

## NOTICES

### EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Department Of Justice

Office of Special Counsel for Immigration Related Unfair Employment Practices; Coordination of Functions; Memorandum of Understanding

Tuesday, February 3, 1998

**\*5518 AGENCIES:** Equal Employment Opportunity Commission and Office of Special Counsel for Immigration Related Unfair Employment Practices, Department of Justice.

**ACTION:** Notice.

**SUMMARY:** The Equal Employment Opportunity Commission ("EEOC") and the Office of Special Counsel for Immigration Related Unfair Employment Practices, Department of Justice ("Office of Special Counsel"), have adopted as final a Memorandum of Understanding which replaces an earlier 1989 Memorandum between the two agencies, published at [54 FR 32499](#), Aug. 8, 1989. Among other changes, the new Memorandum has been updated to reflect amendments to the Immigration and Nationality Act. As with the earlier Memorandum, the Agreement makes each agency the agent of the other for the sole purpose of receiving discrimination charges under Title VII of the Civil Rights Act of 1964 and section 102 of the Immigration Reform and Control Act of 1986. The Agreement also provides for interagency coordination of charge processing activities to promote efficiency and avoid duplication in the administration and enforcement of these statutes.

**EFFECTIVE DATE:** February 3, 1998.

**FOR FURTHER INFORMATION CONTACT:** Anita Stephens, Office of Special Counsel for Immigration Related Unfair Employment Practice, U.S. Department of Justice, P.O. Box 27728, Washington, D.C. 20038-7728; (800) 255-7688 (toll free) or (202) 616-5594; or (800) 237-2515 (toll free TDD) or (202) 616,5525 (TDD). At the Equal Employment Opportunity Commission, contact Carol R. Miaskoff, Assistant Legal Counsel for Coordination, Office of Legal Counsel, EEOC, 1801 "L" Street, N.W., Washington, D.C. 20507; (202) 663-4689 (Voice) or 663-7026 (TDD).

**SUPPLEMENTARY INFORMATION:** The Memorandum of Understanding was modified in response to amendments to the Immigration and Nationality Act that added document abuse and intimidation or retaliation as unfair immigration related practices. Other changes have been made based on a reexamination of the 1989 Memorandum and consideration of the agencies' experience under it. Among the changes included in the new Memorandum of Understanding are:

1. The Memorandum's "Guidelines for EEOC Staff" and "Guidelines for Attorneys in the Office of Special Counsel" ("Guidelines") now include referral procedures for charges alleging unfair document practices. These changes reflect 1990 amendments to the Immigration and Nationality Act that added document abuse as an unfair immigration related practice.
2. The Guidelines' referral procedures for charges alleging retaliation have been broadened and consolidated. These changes enhance the clarity of the agreement and reflect 1990 amendments to the Immigration and Nationality Act that added intimidation or retaliation as an unfair immigration related practice.
3. The Memorandum and Guidelines provide that charges shall not be referred from one agency to the other if the charging party has declined referral. Thus, the charging party retains control over the decision whether to file a charge with each agency.
4. The Memorandum and Guidelines specify that charges alleging individual act, pattern or practice, or class discrimination are encompassed by the procedures therein.
5. The Guidelines for EEOC Staff no longer include as a condition for referral of charges to the Office of Special Counsel a requirement that the EEOC ask whether the charging party is a U.S. citizen, U.S. national, or work-authorized alien. Information regarding immigration status is generally not relevant under the statutes enforced by **\*5519** the EEOC, and Office of Special Counsel staff are better suited to make determinations about a charging party's immigration status.
6. Lastly, the Guidelines add provisions for each agency to consult with the other if a charge raised allegations not directly addressed by the Guidelines and the agency believes referral may be appropriate. The new provision should further promote the elimination of duplication in the

agencies' enforcement efforts.

Paul M. Igasaki,

Chairman, Equal Employment Opportunity Commission.

John D. Trasviña,

Special Counsel, Office of Special Counsel for Immigration Related Unfair Employment Practices.

