimination may be filed and elucidate the procedures for processing such claims; expand the time frames within which complaints may be filed with OCAHO; and eliminate certain textual ambiguities. The proposed changes would also codify the OSC’s present authority to facilitate the preservation of evidence during its investigations of alleged unfair immigration-related employment practices as well as reflect the office’s name change from the Office of Special Counsel for Immigration-Related Unfair Employment Practices to the Immigrant and Employee Rights Section.

©2024 Greenberg Traurig, LLP. All rights reserved.

National Law Review, Volumess VI, Number 246

Source URL:<https://natlawreview.com/article/us-department-justice-announces-proposed-rulemaking-revisions-to-grounds-and>