U.S. Department of Justice

Civil Rights Division

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Unfair Employment Practices - NYA
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December 22, 2015

Sent via E-Mail (b.a.m@att.net)

Bruce A. Morrison, Chairman
Morrison Public Affairs Group
6004 Onondaga Road
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Dear Mr. Morrison:

This is in response to your letter of November 2, 2015 to the Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC" or "Office"). In your letter, you pose several questions regarding whether certain employer practices violate the Immigration and Nationality Act's ("INA's") prohibition against citizenship status discrimination. Specifically, you ask whether an employer may, consistent with the anti-discrimination provision of the INA, terminate U.S. workers and rely on contract workers with temporary work visas to perform the work previously done by the terminated U.S. workers.

OSC cannot provide an advisory opinion on any set of facts involving a particular individual or entity. However, we can provide some general guidelines regarding employer compliance with the INA's anti-discrimination provision. The anti-discrimination provision prohibits the following types of employment-related conduct: (1) national origin, citizenship, or immigration status discrimination in hiring, firing, or recruiting for a fee; (2) unfair documentary practices during the employment eligibility verification (Form I-9 and E-Verify) process ("document abuse"), which includes requesting more or different documents than required for employment eligibility verification because of an individual's citizenship, immigration status, or national origin; and (3) retaliation for filing a charge, assisting in an investigation, or asserting rights under the anti-discrimination provision. 8 U.S.C. § 1324b. For more information about OSC, please visit our website at: http://www.justice.gov/crt/about/osc.

Your letter asks several questions about the appropriate legal framework (and *prima facie* burdens) for analyzing a citizenship status discrimination claim under the anti-discrimination provision of the INA, 8 U.S.C. § 1324b(a)(1)(B). Citizenship status discrimination occurs when protected individuals are denied or deprived of employment because of their real or perceived immigration or citizenship status. U.S. citizens and nationals, refugees, asylees, and recent lawful permanent residents are protected from citizenship status discrimination under the INA. The INA grants OSC jurisdiction over citizenship status discrimination claims involving employers with four or more employees.

The elements of a *prima facie* case of citizenship discrimination under 8 U.S.C. § 1324b(a)(1)(B) depend on whether the alleged discrimination is an individual act or a pattern or practice of discrimination. The *prima facie* burdens for individual and pattern or practice cases involving intentional discrimination are set forth in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), respectively.[1] Further, in determining whether a violation has occurred, the Office of the Chief Administrative Hearing Officer ("OCAHO"), the adjudicative body that hears cases arising under the INA's anti-discrimination provision, looks to relevant case law of the federal circuit in which the claim arises.

Your letter also asks whether a violation of the anti-discrimination provision of the INA can be established where an employer replaces a protected employee with a non-protected contract employee provided by a third party company, rather than directly hiring a replacement worker from outside of the protected class. Except in very narrow circumstances, an employer violates the anti-discrimination provision if it terminates workers or hires their replacements because of citizenship or immigration status. This is true regardless of whether the employer takes the discriminatory employment actions itself through direct hiring, or contracts, as a joint employer, with an outside agency to implement its discriminatory staffing plan. Whether an employer has, in fact, violated the anti-discrimination provision through its use of contract workers will depend upon the facts of each case, including (1) whether there is evidence of intentional discrimination in the selection of employees for discharge or rehire, (2) the circumstances surrounding the selection of the third party staffing contractor, and (3) the extent to which the original employer could be considered a joint employer of the contract workers. In addition, nothing prevents the filing of a charge against the contractor for potential citizenship status discrimination, or prevents OSC from independently investigating the contractor for potential discrimination if OSC receives information indicating a possible violation.

Your letter also seeks guidance on the issue of discriminatory intent under the anti-discrimination provision. In contrast to several anti-discrimination laws that prohibit neutral policies that impose a disparate impact on a protected class, the INA's anti-discrimination provision only prohibits intentional discrimination. This means that to engage in unlawful citizenship status discrimination, an employer must have acted "because of" citizenship or immigration status. 8 U.S.C. § 1324b(a)(1)(B). It is important to note that intentional discrimination does not require animus or hostility toward the protected class member. Determining whether a party has engaged in intentional discrimination will depend upon the facts of each case.

Some examples of OSC's enforcement efforts to stop unlawful employer preferences for temporary visa holders can be found on OSC's website. *See, e.g.*, Settlement Agreement with Autobuses Ejecutivos d/b/a Omnibus Express, (resolving OCAHO Case no. 13B0094), and press release; Settlement Agreement with IBM, and press release; Settlement Agreement with Iflowsoft LLC, and press release; Settlement Agreement with iGate/Mastech, Inc., and press release; *see also United States v. Jerry Estopy and Manuel Bortoni, d/b/a Estopy Farms*, 11

[1] *See Sodhi v. Maricopa County Special Health Care Dist.*, 10 OCAHO no. 1127, 7-8 (2008) ("Because § 1324b was expressly modeled on Title VII of the Civil Rights Act of 1964 as amended . . . case law developed under that statute has long been held to be persuasive in interpreting § 1324b.").

OCAHO no. 1252 (2015); *United States v. Jerry Estopy and Manuel Bortoni, d/b/a Estopy Farms*, 11 OCAHO no. 1256 (2015).

We hope that this information is helpful.

Sincerely,

Alberto Ruisanchez
Deputy Special Counsel