Memorandum of Understanding Between The Equal Employment Opportunity Commission and The Office of Special Counsel for Immigration Related Unfair Employment Practices

The Equal Employment Opportunity Commission ("EEOC"), under Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), has jurisdiction to process charges alleging individual act, pattern or practice, or class employment discrimination on the basis of national origin and retaliation. The Department of Justice, Civil Rights Division, Office of the Special Counsel for Immigration Related Unfair Employment Practices ("Special Counsel"), under section 274B of the Immigration and Nationality Act, has jurisdiction to process charges alleging an individual act or a pattern or practice of employment discrimination on the bases of national origin, citizenship status, unfair document practices, and intimidation or retaliation. The purpose of this Memorandum of Understanding between the EEOC and the Special Counsel is to prevent any overlap in the filing of charges of discrimination under these statutes and to promote efficiency in their administration and enforcement. This Memorandum of Understanding is intended to apply to Title VII and Section 274B of the Immigration and Nationality Act as currently written, as well as to any future amendments of these acts.

The parties to this Memorandum agree as follows:

*I. Exchange of Information*

The EEOC and the Special Counsel shall make available for inspection and copying to officials from the agency any information in their records pertaining to a charge or complaint being processed by the requesting agency. Such request shall be made by the Chairman of the EEOC or his or her designee, or the Special Counsel or his or her designee.

*II. Confidentiality*

When the Special Counsel receives information obtained by the EEOC which is subject to the confidentiality requirements of sections 706(b) and 709(e) of Title VII, the Special Counsel shall observe those requirements as would the EEOC, except in cases where the Special Counsel receives the same information from a source independent of the EEOC.

*III. Referral of Charges*

When, during the processing of a charge by either agency, it becomes apparent to the agency processing the charge that the charge or any aspect of the charge falls outside its jurisdiction, but may be within the jurisdiction of the other agency, the agency processing the charge will immediately dismiss as much of the charge as may fall within the jurisdiction of the other agency and, if the charging party has not declined referral, refer the dismissed aspects of the charge to the other agency, and notify the charging party and the respondent of the referral. In determining whether to refer such a charge or such aspect of a charge to the other agency, the agency processing the charge shall be guided by the attached Guidelines.

*IV. Appointment of Respective Agents*

By this Memorandum of Understanding, the agencies hereby appoint each other to act as their respective agents for the sole purpose of allowing charging parties to file charges to satisfy the statutory time limits. To ensure that filing deadlines are satisfied, each agency will accurately record the date of receipt of charges and notify the other agency of the date of receipt when referring a charge.

This Memorandum of Understanding supersedes the 1989 agreement.

Dated: December 18, 1997.

Approved and Accepted for the Equal Employment Opportunity Commission.

Gilbert F. Casellas

Chairman, Equal Employment Opportunity Commission.

Dated: December 18, 1997.

Approved and Accepted for the Office of Special Counsel for Immigration Related Unfair Employment Practices.

John D. Trasviña

Special Counsel, Office of Special Counsel for Immigration Related Unfair Employment Practices.

Guidelines for EEOC Staff

### *I. National Origin Charges*

Charges or aspects of charges alleging an individual act or a pattern or practice of discrimination on the basis of national origin should be referred to the Special Counsel when all of the following conditions are met:

- (1) The charge alleges discrimination against the complainant with respect to his or her hiring, discharge, or recruitment or referral for a fee;
- (2) The charge is outside the jurisdiction of the EEOC in that the employer (a) does not have 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year or (b) is an employer that is expressly excluded from coverage under Title VII; and
- (3) The employer may have had at least 4 employees, including both full-time and part-time employees, on the date of the alleged discriminatory occurrence as required by the Special Counsel's regulations at 28 CFR Part 44.

### *II. Citizenship Status Charges*

#### *A. Referral to the Special Counsel*

Charges or aspects of charges alleging an individual act or pattern or practice of discrimination on the basis of citizenship status should be referred to the Special Counsel when all of the following conditions are met:

- (1) The charge alleges discrimination against the complainant with respect to his or her hiring, discharge, or recruitment or referral for a fee; and
- (2) The employer may have had at least 4 employees, including both full-time and part-time employees, on the date of the alleged discriminatory occurrence as required by the Special Counsel's regulations at 28 CFR Part 44.

#### *B. Special Procedure*

- (1) A charge or aspect of a charge of citizenship status discrimination that cannot be referred to the Special Counsel should, to the extent possible, be construed as alleging national origin discrimination and processed in accordance with Title VII, if the employer otherwise is covered by Title VII.
- (2) A charge or aspect of a charge that alleges that a citizenship requirement or preference has the purpose or effect of discriminating on the basis of national origin and is otherwise within the jurisdiction of the EEOC, should be processed in accordance with Title VII. See 29 CFR Part 1606 and *Espinoza v. Farah Mfg. Co. Inc.*, 414 U.S. 86 (1973). In addition, if any aspect of this charge satisfies the conditions, described in section II A above, for referral to the Special Counsel, it should be so referred.

