

U.S. Department of Justice Issues Final Rule for Enforcing Anti-Discrimination Provisions of the Immigration and Nationality Act

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Immigration & Compliance

This week the [U.S Department of Justice's Civil Rights Division \(DOJ\)](#) released a final rule implementing the anti-discrimination provisions of the Immigration and Nationality Act (INA) found at 8 U.S.C. 1324(b). These INA provisions were originally enacted to ensure the rights of foreign nationals working for covered employers and have resulted in regulations still in force today. One such regulation includes the prohibition on requesting more or different documents – or rejecting valid documents – to evidence identity and U.S. work authorization for I-9 and E-Verify purposes, when such requests are made with the purpose or intent of discriminating against an individual. DOJ received 47 comments in response to the rule before it became final. All comments received, DOJ's responses to those comments, and the text of the final rule are available in the Federal Register, Vol. 81, No. 243, [Page 91768](#).

The final rule, which takes effect on Jan. 18, 2017, achieves the following:

I. Updates the procedures for filing, processing, investigating, and deciding INA-based discrimination claims.

The rule renames as the Immigrant and Employee Rights Section what was formerly the Office of Special Counsel for Immigration Related Unfair Practices within the DOJ's Civil Rights Division. The renamed office is headed by a Special Counsel for Immigration-Related Unfair Employment Practices (Special Counsel). The Special Counsel is a government official appointed by the President for a four-year term, by and with the consent of the Senate, who reports directly to the Assistant Attorney General in the DOJ's Civil Rights Division. The Special Counsel has authority to, among other things, investigate charges of immigration-related employment practices and conduct litigation in Federal court to enforce orders and subpoenas of administrative law judges. The rule also gives the Special Counsel authority to act on his or her own initiative if s/he has reason to believe an entity has engaged in unfair immigration-related employment practices.

The final rule also provides detailed information about computing time for filing and processing claims, counting the number of employees within an organization to determine whether it is an entity covered by this rule, as well as the required time periods for filing a charge, acting on a received

charge, investigating a charge, and making a determination on a charge. In particular, the rule requires charges to be filed within 180 days of the occurrence of an unfair immigration-related employment practice. The rule also requires Special Counsel to send a notice to the charging party within 10 days of receipt of the charge indicating that the charging party has 90 days to file a complaint before an administrative law judge if the Special Counsel does not do so within 120 days of receipt of the charge. Finally, the rule requires the Special Counsel to undertake investigation within 120 days of receiving the charge and determine within that time frame whether to file a complaint with respect to the charge.

II. Simplifies and clarifies definitions of specific statutory terms to provide greater clarity and eliminate ambiguities.

Notably, the final rule incorporates the intent requirement of existing anti-discrimination law by defining “discriminate” as “the act of intentionally treating an individual differently from other individuals because of national origin or citizenship status, regardless of the explanation for such differential treatment, and regardless of whether such treatment is because of animus or hostility.” Under the final rule, unfair immigration-related employment practices constituting unlawful discrimination can take place in the context of hiring (which the rule defines as recruitment, selection, and onboarding, including completing Form I-9 and E-Verify for the employee); or in the context of any day-to-day workplace interactions.

In a later section, the rule indicates that intimidation or retaliation and unfair documentary practices based on an individual’s national origin or, in the case of a protected individual, citizenship status are actionable under the new rule. In keeping with prior legal precedent, requesting more or different documents than required to verify employment authorization and refusing to honor documents that appear valid on their face, with the intent of discriminating against an individual, are considered unfair documentary practices that can be considered grounds for an INA discrimination claim.

The final rule also defines “protected individuals” (*i.e.*, employees covered by the rule) as follows: citizens or nationals of the United States; lawful permanent residents except those who have failed to apply for naturalization within six months of becoming eligible or who applied for naturalization on a timely basis but have not been naturalized within 2 years of filing the application and are still actively pursuing citizenship; aliens admitted for temporary residence (such as those admitted under the legalization and special agricultural programs of the 1980s); refugees; or asylees.

III. Updates and modernizes the verbiage of existing regulations.

Finally, the rule makes current the language of the INA by changing the name of the [office responsible for enforcing the INA anti-discrimination laws](#) to the Immigrant and Employee Rights Section; and the name of the Immigration and Naturalization Service to the Department of Homeland Security.

Because immigration likely will be a focus for the new administration, we recommend all companies hiring foreign workers become familiar with this final rule.

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