### *III. Unfair Document Practices (Document Abuse)*

#### *A. Referral to the Special Counsel*

Charges or aspects of charges alleging an individual act or a pattern or practice of document abuse should be referred to the Special Counsel when all of the following conditions are met:

- (1) The charge alleges that the employer requested complainant to produce more or different documents than required to complete the Immigration

and Naturalization Service Form I-9 (Employment Eligibility Verification form), or that the complainant's documentation was rejected by the employer during the I-9 process, or that the employer requested the complainant to produce a specific document or documents for purposes of completing the I-9 or establishing employment eligibility; and

(2) The employer may have had at least 4 employees, including both full-time and part-time employees, on the date of the alleged document abuse as required by the Special Counsel's regulations at 28 CFR Part 44.

#### B. Special Procedures

(1) A charge or aspect of a charge of document abuse that cannot be referred to the Special Counsel should be construed to the extent possible as alleging national origin discrimination, if the employer otherwise is covered by Title VII.

(2) A charge or aspect of a charge alleging that document abuse has the purpose or effect of discriminating on the basis of \*5520 national origin should, to the extent possible, be processed in accordance with Title VII, if the employer otherwise is covered by Title VII. In addition, if any aspect of this charge satisfies the conditions, described in section III A above, for referral to the Special Counsel, it should be so referred.

#### IV. Intimidation or Retaliation

Charges or aspects of charges alleging an individual act or a pattern or practice of intimidation or retaliation should be referred to the Special Counsel when all of the following conditions are met:

(1) The charge alleges that any person or other entity intimidated, threatened, coerced, or retaliated against any individual for the purpose of interfering with any right or privilege secured under section 274B of the Immigration and Nationality Act, or because the individual intends to file or has filed a charge or complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under section 274B of the INA; and

(2) The person or other entity employs four or more individuals.

#### V. Unique Situations

If a charge or aspect of a charge raises allegations not directly addressed in these guidelines and EEOC staff believes that referral to the Special Counsel may be appropriate, EEOC staff shall contact EEOC's Office of Legal Counsel, who then shall consult with the Office of Special Counsel.

#### VI. Procedure for Referral

##### A. General Provisions

(1) When the charging party has not declined referral, any charge or aspect of a charge alleging discrimination on the basis of national origin, citizenship status, retaliation, or document abuse that satisfies all of the conditions for referral to the Special Counsel should be forwarded by EEOC staff, with the appropriate file, to the Office of Special Counsel for Immigration Related Unfair Employment Practices, P.O. Box 27728, Washington, DC 20038-7728.

(2) When forwarding a charge or aspect of a charge to the Special Counsel, EEOC staff should follow any instructions issued by the Commission regarding this procedure, including instructions relevant to informing the charging party of the possibility of referral and providing notice of the referral to the parties.

##### B. Additional Procedures Where the Commission Retains Jurisdiction

(1) Where the Commission retains jurisdiction over any aspect of a charge when another aspect of the charge is being referred to the Special Counsel in accordance with these Guidelines, the EEOC field office, when making the referral, will inform the Special Counsel of the retained jurisdiction. This notice to the Special Counsel will specify the allegation(s) over which the Commission retains jurisdiction. The notice will also state that the processing EEOC field office will consult with the Special Counsel to coordinate, to the extent possible, the investigative activities of both agencies and assure that duplication of effort in processing the charge is minimized.

(2) After confirming that the Special Counsel has received the referred aspect of the charge, the EEOC field office should attempt consultations with the Special Counsel to coordinate, to the extent possible, the investigative activities of both agencies and assure that duplication of effort in processing the charge is minimized.

## C. Special Procedures Regarding 706 Agencies

Where preferable and not contrary to an existing work sharing agreement, EEOC staff may choose not to defer to a 706 Agency any charge or portion of a charge, if the charge or any aspect of the charge satisfies all of the conditions for referral to the Special Counsel. Charges or portions of charges not deferred pursuant to this provision should be processed according to the procedures described in these Guidelines.

### *VII. Procedures Regarding Referrals from the Special Counsel*

Upon receipt of a charge or aspect of a charge referred from the Special Counsel, the processing EEOC field office should confirm that the charge or aspect of a charge is within the jurisdiction of the Commission. The field office should then notify the Special Counsel of its receipt of the charge or aspect of a charge.

If the Special Counsel has retained jurisdiction over any aspect of a charge when another aspect of the charge has been referred to the EEOC, the field office should attempt to coordinate with the Special Counsel, to the extent possible, the investigative activities of both agencies. If the Special Counsel has not retained jurisdiction over any aspect of a charge that has been referred to the EEOC, the field office should process the referred charge as it would any other charge of discrimination.

#### Guidelines for Attorneys in the Office of Special Counsel

##### *I. National Origin Charges*

Charges or aspects of charges alleging individual act, pattern or practice, or class discrimination on the basis of national origin should be referred to the EEOC when all of the following conditions are met:

- (1) Any aspect of the charge that alleges national origin discrimination is outside the jurisdiction of the Office of Special Counsel or fails to state a claim under [8 U.S.C. 1324b](#); and
- (2) The charge alleges discrimination against the charging party with respect to his or her hiring, discharge, compensation, terms, conditions, or privileges of employment.

##### *II. Citizenship Status and Document Abuse Charges*

Charges or aspects of charges alleging individual act, pattern or practice, or class discrimination on the basis of citizenship status or document abuse should be referred to the EEOC when all of the following conditions are met:

- (1) Any aspect of the charge that alleges national origin discrimination is outside the jurisdiction of the Office of Special Counsel or fails to state a claim under [8 U.S.C. §1324b](#);
- (2) The charge alleges discrimination against the charging party with respect to his or her hiring, discharge, compensation, terms, conditions, or privileges of employment; and
- (3) The alleged discriminatory practice may have had the purpose or effect of discriminating on the basis of national origin.

##### *III. Retaliation*

Charges or aspects of charges alleging retaliation on an individual, pattern or practice, or class basis should be referred to EEOC when the charge alleges retaliation because an individual has opposed an employment practice that he or she believed to be unlawful under Title VII, or because an individual has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII.

##### *IV. Unique Situations*

If a charge or aspects of a charge raises allegations not directly addressed in these guidelines, and the Office of Special Counsel staff believes that referral to the EEOC may be appropriate, Office of Special Counsel staff shall consult with the Special Counsel, who will designate an Office of Special Counsel attorney to consult with the EEOC's Office of Legal Counsel.

##### *V. Procedure for Referral*

###### A. General Provisions

When the charging party has not declined referral, any charge or aspect of a charge alleging individual act, pattern or practice, or class discrimination on the basis of national origin, citizenship status, retaliation, or document abuse that satisfies all of the conditions for referral to the EEOC should be forwarded to the appropriate EEOC field office.

#### B. Additional Procedures Where the Office of Special Counsel Retains Jurisdiction

(1) Where the Office of Special Counsel retains jurisdiction over any aspect of a charge when another aspect of the charge is being referred to the EEOC in accordance with these Guidelines, the attorney making the referral will inform the EEOC of the retained jurisdiction. This notice to the EEOC will specify the claim(s) over which the Office of Special Counsel retains jurisdiction. The notice will also state that the processing attorney will consult with the EEOC to coordinate, to the extent possible, the investigative activities of both agencies and assure that duplication of effort in processing the charge is minimized.

(2) After confirming that the EEOC has received the referred aspect of the charge, the Office of Special Counsel attorney should attempt consultations with the EEOC to coordinate, to the extent possible, the investigative activities of both agencies and assure that duplication of effort in processing the charge is minimized.

#### *VI. Procedures Regarding Referrals from the EEOC*

Upon receipt of a charge or aspect of a charge referred from the EEOC, the Office of Special Counsel should confirm that the \*5521 charge or aspect of a charge is within the jurisdiction of the Office of Special Counsel.

If the EEOC has retained jurisdiction over any aspect of a charge when another aspect of the charge has been referred to the Office of Special Counsel, the attorney handling the charge for the Office of Special Counsel should attempt to coordinate, to the extent possible, the investigative activities of both agencies. If the EEOC has not retained jurisdiction over any aspect of a charge that has been referred to the Office of Special Counsel, the attorney should process the charge as he or she would any other charge of discrimination.

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